

You Make The Call: Is This a Valid COVID-19 Work Refusal?



Social distancing and working from home is the centerpiece of the government's strategy to contain the spread of COVID-19. Regrettably, though, working from home is simply not a realistic option for the majority (roughly 70%) of Canadian workers. While no doubt happy to have a job, workers forced to come to work are also at higher risk of COVID-19 exposure. Not surprisingly, many of these workers are invoking their OHS refusal rights to avoid putting their health and safety at risk. Consider these numbers:

- **15:** The total number of work refusals filed in Ontario during the entire month of February;
- **47:** The number of Ontario work refusals through just the first 2 weeks of March;
- **40:** The number of March work refusals due to fear of exposure to COVID-19.

QUESTION

Is fear of exposure to COVID-19 valid grounds to refuse work?

ANSWER

It depends on the circumstances. Here are 11 scenarios illustrating how the rules work. Your assignment: Determine if the worker's COVID-19 work refusal is valid.

1. Worker Thinks He May Have COVID-19

Scenario: After waking up with a headache and the chills, a worker concludes he has COVID-19 and refuses to go to work to protect himself and his co-workers.

Does the worker have a valid refusal?

Answer: No. "Although a worker must take the necessary measures to protect his health, safety or physical well-being and take care not to endanger the health, safety or physical well-being of other persons in the vicinity workplaces, he cannot decide for himself that he is contaminated with COVID-19." While those

words come from CNEST, the principles apply equally outside Québec.

What the worker should do is notify his employer about his condition. The employer can then direct the worker to speak to a competent medical professional or, if that's not doable, question the employee about the risk factors present, e.g., recent travel, direct exposure to a person with COVID-19, symptoms, etc., to determine if the employee needs to be in self-isolation in accordance with public health guidelines.

2. Worker Doesn't Want to Leave the House

Scenario: A worker feels fine and wants to stay that way. Even though her workplace isn't in the high-risk category and has all of the recommended COVID-19 infection control measures in place—social distancing, handwashing facilities, proper PPE, etc.—she doesn't want to go out in public at all. And since she can't work remotely, she exercises her refusal rights.

Does the worker have a valid refusal?

Answer: No. Because COVID-19 is so contagious, the fear of catching at work is reasonable. After all, just going outside and being in public is a risky proposition. But cases from previous pandemics and new government COVID-19 refusal guidelines make it clear that a worker's fear must not only be reasonable but also involve an "undue" hazard. In the context of COVID-19, undue hazard means one due to the nature of the job that's greater than what normal people face in the course of their life. This includes jobs requiring frequent and close contact, i.e., within 6 feet/2 meters, contact with people who have COVID-19.

3. Nurse Refuses to Treat COVID-19 Patients

Scenario: A nurse responsible for taking throat samples from patients for COVID-19 testing initiates a refusal because he fears infection, even though the hospital is scrupulously following all of the public health guidelines and providing the required PPE.

Does the worker have a valid refusal?

Answer: No. Although the nurse has frequent and close contact with COVID-19 patients, he's not at "undue hazard." Explanation: OHS refusal rights don't apply if the feared hazard is a normal danger for the particular occupation. And treating people with infectious illnesses is part of the nurse's occupation.

4. Nurse Refuses to Treat COVID-19 Patients Without Proper PPE

Scenario: The same as above but now assume that the hospital doesn't have the necessary N95 respirators and requires nurses to use loose-fitting surgical masks instead.

Does the worker have a valid refusal?

Answer: Yes. Hazards become "undue" when the employer doesn't have the required health and safety measures in place to control them. In this case, public health agencies have made it very clear that a tight-fitting N95 particulate filtering mask is necessary to protect workers against COVID-19 exposure and that surgical

and other loose-fitting masks aren't an adequate substitute.

5. Worker Refuses Due to Lack of Proper Social Distancing

Scenario: Deliberately defying social distancing guidelines, a warehouse requires crews to work inside cramped spaces and vehicles. Crew members initiate a work refusal due to COVID-19 infection fears.

Do the workers have a valid refusal?

Answer: Yes. Once more, the failure to follow public health guidelines, in this case with regard to social distancing, makes the hazard undue and justifies the refusal. However, the case might have a different outcome if maintaining the required 6 feet/2 meter distance between workers isn't reasonably practicable and the warehouse implements safety measures providing equivalent protection, such as equipping all crew members with N95 respirators, gloves and perhaps gowns.

6. Worker Refuses Due to Lax Infection Control Enforcement

Scenario: Even though the company has an elaborate infection control program incorporating every measure required by public health guidelines, a worker refuses because she feels nobody is paying attention to it.

Does the worker have a valid refusal?

Answer: Yes, if her allegation is true. In other words, failure to follow required COVID-19 infection control guidelines would turn a same-as-the-general-public hazard into an undue hazard and justify a work refusal.

7. Worker Refuses Due to Being Over Age 65

Scenario: A worker refuses to work because he's over age 65, or has respiratory problems, heart disease, immunity deficiencies or other medical conditions that heighten his vulnerability to COVID-19 infection.

Does the worker have a valid refusal?

Answer: Maybe. What to "normal" workers may be a routine hazard could be an undue hazard to workers at heightened risk of COVID-19. In that situation, the validity of the refusal would depend on whether the employer's current safety measures are adequate to protect the worker. Physical risk factors may also be considered "disabilities" for which the worker is entitled to accommodations up to the point of undue hardship under human rights laws. Although the accommodations required would depend on the specific situation, they could include letting the worker work from home or implementing additional safety measures such as physical barriers or ventilation systems that go beyond public health guideline recommendations for workers with normal vulnerabilities.

8. Worker Refuses After Co-Worker Goes into Quarantine

Scenario: A group of 166 workers at a manufacturing plant initiate a refusal after learning that one of their co-workers was ordered into self-isolation with suspected COVID-19.

Do the workers have a valid refusal?

Answer: No. This scenario describes an actual refusal that took place at a Fiat plant in Windsor, Ontario. The MOL investigated, found no danger and ordered the workers back to work. Although the exact facts of the case haven't been made available, the apparent conclusion is that, at least in the eyes of OHS regulators, exposure to a worker who has or may have COVID-19 is more akin to being out in public than an undue hazard.

9. Worker Refuses to Work with Co-Worker at High Risk

Scenario: A worker who lives with a doctor who treats COVID-19 patients has no symptoms and tests negative for the virus. Even so, his co-workers initiate a work refusal because they fear contracting the virus from him.

Do the workers have a valid refusal?

Answer: No. Current public health guidelines do not require a worker without symptoms or direct exposure to COVID-19 and who test negative to self-isolate just because they live with somebody at high risk.

10. Worker Refuses to Work with Co-Worker Whose Spouse Has COVID-19

Scenario: Exact same scenario but now assume that the worker's wife is confirmed to have COVID-19.

Do the workers have a valid refusal?

Answer: Yes. Current public health guidelines do require workers living with a person who has COVID-19 to self-isolate for 14 days from their most recent exposure with the person. This is true even if the worker tests negative because the COVID-19 virus takes 2 to 5 days to incubate. In other words, testing negative doesn't necessarily mean the worker won't develop and spread the virus.

11. Worker Phones in Refusal

Scenario: A worker surrounded by infected colleagues at a workplace with few to no infection control measures in place phones in her refusal because she's too scared to even go to work and initiate it in-person.

Does the worker have a valid refusal?

Answer: Probably not. The validity of a work refusal turns not only on the basis of the refusal but also whether the worker follows the required refusal procedures. Normally, the worker must be present at the workplace and notify the supervisor or manager of the refusal and reasons for initiating it. But the normal rules may not apply to a pandemic calling for people to stay home and maintain social distancing. So far, only 2 provinces have specifically addressed the issue of whether workers can initiate COVID-19 work refusals from home without actually coming to work:

- WorkSafeBC says that workers exercising refusal rights "should follow steps *within their workplace* to resolve the issue" (emphasis added); and
- WorkSafeNB says that under the "unique circumstances" of COVID-19, workers may initiate refusals without being present at their workplace, *provided that employers agree to the process*.