

RIGHT TO REFUSE WORK(Sec.43)

The Occupational Health and Safety Act gives a worker the right to refuse work that he or she believes is unsafe.

The Act sets out a specific procedure that must be followed in a work refusal. It is important that workers, employers, supervisors and health and safety representatives understand this procedure.

Do all workers have the right to refuse unsafe work?

Yes, but for some workers this right is limited. Certain workers who have a responsibility to protect public safety cannot refuse unsafe work if the danger in question is a normal part of the job or if the refusal would endanger the life, health or safety of another person. These workers are:

- ◆ police officers;
- ◆ firefighters;
- ◆ workers employed in correctional institutions; and
- ◆ health care workers employed in workplaces like hospitals, nursing homes, psychiatric institutions, rehabilitation facilities, residential group homes for persons with physical or mental handicaps, ambulance services, first-aid clinics, licensed laboratories—or in any laundry, food service, power plant or technical service used by one of the above [section 43(2)The following examples show how the right to refuse work applies to the above public sector workers.

Example 1

A police officer could not refuse to intervene in a robbery attempt on the grounds that the suspect was armed, and therefore the work dangerous. Nor could the officer refuse to police a particular area or location because it was considered dangerous. Such situations are an inherent part of the job.

However, a police officer could, before beginning a routine patrol duty, refuse to do so in a vehicle that had defective brakes.

Example 2

A correctional officer could not refuse to enter a jail corridor to intervene in an emergency, such as an altercation between inmates.

However, a correctional officer could refuse to participate in a staff training exercise involving the use of emergency equipment that the officer assessed to be unsafe.

Example 3

A firefighter could not refuse to perform a dangerous task while responding to any emergency.

A firefighter could, however, refuse to handle firefighting chemicals that were being improperly stored in the stationhouse.

Example 4

An experienced medical lab technologist could not, in the course of his or her regular work, refuse to handle a blood sample from a patient with an infectious disease.)).

But the technologist could refuse to test for a highly infectious virus where proper protective clothing and safety equipment are not available.

When can a worker refuse to work?

A worker can refuse to work if he or she has reason to believe that one or more of the following is true:

- ◆ Any machine, equipment or tool that the worker is using or is told to use is likely to endanger himself or herself or another worker [section 43(3)(a)].
- ◆ The physical condition of the workplace or workstation is likely to endanger the worker [section 43(3)(b)].
- ◆ Any machine, equipment or tool that the worker is using, or the physical condition of the workplace, contravenes the Act or regulations and is likely to endanger himself or herself or another worker [section 43(3)(c)].

What happens when a worker refuses unsafe work?

The worker must immediately tell the supervisor or employer that the work is being refused and explain why [section 43(4)].

The supervisor or employer must investigate the situation immediately, in the presence of the worker and one of the following:

- ◆ a joint committee member who represents workers, if there is one. If possible, this should be a certified member; or
- ◆ a health and safety representative, in workplaces where there is no joint committee; or
- ◆ another worker, who, because of knowledge, experience and training, has been chosen by the workers (or by the union) to represent them.

The refusing worker must remain in a safe place near the workstation until the investigation is completed [section 43(5)]. This interval is known as the "first stage" of a work refusal. If the situation is resolved at this point, the worker will return to work.

What if the refusing worker is not satisfied with the result of the investigation?

The worker can continue to refuse the work if he or she has reasonable grounds for believing that the work continues to be unsafe [section 43(6)]. At this point, the "second stage" of a work refusal begins.*

What happens if a worker continues to refuse to work?

The worker, the employer or someone acting on behalf of either the worker or employer must notify a Ministry of Labour inspector. The inspector may come to the workplace to investigate the refusal or conduct an investigation over the telephone by consulting with the worker and the employer (or a representative of the employer). If there is a worker committee member, a worker health and safety representative or a worker selected by the worker's trade union or, if there is no trade union, by the workers to represent the worker, they will also be consulted as part of the inspector's investigation [section 43(6)].

While waiting for the inspector's investigation to be completed, the worker must remain in a safe place near the workstation, unless the employer assigns some other reasonable work during normal working hours. If no such work exists, the employer can give other directions

* "Reasonable grounds" for continuing to refuse means that the worker has some objective information that makes him or her believe the work is still unsafe. The worker does not have to be

correct in his or her knowledge or belief. For example, the refusing worker may have been told by other workers who have used a lift truck that the brakes sometimes fail.

to the worker. If the worker is covered by a collective agreement, any provision in it that covers this situation will apply [section 43(10)].

The inspector must decide whether the work is likely to endanger the worker or another person. The inspector's decision must be given, in writing, to the worker, the employer, and the worker representative, if there is one. If the inspector finds that the work is not likely to endanger anyone, the refusing worker is expected to return to work [sections 43(8) and (9)].

Can another worker be asked to do the work that was refused?

Yes. While waiting for the inspector to investigate and give a decision on the refusal, the employer or supervisor can ask another worker to do the work that was refused. The second worker must be told that the work was refused and why. This must be done in the presence of a committee member who represents workers, or a health and safety representative, or a worker representative chosen because of knowledge, experience and training [sections 43(11) and (12)].

The second worker has the same right to refuse as the first worker.

Is a worker paid while refusing to work?

Although the Act does not cover this point, the Ontario Labour Relations Board has ruled that a refusing worker is considered to be at work during the first stage of a work refusal and is entitled to be paid at his or her appropriate rate.

A person acting as a worker representative during a work refusal is paid at either the regular or the premium rate, whichever is applicable [section 43(13)].

Can an employer discipline a worker for refusing to work?

No. A worker has the duty to work in accordance with the Act and the regulations and has the right to seek their enforcement. The employer is not allowed to penalize, dismiss, discipline, suspend or threaten to do any of these things to a worker who has obeyed the law [section 50(1)]. This also applies if a worker has given evidence at an inquest or a prosecution under the Act or the regulations.

However, this provision does not apply if the work refusal was made in bad faith, or if the worker continues to refuse after the Ministry of Labour inspector finds that the work is not likely to endanger the worker.

What can a worker do if disciplined?

Any worker who believes he or she was unfairly disciplined by the employer may file a complaint with the Ontario Labour Relations Board (OLRB).

If the worker belongs to a union, he or she can choose instead to have the complaint dealt with under the grievance procedure in the collective agreement [section 50(2)].

Before doing either of the above, the worker or the employer has the option of contacting the Ministry of Labour, and an inspector will investigate. There is no requirement to contact the ministry.

In such cases, the inspector does not play an enforcement role, but is more of a conciliator. The inspector will discuss the alleged reprisal with the workplace parties and ensure that both the employer and the worker are aware of their duties and rights under the Act. The inspector cannot issue orders in an investigation of an alleged reprisal by the employer.

If the complaint is taken to the OLRB, the employer must prove that the discipline or other penalty imposed on the worker was the result of an improper refusal [section 50(5)]. The OLRB has the power to remove or change any penalty imposed on the worker [section 50(7)].*

* Workers who are covered by a code of discipline under the Police Services Act must have any complaint about unfair discipline dealt with under that Act [section 50(8)].