Introduction

The current novel coronavirus (COVID-19) pandemic is generating substantial ambiguity in the workplace, particularly in circumstances where employees cannot work from home and must attend at their employer's work site. It is possible that in certain circumstances the COVID-19 pandemic may create the basis for a legitimate work refusal. To keep members informed of their health and safety related rights and obligations as employers, with the support of Bennett Jones, through this bulletin AMHSA offers important considerations regarding an employee's right to refuse work under the *Occupational Health and Safety Act* (OHSA) in Alberta.

Work Refusals – What does the law state?

Worker Rights

A worker who believes on reasonable grounds that there is a dangerous condition at the work site or that the work constitutes a danger to the worker's or another person's health and safety (which includes physical, psychological and social well-being) may refuse to work or to do particular work at the work site. The worker must promptly report the refusal and the reasons for it. Until a dangerous condition is remedied, the worker may continue to refuse to work.

If a worker has refused to work in accordance with Part 4 of the OHSA, the worker is entitled to the same wages and benefits that the worker would have received had the worker continued to work. However, a worker refusal does not entitle the worker to abandon the work site unless necessary for health and safety reasons, and the employer may reassign the worker temporarily to alternate work.

The OHSA prohibits taking any discriminatory action against a worker, by reason of that worker refusing to work in accordance with Part 4 of the OHSA.

Employer Obligations

If the employer does not remedy a dangerous condition immediately, the employer is required to undertake an inspection and the related processes detailed in Part 4 of the OHSA. The employer must take any action necessary to remedy any dangerous condition, or ensure that such action is taken. Employers are reminded of the requirement to involve their joint work site health and safety committee, health and safety representative or another worker selected by the refusing worker, as appropriate, in certain process as prescribed by Section 31.

When a worker has refused work, the employer must not request or assign another worker to do the same work until the employer has determined that the work does not constitute a danger to the health and safety of any person or that a dangerous condition does not exist.

Where the employer assigns another worker to do the work, the employer must advise that worker, in writing, of the first worker's refusal, the reasons for the refusal, the reason why, in the opinion of the employer, the work does not constitute a danger to the health and safety of any person or that a dangerous condition is not present, and that worker's right to refuse to do dangerous work.

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Shortcomings in Legal Clarity

Among other potential issues in in the area, Alberta's Occupational Health and Safety legislation does not provide a definition for "dangerous condition", "danger", or "dangerous". A "hazard" is defined as a situation, condition or thing that may be dangerous to health and safety.

Interpreting "Dangerous Condition", "Danger" and "Dangerous"

Current Alberta Labour OHS Bulletin

While we understand that an update may be forthcoming, the current "right to refuse dangerous work" bulletin published by the Government of Alberta states that Alberta Occupational Health and Safety (OHS) considers that dangerous conditions include health and safety hazards that are not normal for the job, or normal hazards that are not properly controlled. For example: unexpected or unusual circumstances where hazards have not been adequately assessed, or controlled; a danger that would normally stop work; or a situation where the worker risks immediate harm that is not normal for the job. A dangerous condition is a risk that the refusing worker actually observes or experiences at the work site where the work is to occur. Theoretical, anticipated or potential risks are not reasonable grounds for a work refusal.

Case Law

Although not stated in legislation, the case law generally recognizes two exceptions to the right to refuse unsafe work. First, dangers or hazards that are inherent to the worker’s work or normal conditions of the worker’s employment. Second, when the right to refuse would directly endanger the life, health or safety of another person. These two exceptions could include, for example, police officers, firefighters and health care workers regarding certain inherent dangers or conditions in their day-to-day roles.

Practical Advice

Preventing Work Refusals

To minimize the occurrence of work refusals, an employer should establish and implement a robust and comprehensive health and safety program that includes identification of existing and potential hazards to workers at the work site, and measures that will be taken to eliminate, reduce or control those hazards.

In order to demonstrate that you are aware of the hazards and all reasonable elimination and control methods associated with the pandemic, review, consider, and adopt where appropriate all authoritative directives and guidance and make this information readily available to your employees upon request.

Demonstrate to your work force that you are on top of these topics, but have a line open for improvement opportunities (further hazard control) and implement necessary changes in a practical and highly expedient way. This pandemic has been rapid in onset and evolution, and as a result we expect that hazard assessments will require careful reconsideration at reasonable intervals. Employers are recommended to review Sections 7, 8 and 10 of Part 2 of the *Occupational Health and Safety Code* to the OHSA.

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Managing Work Refusals

There are numerous work refusal decisions reported in Canadian OHS law.

Case Example 1:

Some of these decisions consider communicable disease. In such previous decisions, where the workers were adequately equipped and working within the normal course of their employment, worker refusals have not been successful. For example, there are reported decisions where a worker has refused work due to exposure to saliva from spitting and the associated risk of transmission of a communicable disease. Those decisions recognize that the probability of a worker becoming ill from being spit upon are extremely low, and therefore there is not a reasonable expectation of illness or injury to the worker from spitting. These decisions also recognize that there are situations, such as an inmate spitting at a correctional officer, that carry a risk of disease contamination and that risk of exposure to disease is therefore part of the worker's job, assuming the worker is equipped with the appropriate protective clothing to minimize risk. When those dangerous situations occur, the employer should have appropriate protocols in place to address the risk to the worker's health.

Case Example 2: *British Columbia Public School Employers' Assn v BCTF*, 2006 CarswellBC 1771

As another example, an arbitration arose out of grievances filed on behalf of pregnant teachers who were advised by their physicians to cease attendance at school because of potential exposure to Fifth Disease, an infection caused by human parvovirus B19 that is spread through hand-to-mouth contact or respiratory secretions. Fifth Disease is spread through droplets in the same way as a cold or the flu. Fifth Disease is ubiquitous and a person may be exposed to it anywhere in the community. Fifth Disease is contagious before the appearance of symptoms. It is therefore not possible to identify persons who have contracted the disease at the time they are contagious. There is no vaccine for Fifth Disease, but approximately 50% of adults carry the antibody for it as a result of having been exposed to the disease. For persons carrying the antibody there is no risk of contracting the disease. Fifth Disease does not present any lasting effects or risks for the general population. However, for pregnant women contracting the disease, there is a slightly increased risk of miscarriage or fetal death, generally during the first months of pregnancy. Fifth Disease does not cause birth defects. Persons with compromised immune systems or anemia may also suffer persistent health effects (including arthritis-like symptoms) as a result of contracting the disease.

When the pregnant teachers exercised their right to refuse unsafe work, the principals maintained the position that the presence of Fifth Disease did not constitute an undue hazard because Fifth Disease was common to all public settings in the community, most diagnoses were made by observation and were not confirmed with testing, Fifth Disease was an extremely common disease and there was no way of positively identifying whether the disease was present or absent in the community, most people did not exhibit any symptoms and might not even be aware of its presence, most adults had previously been exposed and had a natural immunity to this disease, and there was not an epidemic of Fifth Disease in the community. The pregnant teachers' absence from work was therefore treated as sick leave. The Union's position was that where there was Fifth Disease present in a school, a pregnant teacher had the right to refuse work and must

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not suffer any loss of pay pending confirmation that she had the Fifth Disease antibody or until there was no risk of contracting the disease.

The risk was investigated and the investigation revealed the following: Fifth Disease was not reported to public health; there was no way of identifying cases in the community; it was an extremely common disease; there was not an outbreak in the community; removing a teacher from school would reduce but not remove the chance of contracting the disease; the teacher was well past the risk level; and the risk to pregnant women was very low. The WCB investigated and concluded there was no undue hazard with respect to Fifth Disease, and therefore there was no right to refuse work.

However, the decision also noted that the employer was responsible to reasonably accommodate pregnant teachers who could not enter the schools without risk of harm to their unborn children and had a duty to accommodate pregnant teachers in the workplace short of undue hardship. On the totality of the evidence, the employer had established that there was no accommodation short of undue hardship available, and therefore the employer did not breach its duty to accommodate in the circumstances.

Given the incredible detail in Part 4 of the OHSA that must be followed if a dangerous condition is not immediately remedied, the very best practical advice we can offer is for extremely rapid analysis of the alleged issue and strict adherence to the fundamental principles of hazard assessment, elimination and control.

Work Refusal Resources

- Government of Alberta - Right to Refuse Dangerous Work (LI049) (December 2019)
- Do You Know How to Refuse Dangerous Work? (PTR008) (Poster)

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