

Management Considerations Regarding COVID-19 Work Refusals With and Without Merit

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This document, created by the **Sector Pandemic Planning Initiative**, outlines strategies and considerations for management of Developmental Services (DS) agencies who need to maintain continuity of operations through an outbreak but are experiencing or are concerned about the risk of work refusal. **Example scenarios** are reviewed (beginning on page 3) as well as **practical advice** from an agency managing COVID-19 work refusal requests (beginning on page 5). Each agency will want to assess interpretation and implementation of these strategies and considerations relative to its own needs and counsel.

LEGISLATIVE OVERVIEW RE: WORK REFUSAL

All workers have the right to refuse unsafe work as described by the **Occupational Health and Safety Act (OHSA)**. This right has limitations for certain workers, including developmental service workers. All workers have obligations under the OHSA to report to their supervisors or employers any hazards they are aware of and any breaches of OHSA regulations (OHSA ss.28 (1)(d)). All employers and supervisors have an obligation to take every possible precaution reasonable in the circumstances for the protection of the worker.

Collective Bargaining Agreements may have specific language surrounding what is deemed “unsafe working conditions.”

Developmental Service (DS) workers employed in certain workplaces specified under OHSA clause 43(2)(d) are one group that has a limited right to refuse work they believe is unsafe. These workers are those

“employed in the operation of,

...

(ii) a residential group home or other facility for persons with behavioural or emotional problems or a physical, mental or developmental disability”

Specifically, those designated **DS workers do NOT have the right to refuse work that they believe is unsafe when:**

- (a) the unsafe work or risk is inherent in the worker’s work or is a normal condition of the worker’s employment (e.g., behavioural challenges); or
- (b) the worker’s refusal to work would directly endanger the life, health or safety of another person.

An employee must actually tell you that they are refusing work for health and safety reasons – they cannot stay silent on the reason for the refusal. Further, staff must generally point to a specific hazard they are concerned about. It is unlikely that a generalized fear of COVID-19 will be sufficient.

The best practice when dealing with a work stoppage by an employee excluded from work refusals is to first ask why an employee is stopping work. If the risk is inherent to the position or a normal part of it, or if the stoppage would endanger the life, health or safety of someone else (it can be anyone else), start by explaining to the employee why you believe this is the case, commit to promptly investigating the hazards they raise, and instruct them to return to work.

If the employee refuses to return to work, discipline can generally be issued. However, there is always the risk that an employee might later be found to have had the right to refuse work (and discipline is in that case a reprisal). To mitigate that risk, call the Ministry of Labour (1 800-531-5551) if time allows and obtain a determination of whether the right to refuse work is limited in the circumstances. The Ministry will quickly investigate the matter, usually over telephone, and make a determination as to whether the worker has the right to refuse. This will reduce the risk of being found to have been reprimanded against an employee for a legitimate work refusal.

DS Agencies should keep in mind that despite these limits on the right of certain employees to refuse unsafe work, those employees **may be entitled to a leave or accommodation** (in the form of a leave of absence, modified work location, or modified duties) under the **Employment Standards Act, 2000 and/or the Human Rights Code**. Even if you believe that an employee does *not* have the right to refuse work and the matter is time-sensitive, you should ask them about the reasons for their refusal to determine if they are in need of accommodation or are requesting a leave.

DS residential services have been deemed an 'essential service' by the Province, so agency leadership must ensure they have the equipment and resources they need to sustain safe working conditions and protocols in place. Further, provision of inadequate PPE for a given situation will reduce the likelihood that the employer can successfully argue that the right to refuse work is limited. Provision of inadequate or faulty PPE will not qualify as a risk inherent to the work or a normal condition of employment. However, even in that event, an employee will still not be able to refuse work where it would endanger the life, health, or safety of someone else (e.g., allowing a person supported to go without vital and time-sensitive support).

If an employee is found to have made a legitimate/meritorious work refusal and has the right to do so, you will have to follow the work refusal consultation and investigation process. That process is outlined in the Ministry of Labour online OHSa guide.

<https://www.ontario.ca/document/guide-occupational-health-and-safety-act/part-v-right-refuse-or-stop-work-where-health-and-safety-danger>

It is a good idea to develop a succinct but detailed response flow chart/guide for managers and supervisors in the event of a work refusal. This should be developed with legal counsel if possible.

Regardless of whether work refusals are meritorious or permitted, agencies should provide consistent and frequent written communication to agency personnel about how people supported and staff are being kept safe.

EXAMPLE SCENARIOS – COVID-19 WORK REFUSALS WITH MERIT

1. Workplace Hazards – Limited Right to Refuse

Scenario: A staff member reports that the residential group home where they work is in outbreak but that guidelines are not being followed and staff are accessing PPE at random, with clean or unclean hands. The staff fears the PPE is contaminated, and refuse to work as a result.

The staff member likely has a right to refuse work where that refusal will *not* endanger the life, health, or safety of anyone else (e.g., a person supported). While you can insist that they provide services where delay will have a negative impact of the health of a person supported (like time-sensitive medication administration), they will likely have the right to refuse non-critical services. This is because **the provision of inadequate PPE is generally not considered a risk inherent to or a normal part of employment.**

If the employee has the right to refuse work in these circumstances, follow the process for a work stoppage laid out in the online OSHA guide (linked above). During that time, you can instruct the employee or employees to perform critical functions that would endanger the life, health, and safety of persons supported if delayed.

If it is determined that the staff does NOT have the right to refuse (because a person supported would be endangered), explain why this is so, commit to investigating the hazard and only having them perform critical tasks, and then instruct them to return to work. If they refuse, take the steps above. Regardless of the outcome, do investigate the complaint as soon as possible (remember you have a general duty to take all reasonable precautions to protect employees, separate from the right to refuse work).

Upon examination, the complaint may reveal a legitimate hazard that could potentially increase the scale of outbreak or cause a recurrence at this home. Management should immediately rectify the situation, consult Public Health, and provide training to staff to ensure that this hazard does not recur. Building skills, clear guidelines, and a team spirit around safety and hazard reduction are key to reducing work refusals pertaining to hazard concerns. It also will help ensure that the general duty to take all reasonable precautions to protect employees is met.

2. Human Rights Complaints – Personal Health & Family Safety

Scenario: A staff member feels they are personally at an increased risk for infection or reside with someone at increased risk.

A determination of whether the duty to accommodate is triggered should be made before considering any corrective action for a work refusal that is not protected by the OHSA. Seek to better understand the reason for work refusal. You may learn:

- The staff has a respiratory condition and is at heightened risk for adverse COVID-19 outcomes.
 - **This could be an OHSA work refusal with merit.** Staff are generally entitled to refuse work that is dangerous to them personally, even if it would not be dangerous to others. If the right to refuse work is not limited, you will likely have to treat this as a work refusal.
 - **If the right to refuse is limited.** Even if the right to refuse is limited, you may have obligations to accommodate under the *Human Rights Code*. Gather the necessary information about the employee's restrictions, and determine what an appropriate accommodation would be. The only accommodation appropriate may be allowing the person to work from home or take an unpaid leave (depending on what is an undue burden). The employee may also have the right to take an unpaid protected leave under the *Employment Standards Act*, such as if they have been advised to self-isolate.
- A family member living with the staff member is at heightened risk for adverse COVID-19 outcomes, for example, if they have a respiratory condition or other chronic health condition or are elderly.
 - This would likely not be an OHSA work refusal with merit, but could fall under the *Human Rights Code* duty to accommodate under "family status" or be grounds for an *ESA* infectious disease leave. Open a dialogue with staff to determine what accommodation would be appropriate and whether an employee is requesting an unpaid leave of absence. Obtain the necessary medical documentation so long as the requested leave does not overlap with an *ESA* infectious disease leave (which prohibits medical documentation from being requested). So long as the employee is not providing care or support to the family member, that overlap is unlikely. It will be more likely where there is provision of care and support.
 - **Accommodations could include:**
 - **Offering a short-term leave to make arrangements**, for example, to arrange for appropriate care for their family member in a way that will allow the employee to work without endangering them (if possible). Ask questions such as: whether they live with their family member, whether they care for or provide support to their family member, and whether other alternatives are available that would allow the employee to safely work, and if so, what time the employee needs to implement them.
 - **Free or partially subsidized meals and Ubers** could also be offered to help reduce the workload at home or in transit for staff who have high-support obligations at home with family members who are ill or elderly.
 - **Offering alternate living accommodations** so the staff is not in the same location as the vulnerable family member. Your ability to offer this

will be dependent on your means and the circumstances. Accommodation like this may become an undue burden if the timeline is long enough.

- **Offering a longer leave for the duration of the risk**, to allow the family member to remain safe. If no other reasonable accommodation is available, this is likely the option you will face.
- **Alternatively, the employee could simply request an unpaid *ESA* leave** to care for and support their vulnerable relative. Assuming that the relative is of the type that can be supported under such a leave (the full list is in the *ESA*), then you will have to grant the leave until the Province removes the “infectious disease” designation from COVID-19 or the family member is no longer in need of care and support.

DEALING WITH WORK REFUSAL REQUESTS WITHOUT MERIT

3. Human Rights Complaints –Family Safety

Scenario: The staff member is simply afraid of exposing their otherwise healthy children to any type of risk.

- **This would likely not be an OHSA work refusal with merit and it is unlikely that accommodation would be required.** Employers could explain how based on Ontario Ministry of Health statistics, children are at lowest risk of transmission and adverse health outcomes related to COVID-19, compared to all other age ranges. Ask staff to walk through how they could follow the same safety steps at home as they are following at work (i.e., hand hygiene, social distancing, wearing a mask if closer contact is needed).
- **Accommodations could include:**
 - Offering masks for home use for when close contact is needed. Adjust their work schedule to best align with the childcare support (or other family member’s schedule) to help lessen the time they are the lead for hands-on care.
 - Alternatively, offering alternate accommodation so the staff is not in the same location as their children. Share information on the province’s childcare benefits available. Note, however, that you would likely not have an obligation to do this if the children are healthy.

Keep in mind, the parent could still ask for an unpaid *ESA* protected leave to care for their children while schools are closed.

PRACTICAL ADVICE FROM REENA

Sandy Stemp, Chief Operations Officer for Reena, and Sonia Kapila, Reena’s HR Director, have overseen several homes in outbreak with work refusal requests, but only some resulting in work stoppage.

They have found that work refusal requests without merit fall into two categories:

- a) **Staff who are scared** – Most often, staff will just need reassurance that the agency is acting to ensure staff safety. The more they are communicated with, the better.

Inform them of their importance as front-line care providers, how much their clients depend on them, and thank them for their vital work. They may be having an off day because of the stress at work, the outbreak, or the news of events at another organization. Work refusals are also more common when staff are new to outbreak management.

Suggested approach:

- **Try to understand:** “Tell me about your situation. Why didn’t you come for your shift today?” Probe further, where needed, for example, “Tell me what you are worried about.”
- **Review the facts:** Help staff review what happened that made them want to not come to work. Echo what they’re saying, for example, “I understand it’s tough to hear that info. And we are here for you.”
- **Remind them of actions being taken:** Review all of the steps being taken by the agency to ensure worker safety (including access to PPE) and all the procedures in place that the staff can use to protect themselves.
- **Remind them of their next shift:** “I see that you’re working at 3 p.m. tomorrow. I look forward to seeing you then.”
- **Avoid mention of contacting the Ministry of Labour or referring to HR policies** in discussions with the staff. This is an emotional time. Try to learn and respect the reasons why staff are perceiving they are not safe at work.

- b) **Staff who continue to avoid work** – There will be staff for whom no amount of discussion, education or PPE will re-establish their commitment to support people to the best of their ability. This advice was echoed by a leading sector expert in New York. Staff may give a number of excuses or promises, delaying their return to work bit by bit.

At some point, the practical solution may be to let these staff take a leave of absence for the duration of the pandemic. If they are compelled to work, it may lead to: work of low quality; staff filing a formal complaint; and/or the potential spread of negative or incorrect information amongst other staff. However, it may also be appropriate to impose discipline on an employee who is refusing to attend work and who has no legally justifiable reason to do so. While it can be practical to proceed with a leave, it is important to know that this remains an option.

Effectively Dealing with an Outbreak

Outbreak is a big trigger for work refusal. Reena has established a series of actions when there are symptoms:

- **Everyone gets tested** – Includes staff and people supported. Staff with positive results must discontinue work in order to recover. Staff with negative results continue to work. Even if this leaves organizations short-staffed, teams feel better because they know their colleagues are negative.

- **Treating negatives as positives** – When there is a positive case, Reena now treats all staff and people supported in the home as asymptomatic positive when they receive a negative result. The tests only capture a moment of time and the virus can take time to develop. They recommend all staff adhere strictly to precautions despite all of their colleagues testing negative.
- **Staff to staff precautions enhanced** – Infection rates have been highest amongst Reena staff. One cause of this was originally that staff took every precaution to protect the people supported, but then used reduced precautions amongst colleagues. For example, chatting in the hallway a foot apart. Procedures have been established and practiced since then to prevent this practice. Each home has two meters of tape placed at intervals throughout the home and outside so staff are regularly reminded what social distancing requires.
- **3 key steps** – Reena has access to an IPAC Practitioner who has stressed that staff can enhance their safety at work by taking 3 steps:
 - Hand wash – and use gloves only when doing direct care (because the gloves will transmit anything touched)
 - Physical distancing
 - Wearing a mask
- **Avoid crisis-based messaging** – Staff should be regularly receiving messages about management’s plans and actions re: COVID-19. Remind staff of how we are all on the team together to manage through this pandemic. Work refusal risk is higher when staff are not hearing from management and then receive an alert that another house is in outbreak with many staff testing positive.

The Sector Pandemic Planning Initiative (SPPI) is grateful to Sandy Stemp and Sonia Kapila at Reena for sharing these insights and suggestions.

Disclaimer

Legal input and feedback included in this policy were provided by [PooranLaw](#) lawyers as members/consultants of the Sector Pandemic Planning Initiative’s Governance working group. However, the legal input and feedback included in this policy should not be construed as legal advice. Each agency’s circumstances and legal rights may vary and there will also be nuances within each agency. The goal of the legal input and feedback included in this policy is to help present options and highlight risks and other considerations. Agencies may wish to seek legal advice once they have selected the options that meet the needs of their organization.