

**Sector Pandemic Planning Initiative
Developmental Services Sector**

**Guidance Note for
Right to Refuse Unsafe Work**

April 9, 2020

About This Guidance Note

This *Guidance Note* has been prepared by members of the Sector Pandemic Planning Initiative and DSS stakeholder agencies to assist workplace parties in understanding their obligations under the *Occupational Health and Safety Act* (OHSA) and the regulations. It is not intended to replace the OHSA or the regulations and reference should always be made to the official version of the legislation.

It is the responsibility of the workplace parties to ensure compliance with the legislation. This *Guidance Note* does not constitute legal advice. If you require assistance with respect to the interpretation of the legislation and its potential application in specific circumstances, please contact your legal counsel.

Guidance Note for the Developmental Services Sector

Issue: Right to Refuse Unsafe Work

Process

This document has been developed by the Sector Pandemic Planning Initiative and Developmental Services Sector (DSS) stakeholder agencies to ensure that appropriate, consistent information is made available to DSS workplaces, to support them in assessing practice against legislative requirements and recommended best practices.

1. Purpose of this Guidance Note

The *Guidance Note* is intended for all DSS organizations, to provide advice to workplace parties related to legislative requirements and best practices applicable to the prevention of illness and injury to Developmental Service (DS) workers. The *Guidance Note* is applicable to all DSS organizations that provide personal care and/or supportive services in either residential group home or other facilities for persons with behavioral or emotional problems or a physical, mental or developmental disability.

The *OHSA* requires **all** workplace parties to work together to identify and control health and safety hazards. Occupational health and safety are promoted through partnerships, education and enforcement of the *OHSA*. The goal of occupational health and safety education is to ensure people have appropriate knowledge at all levels of the workplace so that healthcare workplaces and workers are safe.

2. Introduction

This *Guidance Note* describes a DS worker's right to refuse work that he or she believes is unsafe and provides a procedure workplace parties should follow when responding to a DS worker's right to refuse unsafe work.

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 DS workers. The right to refuse unsafe work is a key right under the (*OHSA*). Identifying hazards and finding solutions to eliminate, reduce, or control the risk before it becomes an immediate dangerous condition ought to be the employer's first response, i.e., to protect workers and prevent exposures/injury/illnesses in the workplace.

All workers have obligations under *OHSA* to report to their supervisors or employers any hazards they are aware of and any contraventions of *OHSA* or its regulations (*OHSA* ss.28 (1)(d)).

All employers and supervisors have an obligation to take every precaution reasonable in the circumstances for the protection of the worker.

3. Relevant Legislative and Regulatory Provisions

In Ontario, the *OHSA* establishes the right of workers to refuse work that they believe is likely to endanger without fear of reprisal by the employer. Section 43 of the *OHSA* establishes the general

circumstances in which a worker can refuse. These circumstances are where the worker has reason to believe that:

- Any equipment, machine, device or thing the worker is to use or operate is likely to endanger the worker or another worker.
- The physical condition of the workplace or the part thereof in which the worker works or is to work is likely to endanger the worker.
- Any equipment, machine, device or thing the worker is to use or operate or the physical condition of the workplace or the part thereof in which the worker works or is to work is in contravention of the OHSA or the regulations and such contravention is likely to endanger the worker or another worker; or
- Workplace violence is likely to endanger the worker.

Section 43 also sets out the procedure for workplace parties to follow when a DS worker refuses unsafe work. Section 50 prohibits an employer from intimidating, coercing, penalizing, disciplining suspending or dismissing or threatening to discipline, suspend or dismiss a worker because the worker has exercised the right to refuse unsafe work.

A complete list of applicable sections of the OHSA related to work refusals can be found in *Appendix A*.

4. Statutory Limits on Developmental Service Workers' Right to Refuse

Developmental service workers employed in certain workplaces¹ specified under OHSA clause 43(2)(d), have limitations on their right to refuse work they believe is unsafe. DS workers do have the right to refuse work that they believe is likely to endanger except:

- (a) when a circumstance (where a worker could otherwise refuse work – see list above) is inherent in the worker's work or is a normal condition of the worker's employment; or
- (b) when the worker's refusal to work would directly endanger the life, health or safety of another person.

Here are a few examples to explain the limitation:

- ◇ A DS worker is refusing to take a resident to hospital. In this circumstance, a DS worker could not refuse if by doing so would directly endanger the life, health or safety of the resident. This activity would be considered inherent in the worker's work and therefore the limitation to refuse would apply.

However, it is expected that the employer put into place measures and procedures and provide education and control measures to ensure the health and safety of the worker when accompanying a resident to hospital.

¹(d) a person employed in the operation of,

- (i) a hospital, sanatorium, long-term care home, psychiatric institution, mental health centre or rehabilitation facility,
- (ii) a residential group home or other facility for persons with behavioural or emotional problems or a physical, mental or developmental disability,
- (iii) an ambulance service or a first aid clinic or station,
- (iv) a laboratory operated by the Crown or licensed under the Laboratory and Specimen Collection Centre Licensing Act ,or
- (v) a laundry, food service, power plant or technical service or facility used in conjunction with an institution, facility or service described in sub clause (i) to (iv). R.S.O. 1990, c. O.1, s. 43 (2); 1997, c. 4, s. 84; 2001, c. 13, s. 22; 2006, c. 19, Sched. D, s. 14; 2007, c. 8, s.221.

- ◇ An experienced support worker (SW) could not, during his or her regular work, refuse to provide service to a resident with an infectious disease. But the SW could refuse to provide service where the appropriate controls such as personal protective equipment, training, and engineering controls are not made available.

Potential exposure to infectious agents might be inherent in the workplace for a SW, but working without the proper health and safety controls, measures and procedures, and equipment is not “inherent” or a normal condition of that worker’s employment.

Only those workers providing service in residential group home, facilities where service is provided for those persons with behavioral or emotional problems or a physical, mental or developmental disability, or related workplaces mentioned under clause 43(2)(d) of the OHSA have a limited right to refuse. Certain workers at workplaces in the DSS that are not listed under clause 43(2)(d), such as administrative workers, do not have limitations on their right to refuse unsafe work. Other provincial legislation may apply. For example, a worker who exercises his or her right to refuse work and who is a health professional subject to the *Regulated Health Professions Act, 1991* should also be aware of statutory obligations that they may have as members of their respective regulatory bodies.

Employees may also have the right to accommodation (which may include modified duties or a leave of absence from work) for human rights related reasons (such as disability, family status issues, age, etc.) up to the point of undue hardship. These rights should be considered prior to any corrective action for an invalid work refusal being considered.

5. Reporting a hazard

All workers have obligations under OHSA to report to their supervisors or employers any hazards they are aware of and any contraventions of OHSA or its regulations (OHSA s. 28(1)(d)). When a worker identifies a health and safety hazard, he/she must report that hazard to their supervisor. Workers are expected to take this step before initiating a work refusal. If the supervisor cannot or will not resolve the concern in a timely fashion and the worker believes the hazard is likely to endanger himself, herself or another worker, then the worker may consider initiating a work refusal under s.43 of the OHSA.

6. Procedure for Work Refusals

First Stage:

- The worker must immediately tell the supervisor or employer about the circumstances of the refusal. The worker should document the details pertaining to the work refusal.
- The worker does not actually have to say they are refusing work under the OHSA for it to be considered a work refusal under the OHSA. Supervisors/employers should be alert to situations where a worker reports he/she will not do specific work due to occupational health and safety concerns. These situations might be a work refusal under the OHSA and must be investigated immediately and before the work can be reassigned.
- The supervisor or employer must investigate the situation immediately, in the presence of

the refusing worker and a worker representative from the Joint Health and Safety Committee (if any), a designated worker (appointed by the JHSC), health and safety representative (if any in workplaces with 6 to 19 workers) or another worker chosen by the union, or where there is no union, chosen by the workers, because of her or his knowledge, experience and training (hereinafter referred to as the worker representative).

- It is good practice in situations where workers are working in clients' homes, for the union(s) in that workplace to select worker representative(s) who can be made available and are able to attend work refusals in person without delay. Where there is no union, workers should select representatives accordingly. It is a good practice, in these scenarios, for employers and/or supervisors to request a list of those pre-selected representatives who can be called upon to attend work refusals in person without delay.
- The refusing worker must remain in a safe place that is as near as reasonably possible to the worker's work location and remain available to the employer or supervisor for the purposes of the investigation, until the investigation is completed.
- In situations where a worker is working in a client's home at the time of the work refusal, the worker must remain in a safe place. This may be inside or outside of the client's home, depending on the nature of the hazard. The worker must remain available to the employer or supervisor for the purposes of the investigation, until the investigation is completed.
- If the situation is resolved after the employer or supervisor and worker representative have completed their investigation, the worker will return to work.

Second Stage:

- If the worker has reasonable grounds to believe that the work is still unsafe following the supervisor/employer's investigation, answers and/or corrective measures then the worker can continue to refuse.

Example: in situations involving the potential for harm related to workplace violence, the worker can continue to refuse if they believe the situation to be unsafe until completion of the second stage.

- Where the worker continues to believe the work is unsafe, the employer, refusing worker, or the JHSC/HSR/worker representative, must then notify the Ministry of Labor (MOL). An MOL inspector will come to the workplace to investigate the refusal in consultation with all three parties.
- While waiting for the MOL inspector's investigation to be completed, the worker must remain in his or her safe place as described above, unless the employer (subject to any collective agreement) assigns some other reasonable work during the worker's regularly scheduled working hours. If no such work exists, subject to section 50 of the OHSA (no reprisals), the employer can give other directions to the worker.
- While waiting for the MOL inspector to complete his/her investigation, no other worker shall be assigned to do the work that has been refused unless, in the presence of the worker representative, the second worker has been advised of the first worker's refusal and of their reasons for the refusal. This must be done in the presence of a JHSC committee member who represents workers and, if possible, who is a certified member.

A health and safety representative; or the worker chosen because of their knowledge, experience and training by the union (if any) or the other workers.

- 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 refusing worker, the employer and the worker representative. If the inspector finds that the work is not likely to endanger anyone, the refusing worker will normally return to work as soon as practicable.

No Reprisals

- The supervisor/employer is prohibited under section 50 of the OHSA from penalizing, dismissing, disciplining, suspending or threatening to dismiss, discipline or suspend a worker who has exercised their right to refuse unsafe work in good faith. Note that to exercise an initial right to refuse, the worker does not need to be correct; they only need to have “reason to believe” that unsafe circumstances exist (See Appendix A for additional resources)

Appendix A

Legislation and Guidelines

Statutes and Regulations

Occupational Health and Safety Act, R.S.O., 1990 c.O.1

OHSA Part V – Right to Refuse Section 43

OHSA Part VI – Reprisals by Employer Prohibited Section 50

<https://www.ontario.ca/laws/statute/90o01#BK81>

Healthcare and Residential Facilities (O. Reg. 67/93)

<https://www.ontario.ca/laws/regulation/930067>

Occupational Health and Safety Awareness and Training (O. Reg. 297/13)

<https://www.ontario.ca/laws/regulation/130297>

Ministry of Labor Publications

A Guide to the Occupational Health and Safety Act

<https://www.ontario.ca/document/guide-occupational-health-and-safety-act>

Understanding the law on Workplace Violence and Harassment

<https://www.ontario.ca/page/understand-law-workplace-violence-and-harassment>

Ministry resources on Reprisals

<http://www.labour.gov.on.ca/english/hs/topics/reprisal.php>

A Guide to [OHSA](#) Requirements for Basic Awareness Training

http://www.labour.gov.on.ca/english/hs/pubs/training_guide/index.php

Health and Safety Training for workers and supervisors

<http://www.labour.gov.on.ca/english/hs/training/index.php>

Other Information

Web sites of the various unions, employers, associations and Safety Work Associations (SWAs) also have additional information, including documents that outline a step-by- step process to help the workplace parties comply with requirements in the OHSA. Some organizations provide on their website's examples and/or templates for written recommendations that can be tailored to the needs of individual workplaces

The Developmental Services Sector *guidance notes* have been prepared and approved by members of the Sector Pandemic Planning Steering Committee.