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THE ECSTASY AND AGONY OF REOPENING – Work Refusals and COVID-19

As Ontario inches closer toward fully opening its economy despite the ongoing pandemic, provincially regulated employers will likely experience questions from employees, and have their own, related to the right to refuse unsafe work.

From the outset, it bears noting that any website article on this topic will necessarily be an overview in nature, and gloss-over some potentially significant nuances that may affect the outcome in a particular situation. Therefore, while the information that follows may be of interest, it is important to discuss any specific instance with a lawyer prior to taking any action. Further, unionized workplaces will likely have their own processes in place to deal with health and safety matters, outlined in the collective agreement. This article will focuss more generally on the non-unionized work environment.

With some limited exceptions, under the Ontario Health and Safety Act (the "OHSA") businesses in Ontario are required to take all reasonable actions to protect their workers from workplace "dangers". This would include the danger of contracting potentially deadly diseases like COVID-19 at the workplace. Fortunately, some of the best preventative measures (proper hand hygiene and physical distancing) are readily implementable at most workplaces – and do not come with significant costs provided that the workplace is able to accommodate them. As much as is possible, employers should observe and implement the recommendations of local, provincial and federal health authorities with regards to preventative measures for COVID-19. The Thunder Bay and District Health Unit has more information on preventative measures for workplaces that should be consulted.

Even with all appropriate measures to limit the spread of the virus and disease being, some employees will be understandably fearful to return to work during the pandemic. This will be especially the case where the workplace has been closed for a period of time, either voluntarily by the employer or as ordered by the Province as a non-essential business, or where the employee enjoyed the benefit of being able to work from home.

Under the OHSA, workers are entitled to refuse to work if they feel the worksite posses a danger to them and they are protected against reprisals for raising these concerns, or for refusing to perform their duties in the circumstance. It must be emphasized that the requirement to provide a danger-free workplace is not a requirement for the employer to provide a risk-free workplace - even with all reasonable steps taken there will still exist the unfortunate potential that the novel coronavirus SARS-CoV-2, which causes the disease, may enter into and spread throughout the workplace. The risk of contracting the disease does not entitle an employee to refuse to work. Although the difference between a "danger" and a "risk" may be semantics, in law semantics is critical.

Where a safety concern is raised by an employee regarding the workplace, it should be made or noted in writing with the specific concerns made clear. Once raised, this will trigger a process under the OHSA, beginning with the employer being required to investigate the concern (with the employee, if appropriate) to determine what, if anything, can or needs to be done to remedy it.

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If the employer's investigation determines that sufficient abatement strategies are already in place, are able to be put in place, or are not required (but see additional comments, below) these determinations are to be communicated to the employee and the employee can be again directed to return to work in light of same. If not satisfied with the investigation and response of the employer, the employee may continue to refuse, at which time the Ministry of Labour is to be notified, either by the employee or the employer (or any health and safety committee that may exist at the workplace).

When notified of the refusal, the Ministry of Labour will assign a health and safety investigator to conduct an investigation pursuant to the complaint, which may involve a site visit. Under the current circumstances, site visits likely will be rare. Therefore, clear policies detailing the steps and measures the employer is taking and what is expected of the employees to limit or prevent the spread of COVID-19 will be critically important to have in place as these will assist the investigator in making a determination about the danger of the disease in the workplace.

Following the investigation, the officer will issue a decision with respect to the refusal – which will either:

a. Recognize the danger and order actions for the employer to rectify the situation (which may of course, include a complete work stoppage in certain situations);

b. Find that the risk (if any) does not rise to the level of a danger; or

c. Find that appropriate actions have been taken by the employer.

If the investigator determines that either b or c are the appropriate findings, the employee will be required to return to work.

If the employee then refuses a (now third) direction to return to work after the investigator has determined there is not a danger of COVID-19 at the workplace, the employee may then be disciplined for his or her failure to comply. It must be noted that the employee cannot and must not be disciplined for the raising of a workplace safety concern, even if that concern is not ultimately shared by the Ministry. Any discipline that may issue may only be related to the employee's failure to return to work as directed. Employees therefore would be wise not to refuse to return to work if the Ministry does not find a workplace danger exists and employers would be wise to follow progressive discipline in the circumstance, rather than rushing to termination.

A further question of course is what happens while this process is playing out? If the employee is able to work from home, he or she should be permitted to continue to do so, and continue to be paid for this work. If the employee is not able to perform the duties from home, and no other safe work is available based on the concerns raised in the refusal, the employee may have to be placed (or continue) on a layoff. Please note, there are risks with laying off employees, so if the employee has not already accepted a layoff due to COVID-19, this action should be taken cautiously and only after consulting with an employment lawyer.

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While the work refusal is being investigated, another employee may also be asked to perform the work of the refusing employee. The other employee must be advised of the existence and nature of the work refusal and may also believe that the work is too dangerous and likewise refuse.

TAKE AWAYS:

- Employers are strongly encouraged to implement as many of the recommendations of health authorities as they reasonably can.
- Written policies should be drafted and communicated to staff so that they are aware of the measures being taken to protect their health. This may also protect the employer from other liabilities they may have to clients and agents attending the workplace who may contract the virus.
- If work is refused, a transparent investigation is to be conducted – following which, if the refusal continues, the Ministry of Labour will investigator further.
- Employees are protected from raising health and safety concerns, therefore any discipline that may result must not be in any way related to the employee raising the issue – such discipline must be carefully assessed before action is taken.
- Nevertheless, with reasonable and appropriate measures in place, employees will have little ability to refuse their return to work, when that time comes.
- While COVID-19 is an unprecedented situation, the current legislative framework set out in the OHSA will still apply to ensure that workplaces are as safe as possible for all employees who are present.

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ADDITIONAL COMMENTS/DISCLAIMER:

As with so much else in Employment Law, the right to refuse work may not be as black and white as it may appear. Before rushing to disciplining an employee for failing or refusing to return to work, careful attention must be paid to not only the requirements of the OHSA but to other legislation, such as the Human Rights Code, which may not have been considered by the investigator.

With respect to COVID-19, it bears noting that this illness is a risk that will exist at every workplace for the near- to long-term – therefore every employer needs to ensure that they turn their minds to what can be done to reduce that risk so that they meet their obligations under the OHSA. The prevalence in the community and the particular risk to the employee (ie underlying health conditions) will likely factor into any determination of the actual "danger" that may exist. Nevertheless, due to COVID-19's latent, asymptomatic spread, employers would be wise to assume it is a danger to their worksite and operations even if the actual prevalence of affected persons in the community is low or even nil. The virus will certainly be determined a "danger" to employees if there is a known workplace exposure regardless of the preventative measures that may be in place.

The above article is for information purposes only and is not to be taken as legal advice. Employers and employees are strongly encouraged to consult with a lawyer prior to making any potentially drastic decisions – our office has the knowledge base to ensure that whatever action you take is legal and appropriate in the circumstances. For employers in particular, we would be happy to assist you in preparing sound policies and procedures to ensure the safety of your workforce and the public.

We are here to help you navigate through this issue, or any issue that you may encounter in any of our numerous practice areas. You will be happy to know that we have our own policies and procedures in place to maintain our team's and your safety from exposure during these challenging times. Feel free to call one of our employment lawyers to learn more.

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