# COVID-19 and an employee's right to refuse work

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Amidst the COVID-19 pandemic, Canadian employees are increasingly exercising their right to refuse work. The threat of contracting the virus and potentially passing it on to family members explains this growing trend.

In this context, we wish to advise employers on the extent and limitations of employees' right to refuse to work. Here are some key considerations surrounding an employee's right to refuse to work in the provinces of Québec, Ontario, Alberta and British Columbia.

## When can an employee refuse to work?

Generally, the law provides that employees have the right to refuse to work when they feel that their health could be compromised by going to work or performing a task throughout the course of their work.

Although the specific language varies from province to province, the idea remains the same. Particularly, the criteria that must be met under the various provincial legislations are as follows:

- In Québec, an employee must have "reasonable grounds" to believe the performance of the work would expose themselves or any other person to a "danger";
- In Alberta, the employee must "reasonably think" that the work would put themselves or others in "danger";
- In British Columbia, an employee must have a "reasonable cause" to believe that the work would expose themselves or anyone else to an "undue hazard"; and
- In Ontario, the employee must have "reason to believe" that:

- The equipment, machine, device or thing being operated by the employee is likely to endanger themselves or another employee;
- The physical condition of the workplace, or part thereof, where the employee works is likely to endanger themselves;
- That violence within the workplace is likely to endanger the employee;

- That any equipment, machine, device or thing the employee operates or the physical condition of the workplace or the part thereof in which they work or is to work is otherwise in contravention of the requirements of the *Occupational Health and Safety Act*.

The notion of "reasonable" belief that a "danger" or "undue hazard" exists for the employee is assessed on a case-by-case basis, given the specifics of the work environment. The law provides a procedure to evaluate the soundness of the employee's apprehensions and, by extension, the legitimacy of the exercise of their right to refuse to work.

## Procedure once the right to refuse to work is exercised

Although the procedure varies slightly from province to province, the fundamental steps are similar. When an employee exercises their right to refuse to work, the parties must adhere to the following procedure:

1. The employee exercising the right to refuse to work must immediately notify his or her supervisor or employer that they believe their own health or well-being or that of others is endangered, and explain the reasons for the refusal.
2. The supervisor or employer must examine the situation and investigate the safety concerns to determine whether the circumstances justify the employee's refusal to work. The investigation often takes place in the presence of the employee and a member of the joint Health and Safety Committee and/or a representative of the employee's certified association, if any, or, if none is available, another employee.
3. If there is disagreement between the parties that a danger exists, the parties may request the intervention of a governmental Health and Safety Officer, who will conduct an investigation into the safety concerns. The governmental Officer shall determinate whether or not a danger exists which would justify the employee's refusal to work and will report their findings to the parties. The governmental Officer has wide-ranging powers; including imposing the shutdown of operations as well as temporary danger abatement if they determine that a danger is present in the workplace.
4. The parties may appeal the governmental Officer's decision to a competent tribunal.

## What can be done while waiting on the governmental Health and Safety Officer's decision?

While waiting on the governmental Health and Safety Officer's decision, the law in Québec, Ontario, Alberta and British Columbia allows for assigning the employee who exercised their right to refuse to work to another job or alternative assignment that they are capable of performing, with no reduction in pay.

In Québec and Alberta, the employer may also ask another employee to perform the work under contention. The employer may do so provided that they inform the replacement employee there is a refusal to perform this work by the employee normally

assigned to it and the reasons behind the refusal. Before doing so, the employer must ensure that, in its opinion, there is no risk to the replacement employee.

## Should an employee refusing to work for health concerns continue to be paid?

Yes. In the four aforementioned provinces, the law provides that an employee who exercises their right to refuse to work must be paid their regular salary until the matter is resolved either amicably or through the intervention of the governmental Health and Safety Officer. Failure to do so may be construed as discriminatory action against the employee.

## Exceptions to the above

The law in all four aforementioned provinces provides there are exceptions to the right to refuse to work. The exceptions are:

- An employee cannot refuse to perform their work if such refusal could endanger others. For example, essential services would fall under this category. The law in Ontario is specific as to the categories of workers that fall in this category.
- An employee cannot refuse to perform their work if the danger associated with the work is inherent to the job and a normal condition of employment. For example, firefighters would fall under this category.

## Additional considerations in the COVID-19 age

Employers should strive to implement all measures prescribed by Public Health authorities, including but not limited to social distancing and hygiene measures, as well as providing all employees with job-appropriate Personal Protective Equipment.

Without these measures put in place, a governmental Health and Safety Officer may well agree with the employee in their refusal to work because of the risk of contracting COVID-19.

## How BLG can help

BLG professionals have adapted existing methodologies for dealing with an employee's right of refusal to work to the risks associated with COVID-19. These methodologies allow employers to deal efficiently with the new challenges the current pandemic brings to the workplace. To learn more, get in touch with any of the contacts listed below.

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