

Background

We are receiving numerous calls from members asking if they can refuse to work because the employer will not provide them with a N95 respirator when being asked to screen/assess possible coronavirus patients, and/or care for persons under investigation or confirmed coronavirus patients.

Under the *Occupational Health & Safety Act* (OHSA), health-care workers in places like hospitals and long-term care homes do have a right to refuse unsafe work but it is more limited than industrial workers and community health-care workers.

When dealing with infectious disease, health-care workers can refuse to work as long as the elements of the work and workplace are NOT INHERENT in their work and refusing does not endanger them or someone else. Where the Employer fails to implement measures or protections, this is not inherent to the work of health-care professionals. Instead, there is an increase in the risk over and above the normal conditions. Inherent dangers must be distinguished from dangers that can be eliminated or reduced by the employer. Ask is it inherent in their job to work without proper protective equipment, any more than it is inherent in a firefighter's work to go into a fire without adequate protective equipment?

In the case of coronavirus, if an employee believes that the employer does not have in place the necessary personal protective equipment (including N95 respirators) or other safety measures for them to safely screen/assess and/or care for a person under investigation or care for a confirmed coronavirus case and they choose to exercise their right to refuse unsafe work, ONA believes they would have that right, because it is not inherent in their job to work in an area with an infectious agent without personal protective equipment known to protect against the hazard even though OHSA puts limits on their right to refuse.

How to Refuse Unsafe Work

If an employee chooses to exercise their right to refuse unsafe work, their employer may challenge that right because the Chief Medical Officer of Health's directive of March 13, 2020, downgraded health-care personal protective equipment from N95 respirators to surgical masks.

Remember to refuse unsafe work a worker need only have reason to believe that their work or a particular task may endanger themselves or another worker. The test at this stage is subjective and the worker's belief need only be honest and genuine. It is an individual right (not a group of workers' rights) and legally, the worker does not need to be right, they only need to act in good faith.

For a work refusal process to be triggered, the worker must refuse AND stop (or not do) the work or task. There are two possible stages of a work refusal. Stage 1 is when the worker first reports the refusal to the supervisor or employer and the supervisor or employer must investigate in the presence of the worker and;

- a) a Joint Health and Safety Committee (JHSC) member who represents workers; or,
- b) a Health and Safety (H&S) representative in workplaces with 6-19 workers; or,
- c) a worker selected by the trade union because of knowledge, training and experience.

No other worker can be assigned the work or task that was refused without being told in the presence of a person in (a) to (c) above of the refusal and the reasons for the refusal.

If the refusing worker is satisfied after the employer or supervisor's investigation that the measures the employer has taken or put in place protect the worker (such as providing appropriate PPE), the Stage 1 refusal is resolved.

If the worker disagrees with the measures and has reasonable grounds to believe the work will continue to endanger them or another worker, the Ministry of Labour (MOL) must be called in to investigate. This is considered Stage 2 of the work refusal. The Ministry's health and safety contact centre number is Toll-free: [1-877-202-0008](tel:1-877-202-0008) and TTY: [1-855-653-9260](tel:1-855-653-9260). For more information about the stages, see ONA's right to refuse unsafe work guide at www.ona.org.

Throughout this process, these workers must prepare to satisfy their professional college that they took concrete steps to prioritize the safety and well-being of their patient. In addition, regulated health-care professionals ought to document their concerns and requested safety measures to ensure they can continue to provide patient care safely. For more information about your professional responsibilities, see [ONA's right to refuse unsafe work guide](#).

What to Do before a Work Refusal?

Health-care workers who anticipate a possibility of exercising their right to refuse are advised to make every effort to preempt the need by reporting their concern to their supervisor and if not resolved move up through their employer's reporting structure (Internal Responsibility System) as high as necessary to ensure their protection and uninterrupted care for their patients. They should engage their Joint Health and Safety Committee ONA worker representative and the Union to advocate for them, so that they are not on their own.

Resolution with the Employer

The easiest way for the employer to resolve the refusal would be to provide the worker with appropriate personal protective equipment including respiratory protection (e.g. N95s, PAPRs). A surgical mask does not protect the wearer from inhaling infectious disease particles. It is designed to capture what the wearer expels, thus protecting people from an infected wearer.

A recent study released March 16, 2020 by Dr. Lisa Brousseau, *an international expert on respiratory protection and infectious diseases and professor (retired), University of Illinois at Chicago* provides recent and relevant evidence that was not considered by the Chief Medical Officer of Health and should be cited when/if an individual decides to refuse unsafe work:

<http://www.cidrap.umn.edu/news-perspective/2020/03/commentary-covid-19-transmission-messages-should-hinge-science>

Dr. Brosseau writes, *“all of the particle sizes in a typical cough or sneeze aerosol are inhalable. The larger particles will deposit in the nose, while smaller particles deposit in the lungs, where cell receptors for many infectious respiratory viruses are typically located.”* She goes on to say, *“Higher doses of infectious particles are more likely to result in infection and disease. Health-care workers, whose work brings them close to more people with more severe symptoms in relatively enclosed spaces, are at more risk than the general public at being exposed to a dose of infectious particles that could lead to infection.”*

She also states, *“The precautionary principle suggests we should approach this organism as we would any novel highly transmissible respiratory disease—as a contact, droplet and airborne disease, but with one important caveat: Short-range aerosol transmission is also a strong possibility...”*

The above is evidence that an individual could provide to their supervisor or employer when they first report the refusal to them and could provide to the MOL if the refusal is not resolved at Stage 1 to demonstrate that the science is not certain on transmission of this novel coronavirus and they have evidence to support that the Chief Medical Officer of Health’s Directive does not provide adequate personal protective equipment to protect them from being exposed to COVID-19.

Ministry of Labour and Appeals

Based on recent reports, the MOL is not fulfilling its duty to investigate the facts based on the precautionary principle and is deferring to the Chief Medical Officer of Health's recent directive dated March 13, 2020 and, in our opinion, both are risking worker safety. If the MOL does attend the workplace and makes a finding that the work is not likely to endanger the worker, the worker at this point has a decision to make - risk their safety or continue to refuse and risk being disciplined for not returning. If disciplined at this stage, the Union will need to convince an arbitrator that they are were correct and the inspector was wrong.

ONA will consider appealing any Ministry of Labour inspection that denies a worker their right to refuse unsafe work due to a lack of protective equipment or other safety measures. Due to the strict timelines, please notify ONA immediately of any decisions that do not support our members' right to refuse unsafe work.