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## Can Essential Service Workers Refuse to Work in Ontario?

By: Ryan J. Conlin and Jeremy D. Schwartz

The province of Ontario has now announced that will order the shutdown of all “non-essential” services. This opens the door to the question of whether those workers employed in what OHS legislation has deemed to be essential workers are entitled to refuse to work and how to deal with workers who are working in “essential” industries for COVID-19 purposes but who are not subject to any legislative exemptions.

The OHSA has already carved out exceptions for specific types of workers in circumstances where the basis of the work refusal is a normal or inherent condition of the worker’s employment or where the refusal to work would directly endanger the life, health or safety of another person. The list of workers subject to this legislative exception is as follows:

- a) a person employed in, or a member of, a police force to which the Police Services Act applies;
- b) a firefighter as defined in subsection 1 (1) of the Fire Protection and Prevention Act, 1997;
- c) a person employed in the operation of,
  - i. a correctional institution or facility,
  - ii. a place of secure custody designated under section 24.1 of the Young Offenders Act (Canada), whether in accordance with section 88 of the Youth Criminal Justice Act (Canada) or otherwise,
  - iii. a place of temporary detention under the Youth Criminal Justice Act (Canada), or
  - iv. a similar institution, facility or place;
- 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 above

Clearly, there is a significant number of workers whom the government has deemed “essential” for the purposes of COVID-19 and who are not subject to the exemptions in the OHSA which are primarily related to the public safety and medical sectors (e.g. grocery stores). We will address both categories of employees below.

### **Exempt Employees**

As we discussed above, it must be borne in mind that the work refusal exemption for the carved-out employees is not a blanket one. It only applies where the dangerous work is inherent in the job or where the safety or life of another person is in danger. For the purposes of this section of this article, we will assume that there is no dispute that the exemption applies.

The Ontario Labour Relations Board (“OLRB”) has dealt previously with situations in which these carved-out, exempt employees initiated a work refusal when directed to carry out their work. In *Hamilton Wentworth Detention Centre* [2012] OLRB Rep. November/December 2017, for example, the OLRB made clear that any employee who refused to perform work in these circumstances would suffer the “employment law” consequences of same. The Vice Chair’s unusually blunt statement of the law is set out below,

I don’t mince words: the Legislature would rather a worker in this special category of professions have different health and safety rights than have a member of the public or someone under their care be hurt.

This statement of the law is more applicable than ever, as our province deals with this unprecedented crisis. Employees subject to the exemption from initiating work-refusals are required to put the health and safety of the people they are responsible for ahead of their own. Those employees who fail to do so are in our view subject to serious employment consequences, up to and including immediate termination of employment for just cause.

Employers must appreciate that the exemption to the normal work refusal process does not allow employers to ignore OHS compliance. Any legitimate safety issues raised by workers must be taken seriously and dealt with appropriately.

### **Non-Exempt Employees**

Employees who are not subject to the OHS exemption to normal work refusals must be treated differently. The regular work refusal provisions apply, even during this pandemic. The first step in a work refusal is to attempt to resolve the matter internally. If it is possible to deal with the issue right away, we recommend that the company do so. It may be advisable to agree to resolve the matter on a “without prejudice” and “without precedent” basis so that the matter can be re-visited once the crisis is over.

Where there is a dispute, the matter must be referred to a Ministry of Labour Inspector. We anticipate that it is quite unlikely that Inspectors will attend in person in these times of office closures and competing demands. We strongly recommend that any business that finds itself in such a position get in touch with counsel experienced in OHS matters who can assist in achieving a prompt and favourable resolution.

Please [join us on Friday, March 27 from 12-1pm](#) for an interactive, complimentary webinar: *Fail to Plan? Plan to Fail. Pandemic Planning and Response for HR and OHS.*

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