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Amendments to the Canada Labour Code impact the right to refuse dangerous work

Written by Stephen Shore
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Employees of federally regulated companies will face new restrictions on their right to refuse work they view as dangerous. Recent amendments to the Canada Labour Code, effective Oct. 31, have narrowed the definition of "danger" in the workplace, and require an employer to respond to a refusal with an internal investigation — including the requirement to prepare a written report — before an officer from the Ministry of Labour will become involved.

Refusal of dangerous work

As it relates to an employee's right to refuse dangerous work, there have been four key changes to the definition of "danger" under the code.

First, under the prior definition of "danger", an employee could refuse work which posed an "existing or potential" hazard or condition. The "existing or potential" qualifiers have been struck from the definition. Now an employee can only refuse to perform work in the face of present hazards or conditions.

Second, the old definition permitted an employee to refuse to work in respect of a "current or future activity." The "current or future" qualifiers have been struck, so that an employee must actually be engaged (or ordered to engage) in the alleged dangerous activity at the time the work refusal is made.

Third, prior to the amendments an employee could refuse work if he or she reasonably expected the activity would cause "injury or illness." Now, an employee must meet the higher threshold of demonstrating he or she reasonably expects the activity would cause "an imminent or serious threat" to "life or health."

Finally, the former definition of "danger" expressly included reference to injuries or illness which occurred at any point following the exposure to the hazards, conditions and activities. This provided workers with a right to refuse work which could reasonably be expected to cause a future health event, such as a chronic illness. These references have now been removed so that a work refusal will be measured against a standard of "imminent" harm, not future harm to an employee.

The amendments return the code to its pre-2000 state when the right to refuse dangerous work was extraordinary and applied in more restricted circumstances. It should be noted that this narrowing of the work refusal right does not remove or limit an employee's right to make representations to his or her employer about health and safety in a general sense. Indeed, there are many other aspects of the code that are specifically directed at providing employees with such opportunities (such as the mandatory establishment of workplace health and safety committees).

Changes to the investigation process

The amendments to the code have also changed the process of responding to a work refusal, shifting greater responsibility away from the ministry and into the hands of the workplace parties themselves.

In receipt of a work refusal, an employer must conduct an internal investigation in the presence of the employee and one of the health and safety representative, an employee representative of the workplace committee, or, if neither of the above are available another employee appointed by the employee who made the refusal.

As a result of the code amendments, the employer must now issue a written report at the conclusion of its investigation. The format or content of the written report is not specified by statute, but Service Canada has prepared a two-page form entitled *Workplace Investigation Reports on Refusal to Work* as a recommendation to employers.

If the dispute is not resolved through the employer's internal investigation, a further investigation into the refusal will be carried out by the workplace committee or health and safety representative. At the conclusion of this investigation, a report must be prepared and provided to the employer along with any recommendations.

The employer is free to accept or reject the conclusions contained in that report. Only if the employer's decision does not resolve the work refusal will notification of the dispute be given to the Ministry of Labour. Upon giving notice, the employer is also now required to provide the Ministry with the reports from the internal investigations conducted by the workplace parties.

Disciplining employees

Unchanged by the amendments is the fact an employee may be subject to discipline if he or she willfully abuses his or her right to refuse dangerous work. It has been held that a purported work refusal is not an appropriate means of generally challenging an employer's policies or procedures or to criticize a training program. In addition, an employee (or group of employees) should not utilize the right to refuse unsafe work as a way to gain an advantage in a collective bargaining process.

While discipline is permitted in appropriate circumstances, the code places specific requirements on an employer who issues discipline in response to a work refusal. First, discipline cannot be issued until the investigations and any appeals from those investigations have taken place.

Second, at the employee's request, an employer must provide written reasons for the disciplinary action taken.

Although the recent amendments to the code have not changed the provisions relating to disciplinary action, the narrowed definition of dangerous work may assist employers by removing vague and speculative words such as "potential" or "future" harm.

As a result of these amendments it is important that federally regulated employers ensure their supervisors and managers are aware of the new rules and trained in how to respond to a work refusal. Employers should also review and update their internal investigation protocols and discipline assessment tools to ensure compliance with the new requirements.

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