A COVID-19 Health and Safety Rights Guide

for Education Workers

ONTARIO FEDERATION OF LABOUR

This guide was prepared in consultation with the labour caucus of the Provincial Working Group for Health and Safety which includes the following unions representing Ontario's education workers. This guide is primarily intended for the use of education workers in Ontario, working in Kindergarten through Grade 12.

We would also like to acknowledge the valued input of the labour caucus of the Health Care Section 21 Committee for their contributions to this guide.

ONTARIO FEDERATION OF LABOUR

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ETFO FEEO

ONTARIO ENGLISH Catholic Teachers ASSOCIATION

OPSEU SEFPO Ontario Public Service Employees Union / Syndicat des employés de la fonction publique de l'Ontario

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ABOUT THIS GUIDE

This short guide is to clarify specific worker rights in the *Occupational Health and Safety Act* during the COVID-19 pandemic.

While not exhaustive, the guide provides information about:

- the work refusal process,
- reporting workplace exposures and cases of COVID-19 to the Workplace Safety and Insurance Board (WSIB),
- where to find more information about COVID-19.

Workers, unions, joint health and safety committees and health and safety representatives can use this information to continue the push for safe and healthy workplaces during the COVID-19 pandemic.

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REFUSING UNSAFE WORK

Who Has the Right?

Section 43 of the *Occupational Health and Safety Act (OHSA)* gives all workers covered by provincial legislation the right to refuse unsafe work.

Teachers have a limited right to refuse in certain situations, but the right still exists. Ontario Regulation 857 states that a teacher, as defined in the *Education Act*, does not have a right to refuse unsafe work where the circumstances are such that the life, health or safety of a pupil is in imminent jeopardy. This means that teachers have an obligation to ensure that a student's life, health or safety is not in imminent jeopardy before exercising their right to refuse.

> Refusing unsafe work is a decision only the worker can make based on their own belief.

What Can Be Refused?

A worker can refuse to do any work where there is a reason to believe that:

- the equipment, machine, device or thing the worker is to use or operate is likely to endanger themselves or another worker;
- the equipment, machine, device or thing the worker is to use or operate or the physical condition of the workplace, contravenes the *OHSA* or regulations and is likely to endanger themselves or another worker;
- the physical condition of the workplace is likely to endanger themselves or another worker;
- workplace violence is likely to endanger them.

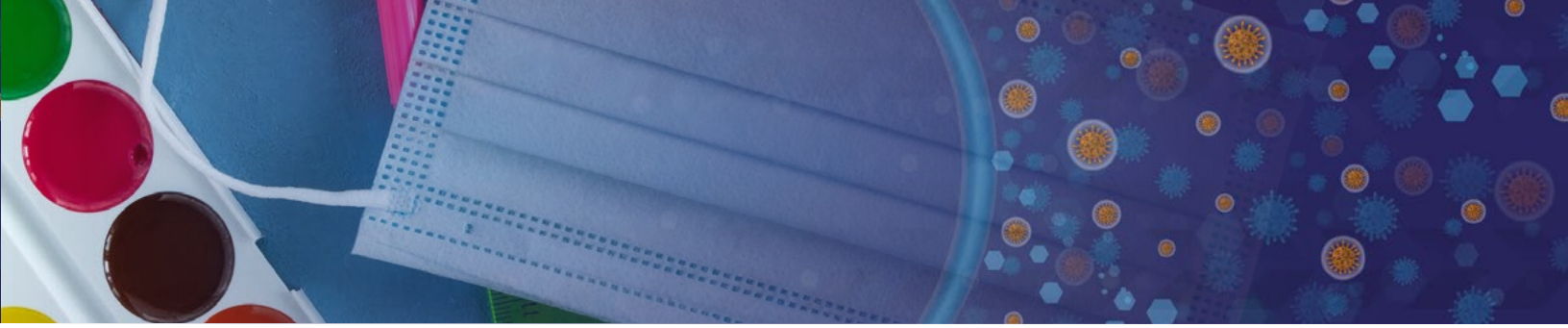
Exposure to chemical or biological agents are covered by the second category, while jobs that produce repetitive strain injuries are included in the first.

Being required to wear insufficient PPE to protect you from a chemical or biological agent would be covered in the first category.

Being required to perform a task using a faulty or improperly guarded equipment, machine, device, or thing would be covered in the first and second categories.

Being required to wear PPE without receiving training on the use, care and limitations of the equipment would be covered in the first category.

Being required to perform a task alone, where the task requires at least two workers to perform the work safely, would be covered in the first category.



What Cannot Be Refused (Teachers)?

The right to refuse is limited in that teachers do not have the right to refuse where the refusal puts the health and safety of a student (pupil) in imminent jeopardy.

In terms of COVID-19, a teacher has the right to refuse work in the circumstance where there is a likelihood of exposure because the teacher has not received adequate training or PPE to protect themselves. A teacher is able to exercise this right at any time of the school day as long as the students under their supervision are not exposed to any imminent adverse situation or condition which threatens their health or safety.

Professional Obligations

For workers who belong to regulatory colleges (e.g. Ontario College of Teachers, College of Early Childhood Educators, Social Workers, Trades, Speech and Language Pathologists and Audiologists, etc.), it is important that they also consider their professional obligations and the standards of their college.

Regulatory colleges have standards and guidelines that prohibit activities that result in harm to a person under their care. Members must consider the best possible solution while still making decisions that are ethical and in the best interest of their client (child, student, etc.), while also maintaining their professional accountability. They are accountable for their own actions and decisions and should not act solely on the direction of others.

What Are the Steps to Take When Refusing Work?

1. Worker must tell the supervisor or employer that they are refusing work and indicate why.
2. Supervisor or employer must immediately investigate with the worker and a worker representative of the JHSC[1].
3. Worker must remain in a safe place near the work area until the investigation is complete.
4. If the issue is not resolved and the worker still has grounds to believe that the work is likely to endanger themselves or another worker, a Ministry health and safety inspector must be contacted.

See the chart below for more details.

1 If this worker representative is not available another worker appointed by the workers or the union is to be involved in the investigation. Employers are not entitled to select the worker representative.

Does the Worker Have to Be Right?

NO! Workers need only have a genuine belief that the work is unsafe.

Does the Worker Get Paid?

The worker should be paid for the time while the refusal is investigated. However, once a Ministry inspector is called, the employer can assign the worker to other "reasonable" alternate work unless the work assigned conflicts with the collective agreement.

Refusal or Complaint?

It is important not to let the supervisor/principal try to change the refusal to a complaint. If the supervisor/employer starts to say "complaint," in reference to the refusal, make it clear to the employer that it is a refusal, not a complaint. If the employer/supervisor is successful in changing the language, then they will feel free to treat the refusal as a complaint and not follow their work refusal obligations under the *OHSA*.

What if My Employer Is Saying that My Right to Refuse Dangerous Work Is "Insubordination"?

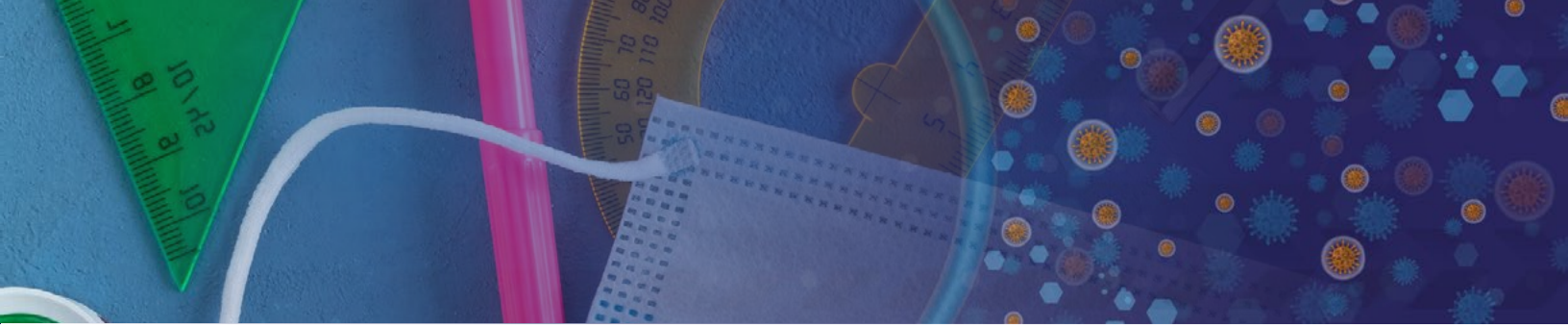
It is important to clearly make the distinction between refusing unsafe work and insubordination. Indicate from the outset that your refusal is based on a health and safety concern (or that of other workers). It is recommended to put the circumstances of the refusal in writing as soon as you can, if possible. There are no required phrases or words to initiate the process, but you should clearly state your reasons for refusing, so it is not confused with being insubordinate.

Can the Worker Be Penalized for Refusing Work?

A worker cannot be subject to reprisals or threats of reprisal by the employer, or by anyone acting on the employer's behalf, for refusing work that they believe endangers their health and safety or that of another worker, or for exercising any other right under the *OHSA* or for contacting the Ministry about a refusal, complaint or concern.

It is illegal for the employer to:

- fire or threaten to fire you;
- suspend or discipline you, or threaten to do so;



- intimidate or coerce you including, for example, bullying you or strongly encouraging you not to report a danger;
- impose any penalty including, for example, changing work assignments, shift or work location, reducing or changing your hours, or denying you a raise or benefits that you are entitled to.

Can I Refuse Work Because of the Covid-19 Pandemic?

You cannot refuse work simply because COVID-19 exists. There must be a link between COVID-19 and your reasonable belief that you are at risk of injury or illness. In the case of COVID-19, a potential danger would include a risk of exposure that is not being properly managed, such as an employer failing to provide you with appropriate personal protective equipment or the training to use it.

Can a Group of Workers Refuse Work Where Health and Safety Is in Danger?

The right to refuse unsafe work is an individual process. Multiple workers can refuse to perform work they think could cause injury or illness, but each worker must make their own refusal and give their own reason when they report the refusal. You are not protected from discipline if you stop working “in solidarity” or for “sympathetic” reasons because your co-worker has refused to perform unsafe work.

Appealing Ministry Inspector’s Decisions

Workers, unions and even employers have a right to appeal a decision of an inspector through the Ontario Labour Relations Board. This includes an order or a lack of an order by an inspector. The appeal must be filed within 30 days. It is important for workers to notify their union as soon as possible if they disagree with an inspector’s decisions. Your union will have a process to review the inspector’s decision. The unions have staff who understand the appeal process and they will be able to determine if an appeal should be started. They will need a copy of the unredacted Inspector’s Field Visit Report. Despite what some employers may say, there is nothing confidential in the report. In fact, a copy of the report must be posted in the workplace where it will come to the attention of workers, i.e. the health and safety bulletin board at the school/worksite.

The appeal must be filed within 30 days.

Inspector Decisions During the Pandemic

Inspectors are instructed by their management about how and when to go to the workplace to investigate work refusals. At the onset of the pandemic, almost all investigations were being done over the phone. We know from internal government sources that inspectors are directed on how to investigate work refusals involving COVID-19 and a lack of PPE. Despite this lack of support, workers and their unions are keeping the pressure on employers to protect workers and on the government to support worker rights and enforce the *OHSA*.

More Information

For more information on how to pressure an inspector to support the rights of workers, see "Advice for Joint Health and Safety Committee Members/Health and Safety Representatives."

* reference to "inspectors" in this document are the Health and Safety Inspectors with the Ministry of Labour, Training and Skills Development (MLTSD). These inspectors enforce the *Occupational Health and Safety Act (OHSA)*.

STEPS TO TAKE WHEN REFUSING UNSAFE WORK

1 Worker must tell the supervisor or employer about the refusal and why they believe the work is unsafe.

2 Supervisor investigates with the worker and a worker representative of the JHSC.

To report health and safety refusals, call 1-877-202-0008.

3a Supervisor agrees with the worker, implements corrective measures and takes action that satisfies the worker.

4a Worker returns to work.

It is **illegal** for the employer to carry out a reprisal against a worker for exercising their right to refuse or any other rights under the *OHSA* or for contacting the Ministry about a refusal, complaint or concern.

No job is worth a life – know your rights. A work refusal is an individual decision, but you are not alone.

Your union can't coach a worker to refuse work, but they support your right.

Workers, unions and employers have a right to appeal a decision of an inspector through the Ontario Labour Relations Board within 30 days.

8a Inspector finds job unsafe and issues orders and/or directions.

3b Supervisor disagrees with the worker and the worker continues to refuse.

4b Worker, worker rep. or employer calls Ministry health and safety inspector.

5 Worker stays in a safe place, does alternate work if it doesn't conflict with the collective agreement or is given other non-punitive directions.

6 No other worker shall be assigned the job unless informed about the refusal in the presence of the worker representative. This worker may also refuse.

7 Ministry inspector investigates with worker, worker rep. and the employer rep. present.

8b Inspector finds job safe. Worker must go back to work.

ADVICE TO THE WORKER MEMBERS OF JHSC

Employers have a duty in law to do everything reasonable in the circumstances to protect workers. See 25(2)(h) of the *OHSA*. Issuing personal protective equipment (PPE) is the last line of protection in the hierarchy of controls. However, with COVID-19, it is important that all of the hierarchy of controls, including personal protective equipment, are available and in place to protect all workers at risk of being exposed.

A lack of medical masks and face shields cannot be used as an excuse to do nothing.

Hierarchy of Controls

1. Elimination
2. Substitution
3. Engineering Controls
4. Administrative Controls
5. Personal Protective Equipment

Any worker who has reason to believe that their job is not safe can exercise their right to refuse. No job is worth a life. Know your rights. You are not alone. Your union supports you.

Worker Protection Is Paramount

In Ontario Law, the *OHSA* prevails over all other Ontario legislation. (See Section 2(2) of the *OHSA* for the precise wording.) This includes any directives issued by Public Health Ontario or the Chief Medical Officer of Health.

Health Protection and Promotion Act (HPPA)

Section 77.7 of the *HPPA* is important for workers. Subsection (5) confirms that if there is a conflict between a directive issued under *HPPA* and the *OHSA* then the *OHSA* prevails.

This section also requires that the Precautionary Principle be considered when directives are developed and issued.

Precautionary Principle

This principle calls for action to be taken if there is evidence of harm that exists and not wait for scientific certainty. In a pandemic, this should mean that high levels of protection be taken to protect workers and the public first. Then over time, if the evidence proves that this level of protection is not necessary, some protections can be reduced.

Evidence of Airborne Virus

There is a growing body of scientific evidence that demonstrates that COVID-19 transmission also occurs through the inhalation of infectious aerosols when within close range of an infected individual. This evidence does not fit the rationale provided by the Chief Medical Officer of Health (CMOH). Instead of adjusting their directives to fit this emerging scientific evidence, they have chosen to ignore, devalue, or argue against information that contradicts their beliefs.

This evidence is also being ignored by the MLTSD, who have the mandate to enforce the *OHSA*. They do not have the mandate to blindly follow directives from the CMOH blindly.

Additional information is available from the Occupational Health Clinics for Ontario Workers (OHCOW): www.ohcow.on.ca/airborne-transmission-risk-and-control.html

In November 2020, the Public Health Agency of Canada acknowledged that the spread of COVID-19 includes aerosol transmission. Aerosols are small airborne droplets created when an infected person coughs, sneezes, sings, shouts, or talks. The new update to official guidance comes months after the World Health Organization and the Centers for Disease Control acknowledged that the virus can be transmitted through aerosols.

Reporting Exposure and Illness

All workers who believe they are exposed to the virus from work should be filling out a Worker's Exposure Incident Form (FORM 3958A) from the Workplace Safety and Insurance Board (WSIB).

FORM 3958A: www.wsib.ca/sites/default/files/documents/2018-12/3958a_07_16_fs.pdf

If a worker contracts COVID-19 in the course of their work, a claim should be filed for occupational illness with the WSIB (FORM-6). Employers cannot stop you from completing a Form 6. A copy must be provided to the employer and should be forwarded to your union.

Form 6: www.wsib.ca/sites/default/files/2019-02/0006a_fs_09_15.pdf

Workers should complete their employers reporting process first. It is often useful for workers to see the employers WSIB Form 7 before they initiate a Form 6 so they can correct any misinformation. A WSIB claim also can be initiated by the employers form 7 first and then the workers complete form 6.

Some employers and public health officials are arguing that workers who test positive for COVID-19 were infected in the community, not while at work. Meanwhile, labour is arguing for a change in worker compensation legislation. A change that will automatically assume workers exposed to the virus at work contracted the illness because of their work unless it can be proven otherwise.

www.documents.ofl.ca/communications/20200403FORDWorkersCompensationandCOVID.pdf

An additional benefit of filling out the Form 6 is that it triggers the notification/reporting requirements under section 52(2) of the *OHSA*. Once the employer is notified that a Form 6 has been filed, they have a duty to provide notice to the JHSC and the union. The notice must include information about the exposure and the steps the employer will take to prevent further exposure to workers.

The WSIB is publishing the data on claims related to COVID-19 on their website. This information is updated each Monday.

www.wsib.ca/en/novel-coronavirus-covid-19-update#covid

Reprisal Protection under *WSIA*

Under the *Workplace Safety and Insurance Act (WSIA)*, it is illegal for employers to take reprisal against a worker for filing a claim with the WSIB. It is also illegal for the employer to discourage or prevent a worker from filing a WSIB claim.

Once a worker has filed a claim, it is illegal for the employer to try to induce or influence a worker to withdraw or abandon the claim. There is also a legal duty for the employer to file a Form 7 with the WSIB within 3 days. This is not optional for the employer. They do not get to say the illness is not work-related and not file the form. This is claims suppression. It is the role of the WSIB to decide if the illness is work-related.

Do NOT contact a MLTSD health and safety inspector for a compensation matter because they cannot enforce compensation legislation.

Any attempt by the employer to suppress claims is illegal. If the employer attempts to take any of these actions, the compliance staff at the WSIB should be contacted.

1-888-745-3237 during regular business hours or at **sileads@wsib.on.ca** anytime.

Provide them with the information they ask for as they need it to start an investigation. Just make it clear that you want an investigation. Contact your union, so they are aware of the actions taken.

Reports to JHSC

In addition to the information resulting from 52(2) of the *OHSA*, the JHSC is entitled to any reports the employer may have dealing with health and safety at the workplace, and the employer has a duty to provide all of these reports to the committee under 25(2)(l) and to the workers under 25(2)(m).

For greater clarity, a report respecting occupational health and safety is a report which contains something in the nature of an assessment, judgement, evaluation, analysis or conclusion that affects workers' health and safety. All information which can assist members of the JHSC/HSR in determining whether specific circumstances give rise to an occupational health and safety concern in the workplace is relevant information and must be provided.

Section 12(1) of the *OHSA* gives a worker, including a worker member of the JHSC or the union the power to request from the WSIB a summary report on injuries and illnesses from that workplace. The WSIB is obligated by law to provide the information to the worker, JHSC, employer and the union. The employer is obligated to post this information in the workplace.

Compliance with Inspector Orders

In cases where an inspector has issued an order, they will often give the employer a period of time to come into compliance. Often, they will rely on a notice signed by the employer and a worker member of the JHSC to tell them the employer has complied with the order. Worker members of the JHSC or a worker named by the union should carefully review the order and action or compliance plan by the employer carefully. Ensure the measures taken really will protect workers and comply with the orders. Provide to the inspector in writing any evidence of non-compliance and any recommendations, or state that they agree or disagree with the action or compliance plan and provide written reasons for any disagreement.

ADDITIONAL SOURCES OF INFORMATION FOR WORKERS

Ontario Federation of Labour
ofl.ca/covid-19-information

This information includes:

- the OFL response to Ford's emergency legislation,
- demands for workers during the pandemic,
- a fact sheet outlining short-term and long-term actions to avoid the harm that the virus can bring to your health,
- an important timeline of COVID-19 policy announcements, and
- links to affiliate information pages on COVID-19.

The OFL will continue to monitor recommendations and advisories from local, provincial and national public health officials as further information becomes available. Our advocacy work continues, and we will stay vigilant while pressing the government on our demands.

Prevention Link
www.preventionlink.ca/covid-19

www.preventionlink.ca/video-library

OHCOW
www.ohcow.on.ca/covid-19.html

Workers Health and Safety Centre
www.whsc.on.ca/Resources/Publications/COVID-19-Resources

www.youtube.com/user/whsctraining

Information includes COVID-19 specific documents, webinar materials, and posters.

Affiliate Resources

AEFO Health and Safety & COVID-19 Resources
www.aefo.on.ca/fr/outils-et-ressources/ressources/sante-et-securite-au-travail

CUPE Health and Safety & COVID-19 Resources
www.cupe.ca/health-and-safety

www.cupe.ca/covid-19

ETFO Health and Safety & COVID-19 Resources
www.etfohealthandsafety.ca

www.etfohealthandsafety.ca/site/infection-prevention-and-control

OECTA Health and Safety & COVID-19 Resources
www.catholicteachers.ca/Account/Login?returnurl=%2fMembers-Area%2fHealth-Safety

www.catholicteachers.ca/For-Your-Career/Safety-in-Schools

OPSEU Health and Safety & COVID-19 Resources
www.opseu.org/health-and-safety

www.opseu.org/2019-novel-coronavirus-covid-19

OSSTF Health and Safety & COVID-19 Resources
www.osstf.on.ca/services/health-safety.aspx

www.osstf.on.ca/en-CA/news/covid-19-information-osstf-feeso-communications-content.aspx

Links to Relevant Legislation

Occupational Health and Safety Act (OHSA)
www.ontario.ca/laws/statute/90o01

Industrial Establishments Regulation
www.ontario.ca/laws/regulation/900851

Teachers Regulation
www.ontario.ca/laws/regulation/900857

Workplace Safety and Insurance Act
www.ontario.ca/laws/statute/97w16

Ministry of Education B-Memos
www.efis.fma.csc.gov.on.ca/faab/B_Memos_2020.htm

B-Memos include information related to COVID-19 funding investments for staffing, infrastructure and enhanced cleaning, as well as guidelines for reopening and optimizing air-quality in schools.

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The Ontario Federation of Labour (OFL) represents 54 unions and one million workers. It is Canada's largest provincial labour federation.

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