

workplace violence & harassment

SPECIAL REPORT ON THE NEW ONTARIO WORKPLACE
VIOLENCE & HARASSMENT LAW

Bongarde Media Company
USA: 103 Eastside Oroville Rd., Oroville, WA 98844
Canada: 102-501 Main Street, Penticton, BC V2A 9A6

Phone: 1-800-667-9300 Fax: 1-250-493-1970
Email: customerservice@bongarde.com
www.SafetySmart.com
© 2009 Bongarde

Table of Contents

Ontario Passes New Workplace Violence & Harassment Law.....	4
Conducting a Risk Assessment.....	7
Why You Need to Conduct a Risk Assessment	7
How to Conduct a Risk Assessment	8
Workplace Violence & Harassment Survey.....	11
Drafting a Workplace Violence & Harassment Policy	14
Supervisor Violence Survey	15
Right to Refuse Work Out of Fear of Violence	19
9 Workplace Refusal Traps to Avoid	19

ONTARIO PASSES NEW WORKPLACE VIOLENCE & HARASSMENT LAW

On Dec. 9, 2009, [Bill 168](#), which adds new workplace violence and harassment requirements to the Ontario [OHS Act](#), passed its third reading. Once it receives Royal Assent, the bill will become law six months later. This Special Report will give you an overview of the new law and its requirements and tell you how to comply. It also includes two Model Surveys you can use to conduct a violence risk assessment of your workplace as well as a Model Workplace Violence & Harassment Policy you can adapt and use.

WORKPLACE VIOLENCE LAW IN CANADA

All employers in Canada have a duty to prevent and protect workers from violence. The OHS laws impose this obligation in one of two ways. In Fed, AB, BC, MB, NL, NS, PEI and SK, the OHS laws specifically say employers must take steps to address workplace violence. (Québec requires employers to prevent “workplace psychological harassment,” including physical violence, in its labour standards law.) In the remaining jurisdictions, this duty is implied by the OHS law’s “general duty clause.”

New Ontario Regulation

Until recently, Ontario fell in the implied duty group. But with the passing of Bill 168, it now joins the specific duty group. The elements of the violence and harassment prevention programs required by the new law are similar to the requirements in most Canadian jurisdictions that impose specific violence and harassment duties on employers.

The new law applies to all employers in Ontario covered by

the OHS Act. In addition to defining “workplace violence” and “workplace harassment,” it covers the following areas:

1. **Risk Assessment.** Employers must conduct an assessment of the risk of workplace violence and report the findings to the JHSC, safety representative or the workers (if there’s no JHSC or safety representative).
2. **Policies.** Employers must prepare policies on workplace violence and harassment and review those policies at least annually. If an employer has five or more workers, the policies and must be in writing and posted conspicuously in the workplace.
3. **Violence Program.** Employers must develop a program to implement the workplace violence policy. That program must include measures:
 - To controls risks of workplace violence identified in the assessment;
 - To summon immediate assistance when workplace violence occurs;
 - For workers to report incidents or threats of workplace violence; and
 - For employer to deal with incidents, complaints and threats of workplace violence.
4. **Harassment Program.** Employers must develop a program to implement the workplace harassment policy. That program must include measures for workers to report incidents of workplace harassment and spell out how the employer will deal with incidents and complaints of workplace harassment. In addition, the employer must train workers on the workplace harassment policy and program.
5. **Duties.** The new law clarifies the duties of employers, supervisors and workers with respect to workplace violence and requires employers to train workers on

the workplace violence policy and program.

Two Key Distinctions

Although the new Ontario law generally parallels the requirements in other workplace violence regulations in Canada, it has two key distinctions:

1. **Right of Refusal.** The new law specifically extends workers' right to refuse dangerous work to include refusals based on the risk of workplace violence. That is, a worker may refuse work if he believes that workplace violence is likely to endanger him.
2. **Domestic Violence.** The new law's domestic violence duty is unique in Canada. This language appears to be a response to the 2005 murder of nurse Lori Dupont by her ex-boyfriend, a doctor at the hospital where she worked who later committed suicide. Senior hospital administrators knew about the ex-boyfriend's unstable behaviour and that he'd made threats to Dupont. But on the day she was murdered, the nurse and doctor were scheduled to work together.

Under the new law, employers in Ontario can't ignore domestic violence, at least to the extent that they can protect workers from such violence in the workplace. The new law requires employers to take reasonable precautions to protect workers if they become aware, or should reasonably be aware, that domestic violence that would likely expose a worker to physical injury may occur in the workplace. However, the new law doesn't spell out the specific precautions employers should take. So it remains to be seen exactly how companies will fulfill this duty.

CONDUCTING A RISK ASSESSMENT

To protect your company from liability under the new Ontario law, you'll need to perform a workplace violence risk assessment to identify potential threats and vulnerabilities. The purpose of the risk assessment is to identify which workers may be at risk of violence, the degree of risk, whether control measures are in place to address this risk and, if so, whether these measures are adequate.

WHY YOU NEED TO CONDUCT A RISK ASSESSMENT

There are two reasons why you need to conduct an assessment of the risk of violence in your workplace. First, random acts of workplace violence are impossible to prevent. But most incidents involving violence aren't random. Violence is often preceded by a number of warning signs. Although many of the warning signs are quite subtle, they are identifiable if you know what they are and how to look for them. Thus, one of the keys to preventing violence is to know what the warning signs are. And once you know what the warning signs are, you can establish a program for checking to see if any of them are present in your workplace. (*See Checklist of Warning Signs on the next page*)

Second—and perhaps most important—the new law requires your company to conduct a violence risk assessment. Sec. 32.0.3(2) specifically requires the assessment to take into account:

- Circumstances that would be common to similar workplaces;
- Circumstances specific to the workplace; and
- Any other prescribed elements.

The company must then report the findings of the risk as-

12 Warning Signs of Violence

Most workplace violence incidents are preceded by warning signs. If you know what the signs are, you stand a much better chance of preventing violence. Here's a list of 12 warning signs to look for. Some of them are no-brainers, but some are subtle and far from obvious:

- r Overt or veiled threats
- r Intimidating, belligerent, harassing and other inappropriately aggressive behaviour
- r Frequent conflicts with supervisors and co-workers
- r Bringing a weapon to work
- r Showing a fascination with weapons and acts of violence
- r Statements indicating thoughts of suicide
- r Drug or alcohol abuse
- r Increased absenteeism
- r Mood swings
- r Deteriorating hygiene
- r Deteriorating job performance
- r Extreme changes in behaviour

assessment to the JHSC, safety representative or, if there's no JHSC or safety representative, the workers themselves. In addition, the new law requires an employer to reassess the risk of workplace violence as often as is necessary to ensure that its workplace violence policy and the related program continue to protect workers from workplace violence. For example, conduct a reassessment when and if circumstances change that might increase the risk of violence and if a violent incident occurs.

HOW TO CONDUCT A RISK ASSESSMENT

Step #1: Laying the Groundwork

Be warned: Workplace violence risk assessments can

be a sensitive issue. Management and workers may consider them intrusive and unnecessary. Although awareness of workplace violence has increased in recent years, there are still too many companies who believe that it can never happen to them. Safety coordinators need to overcome this false sense of security to conduct risk assessments and implement effective prevention programs.

That's why it's important to involve both workers and man-

agement in your efforts, including at least one member from the Security, HR and EHS departments. Make sure all members of the group understand the purposes and goals of the assessment and violence prevention program.

Step #2: Conducting the Risk Assessment

In general, there are three parts of a workplace violence risk assessment:

Examining past incidents. Previous experiences with violence in your own company is the first place to look for signs of trouble. But don't limit your assessment to acts involving physical violence that resulted in serious injuries or fatalities. Most incidents of workplace violence involve lower levels of physical force, like pushing and shoving. Although they don't make the headlines, these incidents are often the ones that escalate into more serious forms of violence.

Nor should you limit your inquiry to physical acts. You also need to look at incidents involving harassment, such as intimidation, bullying and verbal abuse. "Subtle" forms of abuse can explode into physical violence, like in the O.C. Transpo tragedy in Ottawa, Ontario, when a worker who was bullied and teased because of a speech impediment finally snapped and shot four workers before turning the gun on himself. At the very least, nonphysical violence poisons the work environment, increases absenteeism and lowers productivity—and it may eventually escalate into acts of physical violence.

Surveying workers to identify red flags. Reviewing reports of previous incidents isn't enough to detect present problems. First of all, many of the subtle forms of workplace violence don't get recorded in incident reports. Compounding the problem is the fact that workers don't always report workplace violence they witness or experience. In fact, workers

tend to brush off threats, harassment and other forms of violence because they don't think it's a problem and don't want to be accused of overreacting or making trouble. Hesitancy to report is especially likely if the person engaging in the violent or harassing behaviour is in a position of authority, such as a supervisor.

So you need to dig deeper when doing a workplace violence risk assessment. How? One effective method is to ask workers to complete an anonymous survey that details their experiences with workplace violence. Then analyze the completed surveys carefully to ferret out red flags.

Survey workers in your company at least once a year. Give them the option to remain anonymous to promote candid responses. Your survey, like the Model Survey on page X, should include:

- A description of what you mean by workplace violence. Most workers may associate violence with physical acts only;
- Reassurances that workers won't be subject to reprisals for speaking candidly;
- Questions about workers' experiences involving workplace violence; and
- Questions about situations workers perceive to be risky.

WORKER VIOLENCE & HARASSMENT SURVEY

Workplace violence and harassment are serious concerns to [insert company's name] (the Company). Management is determined to take all necessary measures to ensure that none of you ever fall victim to it. This survey is part of our prevention efforts. It's meant to help us detect potential problems in your facility and at alternate worksites. Please fill out this form and return it to the Company's safety coordinator, [insert name of safety coordinator] by [insert deadline].

Don't be afraid to tell the truth. Nobody is going to punish you or think any less of you because you tell us about potential problems. You don't even have to include your name.

Instructions: When filling out this survey, keep in mind that when we say "workplace violence," we mean more than just physical acts. Violence can include a range of behaviours including threats, verbal abuse, harassment, bullying, teasing and intimidation. It also involves acts of people in the Company, including co-workers, supervisors and management, as well as outside the Company, including contractors and customers.

NAME (optional*): _____

*You may complete this survey anonymously, if you like.

1. Do you ever work alone? Yes No
If yes, do you notify someone when you finish work? Yes No
2. Have you read the Company's workplace violence and harassment policy? Yes No
3. Do you feel comfortable that you would know how to handle a violent customer or co-worker? Yes No
4. If confronted by a violent individual, would you:
 - a. Request the help of a co-worker? Yes No

If yes, when. If no, why not?

b. Call the police? Yes No

If yes, when. If no, why not?

5. Are you concerned about:

a. How to respond to a verbal threat from an individual at work?

Yes No

b. How to respond to a threat of violence from an individual at work? Yes No

c. How to respond to harassment at work? Yes No

d. Working alone or with a particular co-worker or customer?

Yes No

If you answered yes to any of the above questions, please explain

6. Do you know how to operate the Company's alarm systems?

Yes No

7. Do you feel that the Company's security measures are appropriate:

a. Inside the building? Yes No

b. Outside the building (including the parking lot?) Yes No

If no, please list ways in which they could be improved.

8. Have you ever been assaulted at work by:

a. An outsider? Yes No

b. A customer? Yes No

c. A co-worker? Yes No

d. Other Company employee? Yes No

9. To your knowledge, have incidents of violence ever occurred at

the Company's workplace, either between co-workers or with customers?

Yes, between co-workers Yes, between customers
No

10. Where in the building or worksite do you think a violent incident would most likely occur?

lounge exits deliveries bathroom private offices
parking lot entrance
other (please specify) _____

11. Have you ever noticed a situation that you thought could or would lead to violence? Yes No

If yes, please explain.

12. Do you think the risk of violence is greatest:

During shift work? On the road?
In other situations (please explain)

13. Have you ever missed work because of fear of violence at the workplace? Yes No

If yes, please explain.

14. Has anything happened recently at your worksite that you believe could have led to violence? Yes No

If yes, please explain.

15. Please describe any instances when you have been uncomfortable at work or in fear for your safety as the result of a possible workplace violence situation.

Surveying supervisors. Asking workers about their experiences with workplace violence isn't enough. You also need to survey supervisors. After all, they're on the front line and so may have the best perspective on the likelihood of violence in the workplace. Again, an effective and efficient way to get this information is to have each supervisor complete a survey that asks them about key factors indicating the potential for workplace violence. There's a Model Supervisor Survey on page X that's based on a violence hazard assessment form from the Education Safety Association of Ontario that you can adapt for use in your workplace.

DRAFTING A WORKPLACE VIOLENCE & HARASSMENT POLICY

Once your team has conducted its risk assessment, the company needs to address the risks that are identified in that assessment. The first step will often be adopting a workplace violence and harassment policy.

Reconsider Taking a Zero Tolerance Approach

Many companies implement a zero tolerance policy toward violence/harassment, whereby a worker who commits workplace violence or harassment is automatically fired—regardless of the circumstances and whether this incident was the worker's first offence. You might want to think twice before implementing such a policy. Why? Although zero tolerance has its place, such as in cases where a worker physically attacks a co-worker, less serious incidents should often be handled less harshly, such as by giving the worker a written warning or a brief suspension. However, although the discipline imposed may vary from case to case, it's important that the company is consistent—that is, similar incidents should result in similar discipline.

SUPERVISOR VIOLENCE SURVEY

Instructions: When filling out this survey, keep in mind that when we say “workplace violence,” we mean more than just physical acts. Violence can include a range of behaviours including threats, verbal abuse, harassment, bullying, teasing and intimidation. It also involves acts of people in the Company, including co-workers, supervisors and management, as well as outside the Company, including contractors and customers.

Part 1: Work Department/Area

Please describe your department/area and the types of activities/functions performed by workers in the department.

Part 2: History

1. Have there been incidents when workers in your department have experienced or been threatened with physical violence?

Yes No

If yes, please describe incidents

2. Have there been incidents when workers in your department have experienced harassment or verbal abuse, i.e. been shouted at or subjected to obscene language, threats or obscene phone calls? Yes No

If yes, please describe incidents

Part 3: Activities that Might Expose Workers to Risk of Violence

3. Do workers in your department handle money or other valuables? Yes No

4. Do workers in your department deliver or collect items of value? Yes No

If yes, please describe

-
-
5. Do workers in your department deal with people who may be under the influence of drugs or alcohol? Yes No
 6. Do workers in your department deal with people who are deeply troubled or distressed? Yes No
 7. Do workers in your department monitor or regulate the activity of others or carry out procedures or make decisions that adversely affect others? Yes No

If yes, please describe

8. Are workers in your department involved with activities that may elicit a negative or confrontational response? Yes No

If yes, please describe

9. Are there other aspects of the work in your department that might spark a violent response? Yes No

If yes, please describe

Part 4: Factors that Increase the Risk of Violence

10. Do any of your workers work alone –that is, out of sight and out of hearing of other workers– after normal working hours?
Yes No

If yes, please describe

11. Do any of your workers work alone during normal working hours? Yes No

If yes, please describe

12. Please describe any precautions already taken to safeguard workers in your department who work alone.
-

13. Please describe other factors that you feel might increase the risk

of violence.

Part 5: Reducing the Risk of Violence

14. Please describe policies or procedures already in place to reduce the risk of violence in your department.

15. In light of your responses to the questions in this assessment:

a. Do you believe that all reasonable steps have been taken to prevent or reduce the risk of violence? Yes No

b. What further steps would you recommend?

c. What assistance do you need to accomplish any of the above steps? Specify:

Name: Department:

Date:

Thank you for your cooperation and input!

Four Elements of a Workplace Violence/Harassment Policy

There's a model workplace violence and harassment policy on page X of this Special Report. Like the model policy, your company's policy should:

Define violence and harassment. The policy should spell out what the company means by violence and harassment. At a minimum, these definitions should include the conduct covered by the new law's definitions of violence and harassment. The new law defines "workplace violence" as:

- The exercise of physical force by a person against a worker, in a workplace, that causes or could cause physical injury to the worker;
- An attempt to exercise physical force against a worker, in a workplace, that could cause physical injury to the worker; and
- A statement or behaviour that it's reasonable for a worker to interpret as a threat to exercise physical force against the worker, in a workplace, that could cause physical injury to the worker.

And the new law defines "workplace harassment" as "engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome."

But it's better to go beyond the legal definitions and define these terms broadly to include a wide variety of acts, gestures, verbal abuses, bullying and harassment.

Bar all violence and harassment. State that all work-related violence is barred, regardless of whether it occurs in or outside your workplace. What happens during off-work hours

often festers long afterwards in the workplace. In addition, the policy should state that all workers will be protected from violence wherever their jobs take them.

Spell out consequences for violations. Reserve a range of disciplinary options for violations of the policy, up to and including termination.

RIGHT TO REFUSE WORK OUT OF FEAR OF VIOLENCE

As noted, one of the unique features of the new Ontario workplace violence regulation is that it specifically extends workers' right to refuse dangerous work to include refusals based on the risk of workplace violence. That is, a worker may refuse work if workplace violence is likely to endanger him.

Handling work refusals is always tricky. Safety coordinators are often called in to help determine whether or not a worker's refusal is justified. And your company is counting on you to get it right. If you say that a refusal is justified when it really isn't, you let workers get away with disrupting operations. But if you make the opposite mistake, you may expose your company to liability if the worker is then disciplined for a refusal a court ultimately finds was justified.

Here are nine common traps that safety coordinators and companies fall into when dealing with work refusals and what you can do to avoid them. These traps apply to all work refusals—including those involving fears of workplace violence.

9 WORKPLACE REFUSAL TRAPS TO AVOID

Trap #1: Failing to Explain Refusal Procedures to Workers

MODEL WORKPLACE VIOLENCE & HARASSMENT POLICY

1. Definition of “workplace violence and harassment.” Ontario OHS law defines “workplace violence” as:

- The exercise of physical force by a person against a worker, in a workplace, that causes or could cause physical injury to the worker;
- An attempt to exercise physical force against a worker, in a workplace, that could cause physical injury to the worker; and
- A statement or behaviour that it’s reasonable for a worker to interpret as a threat to exercise physical force against the worker, in a workplace, that could cause physical injury to the worker.

Ontario OHS law defines “workplace harassment” as “engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome.”

For purposes of the Company’s workplace violence and harassment policy, “workplace violence and harassment” includes the conduct described in the OHS law’s definitions of these terms. In addition, the Company’s definition of these terms also includes, but is not limited to:

- Actual physical assaults or attacks;
- Threats or intimidation;
- Violent gestures;
- Harassment;
- Bullying;
- Persistently and excessively criticising and scrutinizing a worker’s work without justification;
- Spreading malicious rumours;
- Belittling a worker’s opinions;
- Spying on or stalking a worker;
- Tampering with a worker’s desk, workspace or belongings;
- Excluding or ignoring a worker;
- Undermining or sabotaging a worker’s work by, say, setting

- unreasonable deadlines or withholding key information;
- Maliciously blocking a worker's efforts to achieve promotions, raises and other forms of professional success within the Company;
- Engaging in verbally abusive behaviour, such as yelling, making threats and name calling;
- Engaging in physically abusive or aggressive behaviour, such as pushing, hitting, spitting, finger pointing or aggressively invading a worker's space; and
- Any other conduct that gives a worker reasonable cause to believe physical force will be used against him or creates a hostile or toxic work environment.

2. Location of barred conduct.

- This policy prohibits workplace violence and harassment on Company premises and also at off-site locations, including, but not limited to, off-site meetings or conferences, client locations, social situations related to work or workers' homes if there are real or implied consequences related to the workplace.
- Every Company worker has the right to be free from workplace violence and harassment. Employees who work outside of the Company's premises, either full-time or occasionally, have the same right to be free from violence and harassment while they're performing their duties offsite. The Company takes offsite workplace violence and harassment seriously. Employees who have been subjected to violence and/or harassment while working outside of the Company's premises should immediately report such violence to their supervisors. The Company will treat the complaint with the same degree of seriousness and in accordance with the same procedures it applies in response to complaints of workplace violence and harassment that occur on the premises.

- 3. Discipline.** Acts of workplace violence and harassment will not be tolerated and will be responded to with appropriate disciplinary action, up to and including termination, based on a thorough investigation of the incident and the surrounding circumstances. Such disciplinary action may include immediate termination for acts of physical assault, even if the person committing the act has committed no prior offences or engaged in previous acts of violence and/or harassment.

Trap: The right to refuse dangerous work is a key protection. By the same token, workplace refusals are often disruptive and can bring a company's operations to a standstill. The refusal procedures set out in the OHS laws are designed to ensure that the employer addresses the basis for the refusal as orderly and quickly as possible. But for the process to work, workers must cooperate and follow the proper procedures (both under OHS law and company policy). Unfortunately, some companies do a poor job of explaining the refusal procedures. Consequently, refusals generate greater disorder and chaos than they should.

Example: The OHS laws of most provinces require a worker to notify a supervisor of his refusal to work and explain the reasons why. But if workers don't know that a supervisor is the go-to guy for refusals, they may notify someone else, such as a co-worker, or simply walk off the job without talking to anyone, thereby delaying the investigation, maximizing confusion and prolonging disruption.

Solution: As part of your worker training program, educate and train workers on proper refusal procedures under your province's OHS laws and your company's specific requirements. For example, if you have a form workers must fill out explaining the basis for their refusal, make sure workers are familiar with the form and know where to get one. And make sure that they understand that they now have the right to refuse work if they believe that they're at risk of being subjected to workplace violence.

Trap #2: Failing to Determine the Basis for the Worker's Refusal

Trap: Workers might not tell you why they're refusing work or give only a vague reason. So a worker who refuses work because of a valid safety concern might seem like he's just being insubordinate and receive immediate punishment from his supervisor. The company could then be held liable

for improper discipline, even if the worker never made it clear that the refusal was for safety reasons.

Example: Two Ontario workers are carrying a heavy steel beam. One of the workers accidentally drops his end and the beam almost crushes the other. The latter tells the supervisor that he won't work with the former ever again. But the company doesn't realize that it's a work refusal because the worker didn't tell the supervisor that his refusal was because he felt his co-worker to be unsafe. So the company is found liable for improper discipline and must reinstate the worker [Frankel Steel Ltd., [1985] O.L.R.B. Rep. Aug. 1210]. If the supervisor had simply asked why the worker didn't want to work with his co-worker, the misunderstanding would have been avoided.

Solution: Make sure both workers and supervisors know that workers can't simply refuse work without giving a reason. And that reason should be very specific and explain exactly why the worker believes the work in question is dangerous. Example:

Wrong: "I'm not comfortable working with Joe."

Right: "I'm afraid of working with Joe, who's very angry, acting violently and may be drunk."

Trap #3: Failing To Investigate the Refusal

Trap: It may be tempting to rush to judgment and dismiss a worker's refusal as laziness or insubordination. But writing a refusal off as frivolous and ordering the worker back to work without an investigation is a big mistake.

Example: A production line supervisor had a reputation for being a bully and, in fact, had butted heads with one worker in particular. One day, the supervisor and the worker got into an argument. The worker became so

upset that his hands started to tremble. So he refused to work. "It's unsafe with you standing over me and hollering at me," he claimed. "My hands are shaking, and I may slip and cut off a finger." The worker asked for the company's elected safety representative to investigate the refusal, but the supervisor refused. In his eyes, the refusal was "totally ridiculous." When the worker continued to refuse to get back to work, the supervisor suspended him for two days. So the worker filed a grievance.

An Ontario arbitrator ruled that the supervisor shouldn't have dismissed the worker's refusal and decided on his own that it was unwarranted. He should have taken the refusal seriously and followed the procedures required by law. The arbitrator said the worker's grievance was justified and ordered the employer to rescind the suspension [Lennox Industries (Canada) Ltd. v. United Steelworkers of America, Local 7235, [1999] O.L.A.A. No. 158, March 3, 1999].

Solution: The OHS laws require you to investigate all workplace refusals, no matter how absurd or ridiculous they may appear. As the Lennox case shows, failing to investigate is automatic grounds for losing a refusal case. Your investigation doesn't have to be extensive. Exactly what you should look at and who you should talk to will depend, of course, on the basis for the refusal.

Trap #4: Immediately Disciplining the Worker for His Refusal

Trap: Companies sometimes discipline workers on the spot for refusing work, particularly if it looks like the refusal is frivolous or that the worker has an ulterior motive. Supervisors are especially prone to fly off the handle and take immediate action against a refusing worker. The Lennox case above is a good example.

Solution: Train supervisors to follow the proper refusal procedures. Make sure they understand that they must keep their tempers in check and refrain from imposing discipline on the spot. If the worker still refuses, wait until you decide that the refusal isn't justified before you even consider disciplining the worker.

Even then, you still may not be able to discipline the worker for continuing to refuse. Workers have the right to contest the investigation of their refusal if they're not satisfied with the results. At that point, a government inspector or investigator is typically called in. Discipline is appropriate only after the government official concludes that the refusal isn't justified and the worker continues to refuse. But keep an open mind. Discipline may be a bad idea if the worker sincerely believed the work was dangerous and was simply wrong.

Trap #5: Dismissing Refusal if Danger Is Unique to That Particular Worker

Trap: In most cases, the basis for a work refusal is a condition or circumstances that would pose a danger to any worker—not just the worker making the refusal. For example, welding without the appropriate PPE would be dangerous for any worker. But a work refusal may still be warranted if the condition or circumstance the worker is complaining about only poses a danger to him.

Example: An unusually tall trucker refused to drive a small armoured truck because it would be dangerous: his position in the seat left little room to manoeuvre and made it hard for him to reach the controls. The employer dismissed his refusal, arguing that the truck was in good shape and didn't pose a problem for drivers of normal height. Plus, the driver only had to drive the truck a short distance. A health and safety officer ruled that making the tall driver drive a small truck posed a danger to this particular driver

and thus his refusal was justified [Garda du Canada Inc. and Syndicat National des Convoyeurs de Fonds, [2005] C.L.C.A.O.D. No. 39, Sept. 14, 2005].

Solution: Refusal laws protect all workers, including ones in unique situations or who have special sensitivities. So don't dismiss a work refusal if the danger posed is unique to a particular worker. Instead, investigate the refusal like any other refusal and determine whether it was reasonable for that specific worker to refuse to do that specific work. If so, the refusal is justified and you must take steps to accommodate the worker.

Trap #6: Not Notifying & Involving All Necessary Parties

Trap: If the worker isn't satisfied with the supervisor's investigation and proposed resolution and continues to refuse to work, OHS laws typically require you to notify other parties about the work refusal and involve them in the investigation and resolution. However, out of a desire to quickly resolve the refusal and get the worker back to work, companies sometimes fail to notify everyone they should. And failing to report continuing work refusals to the right parties may violate OHS laws and collective agreements.

Solution: Make sure that you notify anyone you're required by law to notify of any continuing work refusals, such as the JHSC or health and safety representative, or a government inspector. And in unionized workplaces, the collective agreement may require you to notify the worker's union representative.

Trap #7: Not Paying Worker During Refusal

Trap: When a worker refuses to do certain work, you may be able to reassign him to another job until his refusal is resolved. But if reassignment isn't possible, the worker won't

be able to do any work at all while his refusal is being investigated (although he's presumably assisting in the investigation). Some investigations take hours, but others can drag on for days. You may think that you don't need to pay workers who don't work while a refusal investigation is pending. But in most jurisdictions, including Ontario, you do.

Example: A customs officer refused to work because of safety concerns. A health and safety officer investigated the work refusal and ultimately determined that there was no danger. So the officer returned to work. But the employer refused to pay the officer for the time during his refusal. A Board ruled that the employer had violated the Canada Labour Code, which bars employers from refusing to pay workers for any period during which the workers would have been working but for their work refusal. So it ordered the employer to pay the officer any lost wages and benefits [Ferrusi v. Treasury Board (Canada Border Services Agency), [2007] PSLRB 1, Jan. 5, 2007].

Solution: The OHS law in Ontario requires your company to pay a worker while his refusal is being investigated. So make sure the worker gets paid for that time and that those hours aren't deducted from his paycheque.

Trap #8: Improperly Assigning a Replacement Worker to Do Refused Work

Trap: When one worker refuses, it may be tempting to assign another worker to do the job. But most provinces restrict your right to assign a replacement worker to do the job that the worker refused. And if you fail to comply with those restrictions, you could expose the replacement worker to a hazard—and your company to liability.

Solution: Don't assign a replacement worker to do refused work until you've conducted a preliminary investigation of the refusal and determined that no danger exists. After all,

if the refusal was justified, you'd only be endangering the replacement worker. If you don't believe that any danger exists but the worker continues to refuse, then you can assign the refused work to a replacement worker but only if you:

- Are reasonably sure the replacement worker won't be exposed to imminent danger;
- Tell the replacement worker about the work refusal and the reason for it; and
- Allow the replacement worker to also refuse to do the work in question.

Trap #9: Failing to Remedy Situation if Work Is Found To Be Dangerous

Trap: If a worker refuses to work and an investigation reveals that the refusal was, in fact, justified, your work has just begun. After all, the work refusal has now brought a workplace hazard to your attention. And once you're aware of a hazard, you're legally obligated to take steps to protect workers from that hazard. If you don't, a dangerous situation will continue to exist and thus justify additional work refusals by the same or other workers. Plus, you could now be liable for an OHS violation for failing to take reasonable steps to protect workers from known hazards.

Solution: Take steps to address the hazard identified by the refusal and confirmed by the subsequent investigation. For example, if the worker complained that his PPE was defective or inadequate, provide him with adequate PPE that's in good working condition. Or if the worker refused to work because a piece of machinery was broken, make sure the broken machine is repaired.

Bongarde Media Company
USA: 103 Eastside Oroville Rd., Oroville, WA 98844
Canada: 102-501 Main Street, Penticton, BC V2A 9A6

Phone: 1-800-667-9300 Fax: 1-250-493-1970
Email: customerservice@bongarde.com
www.SafetySmart.com
© 2009 Bongarde