



Managing Employee Work Refusal in a COVID-19 World

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The COVID-19 pandemic has created unprecedented challenges for employers and employees. Among the most pressing is employee reluctance to attend work, whether due to health and safety concerns, family obligations, medical restrictions or a desire to remain on government benefits. In this article, we introduce strategies to manage these issues. But remember — every case has its own facts and context, so it is important to evaluate each on its own merits and not use a cookie-cutter approach that may expose your organization to unnecessary risk.

If an employee expresses reluctance to attend work, the first question to ask is “why”. It is important to get a clear understanding of the basis for the employee’s reluctance because this will impact how you respond.

IF THE REASON IS FEAR OF COVID-19 IN THE WORKPLACE

Across Canada, an employer has a legal obligation to take every precaution reasonable to protect the health and safety of its employees, and an employee may refuse to perform work if the employee holds a bona fide belief a physical condition in the workplace constitutes a risk to their health or safety. Generally, this involves concern over equipment or machinery.

However, it is possible “physical condition” may also include concern for the spread of a serious illness such as COVID-19. If the reluctance to attend work is related to a fear of COVID-19 in the workplace, the first step is to educate the employee on all of the health and safety precautions the employer has taken to reduce transmission of the virus. In many cases, this education will be sufficient to encourage the employee to attend. It is therefore important to have prepared, a comprehensive, written “return to work policy or protocol” which you can use to both educate and guide employees.

If the employee continues to refuse to work, this should be addressed as a work refusal under occupational health and safety legislation. In that case, follow these steps:

- Place the employee in an area where the employee is safe.
- Investigate the circumstances surrounding the refusal. The investigation must include a worker representative of the Joint Health and Safety Committee, as applicable.
- If there is an objective risk, address the risk.
- If there is no objective risk, advise the employee of the outcome of the investigation and ask the employee to attend work. If the employee refuses, contact your provincial health and safety authority to perform its own investigation.

- If your provincial health and safety authority confirms there is no reasonable risk and the employee continues to refuse to attend work, the employee may be disciplined.

**Certain groups of employees are not entitled to refuse to perform work on health and safety-related grounds (e.g., police, firefighters and hospital, long-term care or group home employees, etc.).*

IF THE REASON IS RELATED TO THE EMPLOYEE'S AGE, HEALTH CONDITION OR FAMILY OBLIGATIONS

If the reluctance to attend is related to the employee's age (e.g. if over 70), medical condition, or family obligations, the employee may be entitled to a statutorily protected leave under employment standards legislation, or an accommodation under human rights legislation. At the outset of the COVID-19 pandemic, most Canadian jurisdictions passed legislation to provide unpaid, job-protected leave for an employee unable to work for reasons related to COVID-19 ("COVID-19 leave"). In many jurisdictions, this includes time off to care for a child who is at home due to a school or daycare closure by an emergency order, or a family member who must isolate. If an employee requests a COVID-19 leave, you can request information reasonable in the circumstance to verify the need for the leave of absence

(e.g., direction from public health, notice of school closure, etc.), but you cannot request a medical certificate. On the other hand, if an employee's request for time off does not fall within a COVID-19 leave, this may be a request for accommodation under human rights legislation on the basis of age, disability or family status. If you are not sure whether a request falls under a COVID-19 leave or family status accommodation, consult with experienced employment law counsel.

IF THE REASON IS A GENERAL DESIRE NOT TO ATTEND WORK

If the employee's reluctance to attend is not related to a specific concern about COVID-19 in the workplace, or a reason that would trigger human rights accommodation, it may be related to:

- A general fear of leaving home due to COVID-19 (e.g., being in the public, taking public transit, etc.); or
- A financial disincentive to attend if the employee's income is relatively equal to, or less than, the monthly Canada Emergency Response Benefit.

In these circumstances, continued failure to attend work may ultimately be treated as a resignation from employment or grounds for termination with cause. However, before ending the employment relationship, follow these steps:

- Clearly advise the employee that he/she is expected to attend work, and failure to do so may be treated as a resignation, or grounds for termination with cause.
- Educate the employee on safe practices to reduce risk, as well as all of the precautions that have been taken by the employer to minimize the risk of workplace transmission.
- Advise the employee that, if he/she resigns or is terminated for cause, this may impact continued entitlement to government benefits, such as the Canada Emergency Response Benefit and Employment Insurance.
- In a unionized context, consider whether the collective agreement allows you to apply the administrative termination provisions (i.e., if the employee fails to return to work within a prescribed period after notice of recall). Be alert to any provision in the collective agreement that entitles an employee to a leave of absence on request, subject to operational requirements.

***"Deemed resignation" is not without risk as a resignation must be clear and unequivocal.*

For assistance navigating these uncharted waters, seek the assistance of experienced employment law counsel. The team at Sherrard Kuzz LLP can help. Jeffrey Stewart is a lawyer with Sherrard Kuzz LLP, one of Canada's leading employment and labour law firms, representing employers. Jeffrey can be reached at 416-603-0700 (Main), 416-420-0738 (24 Hour).

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