

FEDERAL Right to Refuse Dangerous Work [Canada Labour Code, s.122,128, 129,146,147]

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Any employee subject to Part II of the *Canada Labour Code (the Code)* has the right to refuse dangerous work as long as they have reasonable cause to believe that it presents a danger to themselves or another employee.

Danger is defined in *the Code* as any hazard, condition or activity that could reasonably be expected to be an imminent or serious threat to the life or health of a person exposed to it before the hazard or condition can be corrected or the activity altered. **[s.122(1)]**

There are restrictions on the right to refuse work for some employees. **[s.128(2-5)]** Employees may not refuse to use or operate a machine or thing, to work in a place or to perform an activity if:

- the refusal directly endangers the life, health or safety of another person, or
- the danger is a normal condition of employment. **[s.128(2)]**

For instance, correctional officers could not refuse to work in what they considered a dangerously overcrowded facility.

Overcrowding can occur on occasion in correctional facilities. This would be considered a normal condition of work. However, these same officers could refuse to work where normally required precautions to handle unsafe conditions created by overcrowding were absent. Though the refusal must not directly endanger another person.

Employees on a ship or aircraft in operation who believe a danger exists to them or another employee must immediately notify the person in charge of the ship or aircraft. That person decides if the employee can refuse to work. If the person in charge decides the employee cannot refuse to work, the employee must continue to work while the ship or aircraft is in operation. Ships and aircraft are in operation any time between leaving a port and beginning a flight in Canada until they secure at a wharf or land once again in Canada. **[s.128(3)(4)(5)]**

It is essential for employees and other work place parties to follow the work refusal steps outlined in Section 128 of *the Code* (or the collective agreement).

Reporting a refusal [s.128(6-7)]

The refusing employee immediately notifies the employer. If refusal language exists in a collective agreement, the employee must inform the employer whether they are refusing under the agreement or *the Code*.

The language in the agreement must provide protections to employees that meet or exceed the minimums provided by *the Code*.

Investigating a refusal [s.128(7.1&8)]

Employer investigates immediately in the presence of the refusing employee and must prepare a written report. If the employer takes immediate action to protect employees they must inform the work place committee or employee health and safety representative. If resolved, refusing employee returns to work.

Continued refusal–internal investigation [s.128(9-14)]

If not resolved and the employee still has reasonable cause to believe work poses a danger they must again report the circumstances to the employer and an employee member of the work place committee or representative. One worker and one employer member of the work place committee or representative must then investigate the matter in the presence of the refusing employee and submit a written report, including recommendations, to the employer.

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After receiving the report, the employer may provide additional information and ask for them to reconsider their report. They can then choose to revise and resubmit the report.

If the employer agrees a danger exists the employer must take immediate action to protect employees. If resolved, refusing employee returns to work. The employer must inform work place committee or employee representative of the actions taken to resolve matter.

If the employer believes no danger exists or the employee cannot refuse work because the refusal will directly endanger the life, health or safety of another worker or the danger is a normal condition of employment, they must inform the employee in writing.

Continued refusal–Minister of Labour notified [s.128(15&16)]

If the employee continues to refuse, the employer immediately notifies the Minister and the work place committee or employee representative. The employer must provide the reports on the matter to the Minister.

The employer may assign employee to reasonable alternative work. The employer cannot assign the refused work to another employee unless they are qualified, advised of the work refusal/reasons and the employer is satisfied it will not place the new employee in danger. **[s.129(5)]**

Minister involvement [s.129(1-7)]

The Minister or a designate which is expected, in many cases, to be a health & safety officer can decide no investigation is required when they are of the opinion that

- the matter is one that could more appropriately be dealt with, initially or completely, by means of a procedure provided for under Part I or III of *the Code* or under another Act of Parliament;
- the matter is trivial, frivolous or vexatious; or
- the continued refusal by the employee under s.128(15) is in bad faith. **[s.129(1)]ⁱ**

The Minister shall inform the employer and employee in writing as soon as feasible and the employee must return to work.

The employer must then inform the work place committee members or the representatives of the employee and employer designated under section 128(10) in writing of this decision.

If an investigation is undertaken, it must be done in the presence of the employer, employee and employee member of the work place committee or representative. The Minister provides a written decision immediately to the employer and employee calling for the employee to either return to work or with direction to the employer to take actions to protect employees. If directions are issued to the employer the employee can continue to refuse work until the directions are complied with.

Appeals

The employee has 30 days after receiving the decision to not investigate from the Minister [s.129(1.1)] to file an application for a judicial review (Federal Court)ⁱⁱ

An employee who feels aggrieved by a decision of the Minister that no danger exists or the work refusal is not permitted under section 128(2) can appeal. This appeal must be done in writing to an appeals officer within 10 days after receiving the decision. While the appeal is in progress, the worker must return to work. **[s.129(7)]** The employer, employee or union has 30 days to appeal a direction issued by the Minister [s.129(6)] that danger exists. **[s.146(1)]**

While this appeal is in progress, the employer is required to continue to act on the direction, unless otherwise ordered by the appeals officer. **[s.146 (2)]**

No reprisals [s.147]

It is against the law for employers to dismiss, suspend, layoff or demote, impose a financial or other penalty, discipline or threaten any employee for performing their rights or duties under *the Code*. **[s.147]**

However, employers have the legal right to take disciplinary action against an employee if the employer can prove the employee wilfully abused their right to refuse. At the employee's request the employer must provide the employee with written reasons for any disciplinary action taken within 15 working days of receiving the request. **[s.147.1]**

ⁱ<http://www.labour.gc.ca/eng/resources/tpg/083.shtml>

ⁱⁱhttp://www.labour.gc.ca/eng/health_safety/pubs_hs/refuse.shtml