

MY RIGHT TO REFUSE UNSAFE WORK: A Guide for NBNU Members

Purpose of this Guide

Workers in New Brunswick have three fundamental rights under the *Occupational Health and Safety Act (OHSA)*. These rights are:

- 1) The right to know;
- 2) The right to participate and;
- 3) The right to refuse unsafe work.

This guide helps to explain the right to refuse unsafe work; including possible exposure to infectious disease. The circumstances under which a Registered Nurse (RN) can refuse work are narrow:

- The Right cannot be invoked in advance;
- The Right cannot be invoked as part of a job action;
- The Right must be invoked in response to a specific risk for which reasonable precautions have not been taken.

An RN's conduct is subject to review and possible sanctions in assessing whether and to what degree one's conduct is aligned with ethical codes. Ethics are a set of rules or standards developed within a healthcare profession that guides the actions of individuals while working in their professional capacity. There are ethical principles that guide the development of RN standards. Ethical principles such as non-maleficence (i.e. "above all do no harm") and beneficence (i.e. actions should promote good) are two of the principles at play in this context and serve as a basis for RN ethical values and principles. They are not a private concern to the RN or the profession, but developed in dialogue with society, and are open to public scrutiny¹.

The employer is responsible for providing a safe practice setting where every precaution reasonable in the circumstances is taken to protect workers. This includes providing the appropriate equipment, staffing and training for safe and effective infection control, safe patient handling, protection against violence, etc. The employer should make all workers aware of and current on such things as hazard information, material safety data sheets, employer policies and provincial directives regarding infectious diseases.

¹ Canadian Nurses Association (2017). Code of Ethics for Registered Nurses. Retrieved from <https://www.cna-aiic.ca/html/en/Code-of-Ethics-2017-Edition/files/assets/basichtml/page-6.html>; and Keatings, M. & Smith, O. (2010). Ethical & Legal Issues in Canadian Nursing (3rd ed.). Toronto, ON: Elsevier Canada.

While healthcare workers are protected under New Brunswick's *OHS*A, many of them are among those workers who, under that legislation, have limitations on their right to refuse unsafe work. There is another right to refuse apart from the statutory right which can be found in the section entitled "Exception to the Obey and Grieve Rule".

The Statutory Right to Refuse

In New Brunswick, *OHS*A establishes the right to refuse unsafe work without fear of reprisal. According to Section 19:

OCCUPATIONAL HEALTH AND SAFETY ACT - RIGHT TO REFUSE

Employee's right to refuse to do any act:

19 An employee may refuse to do any act where he has reasonable grounds for believing that the act is likely to endanger his health or safety or the health or safety of any other employee.

2001, c.35, s.8

Section 20 sets out the procedures to be followed when a worker refuses unsafe work. Section 24 sets out the complementary right of a worker not to be fired, disciplined and/or threatened for exercising this right.

Steps to Promote Workplace Safety

The right to refuse work is an important one, but it should not be the first line of defense against unsafe conditions. Identifying hazards and finding solutions to implement the hierarchy of controls (i.e. elimination/substitution) is the best line of defense to protect a worker and to prevent exposures/injuries/illnesses in the workplace. Being proactive before the hazard places a member in immediate danger will help to avoid work refusal situations.

Therefore, when the danger is not immediate, a worker should first report health and safety concerns to their manager/supervisor, Joint Health and Safety Committee (JHSC), local president/labour relations officer and if necessary, to WorkSafe NB. Workers are expected to take these steps, if possible, before considering a work refusal.

JHSC's should be working now to verify that appropriate safe work conditions, infection control measures, violence policies, safe patient handling programs, safe staffing levels and all measures are taken to protect worker health and safety. These can include developing Respiratory Protection programs, Safe Lift programs (which include purchasing an adequate supply of mechanical devices/ceilings lifts etc.), Infectious Disease Prevention programs (which include replacing old needles and sharp devices with safety engineered devices, pandemic planning), Violence Prevention programs, etc. If the JHSC is unsuccessful in its efforts to resolve the worker's concerns, the worker or a member of the committee should call NBNU and/or Worksafe NB.

The Decision to Refuse Unsafe Work

Subject to the restrictions outlined above, a NBNU member can refuse to work if they have reason to believe that:

- Workplace violence is likely to endanger the worker;
- The physical condition of the workplace or the part thereof in which the worker works or is to work is likely to endanger the worker;

OR

the worker has reason to believe that the worker or another worker is likely to be endangered by:

- Any equipment, machine, device or thing the worker is to use or operate;

OR

the worker has reason to believe that:

- Any equipment, machine, device or thing the worker is to use or operate, or the physical condition of the workplace or the part thereof in which the worker works or is to work is in contravention of the OHS/Regulations and such contravention is likely to endanger the worker or another worker.

Legal Precedent

The nature of your workplace may also factor into whether a work refusal is reasonable. In *Hogue-Burzynski v. VIA Rail Canada* [2006], the Health and Safety Officer who first investigated the work refusal determined the nature of the employee's work involved inherent risk to exposure to illness by virtue of the fact that they serviced large numbers of the public on a daily basis. The Canada Occupational Health and Safety Tribunal agreed with that decision. If your workplace regularly requires you to provide services to members of the public, including those who may be ill, or employs a large number of workers at the workplace at the same time, it may be determined that exposure to viral infection is a risk inherent to the workplace.

Steps to Follow in Refusing Work

Stage 1:

The worker must immediately tell the manager/supervisor or employer that the work is being refused and explain why. The member should document all the details pertaining to their work refusal. The supervisor or employer must investigate the situation immediately, in the presence of the worker and a JHSC member who represents workers, or another worker chosen by the union.

The refusing worker must remain in a safe place that is as near as reasonably possible to the workstation and available to the employer or supervisor for the purposes of the investigation until the investigation is completed. (No other worker shall be assigned to do the work that has been refused unless, in the presence of a JHSC worker member who, if possible, is a certified member, or another worker chosen by the union has been advised of the other worker's refusal and of their reasons for the refusal.) If the situation is resolved at this point, the refusing worker returns to work.

Following the investigation, the worker can continue to refuse the work if they have reasonable grounds for still believing that the work continues to be unsafe.

Stage 2:

The worker, union or employer must cause a WorkSafeNB inspector to be notified ("cause" notification suggests that the task of notifying may be delegated to a representative of the worker, union or employer). The inspector should come to the workplace to investigate the refusal and consult with the worker and the employer (or a representative of the employer). The worker representative from the first stage will also be consulted as part of the inspector's investigation.

While waiting for the inspector's investigation to be completed, the worker must remain during the worker's normal working hours in a safe place that is as near as reasonably possible to the workstation, and available to the inspector for the purposes of the investigation, unless, subject to the provisions of a collective agreement, the employer assigns some other reasonable work during normal working hours. If no such work is practicable, the employer can give other directions to the worker.

The inspector must decide whether the work is likely to endanger the worker or another person. The inspector's decision must be given, in writing, to the worker, the employer and the worker representative identified above, if there is one. If the inspector finds that the work is not likely to endanger anyone, the refusing worker will normally return to work.

Protection Against Employer Reprisals

The employer is not allowed to penalize, dismiss, discipline, suspend or threaten to do any of these things to, or impose any penalty on or intimidate or coerce, a worker who has used this process in good faith. Note that to exercise an initial right to refuse, the worker does not need to be correct; they only need to have "reason to believe" that unsafe circumstances exist.

A worker may continue their work refusal after the inspector decides it is safe, but they are taking a great risk.

If you are disciplined or threatened after exercising your rights described above, consult your Local President/LRO for advice and assistance.

NANB and Unsafe Working Conditions

Nurses and other regulated health-care workers also must consider their standards of practice established by their regulatory association. Each association has different statutory considerations when looking at the refusal of unsafe work. These will be addressed in several scenarios outlined in Appendix 1.

It is generally accepted that, while nurses are committed to meeting the needs of clients, the provision of professional nursing services does not include working in situations where nurses' health is at risk and no precautions have been taken. There are several guidelines nurses should follow when thinking about their license and a possible work refusal:

Exception to the Obey and Grieve Rule:

The Right to Refuse Beyond the Statutory Provision

Years before there existed a statutory right to refuse unsafe work, arbitrators developed what came to be known as the "obey now and grieve later" rule. These arbitrators said that the workplace is not a debating society: the general rule is that when the employer gives a direct order, it must be obeyed even if the order is contrary to the collective agreement. The issuance of the order and any discipline imposed for failing to comply with it can be challenged through the grievance procedure, but in the meantime the order must be complied.

Arbitrators developed a limited number of exceptions where they may reverse the discipline imposed when an employee refuses an employer's order. One of those exceptions is when the order involves the performance of work which will injure the worker. If a worker can establish the likelihood of injury, they may succeed in overturning discipline for refusing the order.

Up to the point that a WorkSafeNB inspector is called, the statutory right provides more protection for work refusal than the exception to the arbitral "obey now and grieve later" rule. As has been pointed out, under the *OHSA*, an employee only has to have a reasonable belief that the work is dangerous up to that stage.

After an inspector rules that the work is safe, however, an employee must be correct to justify continued refusal, whether they want to rely upon the *OHSA* or the arbitrator's rule.

Questions

If you have any questions regarding this guide and your right to refuse unsafe work, contact your Local President and/or Labour Relations Officer.

Appendix 1

“I do not believe I am adequately protected. Can I refuse?”

Scenarios

Scenario 1

I have been assigned directly to a TB patient and have been provided only with a surgical mask, not the N95 respirator. I have read that the ordinary surgical mask does not provide sufficient protection. I have raised the issue with my supervisor who said I have no choice as they have run out of proper masks. I have to work now, and I don't have time to call a JHSC member. Can I refuse to work?

From an OHSA perspective:

We believe that in this circumstance OHSA would support your work refusal. It would be NBNU's position that while an infectious agent may be expected in a workplace, it is not inherent in your work that you work in an area where an infectious agent is present, without being protected by known personal protective equipment. There is strong evidence of the airborne transmissibility of TB and of the need for at least an N95 respirator to protect you from “a highly infectious virus” when dealing with a TB patient.

Remember that to exercise an initial right to refuse, the worker does not need to be correct, they only need to have “reason to believe” that unsafe circumstances exist.

If the employer/supervisor's investigation into the work refusal makes a finding that it is safe to return to work without the proper respirator and the refusing worker has reasonable grounds to still believe the work is unsafe, then WorkSafe NB must be called in to investigate and make a ruling.

A worker may continue their work refusal after the inspector decides it is safe, but they are taking a great risk.

From a regulatory perspective:

We believe that in this circumstance NANB should support your work refusal. Nurses have the right to refuse work where unsafe conditions exist and they cannot be adequately protected through infection control measures i.e. provision of a N95 respirator when providing care to a TB patient.

According to NANB, nurses can withhold services if they can:

1. Provide an appropriate rationale.
2. Notify the employer of the risk/protection concerns when infection control is inadequate.
3. Hand over the care responsibilities for assigned clients to the supervisor.

When nurses withhold patient care services, careful decision-making is required. Be sure to document the situation carefully step-by-step. In the event the NANB becomes involved, all circumstances pertaining to the situation will be considered on an individual case-by-case basis.

From a labour relations perspective:

OHSA and your collective agreement provides the right for your employer to “make reasonable provisions for the safety and health... protective devices and other equipment deemed necessary to protect employees properly from injury shall be supplied... “. Your Labour Relations Officer can assist Local leadership in the use of the language and strategies to prevent and address hazardous situations in the workplace.

Scenario 2

I am assigned directly to a TB patient and have been given the proper personal protective equipment recommended by Health Canada, the Centre for Disease Control and all official bulletins and have been properly fit-tested for the equipment. With all the news reports, I still do not feel confident that I am protected. Can I refuse to work?

From an OHSA perspective:

There is no reasonable “reason to believe” that unsafe circumstances exist since the proper personal protective equipment has been provided.

We also think WorkSafeNB would NOT support a work refusal in this instance, as they may find exposure to a disease, for which you have proper protective equipment, is inherent in the work and that removing yourself from the work may directly endanger the patient.

From a regulatory perspective:

NANB may find that you have abandoned your patient in this scenario. It would be prudent for nurses to be mindful of and to make a clear distinction between unsafe working conditions and inherently risky work, such as caring for patients with infectious diseases while using appropriate safety precautions. The *Nurses Act* defines professional misconduct. Definitions of professional misconduct may be relevant in situations in which nurses refuse assignments or discontinue nursing professional services when they have been provided with proper protective equipment while caring for clients with an infectious illness. Each situation would be assessed on its own merit.

From a regulatory perspective:

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