

Occupational Health and Safety Violence in the Workplace

The Right to Refuse

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Friday October 25, 2016
Niagara Falls, ON

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Overview

I Introduction: set the context:

- ▶ Who's at risk: what do the statistics on workplace violence show?
- ▶ How workers won the statutory protections for workplace violence

II The Statutory Framework

- ▶ *Principles of the OHS Framework*
- ▶ *Workplace violence provisions*
- ▶ *Enforcement framework*

III The Right to Refuse

- ▶ What the legislation says: right to refuse (s. 43) and bilateral work stoppage (s. 45)
- ▶ Interpretations from OLRB

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For Today's Presentation

A few caveats:

- ▶ Ontario jurisdiction, not federal (OHSA)
- ▶ Presentation is for educational purposes only
- ▶ Slides and comments do not constitute legal advice. Please consult your CUPE staff representative.

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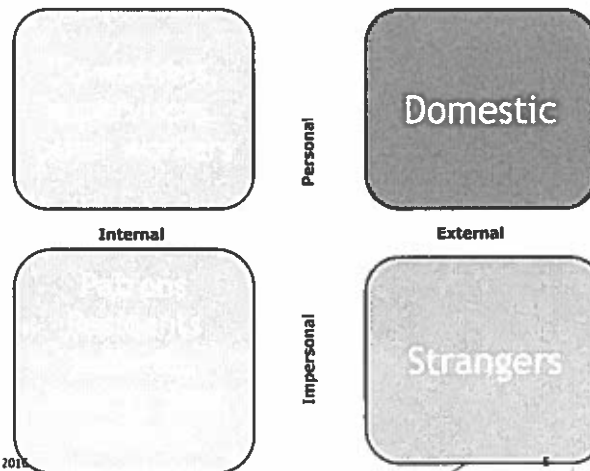
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I Setting the Context

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Set the Context Sources of Workplace Violence and Harassment:



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Question?

**Which Public Sector occupation ranks
highest reports of workplace violence?**

Nurse Aides and orderlies?

Police officers?

Teaching assistants?

Community and social service workers?

Correctional officers?

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Public Sector occupations reporting highest incidents of workplace violence

- 1. Elementary and secondary-school teaching assistants (15%)
- 2. Police officers (14%)
- 3. Nurse Aides and orderlies (13%)
- 4. Registered Nurses and Registered Practical Nurses (12%)
- 5. Community and social service workers (11%)
- 6. Correctional officers (8%)
- 7. Elementary school and Kindergarten teachers (5%)
- 8. Bus Drivers, Subway and other transit officers (3%)
- 9. Secondary school teachers (2%)
- 10. All others (18%)

Source: Ontario 2014 WSIB EIW claim cost analysis schema

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PSHSA Environmental scan, September 2015.

In 2014

- Health care-related occupations considered the number one occupation for risk of workplace violence.

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Question

What is a common element of the majority of these occupations?

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Answer

- ▶ Gender: Women
- ▶ Majority of jobs facing the greatest risk of workplace violence are predominately female.
- ▶ Women's work is predominately in the caring occupations and most closely resembles the invisible work of women in the home.
- ▶ Historically, undervalued work.

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The history to the OHSA workplace violence provisions

- ▶ Prior to 2008 incidents of workplace violence, including domestic violence, were not considered something for which an employer had any responsibility.

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Worker's Deaths and Coroner's Inquests

- ▶ In 1996, Theresa Vince, a Sears employee, was murdered at work by her store manager, who was known to be obsessed with her; he later killed himself.
- ▶ Sixteen months earlier Vince had filed a complaint with her Employer which was not acted upon.
- ▶ Coroner's Inquest recommended that all employers develop policies and procedures to deal with issues of workplace violence as other safety policies

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Worker's Deaths and Coroner's Inquests

Sears (contd)

- ▶ Coroner's Inquest jury concluded that domestic violence should be treated as workplace violence and an occupational health and safety issue.
- ▶ The Ontario government did not act upon the jury's recommendations at that time.

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Worker's Deaths and Coroners Inquests

In 2000, An OC Transpo worker was harassed and bullied by his co-workers with homophobic slurs and taunts regarding his disability. He resigned from the workplace.

Weeks later, he returned to his workplace and shot four co-workers to death before shooting himself.

- ▶ Coroner's inquest recommended that the provincial and federal governments create comprehensive scheme dealing with workplace violence.
- ▶ employers establish zero tolerance policies about harassment and workplace violence.
- ▶ The Ontario government did not act upon the jury's recommendations.

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Worker's Deaths and Coroner's Inquests

Lori Dupont was a recovery room nurse at Hotel-Dieu Grace Hospital, in Windsor.

- ▶ On November 12, 2005, she was murdered at work, by her former partner and work colleague, Dr. Marc Daniel, an anaesthetist at the same hospital.
- ▶ Coroner's Inquest: September 24 - December 11, 2007 ; 10,000 Pages of Disclosure; 51 Witnesses; 176 Exhibits; Three Experts; Extensive Media Coverage
- ▶ Jury Recommends:
 - ▶ Workplace violence policies
 - ▶ Training on domestic violence
 - ▶ Occupational Health and Safety Act review and addition of workplace violence protections including psychological harm

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Bill 168

- ▶ Workplace Violence provisions requiring Employers to develop a policy and programs to control for risks of workplace violence and to protect workers.
- ▶ Effective June 2010.

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II The Statutory Framework

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Health and Safety Foundations

- ▶ OHSa is a remedial public welfare statute intended to guarantee a minimum level of protection for health and safety of workers
- ▶ Precautionary principle
- ▶ Preventative
- ▶ Protective
- ▶ Promotion of the internal responsibility system by the workplace parties
- ▶ Employers cannot contract out of the Act

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Key OHS&C Principles

- ▶ The right to a safe workplace
- ▶ The right to know
- ▶ The right to participate
- ▶ The right to refuse

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OHS&C Foundational Legislative Requirements

- ▶ General Duty clause:
“Employer shall take every precaution reasonable in the circumstances for the protection of a worker” (s. 25.2 (h));
- ▶ Supervisor competency, advice to worker of the existence of any potential or actual danger of which the supervisor is aware;
- ▶ Director’s and officers of corporation’s duty to take all reasonable care to ensure compliance;
- ▶ Employer reporting obligations concerning Death and Critical Injury;
- ▶ Measures, policies and procedures “safe work practices”;
- ▶ Worker Anti-reprisal protections.

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General Legislative Framework - Rights & Responsibilities (Continued)

An Employer must:

- Establish and maintain a joint health and safety committee, or cause workers to select at least one health and safety representative
- Take every reasonable precaution to ensure the workplace is safe
- Train employees about any potential hazards and in how to safely use, handle, store and dispose of hazardous substances and how to handle emergencies
- Supply personal protective equipment and ensure workers know how to use the equipment safely and properly
- Immediately report all critical injuries to the Ministry of Labour
- Appoint a competent supervisor who sets the standards for performance, and who ensures safe working conditions are always observed

Supervisors:

- Must ensure that workers use prescribed protective equipment devices
- Must advise workers of potential and actual hazards
- Must take every reasonable precaution in the circumstances to protect workers

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Internal Responsibility

- ▶ The internal responsibility system puts in place an employee-employer partnership in ensuring safe and disease free workplace.
- ▶ The internal responsibility system foundation is that everyone in the workplace - both employees and employers - is responsible for his or her own safety and for the safety of co-workers.
- ▶ The Act and regulations do not always impose or prescribe the specific steps to take for compliance.
- ▶ Instead, the Act holds employers responsible for determining such steps to ensure health and safety of all employees.

Internal responsibility system does the following:

- Establishes responsibility sharing systems
- Promotes safety culture
- Promotes best practice
- Helps develop self reliance
- Ensures compliance

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OHSA and Workplace Violence

Section 1

Definitions of workplace violence (physical force)

Sections 32.0.01 -.07

Effective as of Sept 8, 2016

Workplace sexual harassment and workplace harassment

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Workplace Violence s. 1 of OHSA

“workplace violence” means,

- (a) the exercise of physical force by a person against a worker, in a workplace, that causes or could cause physical injury to the worker,
- (b) an attempt to exercise physical force against a worker, in a workplace, that could cause physical injury to the worker,
- (c) a statement or behaviour that it is 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.

► Definition effective June 1, 2010

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“workplace harassment” means,
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.

► *Definition effective June 1, 2010*

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Workplace Violence preventative provisions

1. Risk Assessment and post-Risk Reassessment considering:
 - the nature/experience of the workplace;
 - occupational experience in similar workplaces;
 - circumstances/location specific to the workplace conditions.
2. Policy/Program/procedures to include measures and procedures to control for risks of workplace violence.
3. “Flagging” Duty to provide information of risk of violence from persons with history of violent behaviour and likely to encounter.
4. Measures and procedures for summoning immediate assessment (e.g. personal panic alarms)
5. Information and Instruction to workers
6. Annual review of policy

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Workplace Harassment

s. 32.0.6 New as a result of Bill 132

Additional written program to implement a policy to redress workplace harassment

New Duties to protect workers from workplace harassment

- ▶ Employer investigation into incidents and complaints
- ▶ Explicit annual review of workplace harassment policy

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OHSA Enforcement Framework

- ▶ Internal responsibility system
- ▶ Ministry of Labour inspectorate (s. 54-60)
 - ▶ s. 61 Union appeal of Inspectors orders or lack of orders
- ▶ Part V of Act - Right to Refuse

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Due Diligence - a legal defense to be aware of

- ▶ "Due diligence" is a legal defense for an employer/supervisor charged under occupational health and safety legislation.
- ▶ If charged, a defendant may be found not guilty if he or she can prove that due diligence was exercised.
- ▶ In other words, the defendant must be able to prove that all precautions, reasonable under the circumstances, were taken to protect the health and safety of workers.
- ▶ Due diligence is the level of judgement, care, prudence, determination, and activity that a person would reasonably be expected to do under particular circumstances
- ▶ Due diligence means that employers shall take all reasonable precautions, under the particular circumstances, to prevent injuries or accidents in the workplace.
- ▶ To exercise due diligence, an employer must implement a plan to identify possible workplace hazards and carry out the appropriate corrective action to prevent accidents or injuries arising from these hazards.
- ▶ The conditions for establishing due diligence include several criteria. All of the elements of a "due diligence program" must be in effect before any accident or injury occurs.

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Examples of Due Diligence questions.

Does your employer meet the standard?

- Are safety and health responsibilities explained, known and understood to workers?
- Are there definite procedures in place to identify and control hazards?
- Has safety been integrated into all aspects of work?
- Have appropriate resources been committed to safety and health?
- Is there a hazard reporting procedure in place?
- Employees encouraged to report all unsafe conditions and unsafe practices to their supervisors?
- Is safety a factor when acquiring new equipment or changing a process?
- Are records kept of program activities and improvements?
- Are records kept of the training each employee has received?
- Do records show that disciplinary action is taken when safety procedures have been violated?
- Is the program reviewed and improved at least once a year?

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III The Right to Refuse

An health and safety enforcement tool

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S. 43 RIGHT TO REFUSE OR TO STOP WORK WHERE HEALTH OR SAFETY IN DANGER

► Section 43 (3) Right to Refuse where:

*Workplace violence is likely to
endanger himself or herself*

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Section 43 the right to refuse

- ▶ Reasonable grounds for a work refusal
- ▶ s.43 does not require that an employee actually be in danger at the time the work refusal is made.
- ▶ The risk need not actually exist at the time or the work refusal.
- ▶ It is enough that there is a reasonable anticipation of some future danger. (*Re Canadian Auto Workers (1995)* O.O.H.S.A.D. No 48)
- ▶ Not an absolute right for every worker to refuse work; Some workers in certain occupations are exempt and have a limited right to refuse.

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The Right to Refuse

In general, the steps to refuse work are as follows:

1. If you believe that a dangerous situation exists at work, you have the right to refuse unsafe work. Refuse the work.
2. Notify your supervisor about your concerns, and refuse the unsafe work
3. The supervisor must investigate the situation in your presence, and the presence of the JHSC member and take appropriate action .
4. Worker must stay in a safe place and be available for the investigation
5. If the matter has not been resolved to your satisfaction, and you continue to refuse, call the Ministry of Labour inspector
6. The officer will investigate and order remedial action. The written findings will be given to you, the employer, and the committee.
7. Worker is to remain in a safe place at all times and be available for the Inspectors investigation.

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S. 43 Right to Refuse Exemptions

Non-application to certain circumstances of workplace violence:

- ▶ (a) when a circumstance is inherent in the worker's work or is a normal condition of the worker's employment; or
- ▶ (b) when the worker's refusal to work would directly endanger the life, health or safety of another person.

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S. 43 Right to Refuse Exemptions

Non-application to certain occupations employed in the operation of:

- ▶ a correctional institution or facility; a place of secure custody designated under section 24.1 of the Young Offenders Act
- ▶ a place of temporary detention under the Youth Criminal Justice Act
- ▶ a hospital, sanatorium, long-term care home, psychiatric institution, mental health centre or rehabilitation facility,
- ▶ a residential group home or other facility for persons with behavioural or emotional problems or a physical, mental or developmental disability,
- ▶ an ambulance service or a first aid clinic or station,
- ▶ a laboratory operated by the Crown or licensed under the Laboratory and Specimen Collection Centre Licensing Act, or
- ▶ (v) a laundry, food service, power plant or technical service or facility used in conjunction with an institution, facility or service institutions above

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S. 43 Right to Refuse Exemptions

- ▶ “risking ones health and safety is one of the primary requirements of these occupations...if one were to allow individuals in these occupations to refuse work which involved a risk of injury, the important functions which they are obliged to perform would remain unfulfilled.” (*Lloyd v Ontario* [1988])
- ▶ “If they refuse work, they are putting lives at risk” (*Dowling v. Hamilton-Wentworth Detention Centre*, 2012 (O.L.R.B.)).
- ▶ Some exempt occupations, further obligations under the *Regulated Health Professionals Act, Education Act*. e.g. Registered Practical Nurse.

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Interpretation of s. 43

What is “inherent in the worker’s work or...a normal condition of the worker’s employment”?

- ▶ Will depend on the facts

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Interpretation of s. 43

s. 43 exemptions do not relieve the employer of their basic obligation to take reasonable precautions under s. 25 of OHSA.

“inherent” should not be read to include any circumstance which involves a failure to take appropriate and reasonable steps to ensure safety.

“normal condition of employment”, refers to the “established and prevailing conditions” of one’s work. A failed safety device renders the situation “abnormal”

(Re Maplehurst Detention Centre, [1994] O.O.H.S.A.D. No. 21 (Blair))

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s. 43 Right to Refuse Exemptions

- ▶ Workers with a limited right to refuse are still protected by the remaining sections of *OHSA*
- ▶ Arguably, employers have a heightened due diligence requirement for those workers with a limited right to refuse

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Interpretation of s. 43

- ▶ cannot refuse to perform work that is a part of their established routine, unless some circumstance exists which departs from that established norm.
- ▶ It does not mean that an existing practice cannot be called into question as being unsafe.
- ▶ Changed circumstance may raise the prospect of imminent danger or risk and limited right to refuse.
- ▶ Workers must raise question of safety in manner to be “addressed and resolved quickly” (Durham v CUPE Local 1764, 2010)

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s. 45 Bilateral Work Stoppages

- ▶ a certified member has reason to believe that “dangerous circumstances exist at a workplace” requests a supervisor investigate the matter;
- ▶ The certified member may request that a second certified member representing the other workplace party investigate the matter;
- ▶ If both certified members find that the dangerous circumstances exist, the certified members may direct the employer to stop the work and the employer must comply;
- ▶ If the certified members do not agree whether dangerous circumstances exist, either certified member may request that an inspector investigate the matter.
- ▶ OLRB available for a declaration.
- ▶ Rarely used and little case law.

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Thank You

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