

Employers' beware the following: the brave, committed, yet sniffing, sick, and ultimately contagious worker who has the flu and chooses to come to work!

While their intentions may be admirable, the fact of the matter is, an employer has a duty under the *Occupational Health and Safety Act*<sup>1</sup> (the "OHS") to "take every precaution reasonable in the circumstances for the protection of a worker" (s 25(2)(h)). Permitting a sick employee to continue working in your workplace may compromise your duties to your other staff. It may also subject you and or your company to financial liability under the OHS and unwanted inspections by the Ministry of Labour (the "MOL").

Flu season is in full swing and if you do not take preventative measures to protect your workers from an illness in your workplace now, your worker's may take matters into their own hands.

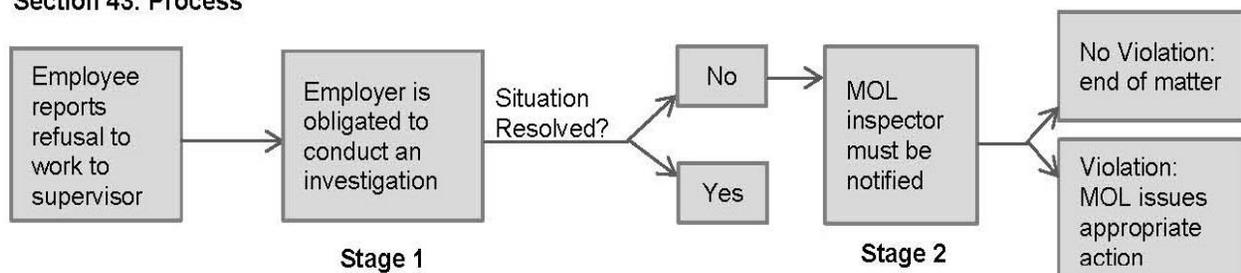
### Workers' Rights

The OHS provides workers with three (3) important rights:

1. The right to know about hazards in their work so as to protect their health and safety on the job;
2. The right to participate in identifying and solving health and safety problems or to go through a health safety representative (if your workplace has one); and
3. The right to refuse work that they believe is dangerous to their health and safety or that of any other worker in the workplace.<sup>2</sup>

If your employee believes that his or her workplace is unsafe, due to the flu or other hazards, the OHS (section 43) provides a process whereby an employee may legally refuse to work (see below).

#### Section 43: Process



Throughout any inspection you must keep the employee in a safe location nearby. You must also pay the employee his or her regular wages during Stage 1 of the Section 43 Process. You may not retaliate against an employee for refusing to work, so long as the refusal was made in good faith.

<sup>1</sup> *Occupational Health and Safety Act*, RSO 1990, c 0.1

<sup>2</sup> Ministry of Labour, *The Internal Responsibility System – A Workplace Partnership*, October 18, 2012

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### **The cost of doing nothing**

To sum it up, sickness can be costly!

During a work refusal your employee is not performing their regular duties and is getting paid. Additionally, if the situation escalates, you or your company may be an unenviable target for further sanctions from the MOL.

Larger companies have an additional concern regarding sick employees. Under the *Employment Standards Act, 2000*<sup>3</sup> employees who work for employers that regularly employ 50 employees or more have the right to take up to 10 days of unpaid job-protected leave each calendar year with respect to illness and certain other matters. This means an employee who provides you with medical proof that he or she is sick, may unilaterally decide to take up to two weeks off, no matter the timing.

### **What steps can you take?**

#### **1. Preventative Measures:**

As the proverbial saying goes, “the best offense is a good defense.” Safety Source Ontario has recommended that employers do the following:

- Cleaning – ensure employees clean shared equipment and furniture;
- Vaccination – consider giving employees time off during the work week to get a flu vaccination;
- Give your employees sick time – most employees come to work sick because they cannot afford to take a day off. Consider giving them paid sick days if they provide proof medical evidence;
- Have contingency plans in place – many employees are worried that work will pile up if they take time off. Implement systems to help employees ‘cover’ for one another

#### **2. Do not let a sick employee come into work:**

Despite your best efforts, it is likely an employee will still come to work with the flu or some other illness. You do not have to tolerate this. You owe a duty to all your employees to provide a safe work environment. Consider sending this worker home and requiring a medical note before he or she may return to work.

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<sup>3</sup> *Employment Standards Act, 2000*, SO 2000, c 41

## Conclusion

As Canadians, winter and the flu are parts of life. However, so is the OHSA, the MOL and employer liability.

A top priority for every employer is providing a healthy and productive work environment for their employees. By being aware of your workers' rights and implementing policies to help protect them, you may rest a little easier this season.

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*This update is designed to supply brief details of recent court decisions and other developments of interest, with some commentary. The summary should not be relied upon as legal advice. We encourage you to speak with a lawyer at Houser Henry & Syron LLP for advice about your particular situation.*