

THOUGHTS ON PHYSICIAN WORKPLACE HEALTH AND SAFETY RIGHTS TO "PPE"

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The Information contained in this resource has been prepared to provide a basic understanding of the general obligations of workplaces and physicians under the Occupational Health and Safety Act and its Regulations, and is considered general introductory information only. No action should be taken based solely upon this resource without first seeking advice from ourselves or other legal professionals regarding your specific situation or circumstances. In no circumstances should this be construed as legal advice or a legal opinion and no solicitor-client relationship arises as a result of accessing or reading this information.

While we have made reasonable efforts to ensure that this memo is accurate to the date of publishing, we make no representations or warranties made as to the accuracy, quality, completeness or substantive adequacy of the information provided in this resource,

particularly in light of the rapidly changing situation with the COVID-19 outbreak and potential changes in provincial or Federal laws which may impact the accuracy or relevance of the information in this memorandum . For information and advice specific to your workplace situation, please contact us to discuss.

Introduction

What occupational health and safety rights do doctors have? In particular, what rights do they have with respect to accessing appropriate PPE while working in hospitals during a pandemic such as the COVID-19 crisis? Unlike nurses, orderlies or other staff, doctors are often not “employees” of the hospital. However, does that make a difference in terms of the right to occupational health and safety?

As Canada (and the world) scrambles to prepare for the influx of patients infected with COVID 19 into our hospitals, and the imminent shortage of PPE (particularly N95 masks), what rights do physicians have to safe workplaces?

The Occupational Health and Safety Act

When it comes to safety at work in Ontario, the *Occupational Health and Safety Act* (“OHSA”), and its *Regulations*, govern. The OHSA applies to all workplaces in Ontario, and there are regulations which apply to certain specific workplaces. For hospitals the relevant regulations are the O. Reg. 67/93: *Healthcare and Residential Facilities*, and O. Reg. 852. *Industrial Establishments*.

The OHSA takes a very broad approach to who is considered an employer, and includes “a person who contracts for the services of one or more workers” (Section.1.1).

“Workers” are defined to include:

... any of the following, but does not include an inmate of a correctional institution or like institution or facility who participates inside the institution or facility in a work project or rehabilitation program:

1. *A person who performs work or supplies services for monetary compensation.*

....

Physicians who work in hospitals should fit within these broad definitions, even though they may not have a typical “employer/employee” relationship.

Employer’s Duties

The OHSA prescribes obligations for both the employer/workplace and the employer. For example, employers must provide and maintain the equipment, materials and PPE “as

prescribed”. They must also “*take every precaution reasonable in the circumstances for the protection of the worker*” (Section 25 (1) and Section 25(2)(h)).

Section 8 of the *Regulation* provides:

every employer in consultation with the joint health and safety committee or health and safety representative, if any, and upon consideration of the recommendation thereof, shall develop, establish and put into effect measures and procedures for the health and safety of workers.

These include policies for the control of infections, and the use, wearing and care of Personal Protective Equipment (“PPE”). Section 10 of the *Regulations* deals specifically with PPE, and requires that PPE that is to be used or worn shall be properly used and maintained.

Worker’s Duties

As workers, physicians also have duties under the *OHSA*. They must comply with the *OHSA* and its *Regulations*. For example, Section 28(1) of the *OHSA* provides that a worker shall:

- (a) *use or wear the equipment, protective devices or clothing that the worker’s employer requires to be used or worn;*
- (b) *report to his or her employer or supervisor the absence of or defect in any equipment or protective device of which the worker is aware and which may endanger himself, herself or another worker; and*
- (c) *report to his or her employer or supervisor any contravention of this Act or the regulations or the existence of any hazard of which he or she knows.*

While the *OHSA* does address PPE requirements, the legislation appears to presume that the PPE requirements set by the employer, where not specifically prescribed, are sufficient to keep workers safe. That being said, there is the ‘catch-all’ requirement that the workplace must take every reasonable precaution in the circumstances for the protection of the worker¹. Arguably, in light of a global pandemic, providing sufficient PPE to frontline workers, such as physicians, to protect them from (and from spreading) viruses, falls within the scope of this provision.

Workplace Health and Safety Committees and Workplace Policies

Under the *OHSA*, workplace joint health and safety committees are required for most workplaces with more than twenty workers. For workplaces that have more than fifty employees, the committee shall have at least four members, half of which cannot be

¹ *OHSA*, Section 25(2)(h).

management. Part of the responsibilities of these committees is to identify situations of danger or hazards to workers, and make recommendations to the employer to improve worker health and safety, including measures and procedures. The committee member who represents workers also have the power to inspect the physical condition of the workplace.²

The names and work locations of health and safety committee members must be posted in the workplace. Consulting with the worker representative on a health and safety committee at your workplace is another option for those concerned about the health and safety precautions in their hospital during the ongoing COVID 19 pandemic.

Further, your workplace likely has its own policies and procedures on PPE or workplace health and safety. Reviewing these policies and ensuring they are being followed by your employer is another step workers can take if they feel that access to PPE or other workplace policies are not sufficient to protect workers during the pandemic.

Other Precautionary Measures

The OHSA does not prescribe specific PPE requirements for all circumstances, and this is often left to the workplace to determine. For example, Section 28(1) states:

*“A worker shall,
... (b) use or wear the equipment, protective devices or clothing that the worker’s employer requires to be used or worn”.*

O. Reg 67/93 states:

10. (1) A worker who is required by his or her employer or by this Regulation to wear or use any protective clothing, equipment or device shall be instructed and trained in its care, use and limitations before wearing or using it for the first time and at regular intervals thereafter and the worker shall participate in such instruction and training.

(2) Personal protective equipment that is to be provided, worn or used shall,

(a) be properly used and maintained;

(b) be a proper fit;

(c) be inspected for damage or deterioration; and

(d) be stored in a convenient, clean and sanitary location when not in use. O. Reg. 67/93, s. 10

² OHSA, Section 9, Joint Health and Safety Committees

What happens if the PPE required or provided by the workplace is not sufficient to protect the worker, or other workplace practices are creating a risk? Section 28(c) of the *OHSA* requires workers to report the absence or defect in equipment or protective devices. If the workplace requirements for PPE are below the standard that is required for the physicians to perform their work safely, then this of course becomes a source of liability for the hospital. However, hospitals may take an absurd position that physicians do not necessarily need to be provided with the immediate access to PPE necessary to be safe at work. Given what we know about the COVID-19 virus, and in light of the SARS Commission Final Report noted above, there is little doubt that PPE is required.

As such it is important that physicians make it known to the hospitals that they want PPE. If there are PPE shortages, physicians should bring those shortages of PPE to the attention of their employers.

In addition, Physicians should remind their employers of their obligations under the *OHSA*, specifically Section, 25(2)(h), to take every precaution reasonable in the circumstances to protect workers. Where there is an absence of PPE equipment the hospitals should be working with their health and safety committees to develop means to minimize the risk of transmission. For example, there may be operational steps that can reduce the spread of transmission that should be explored.

Can Physicians Refuse Work?

While there are provisions in the *OHSA* which allow workers the right to refuse to perform unsafe work³, those provisions do not apply to all workers and all workplaces. The enumerated circumstances in which a worker may normally refuse work include where:

43 (3) A worker may refuse to work or do particular work where he or she has reason to believe that,

- (a) any equipment, machine, device or thing the worker is to use or operate is likely to endanger himself, herself or another worker;*
- (b) the physical condition of the workplace or the part thereof in which he or she works or is to work is likely to endanger himself or herself;*

(b.1) workplace violence is likely to endanger himself or herself...

However, certain workers, including persons employed in the operation of a hospital⁴, cannot refuse work where a circumstance set out in Section 43(a)(b)(b.1) or (c) [set out above] is inherent in the work or is a normal condition of their employment, or where their refusal to work would directly endanger the life, health, or safety of another person.⁵

³ Part V of the *OHSA*.

⁴ Section 43(2)(d)(i) of the *OHSA*.

⁵ Section 43(1) of the *OHSA*.

Essentially, the *OHSA* limits physicians ability to refuse unsafe work. This was an issue during the SARS crisis with nurses, and Ontario Nurses Association asked the Ministry of Labour to clarify health workers' limited rights to refuse unsafe work.⁶

Are you protected from reprisals?

While physicians and healthcare workers may not have the same rights as other workers to refuse unsafe work, they do have some protection from reprisal under Section 50 of the *OHSA*. The protection from reprisals ensures that workers are not threatened, terminated, disciplined, suspended, penalized, intimidated or coerced by employer or workplace for advocating for the enforcement of the law and a safe workplace (ex. the *OHSA*).

There is a recent (2019) case, *Talwar v Grand River Hospital* (2019 CarswellOnt 18484, OLRB) where a physician brought an application to the Ontario Labour Relations Board under this section when the hospital decided to not renew his hospital privileges. That case was ultimately dismissed by the OLRB without prejudice, as Dr. Talwar's pleadings were inadequate to properly set out the basis of his claim. However, it appears that the OLRB will accept jurisdiction of physician's claims against reprisals where their hospital privileges are revoked.

CPSO

An additional concern for healthcare workers is discipline from the regulator. Physicians should consult with the College of Physicians and Surgeons of Ontario ("CPSO") on their workplace rights where PPE shortages or other workplace practices are creating unsafe workspaces, and what their professional obligations are.

The CPSO has advised that the supply of PPE is outside of its jurisdiction, but has also stated: "you should only be conducting clinical assessment and collecting specimens from an at-risk patient if you can take droplet and contact precautions (e.g. using a surgical/procedure mask, isolation gown, gloves and eye protection) and have appropriate disinfection procedures."⁷

Lessons from SARS

Following the outbreak in 2003, a Commission was enacted to investigate the introduction and spread of the SARS virus. The final report "Spring of Fear" was published in 2006. One of the key lessons from the Report was the "precautionary principle". In summary,

⁶ SARS Commission Final Report at page 276.

⁷ CPSO COVID-19 FAQs For Physicians (Updated March 25, 2020). <https://www.cpso.on.ca/Physicians/Your-Practice/Physician-Advisory-Services/COVID-19-FAQs-for-Physicians>

the principle provides that reasonable steps to reduce risk should not await scientific certainty. Where there is reasonable evidence of an impending threat to public health, it is inappropriate to require proof of causation beyond a reasonable doubt before taking steps to avert the threat.⁸

With respect to the specific use of N95 respirators, the Commission found:

“The real problem is not with the N95 respirator but the deep structural contradictions in hospital worker safety. These problems include a profound lack of awareness within the health system of worker safety best practices and principles. They include the failure of the Ministry of Labour to proactively inspect SARS hospitals until June 2003, when the outbreak was virtually over. In B.C. by contrast, the workplace regulator took decisive action and began inspection in early April, wanting to ensure that workers were being protected from the start as required by law. The problems include those in hospital administration and health bureaucracies who resist advice and enforcement on hospital turf by independent worker safety experts and the provincial Ministry of Labour. Most important, the problems include Ontario’s failure to recognize in hospital worker safety the precautionary principle that reasonable action to reduce risk, like the use of a fitted N95 respirator, need not await scientific certainty.” [emphasis added]

The lessons learned from the SARS outbreak should not be disregarded, and healthcare workers should encourage workplaces to employ the precautionary principle to ensure that frontline healthcare workers, including physicians, are not unnecessarily exposed to COVID-19.

Ministry of Labour Involvement

In its Final Report, the SARS Commission condemned the lack of involvement of Ontario’s Ministry of Labour (“MOL”) throughout the crisis, and the MOL’s failure to protect healthcare workers from the virus. The Commission found that the MOL was effectively sidelined during the SARS outbreak by the Ministry of Health and the Provincial Operations Centre responding during the crisis. The Report states:

“Ontario’s worker safety system needs a tune-up to ensure that the Ministry is not sidelined the next time we are hit by something like SARS. Workers are entitled to better safety enforcement than they got during SARS from the Ministry of Labour. Worker safety requires an independent inspection and enforcement arm and in Ontario, the Ministry of Labour is that arm. The public is entitled to expect that the government’s worker safety arm will be more aggressive next time in its protection of workers. Improvements since SARS have put the Ministry in a much better position to protect workers in the next outbreak...”

⁸ SARS Commission Final Report: Volume Two, Spring of Fear, pg. 25.

As Ontario hospitals and the public healthcare system is facing precisely the type of public health emergency contemplated by the Commission in the Final Report, the Ministry of Labour should be prepared to be involved in occupational health and safety in hospitals as necessary.

If you have brought your complaint or concern to the attention of your workplace/supervisor, and to your workplace health and safety committee representative, but the issues are not resolved, or if you feel that you cannot raise your concerns with those bodies, you can file a complaint with the Ministry of Labour. Part VIII of the *OHSA* grants the MOL power to inspect workplaces and make orders where there is non-compliance.

WHO: Rights, Roles and Responsibilities, Occupational Health and Safety and COVID-19

The World Health Organization (“WHO”) has published the ‘Coronavirus Disease (COVID19) Outbreak: Rights, Roles and Responsibilities of Health Workers, Including Key Considerations for Occupational Health and Safety’, which is attached hereto as **Appendix “A”**.

Among the health worker rights, include that that employers,

- provide adequate IPC and PPE supplies in sufficient quantity to healthcare or other staff caring for suspected or confirmed COVID-19 patients, such that workers do not incur expenses for occupational health and safety requirements;
- assume overall responsibility to ensure that all necessary preventative and protective measures are taken to minimize occupational safety and health risks;
- consult with health workers on occupational safety and health aspects of their work and notify the labour inspectorate of cases of occupational diseases;
- not be required to return to work to a situation where there is continuous or serious danger to life or health, until the employer has taken any necessary remedial action;
- allow workers to remove themselves from a work situation that they have reasonable justification to believe presents an imminent and serious danger to their life or health. When a health worker exercises this right, they shall be protected from any undue consequences.

Where the rights listed by the WHO may go beyond the protections afforded to healthcare workers provided in provincial legislation or in Ontario workplaces, workers should ensure that they observe the *OHSA* and its *Regulations* and any applicable professional obligations so as not to risk discipline, termination or other repercussions. However, workers can advocate for the WHO standards to be implemented to protect frontline healthcare workers.

Take-Aways

- Review your workplace policies and procedures. Are the requirements for PPE, or other occupational health and safety procedures, in your workplace being followed? Are they appropriate for these circumstances and in light of the WHO guidelines?
- Go to your supervisor or the joint health and safety committee at your workplace if you have concerns that the health and safety processes in your workplace are not sufficient. If there is a lack of PPE, what other steps is your workplace taking to ensure the safety of workers?
- Consider going to the CPSO for guidance on what your professional obligations are when you have occupational health and safety concerns in your workplace. Is the CPSO taking a position on access to PPE and other occupational health and safety measures in light of the COVID-19 epidemic?
- If you feel that the occupational health and safety measures in effect at your workplace fall below those required under the *OHSA* and its Regulations, you can make a complaint to the Ministry of Labour. You should be protected from any reprisals from raising your concerns.
- To the extent possible, ensure your concerns are confirmed in writing.

CORONAVIRUS DISEASE (COVID-19) OUTBREAK: RIGHTS, ROLES AND RESPONSIBILITIES OF HEALTH WORKERS, INCLUDING KEY CONSIDERATIONS FOR OCCUPATIONAL SAFETY AND HEALTH

Coronaviruses are a group of viruses belonging to the family of *Coronaviridae*, which infect both animals and humans. Human coronaviruses can cause mild disease similar to a common cold, while others cause more severe disease (such as MERS - Middle East Respiratory Syndrome and SARS – Severe Acute Respiratory Syndrome). A new coronavirus that previously has not been identified in humans emerged in Wuhan, China in December 2019.

Signs and symptoms include respiratory symptoms and include fever, cough and shortness of breath. In more severe cases, infection can cause pneumonia, severe acute respiratory syndrome and sometimes death. Standard recommendations to prevent the spread of COVID-19 include frequent cleaning of hands using alcohol-based hand rub or soap and water; covering the nose and mouth with a flexed elbow or disposable tissue when coughing and sneezing; and avoiding close contact with anyone that has a fever and cough.

WHO is working closely with global experts, governments and partners to rapidly expand scientific knowledge on this new virus and to provide timely advice on measures to protect people's health and prevent the spread of this outbreak.

Rights, roles and responsibilities of health workers, including occupational safety and health

Health workers are at the front line of any outbreak response and as such are exposed to hazards that put them at risk of infection with an outbreak pathogen (in this case COVID-19). Hazards include pathogen exposure, long working hours, psychological distress, fatigue, occupational burnout, stigma, and physical and psychological violence. This document highlights the rights and responsibilities of health workers, including specific measures needed to protect occupational safety and health.

Health worker rights include that employers and managers in health facilities:

- assume overall responsibility to ensure that all necessary preventive and protective measures are taken to minimize occupational safety and health risks¹;
- provide information, instruction and training on occupational safety and health, including;
 - Refresher training on infection prevention and control (IPC); and
 - Use, putting on, taking off and disposal of personal protective equipment (PPE);
- provide adequate IPC and PPE supplies (masks, gloves, goggles, gowns, hand sanitizer, soap and water, cleaning supplies) in sufficient quantity to healthcare or other staff caring for suspected or confirmed

¹ Including implementation of occupational safety and health management systems to identify hazards and assess risks to health and safety; infection prevention and control (IPC) measures; zero-tolerance policies towards workplace violence and harassment.

COVID-19 patients, such that workers do not incur expenses for occupational safety and health requirements;

- familiarize personnel with technical updates on COVID-19 and provide appropriate tools to assess, triage, test and treat patients and to share infection prevention and control information with patients and the public;
- as needed, provide with appropriate security measures for personal safety;
- provide a blame-free environment for workers to report on incidents, such as exposures to blood or bodily fluids from the respiratory system or to cases of violence, and to adopt measures for immediate follow-up, including support to victims;
- advise workers on self-assessment, symptom reporting and staying home when ill;
- maintain appropriate working hours with breaks;
- consult with health workers on occupational safety and health aspects of their work and notify the labour inspectorate of cases of occupational diseases;
- not be required to return to a work situation where there is continuing or serious danger to life or health, until the employer has taken any necessary remedial action;
- allow workers to exercise the right to remove themselves from a work situation that they have reasonable justification to believe presents an imminent and serious danger to their life or health. When a health worker exercises this right, they shall be protected from any undue consequences;
- honour the right to compensation, rehabilitation and curative services if infected with COVID-19 following exposure in the workplace. This would be considered occupational exposure and resulting illness would be considered an occupational disease,
- provide access to mental health and counselling resources; and
- enable co-operation between management and workers and/or their representatives.

Health workers should:

- follow established occupational safety and health procedures, avoid exposing others to health and safety risks and participate in employer-provided occupational safety and health training;
- use provided protocols to assess, triage and treat patients;
- treat patients with respect, compassion and dignity;
- maintain patient confidentiality;
- swiftly follow established public health reporting procedures of suspect and confirmed cases;
- provide or reinforce accurate infection prevention and control and public health information, including to concerned people who have neither symptoms nor risk;
- put on, use, take off and dispose of personal protective equipment properly;
- self-monitor for signs of illness and self-isolate or report illness to managers, if it occurs;
- advise management if they are experiencing signs of undue stress or mental health challenges that require support interventions; and
- report to their immediate supervisor any situation which they have reasonable justification to believe presents an imminent and serious danger to life or health.

Additional resources

As knowledge of the virus develops, WHO will continue to create and update [technical guidance](#).

Useful materials include:

- [Emerging respiratory viruses, including nCoV: methods for detection, prevention, response and control](#)
- [Surveillance and case definitions](#)
- [Early investigations](#)
- [Patient management](#)
- [Infection prevention and control](#)
- [Laboratory guidance](#)
- [Country readiness](#)
- [Risk communication and community engagement](#)
- [Disease commodity package](#)
- [Reduction of transmission from animals to humans](#)