

**THOUGHTS ON WHETHER INDEPENDENT CONTRACTOR PHYSICIANS
ARE PROTECTED FROM REPRISALS UNDER
THE OCCUPATIONAL HEALTH AND SAFETY ACT**

APRIL 2, 2020

Contents

OHSA Definitions of Worker and Employee	2
Do Independent Contractors Fit Within This Scope?	2
Does this apply to physicians who are working on a contract basis?	4
Do Physicians enjoy all the rights contemplated in the OHSA?	4
What about protection from ‘reprisals’ under Section 50 of the OHSA?	4

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 pandemic 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.

Last week we published a paper on the occupational health and safety rights of physicians. In our paper we raised the question of what occupational health and safety rights physicians had. We noted that those who work in hospitals have limited rights to refuse unsafe work.

This paper is to further explore the protections of the *Occupational Health and Safety Act* (“OHSA”) particularly with respect to protection from reprisals, in workplaces where there may not always be

typical “employment” relationships. Do independent contractors (like many physicians who work in hospitals) and other workers who are not direct “employees”, still have protection under the *OHS*A? Can they avail themselves of the protection from reprisals under s.50 of the *OHS*A? The common law suggests that the protections against reprisals are most likely available.

***OHS*A Definitions of Worker and Employee**

As noted in our last paper, the definitions of “worker” and “employer” in the *OHS*A are quite broad. Section 1(1) of the *OHS*A defines a worker as:

“worker” means 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.***
- 2. A secondary school student who performs work or supplies services for no monetary compensation under a work experience program authorized by the school board that operates the school in which the student is enrolled.*
- 3. A person who performs work or supplies services for no monetary compensation under a program approved by a college of applied arts and technology, university, private career college or other post-secondary institution.*

An employer is defined as:

“employer” means a person who employs one or more workers or contracts for the services of one or more workers and includes a contractor or subcontractor who performs work or supplies services and a contractor or subcontractor who undertakes with an owner, constructor, contractor or subcontractor to perform work or supply services;

Do Independent Contractors Fit Within This Scope?

The seminal case on this issue is *R v Wyssen (1992 CarwellOnt 688)*, a 1992 decision from the Ontario Court of Appeal. That case dealt with the tragic circumstances where a window cleaner hired to clean several high-rise condo buildings subcontracted another cleaner for one of the buildings. The subcontracted worker provided all his own equipment and was not supervised by the original window cleaner. The subcontractor had an equipment failure, and fell to his death. The window cleaner was charged under the *Occupational Health and Safety Act* for failing to ensure that the measures and procedures prescribed under the *Act* were carried out in the workplace., and the court had to consider whether the *OHS*A applied in this situation.

In that case, Blair J.A. stated:

It is a basic principle of statutory construction that every word in a statute should be given a meaning: Maxwell on the Interpretation of Statutes, 12th ed., (1969), p. 36. With respect, it appears that this principle may have been overlooked by the lower courts who restricted the application of the Act to the employment relationship. A literal construction of the Act

compels the conclusion that it applies to the employment of independent contractors as well as ordinary employees. This follows from the principle stated by Maxwell, *supra*, at p. 28:

[t]he first and most elementary rule of construction is that it is to be assumed that the words and phrases of technical legislation are used in their technical meaning, if they have acquired one, and otherwise in their ordinary meaning: Maxwell, supra, p. 28.

In my opinion, the legislature in the definition of “employer” used the words “contracts for services” in their technical sense to differentiate them from contracts of employment. In doing so, it intended to impose upon the respondent, as the employer of an independent contractor, the responsibility of compliance with the Act.

In this case the court set aside acquittals under the OHSa and directed a new trial of the charges against the Contractor.

The Court of Appeal considered this issue further in in 2011 in the decision **Ontario (MOL) v United Independent Operators Ltd. (2011 ONCA 33)** . In this case, the Ontario Court of Appeal had to consider whether independent contractors need to be included in the calculation to determine whether an employer was required to have a joint health and safety committee pursuant to the OHSa. United Independent Operators Ltd. (“UILO”) was a load broker who customers contract with to transport aggregate. UIOL contracted with truck drivers, who each owned and operated their own trucks, to haul the aggregate to UIOL’s customers. Section 9 of the OHSa, a Joint health and Safety Committee is required where 20 or more workers are ‘regularly employed’. The Court of Appeal had to consider whether the independent truck owners were “regularly employed” within the meaning of the section,), such that a committee was required. The Court noted:

The OHSa is a remedial public welfare statute whose purpose is to guarantee a minimum level of health and safety protection for workers in Ontario. This broad purpose must inform the interpretation of s.9(2)(a) which requires the establishment of the JHSC, and important mechanism in achieving the legislative objective of enhanced worker safety.

Interpreting the words “regularly employed” to include truck drivers makes sense contextually and supports the purpose of the legislation. Conversely, reading in a requirement that s.9(2)(a) applies only to workplaces in which workers are in traditional employment relationship with their employers would seriously curtail the scope of s.9(2)(a) and limit the number of JHSC’s that must be established and maintained. The narrow interpretation would interfere with the attainment of the purpose of the OHSa. It must be rejected in favour of the interpretation that does no violence to the plain meaning of the words “regularly employed” and that promotes worker safety, the purpose of the legislation.

The court concluded that:

Reading the words “regularly employed” in the context and having regard to the purpose of the OHSa, although truck drivers are independent contractors, they must be counted when determining whether the threshold requirement in s.9(2)(a) has been met.

Again, the Courts considered the remedial purpose of the statute, and the purpose of the *OHSA* to afford health and safety protection to workers in Ontario, and found that the independent contractor truckers were entitled to be counted when considering whether the workplace needed a joint health and safety committee.

Does this apply to physicians who are working on a contract basis?

While there is little caselaw which specifically considers the application of the *OHSA* to physicians working on a contract basis, there is no reason why physicians should not be considered workers under the *OHSA* in situations where they are contracted and perform work for monetary compensation. They are in work arrangements comparable to the window cleaner and truckers note above. Further, the Public Services Health and Safety Association (“PSHSA”) considers that physicians can be ‘workers’. In their document, “*Physician’s Occupational Health and Safety Roles and Responsibilities*”, the PSHSA provides a brief overview of doctors’ responsibilities as employers, supervisors and workers. With respect to physicians as workers:

Physicians must consider their health and safety responsibilities as workers— where they are working in a facility as employees or independent contractors (e.g. providing services in a hospital, nursing home, private clinic, etc.). Physicians with staff privileges in a health care facility must comply with the facility’s workplace health and safety measures and procedures. If a physician is a worker as defined by the OHSA, he or she has duties including to:

- *Comply with the OHSA and its regulations and their workplace’s health and safety policies and procedures.*
- *Work and act in a way that won’t hurt themselves or anyone else.*
- *Report any hazards or injuries to their supervisor/ employer.*
- *Wear and use the protective equipment required by their employer.*

Do Physicians enjoy all the rights contemplated in the *OHSA*?

As noted in our previous paper, certain sectors of workers are not entitled to all of the general rules regarding the right to refuse unsafe work. Those who work in hospitals are included in the group of workers who have limited rights to refuse unsafe work. For more information on this topic, please refer to our previous paper or contact us to discuss your specific concern.

What about protection from ‘reprisals’ under Section 50 of the *OHSA*?

One of the strongest protections for workers under the *OHSA* is the protection from reprisals. Workers cannot be punished (disciplined, terminated, penalized or terminated) for obeying the *OHSA* and its *Regulations*, or seeking the enforcement of them.¹

There is a case (noted in our previous paper) where a physician had his hospital privileges revoked and brought an application under section 50 (*Talwar v Grand River Hospital*). Unfortunately, Dr.

¹ Or for giving evidence in a proceeding in respect to the enforcement of the Act or its regulations or in a request under the *Coroners Act*.

Talwar's case was dismissed by the Ontario Labour Relations Board ("OLRB") because of technical issues with his pleadings. However, the dismissal was without prejudice so that Dr. Talwar could bring his case properly before the OLRB. It appears that the OLRB will accept jurisdiction of physician's claims in these types of situations, although jurisdiction was not specifically considered in the limited decision.

However, there are other cases which have found workers with complicated "employment/employer" situations being protected from reprisals under the *OHSA*. For example, in ***Revenco (1991) Inc. v IBEW, Local 586*** (*CarswellOnt 2009 10814*) the grievor was fired (reprisal) for following, and seeking compliance of the *OHSA*. The grievor was an electrician who was referred by the union to employment with "Morrow Electric" for a four-week job at a water park. Although he was to report to Morrow Electric, he met with and received instructions from a Revenco (1991) Inc. employee. He never met anyone from Morrow except other members of his bargaining unit, and then received a paycheque and Record of Employment ("ROE") after he was terminated and removed from the job. The Revenco employee who gave the electrician instructions often instructed him to do things that were unsafe or improper. The electrician protested in several instances, but ultimately did as he was instructed. After the electrician was elected as the health and safety representative, he brought several concerns to the attention of Revenco. He was fired promptly thereafter.

In considering who was the "employer" in the situation, the court stated:

I am satisfied Revenco was, at the very least, a person acting on behalf of Morrow Electric, if not the true employer of Mr. Cayer. It was in control of the employment relationship and the working relationship.... Morrow served as little more than a paymaster. In the context of the definition of employer in the Occupational Health and Safety Act, Section 1, Revenco was either an employer or certainly a person acting on behalf of an employer, and indeed in control of Morrow's employment relationship with Mr. Cayer.

The court found that Revenco was the employer in the context of the *OHSA*, even if Revenco may not have been the employer issuing the ROE and the paycheques. With respect to the reprisal issue, the court concluded that the electrician was acting in compliance of the *OHSA* and sought to ensure that Revenco did the same. The court found that this was the reason for his dismissal, and, therefore, concluded that his discharge was a violation of s.50(1)(a) of the *OHSA* as this was considered a reprisal.

Conclusion

The courts appear to apply the *OHSA* reprisal protections broadly to protect independent contractor work arrangements as well as typical employer/employee relationships. Even if your place of work may not have a typical employee/employer relationship, that does not necessarily mean that you are not entitled to a safe and healthy workplace, or that your employer or workplace does not have to follow the *OHSA*. Nor does it mean that you cannot speak up about unsafe work practices or policies that breach the *OHSA*.