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Enforcing Workplace Health & Safety Rights

One of the most important rights that workers have is the right to a safe and healthy workplace. This advisory provides an overview of this right and how to best uphold it.

PART ONE:

THE FOUNDATION

Occupational Health & Safety Acts (OHSA)

Health and safety rights are enshrined in federal and provincial Occupational Health and Safety Acts (OHSA). The basic OHSA rights are:

The **Right to Know** about any potential hazards in the workplace. This means the right to be trained and to have information on machinery, equipment, working conditions, processes and hazardous substances. This right is strengthened by WHMIS, the Workplace Hazardous Materials Information System, Canada's national hazard communication system.

The **Right to Participate** in the process of identifying and resolving workplace hazards through worker membership on Joint Health and Safety Committees.

The **Right to Refuse Work** that a worker believes is dangerous to either their own health and safety or that of another worker.

OHSAs also contain a “**general duty**” clause that establishes the employer’s

broad obligation to provide a safe and healthy workplace.

Each OHSA is augmented by a series of regulations. These regulations provide direction on specific health and safety issues including, for example the provision of first aid in the workplace and particular hazards (such as asbestos or working alone). Every association should have on hand a copy of the relevant OHSA and its regulations.

Joint Health & Safety Committees (JHSC)

When concerns arise over workplace hazards, Joint Health and Safety Committees (JHSC) should be the first means to address them. A JHSC is an advisory group of worker and employer representatives established under OHSA. At least half the members on the committee must be selected by workers or their trade union. Recommendations arising from JHSCs are legally binding upon the employer to respond to. JHSC duties include:

- developing and implementing workplace health and safety programs;
- dealing with worker health and safety complaints and suggestions;
- keeping records of workplace injuries and hazards;
- delivering health and safety training programs;
- participating in health and safety investigations; and



- participating in resolving workplace refusals and work stoppages.

Strong worker representation on JHSCs is a prerequisite to a healthier and safer workplace. With such representation, the committee can work to ensure that hazards are promptly identified and, by issuing binding recommendations to the employer, are corrected. Unfortunately, employers sometimes view the JHSC as a vehicle to increase productivity rather than protect workers, or they may simply lack a commitment to health and safety. In these situations the association must work to strengthen the committee by ensuring that the worker representatives it appoints are trained and knowledgeable (it is the employer's responsibility to provide such training). Committee functioning can also be improved if the worker representatives enjoy a close reporting mechanism with the association, for example by sitting on the union's executive board. Associations may also have to look for mechanisms outside the JHSC to enforce health and safety rights, including the collective agreement grievance provisions and the ministry of labour workplace inspection process.

Companion Legislation

An array of "companion legislation" works to broaden core OHS health and safety rights to capture issues such as harassment and the needs of injured or sick workers. This legislation includes:

- human rights acts which address discrimination and the duty to accommodate;
- workers compensation acts that oversee the return of injured workers to the workplace;
- the Employment Insurance Act for maternity and sick-leave provisions; and
- Employment Standards Acts

These statutes often create bodies (boards, commissions, tribunals) empowered to investigate and adjudicate violations of the rules they create.

A particularly significant piece of companion legislation is the *Criminal Code of Canada*. Section 217.1 of the Code provides:

"217.1 Every one who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task."

Much of this duty falls on the shoulders of the employer, but the section also creates a legal responsibility for associations to educate their members about health and safety rights in the workplace.

The Collective Agreement

In addition to relying on legislative support for health and safety, workers should augment their rights by negotiating strong and detailed health and safety provisions in their collective agreements. Good language incorporates the relevant OHS into the contract, reiterates the right to refuse unsafe work, sets the rules to establish and maintain a joint health and safety committee, and lists the particular health and safety supplies, facilities, procedures, equipment, etc. that the employer must provide.

Collective agreements also provide another protective mechanism. Grievance arbitrators have the power to interpret and apply employment-related statutes, including health and safety legislation and human rights acts. This means an arbitrator has the ability to adjudicate violations of specific collective agreement language AND the power to enforce OHSAs and other companion legislation - a powerful set of rights for workers.

PART TWO – ENFORCEMENT

When the employer does not follow the health and safety recommendations of the JHSC, the association has five overlapping options:

- 1) Ensure their members are aware of their right to initiate a work refusal;
- 2) request a ministry of labour inspection;
- 3) file a grievance alleging a violation of the collective agreement's health and safety article;
- 4) file a grievance alleging a violation of members' rights under OSHA or companion legislation; and/or
- 5) contact the human rights commission or other relevant authority established by companion legislation and engage their complaint/enforcement mechanism.

Work Refusal – A worker can refuse work she or he believes might endanger herself or himself, or endanger a co-worker. This right is an individual one enshrined in legislation (OHSA) and exists independently of the collective agreement (although it should always be incorporated by reference and language into the contract).

OHSAs set out work refusal protocols. Typically, if a worker refuses work, they immediately report the refusal and the related safety concern to the employer. At this point an investigation is carried out by designated worker/employer JHSC representatives to determine if a stoppage is justified. If a stoppage is deemed necessary, the Ministry of Labour is contacted to make a site inspection. If the JHSC representatives conclude a stoppage is not justified the worker returns to the job, although if the worker still believes a hazard exists the ministry is called in. Recent exercises of this right in academic workplaces include refusals to

work in areas undergoing asbestos removal.

It is illegal for an employer to discipline a worker for exercising their rights under legislation, including the right to refuse work that she or he believes is unsafe. If a member has been punished for exercising health and safety rights, the association can use the collective agreement grievance procedure to seek redress. In non-unionized settings a worker may be able to make a complaint to the relevant labour relations board (for example see Section 50, Ontario OHSA - Unlawful Reprisal Applications).

Ministry Inspection – The association can contact the ministry at any time and request that an inspector visit the worksite. Inspectors have the power to investigate potentially hazardous situations and order compliance with legislation and regulations. The inspection involves a thorough examination of the physical condition of the workplace by the inspector, who is usually accompanied by both employer and association representatives.

Inspectors can also initiate prosecutions. OHSAs typically contain language stating that any person who fails to comply with a provision of the act or its regulations or an order or requirement of the ministry is guilty of an offence and on conviction is liable to a fine or imprisonment. Charges under OHSA are adjudicated by the civil courts.

While ministry inspections and prosecutions can be an important tool in ensuring a safe workplace, limited government resources mean that the inspection, reporting and prosecution process may suffer from delays and obstruction by recalcitrant employers. A strong association with in-house expertise on health and safety is best positioned to ensure that ministry inspections reach a satisfactory outcome. Associations should have ministry contact information on hand.

Health & Safety Grievances – Violations of the Collective Agreement

The primary means for workers to enforce their workplace rights is through the collective agreement grievance arbitration process. Enforcing a health and safety clause is no different – when it is violated, a grievance is often in order.

Addressing health and safety violations requires that the association have a grievance committee and grievance officers who are well-versed with the language of the collective agreement and have in place a rigorous process to gather and assess facts and make fair and reasoned decisions on pursuing the case. In this sense, health and safety grievances are the same as any other grievance filed in response to a contractual breach by the employer.

A number of factors, however, distinguish the health and safety grievance. First, health and safety grievances should be coordinated with the actions of the JHSC and may arise only after the committee's process has been unable to resolve the problem. Second, health and safety is a specialized area of labour relations; associations may need a degree of training to comfortably deal with it. Third, in addition to collective agreement rights, rights enshrined in legislation such as OHSAs are often implicated in health and safety violations and must be brought into the grievance process.

Violations of Employment-related Legislation

Grievance arbitrators, by statute and by court decision, have broad powers to interpret and apply human rights and other

employment-related legislation. This means that in framing a health and safety grievance the association can allege:

- a violation of broad collective agreement rights (such as the “just cause” article in the event of discipline for refusing to perform unsafe work);
- a violation of specific health and safety language in the collective agreement;
- a violation of rights contained in employment-related legislation that has been incorporated by reference and language into the collective agreement; and
- a violation of rights contained in an employment-related legislation, regardless of whether or not they are mentioned in the collective agreement.

At the broadest level a grievance can simply invoke the OHSAs “general duty clause” which establishes the employer's obligations to provide a safe and healthy workplace. If the employer violates specific OHSAs rights, for example by preventing the proper functioning of the JHSC or by retaliating against a member for insisting upon workplace compliance with the act, then the grievance can cite those legislative sections.

Regulations issued under OHSAs provide even greater specificity, establishing rules on matters as diverse as noise levels, scaffolding, ventilation requirements and the provision of first aid equipment. They may also set out detailed standards on a range of hazardous substances such as asbestos, benzene and lead. When a potential health and safety grievance arises it is prudent to investigate whether the matter is dealt with in an OHSAs regulation and if it is, include reference to the regulation in the grievance.

Additional statutory support for workplace health and safety can be found in tobacco

control acts (which limit exposure to second-hand smoke in public places), human rights acts (which address harassment and violence in the workplace) and workers compensation legislation (assistance for injured or sick workers). If sections of these instruments provide support for a grievance then they should be referenced as well.

To take advantage of all these options, the association should become familiar with a wide range of legislative provisions and be able to make creative use of them. While frivolous claims are to be avoided, in selecting the issues to raise in a grievance it is better to err on the side of inclusiveness. After a grievance has been filed it is harder to add issues than to remove them.

Investigation/Adjudication under Companion Legislation – Some hazards, such as violence in the workplace, fall under the jurisdiction of more than one statute. If, for example, an individual is targeted and harassed or assaulted because of their gender, race, ethnic origin, creed, sexual orientation or other prohibited grounds of discrimination, the association can assist the targeted worker in seeking redress through a human rights commission. Similarly, a workers compensation board has the power to address individual health and safety issues associated with injured workers and return to work protocols.

As with ministry inspections, engaging the complaint/appeal processes established by companion legislation is an important option for associations to consider. Although these mechanisms can be onerous and time-consuming, in select circumstances they may provide a supplemental route to a safer and healthier workplace.

Education & Training

Workplace health and safety is an issue of critical importance to academic

staff. It is also a matter of some complexity. CAUT's education program offers three workshops to assist associations in building their core of active and knowledgeable members. They are offered without charge at the association's location.

The first course is the **Health and Safety Training Workshop** which presents the foundational knowledge necessary for academic staff to ensure a safe workplace. Through presentations, video, group work and role play participants learn methods of identifying workplace hazards and the operational basics of Joint Health and Safety Committees.

The second is **Health and Safety Training, Level 2 Workshop**. This one-day offering enhances understanding and application of occupational health and safety and related legislation, and teaches association members how to write and file a health and safety grievance.

The third course is the **Grievance Handling Workshop**. This workshop does not specifically address health and safety issues but rather provides a day and a half general overview of the grievance arbitration process. Through a series of exercises participants learn how to distinguish a complaint from a grievance, and proceed with a grievance through the step process (including initial fact-finding, drafting the grievance, and settlement discussions).

Information about CAUT educational program is available at:
<http://www.caut.ca/pages.asp?page=427>

Conclusion – One Struggle, Many Fronts

The right to a healthy and safe workplace is one of the most important protections that workers enjoy. While occupational health and safety legislation and a range of

other statutes and regulations provide a strong foundation for these rights, they only take on real meaning if the association is prepared to enforce them.

Enforcement requires a basic knowledge of the health and safety landscape and an ability to select the best point to move forward. There needs to be an active Joint Health and Safety Committee with strong worker representation. If the JHSC encounters obstacles then the association must turn to alternate mechanisms to

enforce health and safety rights, including the ministry of labour inspection process and the collective agreement grievance clause. There also needs to be a strong academic staff association committed to protecting its member health and safety. Every workplace is different and each potential hazard will present a different set of facts, but an association with a basic grounding in health and safety law and practice can protect the well-being of its members.■

RESOURCES

For assistance and advice on health and safety issues, including arranging delivery of health and safety workshops, please contact CAUT's Health and Safety Officer Laura Lozanski at lozanski@caut.ca

For information about CAUT's Grievance Handling Workshop, contact Paul Jones at jones@caut.ca

A more detailed overview of workplace health and safety is contained in the: CAUT Health and Safety Bargaining Advisory (password protected)

The Criminal Code of Canada's workplace health and safety section is explained in the: CAUT Bill C-45 Advisory

Health and Safety Model Clause: <http://www.caut.ca/pages.asp?page=425>

CAUT Health and Safety Webpage: <http://www.caut.ca/pages.asp?page=425>

OHSAs and their regulations, as well as companion legislation can be found on Provincial Ministry of Labour Websites

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