

FTR Now

The Ministry of Labour and Ebola Preparedness

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In light of recent concerns regarding the outbreak of Ebola abroad, the Ontario Ministry of Labour (“MOL”) has been conducting a series of Ebola preparedness investigations targeting hospitals and paramedic services. In this *FTR Now*, we outline best practices for handling an investigation by the MOL and consider the right of employees – including health care workers – to refuse to work.

BEST PRACTICES WHEN THE MOL COMES TO INVESTIGATE

Powers of the MOL Inspector. The *Occupational Health and Safety Act* (“OHS”) gives MOL Inspectors broad inspection powers. Among other things, MOL Inspectors have the right to enter any workplace (except a dwelling) at any time, without a warrant or advance notice, to conduct an inspection and verify compliance with the *OHS*, to conduct tests, and to require employers to produce documents or records for inspection.

Designating an Investigation Coordinator at Your Workplace. Before an MOL Inspector visits your workplace, we recommend designating an Investigation Coordinator. This individual will be the primary contact between the organization and the MOL and will be responsible for assisting the MOL Inspector. The Investigation Coordinator will respond to all requests for information, including documents, materials and statements, and will be responsible for coordinating with other members of management to gather this information.

Front line staff and management should be made aware of who the Investigation Coordinator is as soon as possible. The notification should include a direction that staff is to notify the Investigation Coordinator as soon as the Inspector arrives.

Legal Obligation to Co-operate. When the Inspector arrives, front line staff may ask the Inspector if he or she is willing to wait for the arrival of the Coordinator. However, the Inspector is entitled to refuse to wait and to enter the workplace immediately.

The *OHS* imposes a legal obligation on every person to furnish all necessary assistance within his or her power to facilitate a MOL Inspector’s entry, search, inspection, investigation, examination, testing or inquiry. It also makes it an offence for any person to obstruct or interfere with any aspect of an investigation or the exercise of the MOL Inspector’s duties or powers under the *OHS*.

However, cooperation does not mean self-incrimination. Requests by MOL Inspectors for information, documentation or statements should be met with a stated intention to comply and with a request for time to coordinate the provision of the requested item. This will allow management to organize this disclosure through the Investigation Coordinator, and possibly legal counsel, to ensure that the organization's legal rights are protected. If the request for time is denied by the MOL Inspector, the requested item should be provided and legal counsel consulted afterwards.

What Happens During the Inspection. The Investigation Coordinator should ask for the opportunity to follow the Inspector during the inspection so that he or she can be available to provide assistance and required information. The Inspector may decline this offer and choose instead to inspect the workplace without the Coordinator. If the Coordinator is allowed to follow the Inspector, the Coordinator should take detailed notes of all observations, persons interviewed, comments made, tests performed and the results of such tests, as well as any theories, conclusions, requests or comments made by the Inspector. Where possible and appropriate, the Investigation Coordinator should identify and correct any inaccurate information that has been provided to the Inspector.

The MOL Inspector will likely conduct the inspection without a warrant and may require the employer to produce records, reports or other things for inspection and remove a copy of the same. In the unlikely event that a search warrant is provided, the Investigation Coordinator should ask for the opportunity to consult with legal counsel before it is executed; however, the Inspector may refuse to grant this request and may execute the warrant immediately. While a warrant is being executed, management should take careful notes of the date and time of the search, locations searched and items seized. Where possible, management should ask to copy or photograph seized materials before they are taken.

In cases where the Inspector does not have a warrant, the Investigation Coordinator should keep detailed notes of all items requested and given to the Inspector. The best practice is to keep a log and copies of all documents and materials provided. When providing materials to the Inspector, the Investigation Coordinator should communicate, ideally by covering letter, that the Organization's expectation is that the items will not be used in a prosecution against the organization or any individual.

Interviewing Employees. If the Inspector wants to interview individual employees, the Investigation Coordinator should request the opportunity to be present and to obtain a copy of the statement. However, employers have no legal right to attend such an interview or to receive a copy of any statement, and the MOL Inspector may decline any such request. If permitted to attend, the Investigation Coordinator should take detailed notes of the interview. If not permitted to attend, the Investigation Coordinator should be prepared to interview witnesses themselves immediately following the Inspector's interview. During this "de-briefing," the Investigation Coordinator should ask for the details of the questions and answers provided during the interview with the Inspector. Detailed notes of this de-briefing should be kept.

Interviewing Management. If the Inspector asks to interview members of management, the Investigation Coordinator may wish to inquire whether the Inspector may be considering filing charges against those individuals, and management witnesses may wish to consult with legal counsel before providing any statement.

Is Corrective Action Required? The Investigation Coordinator should carefully review any orders issued by the Inspector and immediate corrective action should be taken. These orders should also be forwarded to legal counsel for review in order to determine if there are any grounds for appeal. The *OHSA* only provides a period of 30 days to appeal orders, therefore orders should be forwarded to legal counsel immediately.

DO EMPLOYEES HAVE THE RIGHT TO REFUSE TO WORK?

Generally speaking, under the *OHSA* employees have the right to refuse work if a condition of the workplace “is likely to endanger” their health or safety. Employees encountering the Ebola virus in the workplace (or who fear that they may encounter it) may seek to exercise their right to refuse work in this regard.

The *OHSA* outlines a specific work refusal procedure which must be followed. Employers cannot threaten to discipline an employee exercising a work refusal. When faced with a work refusal, the employer should immediately investigate the refusal in the presence of one of (i) a worker member of the Joint Health and Safety Committee or the Health and Safety Representative (depending on the size of the organization); or (ii) any person selected by a union that represents the worker, or if there is no union, by the worker him- or herself. The employee must remain in a safe place nearby and available to the employer or supervisor for the investigation. If following the investigation and any steps taken to remedy the refusal, the employee has reasonable grounds to believe there is still a danger, he or she may continue to refuse work. In the event of a continuing work refusal, the employer must notify a MOL Inspector who will investigate and issue a written decision. Failure to comply with the *OHSA* may result in fines.

However, with respect to hospital workers and paramedics, the *OHSA* contains an exemption in cases where the danger is inherent in the workplace or if the health and safety of another individual could be at risk. Arguably, health care workers in both the hospital and EMS sectors encounter contagious diseases every day, making the Ebola virus a risk that is a “normal condition of the worker’s employment.” However, this argument has not been tested at arbitration or by the courts, and as a result, management should take a reasoned and cautious approach, and may wish to consult with legal counsel, when faced with a work refusal.

If you have any questions or concerns, or require any assistance, please do not hesitate to contact [Stephanie N. Jeronimo](#) at 416.864.7350, Shane D. Todd at 416.864.7026, [John W. Saunders](#) at 416.864.7247, [Sarah A. Eves](#) at 416.864.7254, [Robert W. Little](#) at 416.864.7332, [Mark H. Mason](#) at 416.864.7280 or your [regular Hicks Morley lawyer](#).

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