

Guidance for CUPE Flight Attendants on the Right to Refuse Dangerous Work

The right to refuse dangerous work is one of your three fundamental rights as a federally regulated employee and legally it must be respected by employers. It is often your last line of defense between choosing between avoiding danger and staying healthy and safe (including exposure to a hazard or danger that could cause injury and illness) and keeping your job without fear of reprisal.

This document has been developed to provide CUPE members working in the airline industry information about their right to refuse dangerous work. Relevant sections of the *Canada Labour Code* have been placed in text boxes, and explanatory text has been added to assist you in interpreting/understanding these sections.

In this guide you will find answers to the following questions:

Question 1: What is the difference between a refusal and a complaint?

Question 2: When can I refuse dangerous work?

Question 3: Can I refuse for someone else, or can we do a 'group' refusal?

Question 4: What is "danger"?

Question 5: Who do I Report a work refusal to?

Question 6: What are the steps for a work refusal?

Question 7: What if I am in flight?

Question 8: Can I be punished for refusing dangerous work?

Question 9: What if the company tells me I can't refuse the work?

Question 10: What are some common experiences in a work refusal process?

Question 11: Will I lose my pay for refusing to perform dangerous work?

Question 12: Can the company reassign me to alternate flights?

Question 13: Can I be forced back to work after the employer or committee has investigated the work refusal?

Question 14: Can I be required to work after the government investigation?

Question 15: Is there any time when I can't refuse dangerous work?

Question 16: What is a "normal condition of employment"?

Question 17: What is "in operation"?

Question 18: Can the company ask someone else to do the work that I am refusing?

Question 19: What if someone else is refusing dangerous work and I don't agree with the refusal?

Question 1: What is the difference between a refusal and a complaint?

127.1 (1) An employee who believes on reasonable grounds that there has been a contravention of this Part or that there is likely to be an accident or injury to health arising out of, linked with or occurring in the course of employment shall, before exercising any other recourse available under this Part, except the rights conferred by sections 128, 129 and 132, make a complaint to the employee's supervisor.

If you have a concern about a potential danger or contravention to Part II of the *Canada Labour Code (Code)*, report it to your supervisor immediately. A complaint may be raised verbally. This might be the case where there is a potential danger that management can quickly and easily fix on-the-spot. However, you can also make a written complaint (*formally known as a health and safety complaint in the law*), which provides your employer time to address the issue with you as long as this is done as soon as possible.

It is important to understand that if you are being asked to perform the work for which you've made a complaint, after you have made the complaint and you still feel that you may be injured or exposed to something that can cause illness, then you can refuse to perform the dangerous work – that is, you are no longer filing a complaint, but moving to the next step which is a refusal to perform dangerous work. (see question 2).

Question 2: When can I refuse dangerous work?

"... an employee may refuse to use or operate a machine or thing, to work in a place or to perform an activity, if the employee while at work has reasonable cause to believe that

- (a) the use or operation of the machine or thing constitutes a danger to the employee or to another employee;*
- (b) a condition exists in the place that constitutes a danger to the employee; or*
- (c) the performance of the activity constitutes a danger to the employee or to another employee."* (Code Part II 128. (1))

The only requirement for a worker to refuse dangerous work is that, with good faith, the employee believes there is danger. *The employee is not expected or required to prove the danger* - that is the purpose of the investigations outlined in the work refusal process. Remember, there is no "work now, grieve later" rule when it comes to potential danger in the workplace. The right to refuse dangerous work exists solely to give workers the ability to stop work when they have a belief that they will be placed in or exposed to danger if they continue working.

A valid work refusal requires you to identify that you cannot perform work because of concern **or fear you or others will be hurt**. If you *only* make a complaint (whether verbal or in writing) about a situation, some employers may interpret this as only a complaint. You have not actually refused to perform unsafe work.

A health and safety complaint (whether verbal or in writing) may escalate to a work refusal. However, once you have stated that you are not performing a task because you feel it is dangerous to do so (see question 5) the process cannot move back to the complaint stage. It is now a work refusal until you are satisfied the situation has been made safe or a government official delegated by the Minister has ruled on the refusal.

If you feel like the supervisor you are reporting to is acting as if you are only making a complaint rather than moving to a work refusal, be clear you are in fact moving to a work refusal because of a continued concern of danger. Whether you are complaining or refusing dangerous work, the employer must attempt to quickly resolve the potentially dangerous work situation as soon as possible. The goal and responsibility of the employer remains the same: remove the danger.

Question 3: Can I refuse for someone else, or can we do a 'group' refusal?

Though you have a union, the right to refuse dangerous work is an individual one. The pressure that may be put on you to not refuse work will also often be individual. You need to stay firm and remain clear in their intentions. If you believe that performing the required work will endanger yourself or others, you must not let the employer or anyone pressure or bully you into performing the work.

Although the right to refuse dangerous work is individual, multiple workers can refuse to do the same work, but they must do so individually. If more than one employee has made a report of a similar nature, those employees may designate one employee from among themselves to represent them during the Workplace Health and Safety Committee's investigation, but this is not required and cannot be forced.

Representatives from the Workplace Health and Safety Committee at your workplace will become involved after the initial investigation by the employer. But if the employer isn't recognizing your work refusal or says you will be disciplined or fired, you should document this and call your Union representatives right away.

Question 4: What is a danger?

Danger means any hazard, condition or activity that could reasonably be expected to be an imminent or serious threat to the life or health of a person exposed to it before the hazard or condition can be corrected or the activity altered. (Code Part II 122. (1))

The *Code* does not require the danger to be both an imminent and a serious threat; one is enough.

The definition of danger includes "imminent threat", and not actual harm. The right to refuse dangerous work was created to prevent harm to workers.

The definition of danger also includes a provision for a "serious threat" to your health or the health of another employee. This clause protects you from doing work that would lead to an

occupational disease, or when the threat is not necessarily immediate but nevertheless entails significant potential consequences.

Question 5: Who do I Report a refusal to?

An employee who refuses to use or operate a machine or thing, work in a place or perform an activity... shall report the circumstances of the matter to the employer without delay. (Code Part II 128. (6))

In the airline industry, the process to start a dangerous work refusal frequently begins by contacting crew scheduling. As this is not always the case, CUPE recommends consulting your company procedures to know the exact process to follow.

Whoever you contact first, remember there are no specific words that must be said to initiate a dangerous work refusal. It is only important to clearly express two concepts: a) you are not working because (b) you believe that you or someone else could suffer harm.

Once you state you are initiating a dangerous work refusal, you *should* be transferred to a management representative who knows how to properly handle the work refusal. However, this is often where the process starts to break down, as the initial contacts have either not been taught how to respond to a dangerous work refusal or simply do not understand or agree that you are raising a legitimate work refusal.

When starting a work refusal, you must be firm and insist that you are put in contact with an employer representative (for example, a manager) who is trained to handle dangerous work refusals. **Regardless of a company's policies, no employer has the right to dismiss a dangerous work refusal unilaterally or make a final and arbitrary decision that danger doesn't exist.**

Question 6: What are the steps for a work refusal for danger?

The right to refuse dangerous work can seem incredibly confusing. It will help if you try to think of it as a THREE STEP PROCESS:

1. *THE COMPANY INVESTIGATES and if there is no satisfactory resolution*
 2. *THE COMMITTEE INVESTIGATES and if there is no satisfactory resolution*
 3. *THE GOVERNMENT INVESTIGATES and renders a decision (that may be appealed)*
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Step 1. THE COMPANY INVESTIGATES:

- You feel that there is an imminent or serious threat to your life or health (or to that of another person).
- You are physically present at the workplace, and notify the employer of the danger (see Question 5).

- The company will investigate the danger ***in your presence (note that this could be over the phone). This means you have a right to witness discussions with any experts etc...***
- If the company agrees that there is a danger, measures will be taken immediately to protect you, and potentially other employees and remove the danger.
- The company may also find that there is no danger.
- The company will generate a written report with the results of the investigation.

WHETHER THE COMPANY AGREES OR NOT, YOU CHOOSE WHETHER YOU NOW FEEL SAFE TO PROCEED WITH THE WORK.

If you do feel safe, then the issue is resolved, and the health and safety committee will be notified of your work refusal and provided with a copy of the written report with the actions taken to resolve it. You go back to work.

If you do not feel safe not, you inform the employer of your continued refusal and go to step 2.

Step 2. THE COMMITTEE INVESTIGATES

- The workplace health and safety committee comprised of management and Union representatives will receive the report from step 1 and investigate again ***in your presence***.
- After investigating, the committee will write a report and send it to the company including any recommendations which may help resolve the work refusal. The company may or may not accept the committee's assessment and/or implement the recommendations.
- The company can also provide extra information at that point to the committee, which may or may not elect to revise its report and/or recommendations.
- If the company agrees that there is a danger, it will take measures to immediately protect you, or the other employees and remove the danger. It could also find danger but conclude that it is a normal condition of employment ***or*** that the refusal would put the safety of another person(s) in direct danger.
- The company may also find that there is no danger.

AT THIS POINT, YOU ONCE AGAIN CHOOSE WHETHER YOU NOW FEEL IT IS SAFE TO PROCEED WITH WORK. If you do, the refusal is resolved, the health and safety committee will be notified of the refusal and actions taken to resolve it. You will then go back to work.

If not, you go to step 3.

Step 3. THE GOVERNMENT INVESTIGATES

The company will contact the Minister of Labour (or Transport Canada (TC) on the plane) to investigate the work refusal and notify the joint workplace committee. The Minister or their designate will be provided with copies of the written reports from steps 1 and 2.

- The Minister or designate will investigate ***in the presence of you, the employer and the CUPE workplace health and safety committee member*** (unless one of them decides not to be present).
- As part of this investigation, the Minister may refer to previous decisions rendered in dangerous work refusals concerning the **same issue**, at the **same company**.
- ***With the Minister or designated official's permission***, the company may replace you with another person – ***and only if that person is made aware of the refusal and the reasons for***

your refusal. The other person may also choose to exercise their right to refuse dangerous work.

- The Minister or designated will conduct an investigation and decide whether a danger exists or not.
 - If the official agrees a danger exists, the employer will be directed to take measures to immediately protect employees and you may continue to refuse work until these measures are put in place.
 - If the official does not agree a danger exists, you must return to work. You may file an appeal within **10 calendar days**.

Your union has the resources to assist with appeal and can provide additional guidance about whether an appeal should be filed.

Question 7: What if I am in flight?

128(3) If an employee on a ship or an aircraft that is in operation has reasonable cause to believe that

- (a) the use or operation of a machine or thing on the ship or aircraft constitutes a danger to the employee or to another employee,*
- (b) a condition exists in a place on the ship or aircraft that constitutes a danger to the employee, or*
- (c) the performance of an activity on the ship or aircraft by the employee constitutes a danger to the employee or to another employee,*

the employee shall immediately notify the person in charge of the ship or aircraft of the circumstances of the danger and the person in charge shall, as soon as is practicable after having been so notified, having regard to the safe operation of the ship or aircraft, decide whether the employee may discontinue the use or operation of the machine or thing or cease working in that place or performing that activity and shall inform the employee accordingly.

If you are actually in flight when you feel you are in an unsafe work situation, the verbal or written procedure is very different. If you believe a work-related danger exists, you must bring it to the attention of the pilot in command (generally the captain) who will then decide what to do after taking into account the overall safety of the aircraft.

Regardless of what the pilot decides, once the plane lands, if you feel that there is still a danger then the process starts at the beginning with the employer. A detailed discussion on “in operation” is found in question 17.

Question 8: Can I be punished for refusing dangerous work?

No employer shall dismiss, suspend, lay off or demote an employee, impose a financial or other penalty on an employee, or refuse to pay an employee remuneration in respect of any period that the employee would, but for the exercise of the employee's rights under this Part, have worked, or take any disciplinary action against or threaten to take any such action against an employee because the employee ... has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part.. (Code Part II 147)

The simple answer is no. If you are acting in good faith and have a true belief that danger exists, you are protected by the *Code* from discipline. This also includes the **threat** of discipline. If during the work refusal you feel that you are being threatened in any way, please take notes about the conversation and immediately inform your Union representative.

Example of a threat of discipline: “*you could lose your job if you refuse to work*”.

Example of something that is not a threat of discipline: “*Please don't raise your voice*”.

The exception to this is when a final decision of no-danger has been issued by a government representative designated by the Minister of Labour (See Question11). You cannot legally continue your work refusal without potentially facing disciplinary consequences.

Question 9: What if the company tells me I can't refuse the work?

Many members have reported that they feel tremendously pressured not to exercise their right to refuse dangerous work. CUPE members have received comments such as the following for making verbal reports of dangerous work situations:

- That is not a valid reason, you can't refuse to do the work.
- We'll mark you down as a 'no-show'.
- That is not a hazard or safety issue or danger, you can't refuse to do the work.
- There's nothing else we can do. Are you still going to refuse to work?
- We've got to get these people home, you can't refuse to do the work.
- You have to understand we have an operation to run, are you still refusing to do the work?
- The other flight attendants don't have a problem, why do you?
- This is more of a health and safety complaint that we can discuss after you get back. File a report and we'll work on it.
- Get back to work.
- That's just part of your job, or a normal condition of employment, you can't refuse to do the work.

(Normal condition of employment is discussed later in this document.)

FOR CLARITY, A DANGEROUS WORK REFUSAL DUE TO A SAFETY CONCERN CANNOT BE DENIED OR STOPPED BY THE AIRLINE, NOR CAN THE AIRLINE MAKE A FINAL DECISION OF NO-DANGER. ANY ATTEMPT TO DO SO SHOULD BE IMMEDIATELY DOCUMENTED AND REPORTED TO THE UNION.

ONLY a health and safety inspector working through the government divisions of the Employment Standards Development Canada (ESDC) labour program or Transport Canada through the power granted by the Minister of Labour can end a dangerous work refusal when you continue to believe that work will put you or others in danger. This is done by means of a no-danger decision (See Question11).

Question 10: What are some common experiences in a work refusal process?

Everyone must know that making a work refusal complaint and then actually refusing to work is a serious undertaking, and that it takes time. If you are exercising your right, you can expect to be asked many questions, many times over, and the process can last many hours. A properly handled work refusal may involve different steps, with different people and may involve the inclusion of experts. Each person, at each step, needs to understand your concerns in order to treat the situation with the seriousness it deserves.

People who have initiated a work refusal may find this level of repetitiveness annoying or frustrating, but it is normal within a work refusal process.

It is also normal to be asked at various points if one now feels safe, or for a reminder of what the core concerns or fears are. It is also normal, and sometimes beneficial, to review the work refusal process at various points during the investigation.

If you are constantly being verbally attacked or bullied to end the refusal, rather than simply being asked questions, that can be considered harassment. The repetitive nature of the process should not be perceived itself, as harassment. Also remember that during a work refusal, you remain on duty and must follow the procedures of your workplace.

It falls upon the employer at step 1 and the committee at step 2 to investigate and come up with solutions. It is acceptable and even beneficial for you to be asked what you feel would resolve the work refusal. ***But you should not be made to feel that it is your sole responsibility to come up with solutions.***

Question 11: Will I lose my pay for refusing to perform dangerous work?

128.1 (1) Unless otherwise provided in a collective agreement or other agreement, employees who are affected by a stoppage of work arising from the application of section 127.1, 128 or 129 or subsection 145(2) are deemed, for the purpose of calculating wages and benefits, to be at work during the stoppage until work resumes or until the end of the scheduled work period or shift, whichever period is shorter.

Employers sometimes use the threat of lost earnings when you begin to exercise your right to refuse dangerous work. The *Code* is clear, **you are pay protected** for the greater of your flight credits or any other relevant contractual language covering compensation in the event of a dangerous work refusal. However, the employer may assign you to alternate duties, once your presence is no longer required (See Question 14).

Question 12: Can the company reassign me to alternate flights?

128.1 (3) An employer may assign reasonable alternative work to employees who are deemed under subsection (1) or (2) to be at work.

and

129 (5) If the employee has exercised their right under subsection (1.3), the employer may, during the investigation and until the Minister has issued a decision, require that the employee concerned remain at a safe location near the place in respect of which the investigation is being made or assign the employee reasonable alternative work...

If you begin a dangerous work refusal you may be reassigned to alternate flights. However, the Code is clear that you have the right to participate in the investigation, and the right to be involved in every step of the refusal process. Often times, for this to happen, you must be kept near the scene, in a safe place. If the dangerous work refusal is resolved to your satisfaction or a government official delegated by the Minister of Labour ends the refusal, it is possible (as long as the collective agreement isn't being violated) that you could be reassigned to a different flight.

Question 13: Can I be forced back to work after the employer or workplace health and safety committee investigations?

If the matter is not resolved [by the initial investigation], the employee may, if otherwise entitled to under this section, continue the refusal and the employee shall without delay report the circumstances of the matter to the employer and to the work place committee or the health and safety representative.. (Code Part II 128. (9))

As mentioned previously, except for when a plane is in operation, only government officials designated by the Minister of Labour can end a refusal if you continue to believe that danger exists. After the employer investigates, the company is required to complete and provide you and the workplace health and safety committee with a report of the investigation. If you continue to believe there is danger, you should contact a member of your health and safety committee which will take over the investigation. Unionized members of the workplace committee have been given additional training by the union and will be able to provide further guidance as the process unfolds. In some cases, management members of the committee may also have additional training.

Question 14: Can I be required to work after the government investigation?

(7) If the Minister makes a decision [that there is no danger, or that a worker can't refuse], the employee is not entitled under section 128 or this section to continue to refuse to use or operate the machine or thing, work in that place or perform that activity, but the employee, or a person designated by the employee for the purpose, may appeal the decision, in writing, to the Board within 10 days after receiving notice of the decision.

Yes, a decision of no-danger from a government official designated by the Minister of Labour means you must go back to work. Such decisions are usually rendered days or weeks afterwards, however there is always a slim chance one could be issued on-the-spot. If you still insist a workplace danger exists, the union can assist you. However, if you continue to refuse to work or refuse to return to work you may suffer disciplinary penalties up to and including termination of employment.

If you feel a decision of no-danger is wrong, you have ten (10) calendar days (including weekends) to file an appeal with the Canadian Industrial Relations Board. The Union has resources to assist its members at this stage of the process, and any member wishing to appeal should contact their Union.

Question 15: Is there any time where I can't refuse?

128 (2) An employee may not, under this section, refuse to use or operate a machine or thing, to work in a place or to perform an activity if

- (a) the refusal puts the life, health or safety of another person directly in danger; or*
- (b) the danger referred to in subsection (1) is a normal condition of employment.*

Yes, the *Code* prohibits you from refusing work if your refusal puts the life, health or safety of another person directly in danger; or, the danger in question is a normal condition of employment.

The pilot in command of an aircraft (generally the Captain) also has the right to temporarily suspend a work refusal while the aircraft is in operation (See Questions 7 and 17).

Question 16: What is a normal condition of employment?

Excerpts of IPG 070:

Normal: *Normal refers to something that is regular, to a typical state or level of affairs, something that is not out of the ordinary.*

What is not Normal: *A danger that is a normal condition of employment does not include unexpected situations that increase the risk or present a danger to the employee. Such unexpected situations may include pandemic illnesses, ice storms, floods and other natural disasters or unusual weather events.*

It should be understood that pursuant to the *Code*, an employee may not refuse to work under the *Code* where the danger on which they are basing their refusal is a normal condition of work. However, an employee always has the right to refuse to work under the *Code* when the employee has reasonable cause to believe the danger is not a normal condition of employment.

According to the Internal Program Guidelines of the Federal Labour Program, which are meant to provide guidance to government officials on how to apply the law, while a worker cannot refuse to do a task that is a normal part of their job, *normal job tasks can become abnormal if the work situation changes. For example: normally provided personal protective equipment is not available: If you don't have the proper equipment to perform a normal part of your job, then it is no longer a "normal" condition of employment. You are being asked to do something abnormal – work without the appropriate equipment.*

Question 17: What is "in operation"?

In written correspondence with the Union, the Federal Labour Program and Transport Canada define an aircraft being in operation as follows:

Transport Canada and the Labour Program's interpretation of the Canada Labour Code requirement is that the aircraft is "in operation" from the time it first moves under its own power for the purpose of taking flight until it comes to rest at the end of its flight. This movement can be within the air or on the ground. Furthermore, the aircraft would not be considered to be "in operation" when it is sitting at an airport (within or outside of Canada), connected to a gate or not powered up.

Though some airlines try to enforce different rules, CUPE's Health and Safety Branch has received written confirmation from the ESDC's Labour Program that an aircraft is NOT in operation any time it is still connected to a gate or not yet powered up, **regardless of where it is situated in the world**. This has been reconfirmed by Transport Canada and individual government representatives delegated by the Minister of Labour. Unless the plane is moving under its own power, it is not in operation, and the pilot in command does not get to determine the work refusal. It must go

through the steps of employer investigation, then workplace health and safety committee investigation and finally a Labour Canada Representative.

While in flight and in operation, the pilot in command determines a work refusal, the employer still has an obligation to investigate a dangerous work refusal. If a dangerous work refusal is reported to the pilot in command, they cannot simply ignore it or say NO. The pilot in command must hear your concerns and engage in a discussion about them and the other factors being considered and render reasons as to why they would reject the work refusal.

Upon landing, if you still feel a dangerous situation existed, the employer must start the investigation process of the dangerous work refusal at the first stage.

Please contact your union if your work refusal is treated as “in operation” but the plane was not moving under its own power at the time of refusal.

Question 18: Can the company ask someone else to do the work that I am refusing?

Once a work refusal is initiated and the danger remains present, **no one can replace you** until the investigation by the workplace health and safety committee has been completed and the Minister or designated labour program official has been informed and allowed such a replacement. In dangerous work refusals involving a plane, they must also release the aircraft. Both would generally occur at STEP 3, but the Minister may release an aircraft earlier under certain circumstances.

In all cases, an employee replacing someone who is exercising their right to refuse dangerous work must be informed of the dangerous work refusal and reasons for it, and they may also exercise their right to refuse to do the work.

Question 19: What if someone else is refusing dangerous work and I don't agree?

Work refusals often seem to happen at the worst possible time, and generally cause inconvenience. ***Recognize and respect your colleague's right to refuse dangerous work should they ever use it. Just because you may not share their concern(s) doesn't mean the concerns aren't valid.*** Your colleague is fully aware of any inconvenience they are causing – and are only refusing out of a genuine fear for their or someone else's safety.

Conclusions

We all hope that we never end up in a situation where we have to refuse work due to danger. But if it does happen, or if you are involved in a flight where someone is refusing to perform dangerous work, it is important you know your rights.

Your Union understands that standing up to the company and refusing to perform dangerous work can be stressful. There are many pressures acting on you to 'just shut the door and go' and many people won't want to push back against this pressure. Flight attendants are trained safety professionals. If there is any doubt about the safety of a task, it is better to bring forth your

concerns rather than hoping it will all work out. You are not alone; your union is there to support you.

If there are any questions about this guideline, please contact your local health and safety committee members, and make sure that you have the union contact numbers for both regular and after hours.

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