

Labour and Employment Law

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Recent Interim Changes to Work Reintegration under the *Workplace Safety and Insurance Act*

Recently, the Workplace Safety and Insurance Board (WSIB) implemented revamped Work Reintegration policies. These interim policies (in force as of December 1, 2010 but subject to a consultation period until February 15, 2011) reflect the WSIB's new guiding principles on work reintegration. They will be of particular interest to Occupational Health & Safety (OHS) coordinators and corporate human resources personnel.

Historically, when workers receiving WSIB benefits were not able to return to their pre-injury job, they would be retrained under the Labour Market Re-entry ("LMR") program. The LMR program retained organizations external to the WSIB to provide training and educational services for workers. Following a recent comprehensive review of its costly LMR and return to work ("RTW") programs, the WSIB has fundamentally changed the LMR program to make it more cost-effective for Ontario employers.

A New Approach to Work Reintegration

The WSIB's new Work Reintegration policies are an integrated set of guidelines aimed at ensuring a worker's opportunities for successful RTW are optimized and consistent with the *Workplace Safety and Insurance Act* (the Act) and human rights legislation. The policies formally integrate existing policies on early and safe return to work (ESRTW), re-employment and LMR.

The WSIB is now guided by the following objectives:

- Appropriate, early RTW that maintains the dignity and productivity of a worker;
- Early support and intervention to respond to recovery and RTW barriers;
- Maximizing opportunities for RTW with the original employer, including retraining for a suitable occupation (SO) with that employer;
- Providing the worker with meaningful input and choice in relation to the programs offered.

RTW Overview

RTW is a process that starts as soon as the employer learns of a workplace-related injury. The WSIB expects the employer and the worker to both co-operate in identifying and undertaking RTW opportunities within the workplace, failing which the WSIB may impose significant penalties or withhold benefits for those not co-operating.

The WSIB's role in work reintegration includes providing education and advice, case management, RTW co-ordination, health recovery support, accommodation assistance, dispute resolution, and ensuring compliance with co-operation and re-employment obligations and work transition services.

The WSIB has established the following hierarchy as an order of preference for RTW:

- Pre-injury job with original employer, the starting point and overall goal;
- Pre-injury job with original employer, with accommodation as required;
- Work comparable in nature and earnings to pre-injury job with original employer, with accommodation as required;
- Alternate suitable work with original employer, with accommodation as required;
- Work comparable in nature and earnings to pre-injury job in the labour market, with accommodation as required; **or**

- Alternate suitable work in the labour market, with accommodation as required.

The new WSIB Work Reintegration policy specifically defines suitable work as post-injury work (including the worker's pre-injury job) that is safe, productive, consistent with the worker's functional abilities, and that, to the extent possible, restores the worker's pre-injury earnings. The work must also be both available and sustainable.

What is Available and Sustainable Work?

Available work as it relates to the original employer is work that exists at the pre-injury worksite, or at a comparable worksite arranged with the original employer. The WSIB looks at objective workplace criteria to establish availability.

Sustainable work is defined in relation to whether the post-injury work being performed by the worker has reasonable prospects of being available on a long-term basis with the original employer. Unless the post-injury work is sustainable, it is unlikely to be considered the best RTW alternative.

If sustainable work is not available with the original employer, the WSIB will consider sustainable and available work in the general labour market. To qualify as such, the worker must have a reasonable chance of obtaining employment with average or good employment prospects.

Work Transition and Suitable Occupation

When the workplace parties have been unsuccessful in arranging a return to available, suitable and sustainable work with the original employer, the WSIB provides a work transition (WT) assessment to determine what specialized assistance a worker requires to enable a RTW with the original employer or, if necessary, in a suitable occupation (SO) that is available in the labour market.

The SO is a category of jobs suited to the worker's transferable skills that are safe, productive, consistent with the worker's functional abilities and that, to the extent possible, restore the worker's pre-injury earnings. The SO has to be:

- Available with the original employer or in the general labour market;
- Sustainable with the original employer or a new employer; **and**
- Achievable immediately following appropriate WT activities, which may include literacy and basic skills, ESL training, academic upgrading, vocational skills training, training on the job, job search training, employment placement services and work trials.

The WSIB pays directly all expenses it considers appropriate to enable the worker to engage in WT assessments and subsequent WT activities. The original employer is not liable for the WT expenses.

Reaffirming Re-employment Obligations Generally

The new Work Reintegration policies reaffirm the specific responsibilities of employers in the RTW process.

In addition to their obligation to co-operate in the RTW process, employers have an obligation to re-employ an injured worker who has been unable to work as a result of the work-related injury/disease if the following three conditions are satisfied:

- The worker has been "unable to work" as a result of the work-related injury/disease;
- The worker was employed with the injury employer for at least one year before the date of injury; **and**
- The employer regularly employs 20 or more workers.

When a worker is medically able to perform alternate suitable work, to comply with the re-employment obligation, the employer is required to offer to the worker the first available alternate and suitable employment with the employer.

This re-employment obligation continues until the earliest of:

- Two years after the date of injury;

- One year after the worker is medically able to perform the essential duties of the pre-injury employment; **or**
- The date the worker turns 65 years old.

Employers should note that if a worker is terminated within six months of being re-employed, the WSIB presumes the employer has not fulfilled the re-employment obligation. Employers may rebut this presumption by showing the termination was not caused in any part by the work-related injury or disease (and related absences from work), treatment for the work-related injury or disease, or the claim for benefits.

All employers have a duty to modify the workplace to accommodate the needs of the injured worker up to the point of “undue hardship”. The WSIB refers to the accommodation policies of the Ontario Human Rights Commission to assess undue hardship. The threshold required to constitute undue hardship is relatively high.

That being said, the WSIB will consider financial assistance to small businesses for accommodation resulting in a long-term solution to the worker’s impairment and which would otherwise constitute an undue hardship for the employer.

Penalties to employers for violating the re-employment obligation can be significant. Generally, if the employer does not respond to warnings and a notice of non-compliance, the WSIB levies a penalty against the employer based upon the worker’s actual net average earnings for the year before the injury. This penalty amount is *not* subject to the ceiling used in calculating loss of earnings (LOE) benefits. The penalty may, however, be reduced, but not waived, if the employer subsequently offers the worker suitable work which is maintained for the duration of the obligation period.

Re-employment Obligations in the Construction Industry

Employers in the construction industry are subject to industry-specific re-employment obligations. The

definition of which construction employees are covered by re-employment obligations is broad, including activities integral to construction such as supervising, surveying, estimating, engineering or overseeing health and safety.

The construction employer’s obligation to re-employ begins when it is notified that the injured construction worker is medically able to perform:

- The essential duties of his or her pre-injury job;
- Suitable construction work; **or**
- Suitable non-construction work.

The employer must offer to re-employ the injured worker in the first available job that is consistent with the worker’s medical ability to return to work.

In all cases where the worker is medically able to perform some type of construction work, an employer who has more than one construction job available must offer to re-employ the worker in the construction job that is most similar in nature and earnings to the one the worker had on the date on injury.

The construction employer’s duty to re-employ continues until the earliest of:

- Two years from the date of injury;
- One year after the worker is medically able to do the essential duties of the pre-injury job;
- The date the worker declines an offer of work; **or**
- The date the worker turns 65 years old.

Proposed Expanded Window of Application for WSIB’s NEER Policy

Another significant proposed change to WSIB policy is the draft Work Reintegration NEER policy. NEER refers to the New Experimental Experience Ratings Plan, which applies to all employers in Schedule 1 paying more than \$25,000 in average annual premiums. NEER generates premium refunds and surcharges based on an employer’s historical accident cost experience, taking into account for the

calculation of claims cost the overhead costs and future costs of benefits relating to the claim. In the proposed NEER policy, the WSIB intends to expand the window of retrospective rating of claims costs for those employers subject to NEER to four years from the current three years, beginning with the 2008 accident year. The result of the proposed change is that claims costs may impact on any employer's overall premiums for a longer duration than before. The proposed changes to NEER are currently subject to a consultation process expected to be completed shortly.

The proposed changes to the NEER policy do not affect those employers subject to the CAD-7 experience rating plan (construction industry employers with more than \$25,000 in average annual premiums) or those employers subject to the Merit-Adjusted Premium (MAP) program (employers with \$1,000 to \$25,000 in average annual premiums). Employers with less than \$1,000 in average annual premiums are not experience-rated. Furthermore,

the proposed NEER changes affect only the window of application of NEER at this time. There are no proposed changes to claims costs or firm limits under the existing NEER policy, although it is expected these will be reviewed as part of the current WSIB funding review.

Conclusion

The new Work Reintegration policies represent WSIB's vision of an integrated program aiming to optimize a worker's opportunities for successful RTW, ideally with the original employer. The proposed changes to NEER are intended to promote significantly improved work reintegration outcomes, overall cost reductions and fairer premiums for employers. These new policies will require greater involvement on the part of the original employer to foster successful work reintegration. Ontario employers should review their current internal policies to ensure consistency with the new policies, particularly in light of the significant penalties in cases of non-compliance.

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