

# **NEW REGULATION FOR EARLY AND SAFE RETURN TO WORK AND RE-EMPLOYMENT IN THE CONSTRUCTION INDUSTRY**

(Regulation Comes Into Force September 1, 2008)

September, 2008

# To Cover

- A. Background
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# A. Background

- **1990 – *Workers’ Compensation Act (WCA)*** stipulates that construction employers’ re-employment obligations are to be set out in a Regulation. Obligations apply to employers who employ 20 or more workers and when the worker has been continuously employed for 1 year.
- **1992 – Reinstatement in the Construction Industry Regulation** is passed and associated policy is approved.
- **1998 – *Workplace Safety and Insurance Act (WSIA)*** stipulates that construction workers’ and employers’ rights and obligations regarding early and safe return to work and re-employment are to be set out in a Regulation. Re-employment obligations apply to employers regardless of the number of workers they employ and the length of the worker’s employment.

# **A. Background (Cont'd)**

- **1998 – WSIA also stipulates that until a new Regulation is passed the old Regulation under the WCA continues to apply.**
- **1998 - 2007 – Construction stakeholders and the WSIB are in discussions to develop a draft Regulation.**
- **February 2008 – Ontario Government passes a new Regulation – Return to Work and Re-employment - Construction Industry.**
- **September 1, 2008 - The Regulation becomes effective and applies to injuries on or after this date.**

## **B. The New Regulation**

- **The new Regulation:**
  - provides return to work co-operation rules for construction employers and workers that do not currently exist
  - provides more clearly articulated re-employment obligations for construction employers
  - will lead to more consistency, compliance and consequently improved return to work outcomes for the construction sector
  - represents a reasonable balance between the interests of employers, workers and the system.

## **B. The New Regulation (Cont'd)**

- The new Regulation is flexible and designed to maximize return to work opportunities.
- The new Regulation **does not**:
  - require employers to create jobs that don't exist.
- The new Regulation strives to maximize return to work by requiring employers to offer work, and for workers to accept work,
  - within the worker's trade, or
  - in certain cases, outside of the worker's tradethat is available, or becomes available at the original job site or at a comparable job site.

# **C. Policy Development & Implementation**

## **Policy consultation**

### **Draft Construction Re-employment Policies (3 documents)**

- Written feedback from focused consultation with construction stakeholders was requested by end of July 2008.
- Submissions received from 13 stakeholders. Policies revised to reflect stakeholder feedback where appropriate.

### **Draft Early and Safe Return to Work Policies (6 documents dated October 2006 currently posted on the WSIB web site)**

- Written feedback from focused consultation with construction stakeholders to be provided by October 20, 2008.
- Policies will be revised once feedback is received.

# C. Policy Development & Implementation (Cont'd)

## Policy process

- Construction Re-employment Policies (3)– apply to injuries on or after September 1, 2008 and 2 of the 3 policies became effective on this date.
- However the levying of re-employment penalties will be deferred until staff training and stakeholder education has occurred. Re-employment penalties will therefore only be applied on or after April 15, 2009. The policy dealing with penalties will therefore only be effective on that date.
- Early and Safe Return to Work Policies (6 documents) (which include the non-co-operation penalties) will become effective for the construction industry at the same time they become effective for all other covered industries in 2009.

# **C. Policy Development & Implementation (Cont'd)**

## **New construction policies & overview document**

19-05-01, Overview–Re-employment in the Construction Industry

19-05-02, Re-employment Obligation in the Construction Industry–  
Threshold, Duration and Specific Employer Requirements

19-05-03, Compliance with the Re-employment Obligation–  
Construction Industry

19-05-04 – Re-employment Penalties and Payments - Construction  
Industry

# **D. Re-employment Policy Issues Addressed**

- When the re-employment obligation arises – when workers meet the “unable to work” threshold
- When an employer’s re-employment obligation begins
- Employer’s duty to accommodate when it has control over the workplace
- Differences between a unionized and a non-unionized environment
- Re-employment obligation when more than one position is available
- Definition of suitable work
- Duration of the re-employment obligation when a worker has declined an offer of work
- Breaches of the re-employment obligation and the presumption
- Education versus levying penalties.

# E. Key Concept - Re-employment Threshold

- A construction employer does not have an obligation to re-employ unless an injured construction worker has been *unable to work* because of the work-related injury/disease.
- A worker is considered “unable to work” if, because of the work-related injury/disease, he:
  - is absent from work
  - works less than regular hours, and/or
  - requires accommodated/modified work that pays, or normally pays, less than his regular pay.
- An employer’s decision to pay advances does not impact whether a worker is “unable to work.”

# **E. Key Concept - Start of the Re-employment Obligation**

- A construction employer's obligation to re-employ begins when it is notified that an injured construction worker is medically able to perform
  - the essential duties of the pre-injury job
  - suitable construction work, or
  - suitable non-construction work.
- Notice respecting a worker's level of fitness to return to work may be provided to the employer by
  - the worker
  - the worker's treating health professional, and/or
  - the WSIB.
- Following notification, the employer must offer to re-employ the injured worker in the first job that becomes available that is consistent with the worker's medical ability to return to work.

## **E. Key Concept - Duty to Accommodate**

- The employer's offer of work must take into account its obligation to accommodate the work or the workplace to the needs of the worker, to the extent the accommodation does not cause the employer undue hardship.
- Employers are only required to accommodate the workplace if they have control over the workplace - the authority to order or implement non-permanent physical changes to any structures on the workplace (e.g., building a temporary ramp).

# E. Key Concept - Re-employment Obligation – Union Workers

## Essential Duties of Pre-injury Job

- If a worker is medically fit to perform the essential duties of the pre-injury job, the employer must offer to re-employ the worker in a position in the worker's trade and classification at a collective agreement workplace, if such a position
  - is available, or
  - is occupied by another worker who was hired, assigned or transferred on or after the date on which the worker was injured.

## Suitable Construction Work

- If a worker is medically fit to do suitable construction work, the employer shall offer to re-employ the worker
  - in an available position whose duties consist of suitable work in the worker's trade and classification at a collective agreement workplace, or
  - **if there is no such position**, in an available position whose duties consist of suitable work in the worker's trade at a collective agreement workplace, or
  - **if neither position is available**, in an available position whose duties consist of suitable work in construction at another workplace of the employer.

## Suitable Non-construction Work

- See slide number 16.

## **E. Key Concept - Re-employment Obligation — Non-union Workers**

**Note:** The obligations set out in this section only apply to employers if, during the period of the re-employment obligation, they are still employing workers at the workplace where the worker was injured or at a comparable workplace.

### **Essential Duties of Pre-injury Job**

- If a worker is medically fit to perform the essential duties of the pre-injury job, the employer must offer to re-employ the worker in a position in the worker's trade at the workplace where the worker was injured if such a position
  - is available, or
  - is occupied by another worker who was hired, assigned or transferred on or after the date on which the worker was injured, or
  - **if such a position is not available**, in an available position in the worker's trade at a comparable workplace of the employer.

### **Suitable Construction Work**

- If a worker is medically fit to do suitable construction work, the employer shall offer to re-employ the worker
  - in an available position whose duties consist of suitable work in the worker's trade at the workplace where the worker was injured, or
  - **if there is no such position**, in an available position whose duties consist of suitable work in the worker's trade at a comparable workplace, or
  - **if neither position is available**, in an available position whose duties consist of suitable work in construction at the workplace where the worker was injured, or
  - **If none of the above positions are available**, in an available position whose duties consist of suitable work in construction at a comparable workplace.

# **E. Key Concept - Re-employment Obligation — Union and Non-union Workers**

## **Suitable Non-construction Work**

- For both Union and Non-union workers, if a worker is medically able to perform suitable non-construction work and, due to the seriousness/significance of his work-related impairment, is not likely to be able to return to construction work in the near future, the employer shall offer to re-employ the worker
  - in the first available position whose duties consist of suitable work other than in construction.
- If it is unlikely that a worker will be medically able to perform construction work again, the worker is entitled to
  - an LMR assessment, and if necessary,
  - an LMR plan to facilitate the worker's return to non-construction work with the accident employer or in the general labour market.

# **E. Key Concepts – Multiple Positions & Duration of the Re-employment Obligation**

- 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 of injury.
- In addition, if suitable construction work has been offered to the worker and another suitable job, more similar in nature and earnings to the pre-injury job becomes available, the employer should offer the more similar job. This obligation applies every time a more similar job becomes available throughout the period of the re-employment obligation.
- **Obligation ends**
  - The employer's re-employment obligation continues until the **earliest of**
    - two years from the date of injury
    - one year after the employer receives notice that the worker is medically able to perform the essential duties of his or her pre-injury employment (with or without accommodation)
    - the date on which the worker declines an offer from the employer to re-employ the worker, or
    - the date on which the worker reaches 65 years of age.

# **E. Key Concept - Identifying Breaches of the Re-employment Obligation**

- At the worker's request, or on its own initiative, the WSIB can determine whether the employer has met its re-employment obligation.
- If a construction employer terminates an injured worker's employment within 6 months of having re-employed him, the WSIB presumes that a breach of the re-employment obligation has occurred. Employers can rebut the presumption.
- There are a number of other instances – generally involving a failure by the employer to offer appropriate work when it is required to do so – whereby the WSIB may find an employer in breach of its obligation to re-employ.

# E. Key concept - Identifying Breaches of the Re-employment Obligation (Cont'd)

## Terminations within 6 months of re-employment—presumption of breach

- The WSIB presumes that the employer has not fulfilled the re-employment obligation if a worker is terminated:
  1. Within six months of being re-employed, other than at a construction project.
  2. Within six months of being re-employed at a construction project and before his or her work on the construction project is completed, or
  3. When his or her work on a construction project is complete and the employer does not re-employ the worker at a construction project within 6 months after the date on which the worker was re-employed although
    - the worker is able to perform the essential duties of his or her pre-injury employment, and the pre-injury employment, or employment that is **comparable** to it, is or becomes available at the construction project, or at another construction project, or
    - suitable work is or becomes available at the construction project, or at another construction project.

# **E. Key Concept - Identifying Breaches of the Re-employment Obligation (Cont'd)**

## **Rebutting the Presumption**

- Employers can rebut the presumption by showing that the termination or failure to continue to re-employ within 6 months of re-employment was not caused by
  - the work-related injury or disease (and related absences from work)
  - treatment for the work-related injury/disease, or
  - the claim for benefits.

## **Termination before re-employment or more than 6 months after re-employment**

- Presumption does not apply and WSIB decision-makers must be satisfied that the reasons for the termination are
  - not related to the work-related injury or the claim for benefits, and
  - consistent with generally accepted employment practices in the construction industry.

## **Failure to offer available work**

- An employer breaches the re-employment obligation when it fails to offer available work when it is required to do so – actual termination not required.

# **E. Key Concept - Ensuring Compliance with the Re-employment Obligation**

Focus will be on education and assistance as opposed to levying re-employment penalties.

WSIB will therefore:

- inform and educate construction employers, workers and workplaces about what is expected of them throughout the return to work and re-employment process
- work with workplace parties to provide understanding, provide assistance (e.g., offer mediation services), and if required, resolve disputes
- introduce procedural safeguards such as providing a warning to employers, followed by verbal and written notices of the breach. These safeguards are designed to provide the employer with a reasonable amount of time to come into compliance with its re-employment obligation.

# **E. Key Concept - Ensuring Compliance with the Re-employment Obligation (Cont'd)**

## Small Business

- The WSIB is committed to assisting small construction employers, i.e., those that employ 20 or fewer workers, in meeting their re-employment responsibilities.
- WSIB recognizes that small construction employers may not have the capability and resources to manage the re-employment process.
- Accordingly the WSIB will strive to provide to all small construction employers: focused education, just-in-time case management support and, when necessary, financial assistance for work and/or workplace accommodations.

# **E. Key Concept - Ensuring Compliance with the Re-employment Obligation (Cont'd)**

- As a last resort, if following a warning and appropriate notices, an employer has failed to bring itself in compliance with its re-employment obligation, the WSIB may:
  - levy a re-employment penalty on the employer, and
  - issue re-employment payments/LOE benefits to the worker.

## **Reducing the penalty**

- The WSIB may reduce the amount of the penalty if the employer
  - subsequently meets the re-employment obligation, or
  - offers work that the worker can do even though the offer falls short of meeting the applicable re-employment obligation.
- Penalties for failing to meet applicable re-employment obligations are the same for the construction industry as they are for all other covered industries.

# **F. Education Plan for Implementation**

**There will be a two-phased approach**

- **Phase 1 : Implementation of the communication products, and education to all internal and external stakeholders – September 2008 to March 2009.**
- **Phase 2: Evaluation of communication strategies and new communication around the introduction of the employer penalties – March to April 15, 2009.**