

February 20, 2025

Background Policy Paper

Return to Work and Duty to Cooperate

**WORK SAFE.
FOR LIFE.**

WORKERS' COMPENSATION BOARD OF NOVA SCOTIA

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1. Purpose

In the fall of 2024, *The Stronger Workplaces for Nova Scotia Act* resulted in changes to the *Workers' Compensation Act* (the "Act") that reinforce the WCB's responsibility for facilitating the safe and timely return to work of those injured on the job. At the same time, a new "**duty to cooperate**" was added to the Act that empowers the WCB to hold both workers and employers accountable for their collective participation during the early and safe return to work process (ESRTW). ESRTW is the process and plans implemented concurrent to active medical treatment during the acute phase of an injury to facilitate stay at work (when possible) and return to work with the injury employer.

Building on the recent changes to the Act, and the work the WCB has been doing to evolve our return to work practices, methods and procedures in the last two years, we are introducing a suite of return-to-work policies that set out the principles, concepts,

and tools the WCB will use to support workers and employers achieve successful return-to-work outcomes. These policies will include guidance on how the WCB will interpret and apply the new duty to cooperate requirement in Section 89A of the Act that becomes effective on **July 15, 2025**.

This background policy consultation document will:

- Provide information on the legislative changes related to the duty to cooperate.
- Provide an overview of the WCB's proposed suite of return-to-work policies (that includes guidance on the interpretation and application of the new duty to cooperate provision in the Act).
- Describe how you can participate in the consultation.

2. Background – *The Stronger Workplaces for Nova Scotia Act*

On September 20, 2024 changes were made to the *Act* that added a new Section 1A that makes it clear the WCBs purpose is to, in a financially responsible and accountable manner, “facilitate the rehabilitation and the safe and timely return to suitable work of workers who sustain a work-related injury”...and “require workers, employers and organizations supporting the workers’ compensation system to work collaboratively with each other for the benefit of workers and employers.” The WCB has always strived to administer the *Act* in this manner and welcomes the clarity that comes with this change to the *Act*.

Building on this new purpose statement in the *Act*, and **coming into effect on July 15, 2025**, the new Section 89A of the *Act* “**duty to cooperate**” **requires all employers and workers to cooperate in a worker’s early and safe return to suitable and available work (ESRTW)**. Failure to comply with these cooperation obligations may result in penalties for the employer and/or worker.

The new duty to cooperate requires injured workers and employers to cooperate with each other, and the WCB, to maintain workplace connections and facilitate return to work. Employers and workers will be required to cooperate in ESRTW by:

- contacting each other and maintaining communication;
- identifying suitable and available work for the worker;
- providing the WCB with information required to support return-to-work efforts.

If the worker and employer disagree regarding compliance with the obligations under duty to cooperate, the WCB will determine whether the employer or worker failed to comply. If a worker fails to comply with any of the duty to cooperate obligations, the WCB may reduce, suspend, terminate, or withhold compensation payments to the worker until the worker complies. Similarly, if an employer fails to comply with any of the duty to cooperate obligations, the WCB may impose a penalty on the employer until compliance is achieved.

The new suite of return-to-work policies proposed by the WCB will place this new duty to cooperate in the context of the WCB’s overall return-to-work mandate. The policies will define terms, explain concepts, approaches, and roles, highlight the importance of ESRTW plans, as well also communicate how the WCB will determine non-compliance with the new obligations.

Please read the ***Stronger Workplaces for Nova Scotia Act***.

3. Return to Work

What is return to work (RTW)?

RTW is the act of re-introducing (or maintaining) injured workers to safe, timely and productive work that eliminates or minimizes wage loss, as soon as it is safe to do so. This is vital to an injured worker's rehabilitation process and promotes recovery. RTW is facilitated using best practice approaches and legislated requirements including workplace accommodation, ESRTW, the duty to cooperate, re-employment, vocational rehabilitation, employability assessments, and job retraining.

What is early and safe return to work (ESRTW) and duty to cooperate?

ESRTW is the processes and plans implemented concurrent to active medical treatment during the acute phase of an injury to facilitate stay at work (when possible) and return to work with the injury employer. ESRTW starts as soon as a worker is injured and continues throughout the worker's recovery period.

During ESRTW, the *Act* requires workers and employers cooperate in returning the worker to suitable and available work that, where possible, restores the worker's pre-injury earnings.

Cooperation is an essential ingredient for achieving better recovery outcomes and reducing time loss due to injuries. The duty to cooperate requires employers and workers to engage in the ESRTW process. People that can stay at work, or stay connected to work, while they recover from an injury have better outcomes. Employers that have an ESRTW plan that includes accommodations can reduce time loss, improve employee morale and outcomes while benefitting their bottom line.

Duty to cooperate in ESRTW vs Re-employment

With the announcement of the new duty to cooperate in ESRTW, the WCB has received questions wondering how the new duty is different from the existing duty to re-employ in the *Act*.

The *Act* (Sections 90 -101) has always required some employers¹ to re-employ injured workers once the worker has **recovered/reached medical stability**. However, prior to the duty to cooperate in ESRTW, there was no duty in the *Act* requiring an employer to cooperate in the return-to-work process during the **recovery (acute) phase of an injury**. While the WCB encourages employers to offer modified work to an injured worker during this phase (and many do), the employer was not legally required to cooperate in this stage of RTW and there were no penalties for non-cooperation. The new duty to cooperate places a legal duty on the employer to cooperate in return-to-work efforts during the recovery (acute) phase of a work-related injury.

What's different for workers?

Since its inception, the *Act* has required injured workers (Sections 84 and 113) to mitigate earnings loss, cooperate in medical treatment and the development of rehabilitation programs, and keep the WCB up to date on changes in their circumstances that could affect their claim. Non-compliance could result in the suspension or termination of benefits. So, workers have always been required by the *Act* **to cooperate with the WCB and health care providers** in their recovery and return-to-work efforts, but there was no mention of cooperation by, or with, the employer. Of course, this doesn't mean cooperation with employers and successful RTW wasn't happening. **But with the new duty to cooperate, workers now have a legal obligation to cooperate with the employer in ESRTW.**

¹ Employers who do not work in the construction industry and employ 20 or more workers are covered by the re-employment provisions of the *Act*.

4. Draft RTW Policies

We are proposing adding three new policies to the WCB Policy Manual as set out in Appendix A. The proposed policies communicate the WCB's commitment to facilitating recovery and the safe and timely return to suitable work of workers who sustain a work-related injury. These policies will also provide guidance on how the WCB will interpret and apply the new duty to cooperate in the context of ESRTW. It is proposed the following three policies be added to the WCB Policy Manual:

- ***Policy 5.7.1 – Return to Work – Overview***
- ***Policy 5.7.2 – Early and Safe Return to Work – Roles and Responsibilities***
- ***Policy 5.7.3 – Early and Safe Return to Work – Plans and Functional Abilities Information***

A general overview of each policy follows below.

- ***Policy 5.7.1 – Return to Work – Overview***

This policy reflects the WCB's clarified mandate to facilitate recovery and the safe and timely RTW of workers who sustain work-related injuries. In support of this mandate, the policy communicates the principles, key concepts, obligations, approaches, and plans that underlie RTW at the WCB. It provides an overview of best practice approaches and legislated requirements like workplace accommodation, ESRTW, duty to cooperate, re-employment, and vocational rehabilitation, that are used to facilitate RTW. This policy should be read in conjunction with the other two new policies as well as the existing *Policy 5.6.1 – Re-employment: Obligation, Duties, and Penalties*.

- ***Policy 5.7.2 – Early and Safe Return to Work – Roles and Responsibilities***

This policy outlines the roles and responsibilities of the worker, employer, union, health care providers and the WCB in supporting the ESRTW process. The policy pays particular attention to employers' and workers' duty to cooperate in ESRTW. It does this by describing how the parties are expected to cooperate, the WCB's approach to determining compliance with duty to cooperate obligations and provides some examples of what may be considered non-cooperation. This policy also explains employers' duty to modify the work and/or the workplace to the extent of undue hardship when attempting to provide suitable and available work during ESRTW. The penalties for workers and employers who do not fulfill their duty to cooperate obligations during ESRTW are also included in this policy.

- ***Policy 5.7.3 – Early and Safe Return to Work – Plans and Functional Abilities Information***

This policy provides an overview of the content of an ESRTW plan, types of accommodations available to support ESRTW, the criteria for determining when an ESRTW plan has ended, as well as information on the source and handling of injured worker functional abilities information. The policy also explains what is meant by suitable and available work in the context of ESRTW and provides an overview of the types of accommodations available to enable a worker to safely recover on the job.

5. Providing Your Comments

We are interested to hear your comments on these proposed policies and the information presented in this paper. We appreciate all feedback provided, however please note that requirements contained in the *Act* cannot be changed through policy.

You can participate and send us your feedback in a few different ways:

1. **Attend one of our policy webinars.** If you subscribe to our Policy notification list you will receive an invitation. If not, please sign up here [Policy Subscription](#). The first webinar will be held on **March 6, from 3 p.m. to 4 p.m.**
2. **Make a written submission with your feedback on the proposed new policies.** You can send the submission to our policy email Policy@wcb.ns.ca, or send it in hard copy in the mail to:

Policy Department
WCB of Nova Scotia
PO Box 1150
Halifax NS B3J 2Y2

You can always reach us at Policy@wcb.ns.ca with questions and the paper is also available at www.wcb.ns.ca.

The consultation period concludes on April 28, 2025.

Appendix A:

Return to Work and Duty
to Cooperate Policies

Policy 5.7.1 – Return to Work – Overview

Policy Number: 5.7.1

Topic: Return to Work – Overview

Section: Return to Work

Subsection: General

Effective: TBA

Issued: TBA

Approved by Board of Directors: TBA

PREAMBLE

As set out in Section 1A of the *Workers' Compensation Act* (the "Act") the WCB is mandated to facilitate the rehabilitation and the safe and timely return to work (RTW) of workers who sustain work-related injuries.

At its highest level, RTW is the act of maintaining or re-introducing injured workers to safe, timely, and productive work that eliminates or minimizes wage loss, as soon as it is safe to do so. This is vital to an injured worker's rehabilitation process and promotes recovery. RTW is facilitated using best practice approaches and legislated requirements like workplace accommodation, early and safe return to work (ESRTW), duty to cooperate, re-employment, vocational rehabilitation, employability assessments, and job retraining.

The WCB can't achieve successful RTW on its own. Employers, workers, unions, health care providers and other parties must work collaboratively, with the WCB, to get Nova Scotia workers back to safe, healthy and productive work.

The purpose of this policy is to communicate the principles that guide RTW and provide an overview of the key concepts, obligations, approaches, and plans that underlie RTW. This policy should be read in conjunction with the following policies:

- *Policy 5.7.2 – Early and Safe Return to Work – Roles and Responsibilities*
- *Policy 5.7.3 – Early and Safe Return to Work – Plans and Functional Abilities Information*
- *Policy 5.6.1 – Re-employment: Obligation, Duties, and Penalties*

DEFINITIONS

"employer" means an employer as defined in section 2(n) of the *Workers' Compensation Act* (the "Act");

"functional abilities" means a worker's limitations, restrictions, and abilities (what the worker can and cannot do) with respect to a work-related injury;

“health care provider” means a WCB-approved health care service provider;

“injury employer” is the employer the worker is working for when they experience a work-related injury;

“Return to Work Team” means a team that assists the worker with their recovery, return to work, and if needed, vocational rehabilitation. The team always includes the worker and the WCB. Employers have a duty to co-operate in their worker’s early and safe return to work and will be encouraged to use participation on the Return to Work Team to facilitate that duty. The team can also include a representative of the worker (chosen by the worker), case manager and health care providers. Other members may be added depending on their specific roles and responsibilities;

“worker” means a worker as defined in section 2(ae) of the *Act*.

POLICY STATEMENT

1. Guiding Principles

The following key principles guide the RTW process:

- Safe and timely RTW plays an important role in the worker’s rehabilitation and recovery.
- Where recovery and RTW barriers arise, they must be addressed through early support and services.
- A worker’s prospects for successful RTW in both the short and long term, are often best achieved by maximizing opportunities for return to work with the injury employer. This might even include retraining for a different job with that employer.

2. Eligibility for Return-to-Work Services

Workers are eligible for return-to-work services if:

- a) They have an accepted workers compensation claim; and
- b) Their workplace injury is preventing them from performing their regular job duties, as supported by objective information.

References: Workers’ Compensation Act (Chapter 10, Acts of 1994-95), Sections 10(1), 12, 112.

3. Return to Work Hierarchy of Objectives

At the highest level, RTW efforts are provided according to the following sequential hierarchy of objectives to return the worker to:

- a) Return to the same job with the same employer.
- b) Return to a similar or comparable job with the same employer.
- c) Return to a different but suitable job with the same employer.
- d) Return to work in a similar or comparable job with a different employer.

- e) Return to work in a different but suitable job with a different employer.
- f) Retraining for jobs that are suitable and reasonably available.
- g) Self-employment.

References: Workers' Compensation Act (Chapter 10, Acts of 1994-95), Section 112.

4. Duty To Accommodate

Accommodation means the use of modified work or adaptive technologies to enable a worker to return to work following a work-related injury. Under human rights law, all employers have a duty to accommodate workers with disabilities. The *Nova Scotia Human Rights Act* and (for federally regulated employers) the *Canadian Human Rights Act* apply in Nova Scotia.

As per S. 91 of the *Act*, injury employers with a **duty to cooperate** in early and safe return to work (ESRTW), as well as those with **re-employment** obligations, are required to accommodate the injured worker to the extent that the accommodation does not cause the employer undue hardship.

References: Workers' Compensation Act (Chapter 10, Acts of 1994-95), Section 91.

5. Early And Safe Return to Work (ESRTW)

As set out in Section 89A of the *Act*, all employers and workers have a duty to cooperate in ESRTW. ESRTW is the process and plans implemented concurrent to active medical treatment to facilitate stay at work (when possible) and return to work with the injury employer. Failure to comply with these cooperation obligations may result in penalties for the employer and a suspension, reduction, termination, or withholding of benefits for the worker.

ESRTW plans guide the work of the Return to Work Team and are the foundation of a successful RTW. ESRTW plans set out specific start and end dates and include progression to pre-injury duties in accordance with expected functional improvement.

For more information on ESRTW, see policies:

- *Policy 5.7.2 – Early and Safe Return to Work – Roles and Responsibilities*
- *Policy 5.7.3 – Early and Safe Return to Work – Plans and Functional Abilities Information*

References: Workers' Compensation Act (Chapter 10, Acts of 1994-95), Section 89A.

6. Re-Employment

All employers, except those in the construction industry and those who are determined by the WCB to regularly employ fewer than twenty employees, are subject to the re-employment obligations in the *Act*. Re-employment is intended to return the worker to a

place in the labour market resembling, as closely as possible, the position held at the time of their injury.

Re-employment is different from the duty to cooperate in ESRTW in that: 1) it applies only to the employers that meet the criteria described above; and 2) re-employment becomes effective once the worker has completed ESRTW by recovering/reaching medical stability with respect to their work-related injury. An employer's duty to re-employ is then triggered if/when the WCB advises the employer the worker is fit to perform the essential duties of their pre-injury work, or suitable work on a permanent basis. For more information on re-employment see *Policy 5.6.1 – Re-employment – Obligation, Duties, and Penalties*.

References: Workers' Compensation Act (Chapter 10, Acts of 1994-95), Sections 89 to 101.

7. Vocational Rehabilitation

Some workers may require vocational rehabilitation (e.g. employment readiness services, academic upgrading, re-training, on the job training) to enable them, to the greatest extent possible, to achieve their pre-injury earnings level. Vocational rehabilitation services may be provided to achieve RTW with the injury employer (the primary goal), a different employer if that isn't possible, or help the worker return to employability.

References: Workers' Compensation Act (Chapter 10, Acts of 1994-95), Sections 112, 113.

8. Estimating Earnings Capacity

The WCB's obligation to workers is to return them to their employability status to the greatest extent possible. This is achieved through ESRTW, re-employment, and vocational rehabilitation, in conjunction with the provision of appropriate health care treatment, products and services as determined by the WCB.

In some cases, the WCB must estimate a worker's earning capacity where the worker has recovered and is not earning at their pre-injury level but is employable. See policies *3.5.1 – Definition of Suitable Employment*, *3.5.2 – Definition of Reasonably Available Employment*, *3.5.3 – Wage Rate to be Used in Estimating Earning Ability* for more information.

References: Workers' Compensation Act (Chapter 10, Acts of 1994-95), Sections 37, 38.

APPLICATION

This policy applies to decisions made on or after July 15, 2025.

Policy 5.7.2 – Early and Safe Return to Work – Roles and Responsibilities

Policy Number: 5.7.2

Topic: Early and Safe Return to Work – Roles and Responsibilities

Section: Return to Work

Subsection: Early and Safe Return to Work

Effective: TBD

Issued: TBD

Approved by WCB of Directors: TBD

PREAMBLE

As set out in Section 89A of the *Workers' Compensation Act* (the "Act"), all employers and workers have a duty to cooperate in a worker's early and safe return work (ESRTW). ESRTW is the process and plans implemented concurrent to active medical treatment to facilitate stay at work (when possible) and return to work (RTW) with the injury employer.

Cooperation means the worker and employer (and other workplace parties):

- a) maintain effective communication throughout the period of the worker's recovery;
- b) work towards identifying suitable and available employment for the worker; and
- c) update the WCB throughout the process.

Workers and employers, and where appropriate, health care providers, unions and other parties, are responsible for resolving return-to-work issues in the workplace with support from the WCB. In unionized work environments, WCB encourages and promotes union representatives' participation in the process. The workplace parties must cooperate and be self-reliant in returning the worker to suitable and available employment.

This policy outlines the roles and responsibilities of the worker, employer, union, health care providers and the WCB in supporting the ESRTW of workers. This policy also sets out the penalties for workers and employers who do not fulfill their duty to cooperate obligations during ESRTW.

DEFINITIONS

"employer" means an employer as defined in section 2(n) of the *Workers' Compensation Act* (the "Act");

"health care provider" means a WCB-approved health care service provider;

"injury employer" is the employer the worker is working for when they experience a work-related injury;

“Return to Work Team” means a team that assists the worker with their recovery, safe and timely return-to-work plan and, if needed, vocational rehabilitation. The team always includes the worker and the WCB. Employers have a duty to cooperate in their workers’ safe and timely return to work and will be encouraged to use participation on the Return to Work Team to facilitate that duty. The team can also include a representative of the worker (chosen by the worker), case manager and health care providers. Other members may be added depending on their specific roles and responsibilities;

“worker” means a worker as defined in section 2(ae) of the *Act*.

POLICY STATEMENT

1. Role of the WCB

In order to facilitate the shared responsibilities of the workplace parties in ESRTW, the WCB will:

- a) establish and communicate regularly and effectively with the Return to Work Team.
- b) manage the medical recovery of the worker. In doing so, the WCB will:
 - i. determine the expected duration of injury recovery as per *Policy 2.4.7R1 – Normal Recovery Times*;
 - ii. monitor health care reports and communicate appropriate information to the Return to Work Team;
 - iii. expedite health care appointments; and
 - iv. determine when the worker has reached maximum medical recovery.
- c) support the employer in developing a plan for the ESRTW of a worker.
- d) ensure ESRTW plans are progressing and consistent with the worker’s functional abilities and, where appropriate, are rehabilitative in nature.
- e) communicate to the employer and worker their statutory obligations to cooperate in the ESRTW process and monitor compliance with the duty to cooperate.
- f) communicate to the worker’s union (if applicable) their obligations in the ESRTW process.
- g) resolve disputes.
- h) determine when the ESRTW plan is completed.

References: Workers’ Compensation Act (Chapter 10, Acts of 1994-95), Sections 102, 104, 112.

2. Role of the worker

Worker involvement in ESRTW is essential. It provides a sense of ownership of the program and commitment to RTW in a safe and timely manner. ESRTW services provide early assistance to workers to help the worker maintain a positive connection to the workplace and alleviate any of the concerns experienced by the worker following a work-related injury. It is incumbent upon the worker to take responsibility for their own recovery and ESRTW. This includes accepting offers of suitable and available work from the employer. In recognizing the worker’s key role in the ESRTW

process, the *Act* sets out minimum requirements for worker cooperation in ESRTW.

The Act requires a worker to cooperate in ESRTW to work by:

- a) initiating early contact with the injury employer;
- b) maintaining appropriate communication with the injury employer throughout recovery from the work-related injury as per the ESRTW plan;
- c) assisting the employer, as may be required or requested, to identify suitable work that is available and, where possible, restores the worker's pre-injury earnings;
- d) not unreasonably refusing suitable work when it has been made available by the employer;
- e) giving the WCB all relevant information concerning their ESRTW; and
- f) doing other things as may be prescribed by regulation.

References: Workers' Compensation Act (Chapter 10, Acts of 1994-95), Sections 84, 89A(2), 113.

3. Role of the Employer

Cooperation and commitment by the employer in the ESRTW process is essential. Early involvement by the employer is crucial as well as ongoing communication and consultation in order to develop and support the ESRTW plan for the worker. Commitment by the employer will ensure success and reduce costs due to injuries for all stakeholders. In recognition of this role, the *Act* sets out the minimum requirements for employer cooperation in ESRTW. **The Act requires an employer to cooperate in ESRTW to work by:**

- a) initiating early contact with the worker;
- b) maintaining appropriate communication with the worker throughout their recovery as per the ESRTW plan;
- c) attempting to provide suitable work that is available and where possible, restoring the worker's pre-injury earnings;
- d) giving the WCB all relevant information concerning the worker's RTW; and
- e) doing other things as may be prescribed by regulation.

References: Workers' Compensation Act (Chapter 10, Acts of 1994-95), Section 89A(1).

4. Accommodation and undue hardship

Employers, when attempting to provide suitable and available work during ESRTW, have a duty to modify the work and/or the workplace to accommodate the needs of the worker to the extent of undue hardship. Where the employer claims that an accommodation will cause undue hardship, the onus is on the employer to show adequate evidence of the detrimental impact on productivity, the operation, or the profitability of the business. There are general principles that set out the factors usually considered when assessing undue hardship, but the finding of undue hardship will vary according to the specific circumstances. What is undue hardship for one employer may not be for another. The WCB will consider a number of factors when determining whether the accommodation would pose an undue hardship. These factors may include:

- a) employee and customer safety;
- b) financial cost and benefits of the accommodation;
- c) interchangeability of the workforce and facilities;
- d) disruption of services to the public; and
- e) the size of the employer's operation.

Where the WCB is satisfied that the accommodation will cause undue hardship, it may assist the employer in overcoming the hardship and/or may assist the worker directly.

References: Workers' Compensation Act (Chapter 10, Acts of 1994-95), Section 91.

5. Penalties For Worker And Employer Non-cooperation

At the request of a workplace party, or on its own initiative, the WCB can review whether an employer and/or worker has complied with their ESRTW cooperation obligations.

In assessing whether cooperation has taken place, the WCB generally looks to the pattern of actions and behaviours of the workplace parties. The WCB considers and weighs all the relevant facts and circumstances, including the capability to carry out the obligation and the degree to which the workplace party has initiated/participated in required activities.

Failure to comply with cooperation obligations may result in reduction, suspension, termination, or withholding of the worker's benefits or penalties for the employer.

5.1 Worker Non-Cooperation

If the WCB determines that a worker is not cooperating in the ESRTW process, and the worker does not have a compelling reason, the WCB will advise the worker of this finding as part of the WCB's effort to gain, or regain, the worker's cooperation.

Compelling reasons for workers being unable to co-operate are generally limited to post-injury non-work-related changes in circumstances such as an unexpected illness or injury, death in the family or jury duty. These circumstances are typically of short duration. While a non-cooperation penalty is not levied, wage loss benefits may be adjusted based on the impact of the post-accident non-work-related change as outlined in *Policy 1.3.2R – Interruption of Medical Treatment – Circumstances Beyond Worker's Control*.

Without a compelling reason, failure or refusal to comply with the duty to cooperate may result in reduction, suspension, termination, or withholding of the worker's benefits. While each case must be judged on its individual merits, the following is a non-exhaustive list of some examples of non-cooperation that may result in a reduction, suspension, termination, or withholding of a worker's benefits:

The worker

- a) refuses to provide required information to the WCB within the reasonable time frames specified by the decision maker for providing the information;

- b) refuses to accept an offer of suitable and available employment from the employer;
- c) fails to assist the employer in identifying suitable and available employment options when requested to do so;
- d) fails to attend or participate in an evaluation determined appropriate by the WCB and/or health care provider (e.g., functional capacity evaluation) to progress the ESRTW plan; or
- e) fails to notify the WCB of a dispute between the workplace parties which is impeding the ESRTW process.

5.2 Employer Non-Cooperation

If the WCB determines that an employer is not cooperating in the ESRTW process and does not have a compelling reason, the employer will be notified of the obligation to cooperate in ESRTW, the finding of non-cooperation, and the consequences of this finding. The main goal is to gain, or regain, the employer's cooperation.

Compelling reasons for injury employers being unable to cooperate are generally limited to circumstances such as a summer or holiday shutdown, general layoff, strike or lockout, and/or corporate reorganization. In the case of small employers, such circumstances may also include a death in the family or an unexpected illness or accident. These circumstances are typically of short duration.

Failure or refusal by an employer to comply with the duty to cooperate may result in a penalty on the employer not exceeding the total of:

- a) the full amount or capitalized value, of any compensation payable to a worker of the employer in respect of injuries that occurred to the employer's workers during the period of non-compliance; and
- b) any other expenditures made by the WCB in respect of injuries that occurred to the employer's workers during the period of non-compliance.

Without a compelling reason, failure or refusal to comply with the duty to cooperate may result in an employer penalty. While each case must be judged on its individual merits, the following is a non-exhaustive list of some **examples** of employer non-cooperation that may result in the imposition of a penalty:

The employer

- a) has suitable work available but fails to offer the employment to the worker;
- b) fails to communicate with the worker as per the ESRTW plan;
- c) refuses to pay the salary earned during the ESRTW process;
- d) fails to provide the WCB with a written ESRTW plan in the timeframes agreed to; or
- e) fails to notify the WCB of a dispute between the workplace parties which is impeding the early and safe return-to-work process.

References: Workers' Compensation Act (Chapter 10, Acts of 1994-95), Section 89A(3), 89A(4).

6. Role Of Other Parties

6.1 Union

In unionized work environments, the WCB promotes union representatives' participation in ESRTW. As reflected in the Supreme Court of Canada's *Renaud*² decision, while the employer has the primary duty to accommodate workers, the union also has a positive duty to be a part of the accommodation process and must not unreasonably resist the employer's proposed accommodation(s).

If an injured worker is a member of a union, the WCB will advise the worker they may wish to contact their local union shop steward to get information regarding the collective agreement provisions that may impact return to work in that particular workplace. The WCB will work with union representatives to:

- a) assist the worker in identifying suitable work that is available and, where possible, restoring the worker's pre-injury earnings;
- b) advise the worker of collective agreement provisions that may impact the accommodation process; and
- c) assist the worker in responding to employer accommodation proposals.

When determining if suitable work is available in a unionized environment, the WCB strives to respect the terms of the collective agreement whenever possible. The WCB will work with the union to identify accommodations that do not substantially interfere with the collective agreement rights of the other unionized workers in the workplace.

6.2 Role Of The Health Care Provider

In addition to diagnosing and treating the worker, WCB approved service providers are responsible to:

- a) provide the employer and worker and the WCB with functional abilities information;
- b) provide the worker and the WCB with relevant objective medical information;
- c) identify the most appropriate method of treatment for the work-related injury;
- d) ensure the worker receives timely treatment; and
- e) ensure the benefits of ESRTW are discussed, encouraged and supported throughout recovery.

References: Workers' Compensation Act (Chapter 10, Acts of 1994-95), Section 109.

APPLICATION

This policy applies to decisions made on or after July 15, 2025.

2 Renaud v. Central Okanagan School District No. 23, [1992] 2 S.C.R. 970

Policy 5.7.3 – Early and Safe Return to Work – Plans and Functional Abilities Information

Policy Number: 5.7.3

Topic: Early and Safe Return to Work – Plans and Functional Abilities Information

Section: Return to Work

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Approved by Board of Directors: TBD

PREAMBLE

Return to work (RTW) is the act of maintaining or re-introducing injured workers to safe, timely and productive work that eliminates or minimizes wage loss, as soon as it is safe to do so. A vital part of RTW is the early and safe return to work process (ESRTW). ESRTW is the process and plans implemented concurrent to active medical treatment to facilitate stay at work (when possible) and return to work with the injury employer. Employers and workers have a duty to cooperate in ESRTW, including cooperating in the creation and implementation of the ESRTW plan.

The development and implementation of the ESRTW plan must begin as soon as possible following a work-related injury to prevent the worker from becoming disconnected from the workplace. It is the employer who takes the lead in the development of the ESRTW plan, with input from the injured worker and support from the WCB. The ESRTW plan sets out how (and when) the worker will be returned to their pre-injury position by making use of information about the worker's functional abilities, their job, the workplace and possible accommodations.

This policy provides an overview of the content of a "reasonable" ESRTW plan, types of accommodations available to support ESRTW, the criteria for determining when a ESRTW plan has ended, as well as information on the source and handling of an injured worker's functional abilities information.

DEFINITIONS

"accommodation" means the use of modified work or adaptive technologies to enable a worker to return to work following a work-related injury. Accommodation can include, but is not limited to, any of the options outlined in this policy or an appropriate combination thereof;

"functional abilities" means a worker's limitations, restrictions, and abilities (what the worker can and cannot do) with respect to a work-related injury;

“functional capacity evaluation” means a series of tests that provide an independent assessment and job simulation of critical physical demands, a reliable prediction of functional tolerances and the frequency with which a worker can perform them;

“health care provider” means a WCB-approved health care service provider;

“Return to Work Team” means a team that assists the worker with their recovery, safe and timely return to work plan and, if needed, vocational rehabilitation. The team always includes the worker and the WCB. Employers have a duty to cooperate in their worker’s safe and timely return to work and will be encouraged to use participation on the Return to Work Team to facilitate that duty. The team can also include a representative of the worker (chosen by the worker), case manager and health care providers. Other members may be added depending on their specific roles and responsibilities.

POLICY STATEMENT

1. Early and safe return to work (ESRTW) plan

ESRTW planning occurs when the worker and employer work together, as required by the duty to cooperate in Section 89A of the *Workers’ Compensation Act* (the “Act”), to identify how the worker’s pre-injury job needs to change to temporarily and safely adapt to the worker’s functional restrictions and limitations resulting from their injury. ESRTW plans are clear, written documentation of what the worker will be doing at the workplace in support of the goal of full return to all essential pre-injury duties and hours within the expected timelines set out in *Policy 2.4.7R1 – Normal Recovery Times*.

ESRTW plans should be developed by the employer, with support from the WCB. The WCB will review ESRTW plans for “reasonableness”, confirm the plan with the worker (and other relevant workplace parties), and make any necessary adjustments.

A reasonable ESRTW plan typically meets the following criteria:

- a) Includes worker and other workplace parties’ input where appropriate;
- b) Starts on, or as close to, the date of injury as possible;
- c) Includes a path to the worker’s pre-injury work;
- d) Identifies suitable and available work in accordance with the RTW hierarchy of objectives;
- e) Respects the worker’s restrictions and functional abilities. This may include, for example, the identification of the need for modifications, adaptive technologies, modified duties, or modified hours;
- f) Includes regular communication, both within the workplace, and with the WCB;
- g) Sets out how the plan will be monitored and adjusted as needed;
- h) Defines the salary to be earned by the worker during the ESRTW plan; and
- i) Has an end date consistent within the timelines set out in *Policy 2.4.7R1 – Normal Recovery Times*.

Research supports that virtually any RTW opportunity promotes rapid recovery for most injuries. WCB staff will work with the employer to design and support an ESRTW plan that recognizes the specific needs of the worker balanced with the impact return to work can have on the workplace.

References: Workers' Compensation Act (Chapter 10, Acts of 1994-95), 89A, 112, 113.

2. Suitable and available work

S. 89A of the *Act* requires employers to cooperate in ESRTW by attempting to provide suitable work that is available and where possible, restores the worker to pre-injury earnings. In the context of ESRTW, suitable work is work:

- a) the worker has the necessary skills to perform;
- b) the worker is medically able to perform the work; and
- c) that does not pose a health or safety risk to the worker or co-workers;

During ESRTW, the primary focus is on temporary work modifications to enable the worker to recover at work. As the worker recovers, the nature, or need for, work modification is expected to change. Suitable work arrangements may involve duties different from the pre-injury work, or some modification of the pre-injury duties and/or hours of work. It may also involve work that is different from the work being done at the time of the injury. The key is that the work must be suitable as described above. Please see Section 3 for the typical modifications that are made to work to enable the employer to provide suitable work during ESRTW.

Available work is work that exists with the employer at the time of the work-related injury at the work site, or at a proposed work site, arranged by the employer, comparable to the work site at the time of the work-related injury.

For determining if a proposed work site is comparable to the work site at the time of the work-related injury, the WCB's considerations include, but are not limited to whether:

- a) assignment to a work site other than the injury site forms part of the employment contract;
- b) if travelling to the proposed job is within the normal parameters of travel expected of a worker; or
- c) if the worker or employer agree on the appropriateness of the conditions of work for the worker.

3. Accommodations

An accommodation is any change in the job duties, reorganization or reduction of work hours, physical changes to the work area, or changes in the use/type of equipment that is necessary to enable an injured worker to perform suitable and available work. Accommodations include modified work and adaptive technologies. ESRTW plans accommodate the worker's altered functional abilities as a result of the work-related injury

and, where appropriate, the accommodations are rehabilitative in nature with respect to injury recovery.

3.1 Determining need for modifications and assistive devices

In determining the need for modifications or assistive devices, the WCB will consider:

- a) the tasks or activities to be performed;
- b) the worker's functional abilities;
- c) any non-work-related injury, limitation, or condition a worker may have;
- d) any modification or device necessary for the performance of job tasks or activities; and
- e) other factors in the work environment that affect the worker's ability to perform the job duties.

3.2 Modified Work

Modified work is that which is offered when a worker is able to return to work but is unable to do all of the duties of the pre-accident job without help. It includes any modification of the previous job that helps a worker safely return to work. It may involve a modification to the job, task, function, hours of work, worksite, or any combination of the above. Modified work during ESRTW includes:

- a) **Modified Duties:** Changing the job duties of the position in order to accommodate the worker's functional restrictions or limitations resulting from the work-related injury. Modified duties include altering or removing some or all duties.
- b) **Alternate Duties:** Alternate duties are duties within the worker's functional abilities.
- c) **Graduated ESRTW:** A gradual return to hours of work achieved by increasing the number of hours worked over a defined time frame agreed upon by the workplace parties utilizing the functional abilities information relating to the worker. While the hours of work vary, the duties are ideally the same. Modified duties may be used together with the Graduated ESRTW where needed to accommodate the worker's post-injury functional abilities.
- d) **Alternative Work:** Alternative work is a suitable job or bundle of duties different from the job or duties that an employer provides to accommodate a worker's functional restrictions due to the injury.

References: Workers' Compensation Act (Chapter 10, Acts of 1994-95), 91, 112, 113.

4. Conclusion of ESRTW plan

An ESRTW plan is concluded by the WCB, with input from the Return to Work Team, based on the following factors:

- a) the goals of return to work have been achieved as evidenced by progress reporting, evaluation, testing results and medical evidence validating that the worker is fit for employment held at time of the work-related injury;

- b) the worker is not going to benefit from continued return-to-work services as determined by the Return to Work Team;
- c) the worker has reached maximum improvement but has not reached the goals of return to work (e.g. employment held at time of the work-related injury or earnings at the time of the work-related injury);
- d) the worker fails to cooperate with and/or abandons the ESRTW plan;
- e) the worker refuses to accept suitable and available employment;
- f) the worker's choice to relocate to a place which significantly limits the ability of the WCB to continue with the provisions of the ESRTW plan; or
- g) the worker voluntarily ends employment or is terminated for just cause.

If the worker has not achieved RTW at the conclusion of the ESRTW, other options may be pursued as set out in *Policy 5.7.1 Return to Work – Overview*.

5. Functional abilities information

Functional abilities information is used to identify what a worker can do and what limitations or restrictions apply. This feeds directly into the creation of an ESRTW plan. A health care provider who assesses and treats a worker who has, or may have had, a work-related injury must send a report on the worker's functional abilities to the WCB. The health care provider must also send progress reports to the WCB as required by the WCB's service level agreements. Functional abilities information provided by health care providers include:

- a) An objective assessment of the worker's overall physical and/or psychological abilities.
- b) Clear outline of the limitations or restrictions of the worker.

While generally a family physician is responsible for the ongoing care of the worker, other health care providers who treat and/or assess the worker may also be called upon to provide functional abilities information. If required, a more comprehensive evaluation of functional ability, such as a functional capacity evaluation may be carried out.

Employer's requests for disclosure of functional abilities information shall be limited to that which is required for the purpose of aiding in the worker's ESRTW and will not contain medical or diagnostic information. With the consent of the worker, the employer or employer representatives may disclose the functional abilities information provided by the health care provider to a person assisting the ESRTW of the worker.

References: Workers' Compensation Act (Chapter 10, Acts of 1994-95), S. 109, 192.

APPLICATION

This policy applies to decisions made on or after July 15, 2025.