WORK SAFE. FOR LIFE.
WORKERS' COMPENSATION BOARD OF NOVA SCOTIA

Issues Identification Paper:

Re-Employment

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Purpose

The WCB of Nova Scotia provides workplace injury insurance to approximately 19,800 employers and 335,000 workers. In any given year, almost 6,000 workers miss time from work due to a workplace injury.

The vast majority of injured workers (approximately 94%) successfully return to their pre-injury work. However, sometimes issues arise and the worker is not able to safely return to work in a timely manner. Should this occur, Sections 89 - 101 of the *Workers' Compensation Act of Nova Scotia* (Appendix A) provide the legislated framework for employer and worker re-employment obligations following a workplace injury.

Section 5 of the WCB Policy Manual provides further direction on the application of these re-employment obligations through sixteen policies which came into effect in the 1990s. The policies have not been reviewed since they were approved nearly twenty five years ago. With the passage of time, we have found that application of these policies can be confusing for workers and employers, thereby impacting their ability to meet their re-employment obligations. Further, there are challenges for the WCB to apply these policies in an efficient, fair and consistent manner.

A complete list of re-employment policies is included in Appendix B, and the WCB Policy Manual can be accessed through our website at www.wcb.ns.ca/About-Us/Policy/Policy-Manual.aspx .

We are now starting a process to review the sixteen re-employment policies. It is important to note that through this review, the WCB does not intend to change worker or employer re-employment obligations. We simply wish to enhance understanding of the various policies and simplify this section of the Policy Manual.

Due to the number and complexity of the interconnectedness of these policies, the WCB will undertake consultation on revising these policies in two stages. This paper provides stakeholders with an understanding of the current environment and other relevant background information related to re-employment.

Stage 1 Consultation

In the first stage of this consultation, the WCB is inviting a small group of stakeholders to meet and help identify which re-employment policies need clarification and discuss other issues for consideration as the Policy Manual Section 5 – Re-Employment is reviewed.

Informed by this stakeholder input, the WCB will conduct research and revise the re-employment policies for further stakeholder consideration in the second stage of consultation.

Stage 2 Consultation

Considering the input from stakeholders in Stage 1, the WCB will revise the re-employment policies and prepare another background paper that includes the draft policies for distribution to key stakeholders. The paper and draft policies will also be posted to the WCB's website. All stakeholders will be invited to provide feedback on the draft revised policies before they are submitted to the WCB Board of Directors for approval.

Background

<u>What is re-employment?</u>

The *Workers' Compensation Act of Nova Scotia* requires employers who have 20 or more workers, except for those in the construction industry, to re-employ workers who have had a work-related injury[1]. When an employer does not fulfill these requirements, the WCB has the authority to order an employer to comply and/or to apply penalties.

For a worker to be considered under the re-employment sections of the *Act* and policies, they must be employed for 12 continuous months and have lost time from work as a result of a workplace injury. Re-employment also applies to workers who are seasonally employed or who are contract or temporary workers, if a pattern of continued and repeated employment with the pre-injury employer can be established.

Workers who can return to work performing either the essential duties of their pre-injury work, or other suitable work, are eligible for re-employment. Once the WCB determines, based upon all available medical evidence, that the worker can return to work, there are two paths re-employment can follow:

1. The worker is able to perform the essential duties of their pre-injury work, or
2. The worker is able to work but cannot perform the essentials of their pre-injury work.

Able to perform the essential duties of pre-injury work
If a worker can perform the essential duties of their pre-injury work, the employer is obligated to reinstate the worker in their pre-injury employment. If this is not possible, the employer must offer alternative work *equivalent* to the pre-injury employment. If alternative *equivalent* work is unavailable, the employer must offer to re-employ the worker in *suitable* work.

Able to work but cannot perform essentials of pre-injury work
If a worker cannot perform the essential duties of their pre-injury work, but can safely do other work, the employer is obligated to offer the worker the first suitable work that becomes available. As the worker's condition improves, the employer is required to offer work more compatible with the worker's abilities. This means the employer must offer work within the organization as it becomes available. Once the employer receives notice the worker is able to return to work, the worker has the right to priority placement in any position the employer fills or intends to fill.

Should an employer terminate an injured worker's employment within six months of their returning to work, it is presumed the employer has breached their re-employment obligation. The WCB will require the employer to demonstrate the termination was for reasons unrelated to the workplace injury. Employers are obligated to accommodate an injured worker to the point where the accommodation involves undue hardship.

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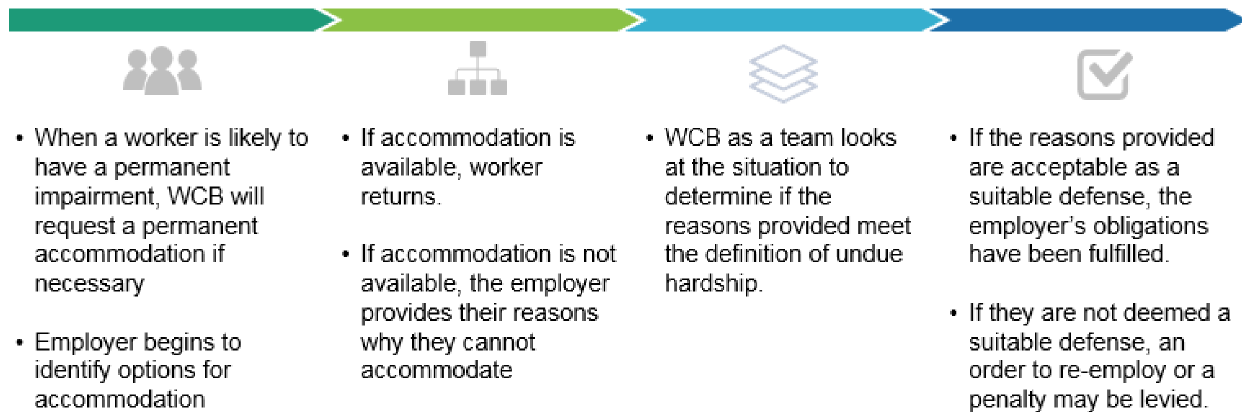
[1] The majority of Canadian jurisdictions' legislation (nine of 12) contain a provision requiring the employer to re-employ an injured worker. Details related to the obligation vary across provinces.

Workers are obligated to participate fully in the return to work and accommodation processes, and to take all reasonable steps to mitigate their earnings loss. They must provide accurate information to the WCB on a timely basis.

Working with the health care providers, the WCB confirms the worker's function and their ability to work. They must notify and communicate with both the worker and employer. The WCB determines if the employer has met their re-employment obligations, and provides all decisions in this regard in writing.

What Does the Re-employment Process Look Like?



Scope of Impact

The WCB does not track how often re-employment obligations are invoked or how often invoking these obligations leads to a successful return-to-work. Caseworkers communicate these obligations with employers at various points throughout the life of a claim, and, as noted above, in the vast majority of claims a successful return-to-work is achieved through the collaborative efforts of all parties involved.

However, there are times when a worker is unable to safely return to work for a variety of reasons. In some cases this may be due to the extent of their injuries. At other times, it may be because either the worker or the employer feels they are unable to accommodate changes in the worker's function that occur after the worker has reached Maximum Medical Recovery. In these cases, the WCB may provide the worker with Extended Earnings Replacement Benefits (EERB) - provided as a full EERB for workers who are completely unable to work, or as a partial EERB for workers who are capable of working partial hours.

Between 2014 and 2018, the WCB provided 1,855 workers with Extended Earnings Replacement Benefits. During this period, there were approximately twice as many full EERBs awarded as partial EERBs (see below).

Full EERB	Partial EERB
1,274	581

While not all of these workers would have benefitted from the re-employment obligations, it is assumed that at least a portion of the 1,274 full EERBs could have been mitigated with clear application of re-employment obligations.

Issues

An entire section of the WCB Policy Manual is devoted to re-employment obligations, categorized into five subsections and 16 policies. With one exception, these policies were approved by the WCB Board of Directors in December 1995 and became effective February 1, 1996. *Policy 5.1.1R – Employer Coverage* became effective April 3, 1997. None of the policies have been reviewed or revised since.

This is a significant number of policies for a section of the Policy Manual that is not relevant for most claims. Revisions to these policies could enhance readability and understanding of re-employment obligations. For example, we believe a number of policies simply duplicate wording in the legislation and could be rescinded while a number of other policies could be consolidated.

Over time other issues have also been identified:

1. Timelines are not clear. The duty to re-employ an injured worker is time sensitive but there is no specific timeframe for an employer to provide an explanation for why they cannot re-employ a worker.

2. The legislation indicates that employers are obligated to accommodate an injured worker to the point of “undue hardship.” The policies do not expand upon this requirement or provide a framework to define what undue hardship is or when an employer reaches this point.

3. There are questions surrounding whether the referenced sections of the *Act* are correct in some policies, and one references a role at the WCB that no longer exists.

4. There is confusion about how the return to work and re-employment processes relate to one another. The *Act* is clear that re-employment obligations start 2 years after the date of accident, but it is unclear about whether this includes transitional duties, the return to work process, or when the worker has reached Maximum Medical Recovery (MMR) and is being re-employed to full duties.

5. Terms in the policies are not defined, for example, “essential duties” and “when the case management process is completed.”

6. The penalty section is confusing, and does not provide clear direction about when the WCB should levy fines or penalties.

Providing Your Comments

We would like to invite you to participate in a stakeholder working group discussion to explore issues regarding re-employment obligations. **In particular, we encourage you to consider whether there are any additional issues you would like to see addressed as the WCB considers revising the re-employment section of the Policy Manual.**

To confirm your participation, or if you have any questions prior to the Working Group meeting (date and location to be determined) please contact:

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Appendix A – Workers’ Compensation Act Sections 89 – 101

RE-EMPLOYMENT

Application and interpretation of Sections 90 to 101

89 (1) Sections 90 to 101 do not apply to
(a) any employer that, in the opinion of the Board, regularly employs fewer than twenty workers or such other number of workers less than twenty as the Board may prescribe by regulation;
(b) any class or subclass of employers or workers exempted by the Board by regulation by reason of the nature of the industry; or
(c) the construction industry, unless included by the Board by regulation.
(2) Sections 90 to 101 apply only to injuries occurring on or after the coming into force of Sections 90 to 101.
(3) For the purpose of Sections 90 to 101,
(a) “alternative employment” means employment that is comparable to the worker’s pre-injury work in nature, earnings, qualifications, opportunities and other aspects;
(b) “suitable work” means work which the worker has the necessary skills to perform, is medically able to perform and which does not pose a health or safety hazard to the worker or any coworkers.
1994-95, c. 10, s. 89; 2017, c. 16, s. 7.

Duty to re-employ

90 The employer of a worker shall offer to re-employ a worker, in accordance with Sections 89 to 101, where the worker
(a) has been unable to work as a result of the injury; and
(b) had been employed by the employer, at the date of the injury, for at least twelve continuous months. 1994-95, c. 10, s. 90.

Duty to accommodate

91 (1) The employer shall, in order to fulfil the employer’s obligations pursuant to Sections 89 to 101, accommodate the work or the workplace to the needs of a worker who requires accommodation as a result of the injury to the extent that the accommodation does not cause the employer undue hardship.
(2) The Board may determine whether the employer has fulfilled the employer’s obligations pursuant to subsection (1). 1994-95, c. 10, s. 91.

Duration of duty

92 (1) Subject to subsection (2), an employer is obligated pursuant to Sections 89 to 101 until the earlier of the day that
(a) is two years after the date of the injury to the worker; or
(b) the worker attains the age of sixty-five years.

(2) Where an employer re-employs a worker pursuant to Sections 89 to 101 less than six months before the time described in clause (1)(a), the employer is obligated, pursuant to Sections 89 to 101, for six months after the date of re-employment. 1994-95, c. 10, s. 92.

Employer not bound where offer refused

93 Where
(a) an employer has offered re-employment to a worker pursuant to Sections 89 to 101; and
(b) the worker has refused the employer's offer,
the employer is no longer bound by the provisions of Sections 89 to 101 in relation to that worker. 1994-95, c. 10, s. 93.

Presumption of non-compliance

94 An employer who
(a) re-employs a worker pursuant to Section 90; and
(b) terminates the worker's employment within six months of the day the re-employment commenced, is presumed, unless the contrary is shown, not to have fulfilled the employer's obligations pursuant to Sections 89 to 101. 1994-95, c. 10, s. 94.

Determination by Board

95 (1) Any worker may apply to the Board for a determination as to whether the employer has fulfilled the employer's obligations pursuant to Sections 89 to 101.
(2) Where
(a) any worker has made an application pursuant to subsection (1); or
(b) the Board considers it advisable, the Board may determine whether an employer has fulfilled the employer's obligations pursuant to Sections 89 to 101.
(3) The Board is not required to consider an application made pursuant to subsection (1) by a worker who has been re-employed and whose employment is terminated, if the application is made more than three months after the date of termination of employment.
(4) In making a determination pursuant to subsection (1), the Board may consider whether the employer has failed to reinstate the worker pursuant to Sections 89 to 101 for any reason that, in the opinion of the Board,
(a) was beyond the control of the employer and could not have been foreseen and avoided by the exercise of due diligence; or
(b) provides a reasonable justification for the failure. 1994-95, c. 10, s. 95.

Determination by Board

96 (1) The Board may determine, with respect to an injured worker who has not returned to work with the pre-injury employer, whether the worker is able to perform
(a) the essential duties of the worker's pre-injury employment;
or
(b) suitable work.
(2) The Board may, from time to time, make a re-determination pursuant to subsection (1).

(3) The Board shall notify the worker's employer in writing when it has made a determination or a re-determination pursuant to subsection (1). 1994- 95, c. 10, s. 96.

Duty of employer on receiving notice

97 (1) The employer, immediately upon receiving actual notice, or notice from the Board pursuant to Section 96, that a worker is able to perform the essential duties of the worker's pre-injury employment, shall offer to reinstate the worker in the position the worker held on the date of the injury.
(2) Where the Board is satisfied that the employer is unable to reinstate the worker pursuant to subsection (1), the employer shall offer to provide the worker with alternative employment with the employer.
(3) Where the Board is satisfied that the employer is unable to reinstate the worker pursuant to subsection (1) or provide the worker with alternative employment with the employer pursuant to subsection (2), the employer shall offer to provide the worker with suitable work. 1994-95, c. 10, s. 97.

Duty of employer on receiving notice

98 (1) The employer, immediately upon receiving actual notice, or notice from the Board pursuant to Section 96, that a worker is able to perform suitable work, shall offer to the worker the first opportunity to accept suitable work that may become available with the employer.
(2) Where
(a) an employer has provided a worker with suitable work pursuant to subsection (1) or subsection 97(3);
(b) the worker is or becomes able to perform work that is more comparable to the worker's pre-injury work; and
(c) work that is more comparable to the worker's preinjury work is available with the worker's employer, the employer shall offer to the worker the work that is more comparable to the worker's pre-injury work. 1994-95, c. 10, s. 98.

Reinstatement or penalty

99 (1) Where the Board determines that an employer has not fulfilled the employer's obligations pursuant to Sections 89 to 101, the Board may
(a) by order, require the employer to
(i) reinstate the worker in the worker's pre-injury employment, where the worker is able to perform the essential duties of the worker's pre-injury employment,
(ii) offer the worker alternative employment, pursuant to subsection 97(2),
(iii) offer the worker suitable work; or
(b) levy a penalty on the employer not exceeding the greater of
(i) the full amount of any compensation payable to the worker and any expenditures made by the Board in respect of the worker, during the year after the injury, and
(ii) the amount of the worker's net average earnings for the year preceding the injury, or both.
(2) The Board may collect any penalty levied pursuant to clause (1)(b) in the same manner as the collection of an assessment.

(3) A penalty levied pursuant to clause (1)(b) may, in the discretion of the Board, be reduced or withdrawn where the Board is satisfied that
(a) the employer has offered the worker suitable work;
(b) the employer has assisted the worker in finding suitable work with another employer; or
(c) the employer cannot, for any reason the Board considers satisfactory, re-employ the worker.
(4) The levying of a penalty pursuant to clause (1)(b) or any action taken by an employer to reduce the penalty pursuant to subsection (3) does not excuse the employer from the obligations on the employer contained in Sections 89 to 101. 1994-95, c. 10, s. 99.

Effect of Sections 89 to 101

100 (1) Where
(a) Sections 89 to 101 conflict with a collective agreement that is binding on the employer; and
(b) the obligations of the employer pursuant to this Section afford a worker better re-employment terms than the terms available to the worker pursuant to the collective agreement, Sections 89 to 101 prevail over the collective agreement, with the exception of any seniority provisions.
(2) Sections 89 to 101 do not prevail over any established rule or practice respecting hiring and placement in the worker's trade or occupation if, in the opinion of the Board, the rule or practice is reasonable.
(3) Where there is a conflict between the provisions of Sections 89 to 101 and Section 71 of the *Labour Standards Code*, Section 71 of the *Labour Standards Code* prevails. 1994-95, c. 10, s. 100.

Failure to re-employ not ground for compensation

101 No worker is entitled to any amount as compensation to which the worker would not otherwise have been entitled as a result of the failure of the worker's employer to fulfil the employer's obligations pursuant to Sections 89 to 100. 1994-95, c. 10, s. 101.

Appendix B – List of Re-employment Policies

5. RE-EMPLOYMENT

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Click Policy Manual for full Policy details.