Workplace Safety & Insurance Board
ONTARIO
Commission de la sécurité professionnelle et de l'assurance contre les accidents du travail

Questions and Answers on new Return to Work and Re-employment Regulation for the Construction Industry

1. **Why was a new regulation developed for return to work and re-employment in the construction industry?**
The new regulation clarifies existing re-employment obligations and introduces return to work co-operation rules for construction employers and workers. In addition, the new regulation, which was developed through the active participation of key construction stakeholders, reflects employment realities that are unique to the construction industry, and will lead to improved return to work outcomes in the construction industry.

2. **What are some of the highlights of the new regulation respecting re-employment?**
The new regulation maximizes return to work opportunities 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 trade that becomes available at the original job site or at a comparable job site.

    The new regulation does not:
    - require employers to create jobs that don't exist, or
    - confer a preferential status for injured workers.

3. **What happened on September 1, 2008?**
On September 1, 2008, the new regulation and re-employment policies for the construction industry took effect. Operational policies to support the return to work provisions of the regulation will take effect at a later date, when they are applied to all covered employers.

4. **How will construction employers and workers know what their re-employment responsibilities/rights are under the new regulation?**
The WSIB is providing communication and educational materials – including a fact sheet and backgrounder – to key construction employer and worker groups and will be asking for their assistance in disseminating the information throughout the industry. Materials have been posted on the WSIB website (www.wsib.on.ca) on the Policy Updates, Workers and Employers pages.

    Other forms of educational support are also being planned, such as assistance with industry-led workshops/information sessions, presentations, and employer statement inserts. WSIB staff in the Construction sector will be available to guide workers and employers through application of WSIB policies that have been created to support the re-employment provisions of the regulation.

5. Will re-employment penalties be levied immediately by the WSIB or will employers be given an opportunity to familiarize themselves with the new requirements before penalties are levied?

The WSIB recognizes that successful education of construction stakeholders is important to the overall success of this initiative. Therefore, penalties will not be levied until the WSIB's education and implementation programs are completed, likely by April 2009. The overall focus of this initiative is on assisting the workplace parties with compliance — not on levying re-employment penalties.

6. Which *employers* does the new regulation apply to?

Any employer whose predominant business activity – as determined by the WSIB – is classified within Schedule 1, Class G-Construction. There is no requirement that the employer must employ 20 or more workers (i.e., the obligations set out in the new regulation also apply to employers with less than 20 workers).

7. Which *workers* does the new regulation apply to?

The regulation applies to a worker who has entered into a contract of service or apprenticeship with a construction employer for the performance of construction work and who has been "unable to work" as a result of a work-related injury. The new regulation does not apply to a construction employer's non-construction workers (i.e., office staff who do not work at a construction workplace).

There is no requirement that the worker must have worked for the employer for one year prior to the injury.

8. What are the criteria used to determine whether a worker has been "unable to work" as a result of a work-related injury?

A worker is considered "unable to work" if, because of the work-related injury/disease, he or she:

- is absent from work
- works less than regular hours, and/or
- requires accommodated/modified work that pays, or normally pays, less than his or her regular pay.

An employer's decision to pay full advances is not relevant to whether the worker has been "unable to work."

9. When does a construction employer's re-employment obligation begin?

A construction employer's obligation begins when it is notified that an injured or ill construction worker, who has been "unable to work," is medically able to perform:

- the essential duties of his or her pre-injury job,
- suitable construction work, or
- suitable non-construction work.

10. How does an employer receive notice of a worker's fitness to return to work?

Notice may be provided by:

- the worker
- the worker's treating health professional (e.g., Functional Abilities Form for Planning Early and Safe Return to Work), and/or the WSIB.

Notice may be provided in person, by telephone, electronically (e.g., fax), or in writing.

11. What must an employer do once they receive notice that the worker is fit to return to some form of work?

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

12. When does a construction employer's re-employment obligation end?

The employer's re-employment obligation continues until the earliest of:

- two years from the date of injury (which is the same as the date of accident)
- one year after the employer receives notice that the worker can perform the essential duties of his or her pre-injury employment
- 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.

13. Does the obligation end sooner in the case of a construction worker hired by the accident employer on a temporary basis (i.e., a contract of employment with a fixed end date)?

No, the obligation continues until the earliest of the dates set out in question #12 – whether the worker was hired on a temporary or a continuing basis.

14. If more than one construction job is available, a construction employer is required to offer the job that is most similar in nature and earnings to the one the worker had on the date of injury. Does this requirement apply to both union and non-union workplaces?

Yes. In addition, the obligation to provide the most similar work applies every time a more similar job becomes available throughout the period of the re-employment obligation.

15. If a unionized worker is fit for suitable construction work and the employer does not have available work in the worker's trade, but does have suitable construction work at another workplace, must the employer offer the suitable construction work?

Yes, if there is no suitable work available in

- the worker's trade and classification at a collective agreement workplace, or
- the worker's trade at a collective agreement workplace, then the employer must offer suitable construction work at another workplace of the employer, if such a position is available.

16. If a non-unionized worker is fit for suitable construction work, must the employer offer suitable work in the worker's trade?

As long as the employer is still employing workers at the workplace where the worker was injured, or at a comparable workplace, the employer's obligation in this scenario is to offer to re-employ the worker:

- in a position whose duties consist of suitable work in the worker's trade at the workplace where the worker was injured, if such a position is available, or
- if there is no such position, in a position in which the duties consist of suitable work in the worker's trade at a comparable workplace, if such a position is available, or
- if neither position is available, in a position in which the duties consist of suitable work in construction at the workplace where the worker was injured, if such a position is available, or
- if none of the above positions are available, in an available position in which duties consist of suitable work in construction at a comparable workplace.

17. For non-unionized workers, if there is no available work at the workplace where the worker was injured, the employer is required to offer available work at a "comparable workplace." How does the WSIB determine if a workplace is "comparable?"

To determine comparability, the WSIB looks to the following factors:

- type of construction work being performed (i.e. residential vs. commercial), and
- whether the location is within a reasonable distance of the worker's home, bearing in mind:
    - the mode(s) of travel available to the worker
    - travel norms for construction workers in the worker's trade who work for the accident employer, and
    - the amount of travel that was required before the injury.

18. If an employer's work is seasonal (e.g. paving) and the worker has been cleared to do suitable or regular work during the employer's "shutdown" period, what is the employer's re-employment obligation during this period? What will happen to the worker's WSIB benefits during this period?

Regardless of what type of work the worker has been cleared to do, the employer is only obligated to offer work if it is available (or being performed by someone hired after the worker was injured). Since this employer has no work during his or her shutdown period, there is no requirement that work be offered.

If the worker was fit for regular work, his or her WSIB benefits would generally be stopped; if the worker was only fit for suitable construction or non-construction work, his or her benefits would generally continue.

For more information on entitlement to benefits following a seasonal shutdown, see 15-06-04, Entitlement Following Work Disruptions: Seasonal Layoffs.

19. Does an employer have to fire (terminate) a worker before he or she can be found in breach of the applicable re-employment obligation?

No. Failing to *offer* work, when required to do so, is a breach of the re-employment obligation. Therefore, once the WSIB has satisfied itself as to the relevant facts and circumstances, an actual termination need not occur for an employer to be found in breach of its obligation to re-employ.

20. Are there special considerations when a termination occurs as opposed to a failure to offer available work?

If a worker is *terminated* within six months of being re-employed, the presumption clause in the new regulation is activated and the WSIB *presumes* that the employer has not fulfilled its re-employment obligation. (A more complex presumption clause applies to workers who are re-employed at a construction project and then terminated within six months.)

If a worker is terminated *before* being re-employed – or more than six months after being re-employed – the presumption clause does not apply. A failure to offer work, in the absence of a termination, does not activate the presumption clause. It should be noted that just because the presumption clause has not been activated **does not** mean that the employer has not breached its obligation to re-employ.

21. What does it mean if a breach of the re-employment obligation is "presumed"?

If the presumption clause has been activated, it is simpler, as a matter of law, for the WSIB to conclude that an employer has not complied with its obligation to re-employ. However, the WSIB is still required to make the inquiries necessary to determine the issue and the determination must still be based on all the relevant information that is available.

22. If an employer has breached its obligation to re-employ, what penalties can the WSIB impose?

The WSIB can levy a re-employment penalty on the employer in an amount that does not exceed the amount of the worker's net average earnings (NAE) for the year preceding the injury.

23. If an employer has breached its obligation to re-employ, what payments/benefits can the WSIB provide to the worker?

The WSIB can provide **re-employment payments** to a worker when there has been a breach of the re-employment obligation but there is no ongoing loss of earnings related to the injury (i.e. the worker is fit for regular work without accommodation).

Loss of earnings benefits are provided to a worker when there has been a breach of the re-employment obligation and there is an ongoing loss of earnings related to the injury (i.e. the worker is only fit for the essential duties of the pre-injury employment with accommodation, suitable construction work, or suitable non-construction work).

Unlike loss of earnings benefits, re-employment payments are limited to one year in duration.

24. When is an injured construction worker entitled to an LMR assessment?

For both union and non-union workers who are only fit to perform suitable non-construction work, an LMR assessment will be provided if it is *unlikely that the worker will be medically able to perform construction work again.*

In addition, an LMR assessment may be provided to both union and non-union workers if an employer has breached its obligation to re-employ and, as a result, the worker is entitled to re-employment payments or loss of earning benefits.

Apart from the right to an LMR assessment arising out of the re-employment provisions in the new regulation, **all** workers – including construction workers – have a right to an LMR assessment arising out of s. 42 of the *Workplace Safety and Insurance Act* if:

- it is unlikely that the worker will be re-employed by his or her employer because of the nature of the injury
- the worker's employer has been unable to arrange work for the worker that is consistent with the worker's functional abilities and that restores the worker's pre-injury earnings, or
- the worker's employer is not co-operating in the early and safe return to work of the worker.