

**Operational
Policy**Section
Re-employment in the Construction IndustrySubject
**Re-employment Obligation in the Construction Industry -
Threshold, Duration and Specific Employer Requirements**

Policy

Construction employers are required to offer to re-employ their injured construction workers who have been unable to work due to a work-related injury/disease.

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 his or her pre-injury job
- suitable construction work, or
- suitable non-construction work.

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.

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 that the accommodation does not cause the employer undue hardship.

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.

The employer's obligation to re-employ continues until the earliest of

- two years from the date of injury
- one year after the worker is medically able to do the essential duties of the pre-injury job
- the date the worker declines an offer of work, or
- the date the worker reaches age 65.

NOTE

This policy is intended to be read in conjunction with, 19-02-04, Functional Abilities Form for Work Reintegration. In addition, this policy **does not apply** to a construction employer's non-construction workers (i.e. office staff who do not work at construction workplace), or persons exempt from compulsory construction coverage, see 12-01-06 Expanded Compulsory Coverage in Construction.

Purpose

The purpose of this policy is to outline an employer's re-employment obligations in the construction industry.

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Guidelines

Definitions

Construction employer - Any employer whose predominant business activity, as determined by the WSIB, is classified within Class G - Construction.

Construction worker - A worker, or deemed worker, who has entered into or is employed under a contract of service or apprenticeship with a construction employer for the performance of construction work in return for monetary consideration. For information on a deemed worker in construction, see 12-01-06, Expanded Compulsory Coverage in the Construction.

Construction work - Includes the act or process of erection, alteration, repair, dismantling, demolition, structural maintenance, painting, land clearing, earth moving, grading, excavating, trenching, digging, boring, drilling, blasting or concreting, general maintenance, the installation of any machinery or plant, and any ancillary work or undertaking in connection with the construction of a public or private building, bridge, structure, industrial establishment, mining plant, shaft, tunnel, caisson, trench, excavation, highway, railway, street, runway, parking lot, cofferdam, conduit, sewer, watermain, service connection, telegraph, telephone or electrical cable, pipe line, duct or well, or any combination of such work. Also included are such activities that are integral to construction work, for example supervising, surveying, estimating, engineering and overseeing health and safety.

Construction project - Construction work being performed by a construction worker for a construction employer in circumstances where the employment relationship between the worker and the employer is expected to come to an end when the worker has completed all his or her assigned duties on a particular construction job.

Construction workplace - Any place where construction work is being performed by a construction worker employed by a construction employer.

The re-employment threshold

The re-employment obligations set out in the *Workplace Safety and Insurance Act, 1997* (WSIA) only apply to employers of workers who have been "unable to work" as a result of a work-related injury. Thus, the "threshold" which a worker must cross before he or she can benefit from the re-employment protections contained in WSIA is that he or she must first have been "unable to work" as a result of a work-related injury.

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Unable to work

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,

regardless of whether the employer reimburses the worker for an actual loss of earnings or not. Thus, an employer's decision to pay advances in these circumstances is not relevant to whether a worker has been "unable to work."

NOTE

"Unable to work" does not include a worker who loses time/earnings from work because he or she must attend a health care appointment.

Determining the worker's fitness to return to work

The employer's re-employment obligation differs depending on whether the worker is medically able to perform

- the essential duties of his or her pre-injury employment (with or without accommodation)
- suitable construction work, or
- suitable non-construction work.

The worker's level of fitness to return to work can be determined **based on the workplace parties' exchange of relevant information (including the worker's functional abilities information)**, or through a **decision by the WSIB** (either on its own initiative or by request of either workplace party). For more information about how an employer is notified about the worker's level of fitness, see "Notice of fitness to return to work," below.

Since the worker's level of fitness for work can change over time, the workplace parties and the WSIB monitor the worker's fitness level to ensure that appropriate re-employment activities occur at appropriate times.

Determining fitness for essential duties

In cases where the worker is off work entirely, or back to suitable construction or non-construction work, the workplace parties and/or the WSIB determine whether he or she is fit

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for the essential duties of his or her pre-injury employment.

To determine the essential duties of a worker's pre-injury job, the duties necessary to achieve the actual job outcome are considered. The "job outcome" is the overall objective of the job in terms of the production of the final product or provision of service. In addition, the following factors are considered

- how often each duty is undertaken
- the proportion of time spent at each duty
- the effect on the job outcome if a duty is removed
- the effect on the process before or after a duty, if a duty is removed
- the current job description, and
- the normal productivity expected in the job.

The "normal productivity expected in the job" refers to the rate, range or level of production or service expected for the job.

In cases where the worker's functional abilities limit him or her from performing a task(s) necessary to achieve the pre-injury job outcome, or limit his or her rate, range or level of production, the workplace parties and/or the WSIB consider whether an accommodation that would not cause the employer undue hardship may allow the worker to perform the task(s) at the required rate. If so, the employer is required to provide the accommodation and the determination is made that the worker is fit for the essential duties of his or her pre-injury job.

Example

The job outcome is the installation of 50 square feet of flooring material per hour. Based on functional abilities information, the worker is only capable of installing approximately 25 square feet of flooring material per hour. After reviewing the issue, the employer determines that there is no accommodation available that would allow the worker to increase his productivity rate to the required level. Since this worker is not able to produce the job outcome at the required rate of production, and since there is no accommodation available that would not cause the employer undue hardship, this worker is not fit for the essential duties of his or her pre-injury employment (with or without accommodation), but only fit for suitable construction work.

Determining fitness for suitable construction and suitable non-construction work

If, based on a review of the worker's functional abilities information, the workplace parties and/or the WSIB have determined that the worker is not fit for the essential duties of the pre-injury job (with or without accommodation), the workplace parties and/or the WSIB must determine whether the worker is fit for suitable construction work.

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If, based on a further review, the workplace parties and/or the WSIB have determined that the worker is not fit to perform suitable construction work, the workplace parties and/or the WSIB must then determine whether the worker is fit for suitable work other than in construction.

Change in worker's level of fitness to return to work

If an employer receives notice that a worker's level of fitness to return to work has changed, the corresponding re-employment obligation also changes.

Example

On May 12th the XYZ Construction Company receives notice that Jason, a drywaller with a work-related left knee injury, is fit to return to work as long as he has no prolonged standing or work that requires ladders. These restrictions prevent Jason from performing the essential duties of his drywalling job, although they do allow him to perform some drywalling tasks.

On May 23rd Jason notifies XYZ that he has been cleared by his doctor to return to his regular drywalling work. Therefore, effective May 23rd XYZ's re-employment obligation changes from the "fit for suitable work in construction" obligation to the "fit for essential" obligation. In accordance with the "fit for essential" obligation, XYZ asks Jason to return to his pre-injury job on May 24th.

For information on how a change in the worker's level of fitness may change the duration of the re-employment obligation, see "Obligation ends," below

Duration of the re-employment obligation**Obligation starts**

If the worker has met the "unable to work" threshold (see above), an employer's re-employment obligation starts

- on the day it receives notice that the worker is medically able to perform the essential duties of his or her pre-injury job, suitable construction work, or suitable non-construction work, as the case may be.

Notice of fitness to return to 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 (i.e., physician, chiropractor, physiotherapist or registered nurse (extended class), and/or

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- the WSIB.

Notice of fitness to return to work may take several forms, see 19-02-04, Functional Abilities Form for Work Reintegration.

Notice provided in person, by telephone or electronically (e.g., fax) is effective on the date it is received by the employer. Notice provided by regular mail is effective seven calendar days from the date the notice was sent.

In cases where the workplace parties are unsure or unable to agree on whether the worker can return to some form of work, either party can contact the WSIB and the WSIB will

- assist them to reach consensus on the issue, or
- make a determination as to the worker's level of fitness to return to work, and
- promptly give the workplace parties written notice of the determination.

NOTE

Workers are required to inform the WSIB of any material change in circumstances, see 22-01-02, Material Change in Circumstances - Worker, maintain contact with the employer throughout the Work Reintegration (WR) process, and provide the employer with functional abilities information when requested.

As a result of these requirements, workers must notify the WSIB and the employer when they are able to return to some form of work. In addition, if a worker's condition improves, i.e., he or she is able to perform suitable construction work, and is later able to perform the essential duties of his or her pre-injury job, the worker must inform the WSIB and the employer of the improvement.

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.

In cases where the work-related impairment of a "fit for essential" worker worsens to the point where he or she is only capable of suitable construction work, or suitable non-construction work, the employer's re-employment obligation continues until the **earliest of**

- two years from the date of injury
- the date on which the worker declines an offer from the employer to re-employ the worker, or

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- the date on which the worker reaches 65 years of age.

NOTES

1. For the purposes of this policy, a worker's "date of injury" is the date the worker is first entitled to WSIB benefits/services. This date is set by the WSIB and is also known as the worker's date of accident. For more information, see 11-01-04, Determining the Date of Injury.
2. As set out above, an employer's re-employment obligation ends on the date on which the worker declines a re-employment offer from the employer. However, before the WSIB finds that a worker has declined an offer of work from the employer, and therefore that the re-employment obligation has ended, it must assure itself that the offer (preferably in writing) was specific enough to allow the worker to determine whether the offered work is consistent with his or her functional abilities and level of fitness to return to work. Secondly, the WSIB must be satisfied that the offered job meets the "suitable work" criteria (see below). Thirdly, the WSIB looks to whether one or both of the workplace parties promptly advised the WSIB that the offer had been declined. Lastly, when requested, the workplace parties are required to provide the WSIB with any documents (e.g., offer of work/refusal of offer) exchanged between them.

Definition of suitable work

Suitable work means post-injury work that is **safe, productive, consistent with the worker's functional abilities**, and that, when possible, restores the worker's **pre-injury earnings**.

Safe

The following factors should be examined when considering whether post-injury work is safe

- the work does not pose a health or safety risk to the worker (e.g., should not cause re-injury or a new injury), to co-workers, or to third-parties
- the work is performed at a worksite that is covered by either the *Occupational Health and Safety Act* or the *Canada Labour Code*, and
- the worker has the functional ability to travel safely to and from the proposed worksite. To determine the worker's ability to travel safely, the following factors should be considered
- whether the worker's work-related injury/disease restricts his or her capability for safe travel (e.g., a worker with a fractured leg, and on crutches, may not be able to walk on icy ground safely), and
- whether the mode of transportation the worker is required to use to travel to the proposed worksite poses a health or safety risk to him or her or to the general public (e.g., a worker with a broken right foot would not likely be capable of operating a motor

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vehicle safety).

NOTES

1. Certain worksites are not covered under the *Occupational Health and Safety Act* or the *Canada Labour Code* (e.g., not-for-profit agencies' offices and a worker's permanent residence for work at home arrangements). In these cases, the workplace parties must satisfy the WSIB that they have taken appropriate steps to ensure that the workplace is safe.
2. Workers and employers are encouraged to jointly resolve expense issues relating to travel to work wherever possible. The basic premise is that workers should not incur additional travel expenses because the work-related injury/disease temporarily dictates a particular mode of travel.

Productive

Productive work is work

- that the worker has, or is able to acquire, the necessary skills to perform, and
- whose tasks provide an objective benefit to the employer's business.

The general type of work tasks that can be expected to provide an objective benefit to the employer's business include, but are not limited to, tasks that

- form part of the employer's regular business operation
- permit the worker to acquire new job skills
- generate revenue (aside from reducing WSIB costs), or
- increase business efficiency or lead to business improvements.

Another relevant factor is whether the worker is performing productive tasks for the entire shift, or only a portion of the shift.

Consistent with the worker's functional abilities

A job is considered consistent with the worker's functional abilities when the tasks and/or duties associated with the job can be performed within the reported physical/cognitive capabilities of the worker. See, 19-02-04, Functional Abilities Form for Work Reintegration.

NOTE

Cognitive capabilities or limitations refer to a worker's mental alertness, reasoning, judgement or short-term memory - all of which may be impaired because of the work-related injury/disease, or because of medication used to treat the work-related injury/disease.

Pre-injury earnings

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In relevant cases, the worker's pre-injury earnings may refer to either the worker's average earnings at the time of the injury, or any appropriate recalculation of those earnings. For more information, see 18-02-06, Determining Average Earnings—Recurrences.

Accommodation requirements

Accommodation means any modification to the work or the workplace, including but not limited to reduced hours, reduced productivity requirements and/or the provision of assistive devices, that results in work becoming available that is consistent with the worker's functional abilities.

In all cases the employer must accommodate the work to the needs of the worker to the extent that the accommodation does not cause the employer undue hardship (for more information on "undue hardship," see definition below). For instance, if a job becomes available that can be made suitable through accommodation, and the accommodation does not cause the employer undue hardship, the employer must provide the accommodation.

In addition, where the employer controls the workplace, the employer's duty to accommodate to the extent of undue hardship applies to both the work and the workplace.

NOTE

For the purposes of determining the extent of an employer's duty to accommodate, an employer has "control of the workplace" if it has the authority to order or implement non-permanent physical changes to any structure(s) on the workplace that may require accommodation to meet the needs of the worker (e.g., building a temporary ramp). In cases where the employer does not have "control of the workplace," the duty to accommodate the work includes the duty to provide assistive devices or appliances (such as a sit/stand stool) if such devices can be carried away from the workplace when they are no longer required.

At the request of the worker or the WSIB, the employer is required to provide written notice to the worker and to the WSIB of how it intends to accommodate the work or the workplace to meet the needs of the worker.

Undue hardship

To determine undue hardship, the WSIB refers to the Ontario Human Rights Commission's *Policy and Guidelines on Disability and the Duty to Accommodate*.

If the employer demonstrates that the expense to accommodate the work or the workplace will cause undue hardship, the employer is still required to pay the expenses up to that point. The WSIB may pay the remaining expenses, if doing so allows the worker to return to

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suitable and sustainable employment within the worker's functional abilities, and restores the worker's pre-injury earnings.

In the case of small construction employers, i.e., those that employ 20 or fewer workers, the WSIB will consider providing assistance towards the cost of accommodation where doing so

- aids in the worker's work reintegration, and
- assists the employer to comply or remain in compliance with its obligation to re-employ.

Specific re-employment obligations to union workers

A construction employer's re-employment obligation commences on the day it receives notice that a union worker, who meets the "unable to work" threshold, is medically able to return to work.

Definition

Collective agreement workplace - A construction project or shop of the worker's employer that is within the trade, sector and geographic jurisdiction covered by the collective agreement that applies to the worker, or the workplace where the worker was injured.

The "fit for essential" re-employment obligation

If an employer receives notice that a worker is medically able to perform the essential duties of his or her pre-injury job (with or without accommodation), 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.

The "fit for suitable work in construction" re-employment obligation

If an employer receives notice that a worker is medically able to perform suitable construction work, the employer must 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

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- **if neither position is available**, in an available position whose duties consist of suitable work in construction at another workplace of the employer.

NOTE

When determining whether a worker is required to accept an offer of work at a location that is not covered under his or her collective agreement, the WSIB considers whether the location of the offered work 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.

The "fit for suitable - non-construction work" re-employment obligation

If an employer receives notice that a worker is medically able to perform suitable non-construction work and, due to the seriousness/significance of his or her 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.

Work transition assessment/plan

If it is unlikely that a worker will be medically able to perform construction work again, the worker is entitled to

- a work transition (WT) assessment and, if necessary
- a WT plan to facilitate the worker's return to non-construction work with the accident employer or in the general labour market.

Specific re-employment obligations to non-union workers

The re-employment obligations set out in this section **only apply** to employers **if**, during the period the re-employment obligation is in effect, the employer is still employing non-union workers at the workplace where the worker was injured or at a comparable workplace. If no such workers are being employed at the workplace where the worker was injured or at a comparable workplace, no re-employment obligation applies.

A construction employer's re-employment obligation commences on the day it receives notice that a non-union worker, who meets the "unable to work" threshold, is medically able to return to work.

Definition

Comparable workplace - A construction workplace where work in the worker's trade is being performed in physical circumstances similar to those that existed at the workplace

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where the worker was injured (e.g., a residential construction site would not likely be “comparable” to a commercial construction site). In addition, for a workplace to be considered “comparable,” its location must be 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.

The "fit for essential" re-employment obligation

If an employer receives notice that a worker is medically able to perform the essential duties of his or her pre-injury job (with or without accommodation), 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 neither position is available**, in an available position in the worker’s trade at a comparable workplace of the employer.

The "fit for suitable work in construction" re-employment obligation

If an employer receives notice that a worker is medically able to perform suitable construction work, the employer must 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.

The "fit for suitable - non-construction work" re-employment obligation

An employer’s obligations in these circumstances are the same as an employer who employs union workers. See above for more information, including applicable provisions relating to WT.

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**If more than one construction job available - union and non-union
workers**

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**. For assistance in determining “nature and earnings,” see the relevant factors set out under the heading “Comparable employment” in 19-05-03, Compliance with the Re-employment Obligation—Construction Industry.

If two or more construction jobs are available that are equally similar in nature and earnings, employers must consider the following factors in determining which job to offer

- the duration of each job
- in the case of a job at a construction project, the duration of the construction project, and
- the proximity of each job to the worker’s home.

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 must offer the more similar job to the worker. This obligation applies every time a more similar job becomes available throughout the period of the re-employment obligation.

Application date

This policy applies to all injuries on or after January 1, 2013.

Document history

This document replaces 19-05-02 dated April 06, 2009.

This document was previously published as:

19-05-02 dated September 18, 2008.

References**Legislative authority**

Workplace Safety and Insurance Act, 1997, as amended

Sections 2(1), 12(1)(3)(5), 12.2, 23(3), 40, 41(1)(8)(11)(13), 159(2)(h)

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