

Impact of the WSI Act on Re-employment Obligations

With the introduction of the Workplace Safety and Insurance Act there has been some changes to the Re-employment obligations found in Section 54 of the pre-1997 Act and now in Section 41 of the WSI Act.

For the most part however the basic thrust and direction of re-employment has remained the same. This article will provide a brief overview of the re-employment legislation and policies as well as a more detailed look at the specific changes under the WSI Act and its associated policies.

Overview Of Re-employment: Pre 1997 Act

Threshold

Re-employment obligations were first introduced on January 2, 1990. They applied to all accidents with the date of accident of January 2, 1990 or later, as long as the employer had regularly employed 20 or more workers and the worker had been continuously employed for at least one year and was unable to work. These threshold criteria continue to apply for Bill 99 claims, with the exception of the Construction Industry claims (see Construction – page 4).

Obligation

The employer has two differing obligations depending upon the worker's level of fitness.

1. When the worker is fit to do the essential duties of the pre-injury job then the accident employer must provide either the pre-injury job or a comparable job.
2. When the worker is unable to do the pre-injury job but is fit to do suitable work then the accident employer must provide the worker with any suitable work that might become available.

Accommodations

Whether they are providing the preinjury job, a comparable job or a suitable job, the accident employer also has an obligation to accommodate the job if any accommodations are required to allow the worker to return to that job. The accident employer is obliged to accommodate to the extent that the accommodation does not cause them undue hardship.

Duration

The obligation to re-employ lasts until the earliest of:

- 2 years following the date of injury
- 1 year following notice that the worker could do the pre-injury job
- the date the worker turns 65 years of age

Notice: This document is intended to assist WSIB decision-makers in reaching consistent decisions in similar fact situations and to supplement applicable WSIB policies and guidelines as set out in the Operational Policy Manual (OPM). This document is **not a policy** and in the event of a conflict between this document and an OPM policy or guideline, the decision-maker will rely on the latter.

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Termination

If an employer terminated a worker within 6 months following reemployment it was presumed the employer had not fulfilled their re-employment obligation.

Penalty

Any employer found in breach of the re-employment obligation could be penalized up to one year's net average earnings of the worker. In addition, a worker could be paid benefits for a maximum of one year following the breach.

Construction

Special rules apply for the Construction Industry. Re-employment requirements for employers engaged in the Construction Industry are governed by the pre-1997 Act and Ontario Regulation 259/92 entitled "Re-instatement in the Construction Industry" which can be found at the back of the Act.

The WSI Act makes a number of small but significant changes to the re-employment rules.

Notification

The WSI Act places greater reliance on workplace parties to manage their own early and safe return to work and this includes any re-employment obligation an employer might have. Consequently the policy around notification of a worker's fitness level has changed.

For accidents on or after January 1, 1998

Generally notices of fitness are no longer sent to the workplace parties except in cases where the workplace parties are unable to agree on the level of fitness. In such cases the Board shall rule on the level of fitness and shall notify the workplace parties in writing.

The exception to this is the Construction Industry. The WSIB shall continue to notify the workplace parties of the worker's fitness level in all cases within the construction industry.

For accidents before January 1, 1998

The WSIB has continued to notify (both verbally and in writing) workplace parties of the worker's fitness level for claims with a date of accident before January 1, 1998.

Mediation

Section 40(7) of the WSI Act states the WSIB shall offer mediation to the workplace parties should they encounter any difficulty or dispute concerning their co-operation with each other during the return to work process. Consequently an offer of the services of a RTW Mediator must be made to the workplace parties before any decision is made on a possible breach of re-employment obligations.

Termination Following Re-employment

Prior to the introduction of the WSI Act, if an employer terminated a worker within 6 months of re-employment it was presumed, unless the contrary was shown, that the employer had not fulfilled their duty to re-employ. To counter this the employer had to show "just cause" or "threat to financial viability". Now the onus is on the employer to show that the termination was in no way related to the work injury if the termination occurred on or after January 1, 1998. If the termination occurred before January 1, 1998 the old test of "just cause" and "threat to financial viability" continues to apply.

Employer in Breach

In cases where an employer is in breach of their obligation to re-employ the WSIB may:

- make Loss of Earnings (LOE) payments and provide an Labour Market Re-entry (LMR) Plan if required or
- Make "re-employment payments", the equivalent of LOE benefits, to the worker from the date of the breach for up to one year.

The worker must be available for and co-operate in a “Return to Work Placement Program” through an LMR Service Provider. The re-employment payments to the worker are reduced or ended if the worker returns to work during the year.

Construction

The WSI Act has a significant impact on the threshold criteria for construction workers. For these workers, with an accident date on or after January 1st, 1998, the criteria of 20 or more regularly employed workers and the requirement for 1 year of continuous employment no longer applies. In other words, any construction worker unable to work as a result of an injury which occurred while working for a construction company has re-employment rights. The new Act sets out that a new regulation is to be drafted. Until it is drafted and approved, Ontario Regulation 259/92 remains in effect
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