



ESRTW Draft Policies: An Overview



Ontario

Office of the Employer Adviser

The OEA

- Independent agency to help employers with WSIB problems
- Arm's length from WSIB
- Advise, represent, educate employers
- 29 staff
- Located across Ontario
- www.employeradviser.ca
 - Fact sheets on various workplace safety & insurance issues
 - Small Business Guide
 - Practical tools for employers

RTW Consultation Continues

- 6 new policies
- February 15, 2007 deadline for written submissions
- WSIB piloting policies in certain areas of the Province
 - No penalties imposed in pilots
- Policies available on WSIB website
- <http://www.wsib.on.ca/wsib/wsibsite.nsf/public/ESRTWconsult>

Key Concepts And Definitions

- Return to work as a **process (19-02-02)**
 - Starts the moment the employer learns that a worker has suffered a work-related injury/disease
 - Continues throughout the work-related injury/disease recovery and impairment period, and
 - Adapts to changes as they arise

Early Return to Work

- “Early” return to work
 - Process initiated immediately, or soon after, the worker suffers a work-related injury/disease
 - As soon as the worker is functionally fit to return to some form of suitable work
 - Encourages active recovery in the workplace
- In cases where worker not functionally fit to do any type of work, (e.g., worker requires time to heal)
 - No offer of work is considered suitable, but
 - The workplace parties are expected to maintain communication

Suitable Work (19-02-02)

- Legislative Obligation
 - attempt to provide suitable employment that is **available and consistent with the worker's functional abilities** and that, when possible, restores the worker's pre-injury earnings
- Draft Policy Obligation
 - 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 preinjury earnings
- Adds concept of productive work
- Sustainable work still included for long term (not defined) modified work

Safe Work

- Work that doesn't pose an increased health or safety risk to the worker (e.g., should not cause re-injury or a new injury) or to co-workers
- Performed at a worksite that is covered by either the *Occupational Health and Safety Act* or the *Canada Labour Code*, and
- Worker has the functional ability to travel safely to and from the proposed worksite

Travelling As a Safety Factor

- Does injury/disease restrict worker's capability for safe travel?
 - e.g., a worker with a fractured upper leg, and on crutches, may not be able to walk on icy ground safely
- Does worker's mode of travel to proposed worksite pose a health or safety risk to worker or general public?
 - e.g., a worker with a broken right foot would not likely be capable of operating a motor vehicle safely

Work at Home

- WSIB only supports *mutually accepted* work at home arrangements in limited circumstances
- Not likely accepted if work at home is not the workplace norm for the type of work being offered
- Work at home arrangements are viewed as a short-term solution until worker can physically travel to the worksite or until the frequency of required rest periods is reduced
- Workplace parties must satisfy WSIB that the work is safe and **productive**

Productive Work

- Tasks provide an *objective benefit* to the employer's business
 - Employer must connect work to a benefit to product / service
- Objective benefit includes work that:
 - Forms part of the employer's regular business operation
 - Permits worker to acquire new job skills
 - Generates revenue (aside from reducing WSIB costs), and/or
 - Increase business efficiency or lead to business improvements
- Employers will need to consider how components of modified work objectively benefits their business

Available Work

- Work that exists with the accident employer at the pre-injury worksite, or at a comparable worksite, arranged by the employer
- Do not have to create a job
- Specific criteria defines a comparable worksite

Comparable Worksite: Criteria

- Travel or assignment to different worksites is a regular practice in the industry
- Travel or assignment to a worksite, other than the pre-injury worksite, forms part of the employment contract
- Worker normally accepts employment assignments in various geographic areas
- The worksite's location has changed subsequent to the work-related injury/disease (i.e., due to relocation, amalgamation or division of business)
- The worksite is covered by either the *Occupational Health and Safety Act* or the *Canada Labour Code*

Comparable Worksite Factors

- Does injury restrict worker's capability to travel safely?
- Is comparable worksite within the reasonable parameters of travel expected of any worker?
 - roughly 50-60 kilometres each way from the worker's principal residence
 - *except* if the worker normally travels more than 50-60 kilometres each way
- What modes of transportation available to the worker to travel to the comparable worksite?
 - e.g., owns/leases vehicle, public transportation, car pooling
- If more than one job is available, is the employer offering the job that is closest in proximity to the worker's principal residence?

RTW a Shared Responsibility

- WSIB expands notion of shared responsibility by including other participants in RTW process who play an important role:
 - Worker's direct supervisor
 - A **union representative** or **authorized worker representative**
 - An **authorized employer representative**
 - The treating health professional(s)
 - WSIB
 - Co-workers
- All participants need to work towards returning the worker to suitable work that is most comparable in nature and earnings to the worker's pre-injury job

Workplace Parties' Co-operation Obligations

- Workplace *parties must co-operate with each other* in RTW process by (section 40 of the WSIA):
 - Initiating early contact
 - Maintaining communication throughout the worker's recovery and impairment
 - Working towards identifying and securing a suitable and available job for the worker
 - Giving the WSIB all relevant information concerning the worker's return to work, and
 - Notifying the WSIB of any dispute or disagreement concerning the worker's return to work

Required Communications

Worker

- Contact the employer as soon as possible after the work-related injury
- Contact the employer as soon as possible after receiving initial health care treatment
- Respond to written or telephone contacts from the employer “within a reasonable time”
- Be available to communicate with the employer during regular work hours
- Attend appointments/meetings with the employer

Employer

- Contact the worker as soon as possible after the work-related injury
- Provide the worker/WSIB with the company return to work contact(s),
 - direct supervisor, company nurse
- Respond to written or telephone contacts from the worker “within a reasonable time”
- Be available to communicate with the worker during regular work hours
- Attend appointments/meetings with the worker

Suitable and Available Work

- WSIA obligates employers to attempt to provide suitable employment that is available and consistent with the worker's functional abilities and that, when possible, restores the worker's pre-injury earnings
- Worker's obligation is to *assist the employer*, as may be required or requested, to identify suitable employment that is available and consistent with the worker's functional abilities

RTW Hierarchy

1. Pre-injury job (starting point and overall goal)
2. Pre-injury job with accommodations
3. Work comparable in nature and earnings to the pre-injury job (with accommodation if required)
4. Alternate work (with accommodation if required)

Practical RTW

- Policy recognizes employer's *combined tasks*
- “work” includes the combining of tasks/duties which together constitute a temporary or permanent job, as well as a short-term training program which leads to a job with the accident employer. (19-02-02)

Accommodation

- Employers have duty to accommodate work or workplace to return injured workers to work
 - Re-employment obligations under the WSIA
 - *Ontario Human Rights Code* or *Canadian Human Rights Act*
- There is no specific statutory WSIB duty to accommodate in ESRTW

WSIB Accommodation Expectations

- WSIB expects employers, unions and workers, to comply with human rights legislation and policies
 - Make reasonable efforts to accommodate a worker's pre-existing and work-related disabilities/impairments in the absence of a re-employment obligation
 - Where a **re-employment obligation exists**, accommodate the work or the workplace for the worker to the extent of undue hardship
- If no re-employment obligation exists, but workplace modifications or assistive devices would allow a worker to return to suitable work, the WSIB may provide financial assistance for accommodations to **an employer in need (19-02-03)**

Required *Worker* RTW Activities

- To provide the employer with functional abilities information when requested
- To identify work opportunities he/she believes match his/her functional abilities
- To attend the worksite and attempt to perform those aspects of the work which both parties agree are safe
- To discuss how the workplace or the available work could be accommodated
- To report any difficulties during the RTW process to his or her supervisor

Required *Employer* RTW Activities ...

- Offer suitable work that is available (reason for not offering must be legitimate) - implies that offer must be in writing
- In the absence of re-employment obligation, the employer must **make reasonable efforts to accommodate a worker's pre-existing and work-related disabilities/impairments**
- Be specific about the offer of work by clearly stating:
 - what work is being offered
 - the nature of the work (*specific required tasks/duties*)
 - hours of work
 - associated remuneration, and
 - location of worksite

... Required *Employer* RTW Activities

- Discuss *how* the workplace or the available work could be accommodated and the accommodations the employer is able to provide
- Discuss *what* suitable jobs are available
- *Monitor* the worker's progress during the return to work process
- Workplace parties try to identify and secure suitable work that is most comparable in nature and earnings to the worker's pre-injury job on ongoing basis:
 - a job considered suitable when worker first returned to work *may not be* the most comparable job several weeks later, and
 - a job unsuitable early on (e.g., the pre-injury job) *may become suitable* through improvements in the worker's functional abilities

Written RTW Plan

- Parties encouraged to develop and use a written RTW plan to aid with the monitoring of the return work process
 - Where frequent changes expected during RTW process
 - Where a graduated return to work program is in place
- Written RTW plan should identify regular, formal review dates so that all participants can:
 - Discuss the worker's progress
 - Manage changes that result from updated functional abilities information
 - Identify obstacles and possible solutions
 - Make adjustments/accommodations to the work or the workplace, and
 - Revise the plan as circumstances may require

Required *Worker* Information to WSIB

- Any difficulty or dispute concerning his or her co-operation with the employer
- If an offer of suitable work has been made, and to provide details if requested
- Provide the WSIB, when requested, with relevant information and/or copies of any documented exchanges
- Advise WSIB of any increase/decrease in hours and/or pay
- Any significant change in his or her level of fitness (improvement or deterioration)
- Respond to written or telephone contacts from the WSIB within a reasonable time
- Communicate with the WSIB during regular work hours

Required *Employer* Information to WSIB ...

- Provide the WSIB with the company's return to work contact(s)
 - direct supervisor, company nurse, etc.
- Notify WSIB of any difficulty or dispute concerning the co-operation with the worker in the return to work process
- Notify WSIB if an offer of suitable work has been made
 - provide details if requested
- Provide the WSIB, when requested, with relevant information and/or copies of any documented exchanges
 - documented negotiations, return to work plans, written description of job offered

... Required *Employer* Information to WSIB

- Advise the WSIB of any increase/decrease in hours and/or pay
- Notify the WSIB of any significant change in the worker's level of fitness (improvement or deterioration)
- Respond to written or telephone contacts from the WSIB within a reasonable time and to be available to communicate with the WSIB during regular work hours

Sustainable Work

- On long term basis modified work needs to be sustainable to be suitable
- If worker has a permanent impairment (present or likely):
 - Clinical condition is stable, and
 - Is unable to return to the pre-injury job, or
 - Is only able to return to the pre-injury job with accommodations
- Parties and WSIB consider whether the work currently performing is sustainable
 - Is work likely to restore pre-injury earnings on a long-term basis
- Generally, unless the post-accident work is sustainable, it will likely not represent the best return-to-work outcome in view of all the circumstances

Unsustainable Work

- Significant work or workplace accommodations made
- Rate of pay is significantly higher than what the employer pays for similar jobs
- Productivity required of the worker is significantly lower than would normally be expected
- Job was created especially for the worker
- If job no longer available, would be difficult for the worker to find new employment with similar clinical restrictions or accommodations in the general labour market
- WSIB will consider LMR assessment

WSIB's Role in RTW

- Inform and educate workplaces and workplace parties about:
 - Their roles and responsibilities in the return-to-work process
 - Their return-to-work Co-operation/Re-employment obligations (if relevant)
 - Likely consequences (penalties) when they do not meet their legal obligations, and
 - Relevant RTW good practices and return-to-work resources.

Case Management Approach

- Collaborative process
 - WSIB assesses, plans, implements, co-ordinates and monitors the benefits and services
 - WSIB collaborates with the worker, employer and relevant health professionals
- Suggests WSIB will be much more involved in RTW process to achieve best outcome for worker
- Will ensure Co-operation obligations (19-02-06)

Small Business

- Recognition that small business will need more help
- Small businesses may require increased assistance and intervention from the WSIB to achieve positive return-to-work outcomes.
- WSIB is sensitive to the needs of small businesses during the return-to-work process
- But all obligations and penalties same for small business – not clear how greater sensitivity will be implemented

Resolving Disputes

- Workers encouraged to attempt to perform offered job
- If worker believes job not suitable should assist employer by attempting to perform parts of job that are suitable and safe (19-02-05)
- If job (components) not suitable worker notifies employer *and provides reasons* (2/4)
- Parties discuss issue and consider further accommodation
- If no agreement, parties notify WSIB and provide relevant information

WSIB Role in Disputes

- Discuss suitable work offer with parties
- Determine if parties have adequate information
- Consider an ergonomic assessment if more info needed
- Consider mediation

Mediation

- Significant emphasis on RTW mediation
- Used if parties unable to negotiate RTW
- Participation is voluntary (i.e., worker and employer must both agree)
- If parties don't agree, or mediation unsuccessful, WSIB decides dispute within 60 days (19-02-03)

When Work is deemed “suitable”

- If the WSIB determines that the job offered is suitable, and decides worker able to earn wages associated with the suitable job, WSIB
 - verbally informs both parties of its decision
 - **adjusts the worker’s wage loss benefits**, and
 - confirms its decision in writing
- The worker’s wage loss benefits generally adjusted as of the date of the worker’s next available shift
- When an adjustment date is selected, worker’s LOE adjusted by deducting the earnings associated with the suitable work from the pre-injury earnings—whether the worker has accepted the suitable job offer or not (19-02-05)

Adjusting LOE

- As long as the workplace parties are co-operating in all other aspects of their ESRTW, a benefit adjustment following a refusal of suitable work is adjudicated under dispute policy (19-02-05) and not penalty policy
- Where there is worker non co-operation, wage loss benefits are generally adjusted under the penalty policy (19-02-06)
- Worker not penalized for non-co-operation although there is LOE reduction

Non Co-operation Penalty Process

- Where the WSIB is considering making a finding of non-co-operation, the WSIB first verbally warns the workplace party:
 - Why the decision-maker is considering making a finding of non-co-operation
 - What behaviours and activities require change on the part of the workplace party
 - The likely consequences if the workplace party doesn't change the behaviours/activities, and
 - Any legitimate reasons the workplace party may have for not co-operating in the return to work process.
- WSIB confirms outcome of discussion in writing

Legitimate *Worker* Non Co-operation

- Terms of a collective agreement
- Compelling personal reasons such as a death in the family
- Unexpected illnesses or accidents
- LOE may still be adjusted if the employer has offered suitable work and the subsequent wage loss is no longer solely related to the work-related injury/disease

Legitimate *Employer* Non Co-operation

- The terms of a collective agreement
- Summer or holiday shutdowns
- General layoffs, strikes or lock outs
- Corporate reorganization
- Financial hardship

Non Co-operation Penalty

- Unlikely that a single particular action or behaviour would lead to determination of non co-operation
- WSIB generally looks to *pattern* of actions and behaviours of the workplace party
- For a non-co-operation penalty to be levied, the WSIB must be convinced, on a balance of probabilities, that a workplace party:
 - had knowledge of his or her return-to-work obligation
 - had the capability to carry it out (i.e., there were no legitimate reasons for failing to carry it out), and
 - did not carry it out

Written Notice of Non Co-operation

- Non-co-operation penalty applied from the date the *written* notice comes into effect (19-02-06)
- Written notice comes into effect five “WSIB business days” after the date that appears on the written notice:
 - “WSIB business days” are Monday to Friday inclusive, excluding public and declared holidays

Worker Penalty

- The WSIB reduces the worker's LOE benefits by 50%:
 - from the date the written notice comes into effect
 - until the end of the **tenth business day** following that date, or
 - until the worker starts co-operating again, whichever is earlier
- If non-co-operation continues beyond the 10th business day following the date the written notice comes into effect, the WSIB suspends the worker's wage loss benefits

Employer Penalty

- Initial penalty of 50% of the cost of LOE benefits
 - From the date that the written notice comes into effect
 - Until the end of the **tenth business day** following that date, or
 - Until the employer starts co-operating again, whichever is earlier
- If the non-co-operation continues beyond the 10th day, the WSIB will then levy a penalty of:
 - 100% of the cost of LOE, **plus**
 - 100% of any LMR costs
- The full penalty continues until:
 - The employer has started co-operating again
 - LMR services have been completed, with no prospective wage loss, or
 - 12 months following the date that the written notice comes into effect, whichever is earlier

Summary of Penalties

Penalty starts 5 days after date on written notice	Initial Penalty First 10 Days of Breach	Ongoing Penalty 11th Day + of Breach Up to 12 Months
Worker	50% LOE	100% LOE
Employer	50% LOE	100% LOE + 100% LMR Costs

Retroactive Penalties

- WSIB expects parties to begin co-operating from date of injury or report of disease
- If party failed to co-operate and WSIB determines that:
 - the workplace party had the knowledge and capability to carry out his or her return to work obligations
 - had no legitimate reason for failing to carry out his or her return to work obligations, and
 - did not carry out his or her return to work obligations
- WSIB may make a retroactive finding of non-co-operation
- During retroactive period, only the 50% penalty would be applied
- Does WSIB have authority to impose a penalty before an entitlement determination made?

Full Penalty

- Employer receives a subsequent notice of non-compliance in the same claim
- WSIB imposes 100% penalty at outset (19-02-06, 5/7)

Concurrent Employer Obligations

- Some employers have both RTW and Re-employment obligations:
 - Obligation to co-operate in RTW begins once the work-related injury/disease has occurred
 - Re-employment obligation begins once a worker is medically fit to do the essential duties of the pre-injury job or suitable work
- If employer breaches both obligations, and the breaches are for different acts or omissions, the WSIB may levy *both* penalties

Double Penalty (Example)

- Employer who fails to maintain communication with the injured worker following the work-related injury/disease may be subject to a non-cooperation penalty; and
- Worker becomes fit to perform the essential duties of the pre-injury job and the employer fails to offer the pre-injury job or an alternative job that is comparable in nature to the pre-injury job, the WSIB can also levy a Re-employment penalty

Same Act – 1 Penalty

- If employer breaches both obligations, and the respective breaches are for the *same* act or omission
 - For example, failing to offer suitable work that is available
- WSIB will only impose one penalty
- WSIB chooses the penalty which is most likely to lead to a positive return-to-work outcome for the injured worker
- WSIB considers
 - The length of the remaining Re-employment obligation, and
 - The worker's pre-accident net average earnings

Human Rights Policy (19-02-07)

- Clear statement that although the WSIB has no authority to enforce provincial or federal human rights statutes or policies, the WSIB encourages compliance with such obligations wherever possible
- Where no Re-employment obligation exists, there should be no penalties for not providing accommodation

Accommodation in RTW

- Strong emphasis on obligation of all parties to comply with Code
- Refers to obligation of unions (19-02-07)
 - In the context of unionized workplaces, accommodation may require employers and unions to adapt or modify the operation of a collective agreement if necessary to satisfy a legitimate accommodation request
 - Seniority issues, positions in other unions in same workplace
- Employers at risk of a human right complaint if ignores Code obligations
- WSIB expects employer to make reasonable efforts to accommodate a worker's pre-existing (even non-work-related) and work-related disabilities/impairments in the absence of a Re-employment obligation
- Will there be a non co-operation penalty for failure to do so?

Post Injury Non-Work-Related Disability

- Employer to consider any **post-injury, non-work-related disability/impairment** a worker may suffer in RTW (19-02-07 4/8)
- WSIB may provide accommodation support if it will allow the worker to successfully return to work with the accident employer, or complete his/her LMRP
- Wage loss associated with a work-related injury is calculated only on the basis of a worker's pre-existing and work-related limitations/functional abilities

ESRTW TIPS ...

- Create/review job descriptions (pre-injury and modified)
- Develop physical demands analyses of jobs
- Identify accommodation resources (refer to resources handout)
- Consider place of modified work, i.e. covered under OHSA/CLC
- Consider worker's ability to travel safely
- Review modified work jobs
- Consider available work at other locations within guidelines
- Ensure RTW plan adapts to change, i.e. RTW hierarchy reviewed with updated Functional Abilities information

... ESRTW TIPS

- Consider how jobs add value to goods/services produced
 - How do individual components add value
 - Could business suffer if job is left undone
 - Ever hired anyone to do the job in the past, e.g. clerical/filing/administrative job
- Ensure process/person in place to meet required activities, i.e. initiating and maintaining communication, providing information to WSIB, etc.
- Create template/checklist to ensure all necessary information is provided to the WSIB
- Document everything, especially all communication efforts and conversations with the worker and WSIB personnel

... ESRTW TIPS

- Ensure mutual understanding
- Ensure job offer is in accordance with RTW hierarchy
- Have justification to answer the following:
 - Why employer not able to accommodate the pre-injury job
 - Why employer not able to offer comparable job
- Develop/update RTW program and adhere to it
- Review WSIB's RTW Self Assessment Guide (www.wsib.on.ca)

... ESRTW TIPS

- Ensure workers know of RTW responsibilities
- Develop worker package for when an injury occurs
- Understand and train appropriate staff on your Human Rights obligations: Ontario Human Rights Commission's policy and guidelines on disability and the duty to accommodate

<http://www.ohrc.on.ca/english/publications/disability-policy.pdf>

Return to Work, Accommodation and Disability Resources

Ontario Human Rights Commission's Policy and Guidelines on Disability and the Duty to Accommodate	www.ohrc.on.ca/english/publications
(WSIB) Return to Work Resources	www.wsib.on.ca/wsib/wsibsite.nsf/public/EmployersESRW
Institute for Work and Health	www.iwh.on.ca
National Institute of Disability Management and Research (NIDMAR)	www.nidmar.ca
Work-related Musculoskeletal Disorders: Guide and Tools for Modified Work	www.santepub-mtl.qc.ca/omrt/tools.html
Human Resources and Social Development (formerly Social Development Canada and Human Resources and Skills Development Canada)	www.sdc.gc.ca
Disability Web Links	www.disabilityweblinks.ca
Enablelink	www.enablelink.org
Gateway to diversity	www.equalopportunity.on.ca
Job Accommodation Network	http://janweb.icdi.wvu.edu
Paths to Equal Opportunity	www.equalopportunity.on.ca
Typing Injury FAQ	www.tifaq.com
CTS (Carpal Tunnel Syndrome) Place	www.ctsplace.com
Computer Related Repetitive Strain Injury	http://eeshop.unl.edu/rsi.html

Canadian Workers' Compensation Boards

Association of Workers' Compensation Boards of Canada	www.awcbc.org
British Columbia Workers' Compensation Board	www.worksafebc.com
Commission de la santé et de la sécurité du travail (Québec)	www.csst.qc.ca
Manitoba Workers' Compensation Board	www.wcb.mb.ca
New Brunswick Health, Safety and Compensation Commission	www.whscc.nb.ca
Nova Scotia Workers' Compensation Board	www.wcb.ns.ca
Saskatchewan Workers' Compensation Board	www.wcb.sask.com
Workers' Compensation Board of Alberta	www.wcb.ab.ca
Workers' Compensation Board of the Northwest Territories and Nunavut	www.wcb.nt.ca
Workers' Compensation Board of Prince Edward Island	www.wcb.pe.ca
Workplace Health, Safety & Compensation Commission of Newfoundland and Labrador	www.whscc.nf.ca
Workplace Safety & Insurance Board (WSIB) (Ontario)	www.wsib.on.ca
Yukon Workers' Compensation Health and Safety Board	www.wcb.yk.ca



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QUESTIONS?