FTR Now

WSIB's Work Reintegration Policies

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The Workplace Safety and Insurance Board (WSIB) has implemented five new policies to replace the existing policies relating to early and safe return to work, re-employment and work transition (formerly Labour Market Re-entry (LMR)). The primary focus of these policies is to ensure that an injured worker returns to work with his or her employer.

This *FTR Now* provides a general overview of these new policies and some guidance and strategies on how employers must now respond to meet their legal obligations.

RESPONSIBILITY OF WORKPLACE PARTIES

For the most part, the obligations have not changed. Workplace parties must co-operate with each other in the return to work process. Parties are required to:

- initiate early contact;
- maintain appropriate communication throughout the worker's recovery;
- identify and secure return to work opportunities for the worker;
- give the WSIB all relevant information concerning the worker's return to work; and
- notify the WSIB of any dispute concerning the worker's return to work.

However, the WSIB will now be taking a much more active role in the return to work process and will be carefully scrutinizing the interaction between the parties. It is clear that the WSIB will no longer accept an employer's word that there is no suitable work available without now conducting its own investigation into the employer's claim.

Where the worker is functioning and capable of suitable work, the WSIB will now meet with the workplace parties at the worksite no later than twelve weeks after the date of injury if the worker has not yet returned to work.

Employers will need to be prepared for this meeting as the WSIB will try to obtain an agreement to return the worker to suitable work or will threaten consequences for failing to co-operate. Accordingly, at this meeting, employers must be able to outline exactly what has been done to date to show that there has been compliance with sections 40 and 41 of the *Workplace Safety and Insurance Act*. All contact with the WSIB and the worker, including the worker's responses, should be documented.

RETURN TO WORK OPPORTUNITIES

The policy stipulates that a worker should be provided with work that maintains his or her dignity and productivity. It lists a hierarchy of return to work goals, of which the starting point and overall goal is the worker's return to the pre-injury job with the injury employer. Employers will be required to provide accommodation to the worker, where needed, in order to have the worker return to the pre-injury job. If the pre-injury job, even with accommodation, is not medically suitable, then the hierarchy is as follows:

- work comparable in nature and earnings to pre-injury job, with accommodation where required;
- alternate suitable work, with accommodation where required;
- work comparable in nature and earnings to pre-injury job in the labour market, with accommodation where required; and
- alternate suitable work in the labour market, with accommodation where required.

Employers are required to accommodate a worker's medical restrictions to the point of undue hardship. However, when determining whether an accommodation amounts to undue hardship, the policy provides that the WSIB must refer to the Ontario Human Rights Commission's Policy and Guidelines on Disability and the Duty to Accommodate. Therefore, the WSIB's determination of what constitutes undue hardship may be problematic in view of the fact that the Commission's policy is not law.

An employer's duty to accommodate has been the subject of extensive case law both by arbitrators and the civil courts. One wonders how the WSIB will interpret the duty to accommodate without any solid knowledge or experience in interpreting and applying this vast body of law.

In the case of small businesses, the WSIB will consider assistance with the cost of accommodation where the accommodation provides a long-term solution to the worker's impairment if the accommodation results in undue hardship. How the WSIB will interpret undue hardship in these circumstances remains undefined.

Employers will also be required to consider placing the worker in available work at other locations because the WSIB will examine whether suitable work is available at other worksites. Therefore, employers will need to be aware of available job postings throughout their organizations. New hires or transfers will be closely scrutinized by the WSIB to determine whether an employer has co-operated in return to work. However, the policy does acknowledge that the ability to transfer may be subject to the terms of any applicable collective agreement.

Where suitable alternate work has been identified, employers will be expected to provide a worker with the necessary training to be successful in that new position. Before any such training program is undertaken, an employer should be satisfied that the worker has the necessary skills and abilities

to complete the training program in order to assume the duties of the new position. A formal assessment of the worker's skills and abilities should be undertaken before placing the worker in the new position. In addition, an employer should also consider placing the worker on probation to assess his or her performance before permanently confirming him or her in the new position.

Accommodation can mean any modification to the work or workplace, including reduced hours, reduced productivity requirements and the provision of assistive devices. Employers may also find themselves required to combine tasks or duties to create a temporary accommodation or a permanent new job. Employers should consider whether the new position is sustainable and whether it provides economic value to the organization before agreeing to its creation as it will be difficult to argue that the position is no longer needed or of benefit after the position has been in existence for many years.

Where suitable work with the accident employer is not available, the policies provide for the relocation of a worker where there are opportunities available in the regional or provincial labour market. Where relocation represents the only reasonable opportunity for the worker to obtain suitable employment, the WSIB will pay reasonable costs associated with the relocation. If relocation and relocation expenses are offered but the worker decides not to relocate, the worker's benefits will be calculated as if the worker had relocated.

PENALTIES

Employers should already be familiar with their re-employment obligations under the *Act* and the penalties for breaching the re-employment obligation. As part of its reintegration strategy, the WSIB has introduced a new penalty: the non-co-operation penalty.

A dispute over a job suitability does not automatically mean that the workplace parties are being non-co-operative. However, in assessing whether non-co-operation has taken place, the WSIB will look at the pattern of actions and behaviours of the workplace parties. Accordingly, it will be important for employers to be proactive in their return to work initiatives and to ensure that all initiatives have been documented and conveyed to the worker and the WSIB.

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 the obligation, the opportunity to carry it out and then failed to carry it out.

The WSIB will initially provide a party with verbal notice of the breach. This notice will be confirmed with a written notice that the party is in breach and that a penalty will be levied from the date that the written notice comes into effect. This notice should not be ignored and employers should have a system in place to ensure that the notice comes to the attention of the appropriate person within the organization.

A finding of non-co-operation against a worker will result in the reduction of benefits by fifty percent. If the non-co-operation continues beyond fourteen calendar days, the WSIB will suspend the worker's wage loss benefits.

Where the WSIB determines that an employer has been non-co-operative, the WSIB will levy an initial penalty of fifty percent of the cost of the wage loss benefits to the worker. If the non-co-operation continues beyond fourteen calendar days following the date that the written notice comes into effect, the WSIB will then levy a penalty of one hundred percent of the cost of the wage loss benefits payable to the worker plus one hundred percent of the costs associated with providing work transition services to the worker. The full penalty can continue to be levied for up to twelve months.

While the re-employment obligation is time limited, the duty to co-operate is not. However, if an employer breaches both a co-operation and re-employment obligation in the same claim, the WSIB will apply a single penalty, choosing the higher of the two penalties.

Workers who are terminated within six months of being re-employed will now have three months to ask the WSIB to investigate the reasons for the termination. If the request is made after three months, the WSIB is not required to investigate, but may choose to do so. The WSIB also has the authority to investigate on its own initiative, at any time.

In cases where the re-employment obligation exists but the worker voluntarily quits his or her job, no further re-employment obligation will generally apply. However, if it appears that the worker was pressured into resigning, the re-employment obligation will remain. This is an important point as many employment relationships are ended at the worker's request or through a settlement at a mediation or arbitration. In these cases, employers should ensure that the Minutes of Settlement contain carefully crafted language to respond to the potential argument that the worker was pressured into signing the agreement and therefore that it was signed under duress.

WORK TRANSITION SERVICES

Starting December 1, 2010, the WSIB's Return to Work Specialists and Work Transition Specialists will act as "expert resources" who are charged with managing the return to work of injured workers. The WSIB will no longer use external LMR case managers.

A work transition plan will be created to outline how a worker will return to work with the injury employer or, if required, how a worker will re-enter the labour market. Generally, a worker is offered one plan. Plans will not usually exceed three years in duration although they may be adjusted to accommodate changing circumstances relating to the worker or the employment market.

The plan is designed to assist the worker in obtaining the skills to overcome a permanent impairment and to return to a suitable occupation (SO). The policy provides that the plan must be

signed by the worker, the WSIB and the injury employer (where the SO is with the accident employer).

The plan can provide for a variety of services tailored to the worker's specific circumstances including a worker's transferable skills, aptitudes, interests and learning preferences. It can include enhancing fundamental literacy skills, improving the worker's ability to communicate in English, academic upgrading for workers whose skills are already above a Grade 9 level and vocational skills training at a university or college. The plan can also provide for training on the job (TOJ) undertaken at the employer's worksite. The policy provides that a TOJ program can run anywhere from a minimum of four weeks to a maximum of 26 weeks.

There is a 30 day time limit on appealing a WSIB decision relating to return to work or a work reintegration plan.

There is also a provision for enhanced transitional programs for young workers who, due to their age, were limited in their advancement in the labour market at the date of injury. Young workers are defined as between the ages of 15 to 24.

The WSIB has also created a specific policy for workers 55 years of age or older. The policy allows for older workers to enter into self-directed work transition plans for a period of a year to give them greater flexibility and options.

WORK REINTEGRATION NEER POLICY

To support its new work reintegration initiatives, the WSIB has also changed its policy relating to NEER. This change extends the NEER window from three years to four years, starting with the 2008 accident year. Employers need to be cognizant of the expansion of the NEER window and the potential cost ramifications when making decisions about return to work.

CONCLUSION

The WSIB believes that these new policies will significantly improve a worker's ability to obtain sustainable employment either with the original employer or in the general labour market. WSIB employees are now charged with managing the return to work process and the WSIB can now levy a new penalty to ensure the co-operation of the workplace parties. Clearly, the WSIB will be taking a much more active role in the return to work process. Employers should be prepared to justify their decisions relating to accommodation and return to work and will need to consider the potential risks when making these decisions.

Should you have any questions relating to the WSIB's new policies, please contact your regular Hicks Morley lawyer.