# Policy

The workplace parties (injury employer and worker) are required to co-operate in the return-to-work (RTW) process.

The injury employer and worker are expected to work together to return the worker to their pre-injury job with any necessary accommodation, or to another job within the worker's functional abilities. Ideally, the worker will eventually return to the pre-injury job.

This document should be read in conjunction with 19-02-07, RTW Overview and Key Concepts.

## Purpose

The purpose of this policy is to outline the workplace parties' co-operation obligations, how the WSIB determines compliance with those obligations, and the applicable penalties for non-compliance.

# Guidelines

## Workplace parties' RTW co-operation obligations

Injury employers are obliged to co-operate by:

- initiating early contact with the worker
- maintaining appropriate communication with the worker throughout their recovery
- attempting to provide suitable work that is available and consistent with the worker's functional abilities (when an available job is identified as suitable for the worker, the injury employer is obliged to offer the worker the job), and
- giving the WSIB all relevant information concerning the worker's RTW.

Workers are obliged to co-operate by:

- initiating early contact with the injury employer
- maintaining appropriate communication with the injury employer throughout the recovery
- assisting the injury employer, as required or requested, to identify suitable work that is available and consistent with their functional abilities
- giving the WSIB all relevant information concerning their RTW, and
- participating in all aspects of their RTW assessments and RTW plans.

The workplace parties are required to notify the WSIB of any difficulty or dispute concerning their co-operation with each other in the worker's RTW.

In those cases where the worker is not functionally capable of performing any type of work, the workplace parties are expected to maintain regular communication in preparation for a future return to work.

## Accommodation requirements

Injury employers have a duty to modify the work to accommodate the needs of the worker to the extent that the accommodation does not cause the employer undue hardship. If the injury employer has control of the workplace, they also have a duty to modify the workplace as required by the worker, to the extent of undue hardship. This duty arises from the *Ontario Human Rights Code,* or the *Canadian Human Rights Act* for federally regulated employers.

For the purposes of satisfying the co-operation obligation, in cases where a job is or becomes available that can be made suitable through accommodation, and the accommodation does not cause the injury employer undue hardship, the employer must provide the accommodation to allow the worker to remain at or to return to work. A worker's accommodation requirements may be temporary or permanent.

For more information, see "Duty to accommodate" and "Undue hardship" in 19-02-07, RTW Overview and Key Concepts.

## Determining a worker's ability to return to work

The worker's ability to return to work can be determined based on the workplace parties' exchange of relevant information regarding the worker's functional abilities, or through a decision by the WSIB, either on its own initiative or by request of either workplace party.

See 19-02-07, RTW Overview and Key Concepts, for more information about determining a worker's ability to work and use of the WSIB's "Functional Abilities Form for Planning early and Safe Return to Work".

## Suitable and available work

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

When considering the co-operation obligations, the factors the WSIB examines to determine if suitable work is "available" at the pre-injury worksite, or at another worksite, include but are not limited to:

- whether a job vacancy has been posted, advertised or otherwise communicated, or
- evidence of hirings or transfers that occur on or after the date the worker is fit for suitable work.

For further information, see "Suitable work" and "Available work", in 19-02-07, RTW Overview and Key Concepts.

## Workplace party disputes over the suitability of a job offer

Workers and injury employers are encouraged to resolve disputes regarding the suitability of job offers on their own, but they should notify the WSIB if there are any outstanding issues. The WSIB will assist the workplace parties to reach agreement on the issue(s), or make a determination with respect to job suitability.

Disputes over the suitability of a job offered are not acts of non-co-operation, nor is non-co-operation meant to apply to workers who raise a health and safety concern under the *Occupational Health and Safety Act* or the *Canada Labour Code*.

### WSIB finds the job offer is suitable

If the WSIB determines that the specific job offered is suitable, the WSIB informs both parties of the decision. The worker is expected to return to the job.

The WSIB generally adjusts the worker's wage loss benefits based on the earnings of the offered job, as of the date of the worker's next available shift.

### WSIB finds the job offer is not suitable

If the WSIB determines that the specific job offered is not suitable, the WSIB informs both parties of the decision. The injury employer must continue to attempt to identify the next most suitable job that is available, or becomes available short of undue hardship.

The WSIB will generally continue to pay wage loss benefits to the worker as long as they continue to demonstrate co-operation with the injury employer and the WSIB in the RTW process, and no suitable worker is available.

## Duration of the co-operation obligations

Co-operation obligations apply to the workplace parties from the date of injury until the earlier of the date:

- the worker's loss of earnings (LOE) benefits can no longer be reviewed by the WSIB. This is usually at 72 months post injury; however, if LOE benefits qualify to be reviewed post 72 months, the co-operation obligations may apply during the additional LOE review period. For more information, see 18-03-06, Final LOE Benefit Review
- there is no longer an employment relationship between the workplace parties because either the worker voluntarily quits, or the injury employer terminates the employment for reasons unrelated to either the work-related injury/disease or the worker's claim for benefits
- the WSIB is satisfied that suitable work with the injury employer is not available, will likely not become available, or will not continue to exist in the reasonably foreseeable future, or
- the WSIB is satisfied that the injury employer has met its cooperation obligations by offering suitable work, and the worker does not return to the job following the finding that the job is suitable.

In cases where there is no longer an employment relationship between the workplace parties, or when the WSIB has determined that suitable work is not available with the injury employer, the worker continues to be obliged to cooperate in all aspects of their RTW assessments and RTW plans.

## Successor employers

Following the sale or transfer of a business that employs workers covered under the *Workplace Safety and Insurance Act, 1997*, as amended, the question of whether co-operation obligations attach to a successor employer depends on whether the successor employer is the same legal entity as the original employer.

If the successor employer is the same legal entity as the original employer, co-operation obligations generally attach to the successor employer. On the other hand, if the successor employer is a different legal entity than the original employer, the co-operation obligations generally do not attach to the successor employer.

## Complying with co-operation obligations

At the request of a workplace party, or on its own initiative, the WSIB can review whether an injury employer and/or the worker has fully complied with their co-operation obligations.

In assessing whether co-operation has taken place, the WSIB generally looks to the pattern of actions and behaviours of the workplace parties. The WSIB considers and weighs all of the relevant facts and circumstances, including the capability to carry out the obligation and the degree to which the workplace party has initiated/participated in required activities.

Failure to comply with co-operation obligations may result in penalties for the worker and/or injury employer. Specifically, the WSIB may:

- reduce or suspend the worker's benefits, and/or
- levy a penalty on the injury employer that is equivalent to the costs of providing benefits to the worker.

## Factors that will not lead to non-co-operation penalties

The WSIB reviews the specific facts of each situation but generally does not levy non-co-operation penalties if it determines the injury employer and/or worker have not met their co-operation obligations due to compelling reasons.

### Employers

Compelling reasons for injury employers being unable to co-operate are generally limited to circumstances such as a summer or holiday shutdown, general layoff, strike or lockout, and/or corporate reorganization. In the case of small employers, such circumstances may also include a death in the family or an unexpected illness or accident. These circumstances are typically of short duration.

### Workers

Compelling reasons for workers being unable to co-operate are generally limited to post-accident non-work-related changes in circumstances such as an unexpected illness or injury, death in the family or jury duty. These circumstances are typically of short duration.

While a non-co-operation penalty is not levied, wage loss benefits may be adjusted based on the impact of the post-accident non-work-related change as outlined in 15-06-08, Adjusting Benefits Due to Post-accident, Non-work-related Change in Circumstances.

## Levying non-co-operation penalties

The WSIB takes the following steps to levy a non-co-operation penalty when there are no compelling reasons for non-compliance (e.g. the worker has multiple unexplained absences from a training program, or the injury employer did not demonstrate any attempt to provide suitable work):

- Inform the workplace party about their co-operation obligations. Identify the specific requirement they are failing to meet, along with the possible penalty for non-compliance. This is done verbally, where possible, and in writing.
- Confirm the workplace party remains non-compliant.
- Issue written notice informing the workplace party that a penalty is to be levied for a breach in their co-operation obligations.
- Levy the penalty 10 calendar days after the date of the written notice (20 calendar days for small businesses employing less than 20 employees).

If a workplace party breaches any of their co-operation obligations at different periods in the same claim, the WSIB may levy more than one penalty. (e.g., The WSIB levies a penalty and the workplace party comes back into compliance. The workplace party subsequently breaches an obligation and the WSIB levies another penalty.)

## Worker penalties

### Initial penalty—worker

Ten calendar days after the date of the written notice, the WSIB levies the initial penalty and reduces the worker's wage loss benefits by 50%.

The initial penalty continues for 14 calendar days or until the worker starts co-operating again, whichever is earlier.

### Full penalty—worker

The WSIB levies the full penalty if the non-co-operation continues beyond 14 calendar days after the date of the initial penalty.

- If the non-co-operation impacts a **RTW plan (with training)**, the WSIB terminates the RTW assessment and/or the plan and reduces the worker's wage loss benefits to reflect the

earnings the worker would have been capable of earning had they completed the plan, see 19-02-10, RTW Assessments and Plans.
- If the non-co-operation impacts any other **RTW plan/activity**, the WSIB suspends the worker's wage loss benefits.

Wage loss benefits remain reduced or suspended until the worker starts co-operating again. Wage loss benefits are increased or started again as of the date there is evidence confirming the worker's renewed co-operation.

## Employer penalties

### Initial penalty—employer

Ten calendar days after the date of the written notice, the WSIB levies an initial penalty of 50% of the cost of the wage loss benefits to the worker.

The initial penalty continues for 14 calendar days, or until the injury employer starts co-operating again, whichever is earlier.

### Full penalty—employer

The WSIB levies the full penalty if the non-co-operation continues beyond 14 calendar days after the date of the initial penalty. The full penalty is based on the following:
- 100% of the cost of the wage loss benefits payable to the worker, plus
- 100% of any costs associated with providing RTW services to the worker.

The full penalty continues to be levied until the earliest of:
- the date the injury employer starts co-operating again
- the date no further wage loss benefits are payable and no RTW services are being provided, or
- 12 months from the date the initial penalty was levied.

### Concurrent co-operation and re-employment obligations

If an injury employer breaches both a co-operation and re-employment obligation during overlapping periods in the same claim, the WSIB will apply a single penalty. In these cases, the WSIB will levy the higher penalty, see 19-02-09, Re-employment Obligations.

## Application date

This policy applies to all decisions made on or after November 30, 2020.

## Policy review schedule

This policy will be reviewed within five years of the application date.

## Document history

This is a new document.

This document replaces, in part, 19-02-02 dated January 2, 2015.

# References

## Legislative authority

*Workplace Safety and Insurance Act, 1997*, as amended
Sections 21, 23, 33, 37, 40, 41, 42, 43, 44, 77, 86

O. Reg. 35/08

*Canadian Human Rights Act, R.S.C., 1985, c. H-6*

*Human Rights Code, R.S.O. 1990, c. H.19*

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