



Employment Update

Labour and Employment Group

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“The changeover... to Work Reintegration was effective on December 1 of last year... Employers and workers are now starting to see the signs of change, hopefully for the better...”

WORKERS' COMPENSATION: IT'S ALWAYS SOMETHING...

Jack B. Siegel

One of the most predictable things in the life of a Workers' Compensation lawyer is the certainty of change. New laws, new appeal processes and new job titles for Workplace Safety and Insurance Board staff are a matter of course in this business. This year's edition is a new approach to getting injured workers back to work, or, as the WSIB now calls it, “Work Reintegration”.

Several years ago, the WSIB shifted its approach from “vocational rehabilitation” to “early and safe return to work” (ESRTW) and “labour market re-entry” (LMR). This essentially entailed the privatization of services previously provided by the Board internally, initial (and arguably undue) reliance on the workplace parties to work things out for themselves, and the use of outside service providers to evaluate and retrain injured workers who had no prospect of going back to their previous employer or line of work.

And then the pendulum swung yet again.

A 2009 value for money audit called for wholesale change. It found that employers and

employees alike often lacked the necessary resources to facilitate a successful return to the workplace, and despite the successes of service providers within the parameters set by the Board, it declared broken a model that excluded the original employer from a worker's employment options and limited retraining options to only a narrow selection out of those that actually exist. With programs that averaged 21 months in duration (during which full benefits plus training costs were added on to the costs upon which employers are assessed) producing a re-employment rate of less than 25%, the WSIB was essentially sent back to the drawing board.

The changeover from ESRTW and LMR to Work Reintegration was effective on December 1 of last year, with interim policies in place pending a consultation process that is just drawing to a close. Employers and workers are now starting to see the signs of change, hopefully for the better, but only time will tell. These are the main changes:

- Previously, and despite provisions in the law to impose financial penalties on employers who are not cooperative with re-employment obligations, the WSIB rarely, if ever, went after employers over such issues. Now, employers and workers alike will be subject to penalties equal to full loss of earnings benefits

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where they fail to meet their return to work obligations despite knowing of and being able to meet them;

- Under the ESRTW/LMR regime, the Board's approach to returning workers to the original employer was essentially one of hands-off reliance on the parties themselves. Now work-site functional assessments and work transition specialists will be available to facilitate return to work;
- The WSIB will now provide dispute resolution services to help parties work out return to work arrangements without waiting for a disagreement to deteriorate to the point of non-cooperation by one side or the other;
- As a matter both of Human Rights and Workers' Compensation law, employers have long been obliged to accommodate disabilities up to the point where the accommodation poses undue hardship. For small businesses, where "undue hardship" is more likely to arise, the WSIB will now consider paying some of those accommodation costs where doing so will help provide a long term solution to a compensable disability;
- Retraining options will be greatly diversified. Workers can get assistance through on the job training, community college and registered private career college programs, job search training and placement services. With the elimination of the distinction between ESRTW, with the original employer, and LMR, to go work somewhere else, the employer remains in the picture throughout, and can bring the retrained worker back into a suitable role, getting them off benefits;
- A major incentive for employers to take back retrained workers is the change in the Board's New Experimental Experience Rating ("NEER") program. The NEER program has been changed to extend the financial impact of accidents upon employers, into the fourth year. Previously, employers were subject to decreased rebates or penalty charges when workers remained off work, and could obtain no benefit that might reverse that loss where a worker was still involved in retraining after the third year. The WSIB has said that it believes this extended window of review will improve work reintegration outcomes, save money and still produce fair premiums for employers.

It will, of course, be quite some time until anyone knows if any of these changes produce real improvements to the system. What is clear is that employers must pay closer attention to getting WSIB claimants back into the workplace. Non-cooperation penalties and longer lasting NEER charges will create a powerful incentive to actively pursue all realistic return to work options. ■

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