

**Alberta WCB
Policies &
Information**

Chapter:

BENEFITS

Subject:

RETURN-TO-WORK SERVICES

Authorization

BoD Resolution 2018/02/15

Date:

April 17, 2018

**APPLICATION 2: RESPONSIBILITIES OF EMPLOYERS AND WORKERS IN
RETURN TO WORK**

**1. *Why is the obligation to
reinstate and duty to
accommodate in WCB
legislation?***

The concepts of modified work, accommodation and undue hardship are not new as they exist in Alberta’s human rights law. These concepts have now been incorporated into the *Workers’ Compensation Act (WCA)*. Inclusion within the workers' compensation framework provides a more immediate process when there is disagreement concerning accommodation of an injured worker in the workplace.

While this was not part of WCB's jurisdiction before September 1, 2018, a fundamental part of WCB's return-to-work services has been to work with employers and workers to return injured workers to work. The legislative provisions for reinstatement and accommodation support these processes. Employers and workers are expected to work together towards a return to the same job or an alternative job after a workplace accident, to the point of undue hardship.

**2. *Who is responsible for
helping workers return to
work?***

Successfully returning injured workers to their employment involves a number of parties that may include the employer, worker, union, health care professionals and other service providers, as well as WCB. Under s.88.1 of the *WCA*, employers and workers have specific responsibilities in the return-to-work process.

This policy application addresses the responsibilities of the employer and injured worker, their cooperation with each other, and how this integrates with the services provided by WCB. The focus is to have all three parties (employer, worker, and WCB) work together in returning the worker to employment, initially to suitable and safe temporary modified work and, ideally, progressing to the worker’s pre-injury job.

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3. *Do the reinstatement and cooperation obligations in the WCA apply to all employers and workers?*

Section 88.1 applies to most, but not all, employers and workers. It does not apply to:

- volunteer firefighters, ambulance drivers and attendants, and other emergency response personnel who are declared to be workers under s.14(3) of the WCA
- persons with approved applications for Personal Coverage (s.15)
- individuals (for example, subcontractors) deemed to be workers under s.16*
- persons declared to be workers by orders of the Board in accordance with the *WC Regulation* [for example, students under s.7(1) of the *WC Regulation*]
- employers and workers in exempt industries except when an approved application for optional coverage is in effect [s.14(2)]

* The exemption for deemed workers under s.16(d) and (e) applies only to individuals who WCB has determined operate a business as a partnership or proprietorship. It does not apply to individuals whose relationship with the employer has been determined by WCB to be that of worker/employer.

4. *What responsibilities do employers and workers have in return to work?*

Both employers and workers are required by s.88.1 to cooperate with each other and with WCB in the worker’s early and safe return to work (see Questions 5 – 8).

In addition, employers may have an obligation to accommodate and reinstate the worker (see Questions 9 – 24).

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5. *What are the cooperation provisions for employers and workers?*

Employers must:

- contact the worker as soon as possible after the accident and maintain communication throughout the period of the worker’s recovery and impairment;
- attempt to provide suitable employment that is available and consistent with the worker’s functional abilities and that, when possible, restores the worker’s earnings to the level paid on the date of accident;
- give WCB information that it requests concerning the worker’s return to work, including notifying WCB promptly if there is any dispute or disagreement concerning the worker’s return to work; and
- do other such things that may be prescribed by WCB to support a safe return to work.

Workers must:

- contact their employer as soon as possible after the accident occurs and maintain communication throughout the period of their recovery and impairment;
- assist the employer, as required or requested, to identify suitable employment that is available and consistent with the worker’s functional abilities and that, when possible, restores the worker’s earnings to the level paid on the date of accident;
- give WCB information that it requests concerning the worker’s return to work, including notifying WCB promptly if there is any dispute or disagreement concerning the worker’s return to work; and

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*Cooperation provisions for
employers and workers
(continued)*

- do such other things that may be prescribed by WCB to support a safe return to work.

For example, WCB generally recommends bi-weekly communication between workers and employers while the worker is recovering from an injury, or more often if medical reporting supports that a return to work is imminent. Another example is that a case manager may ask the worker and employer to identify alternative or suitable work options that will meet the worker’s anticipated restrictions, involving the union where required.

Disputes about the suitability of work are not considered non-cooperation; however, the employer and worker are both required to notify WCB so that steps can be taken to resolve the dispute.

6. *What happens if an employer doesn’t cooperate?*

If an employer does not cooperate (or fails to meet one of its other obligations under s.88.1 - see Application 3, Question 10), WCB may levy an administrative penalty in an amount up to the worker’s net average earnings for the year before the accident. When WCB does levy a penalty, it may pay to the worker an amount up to the penalty amount (see Question 7).

WCB will not levy a penalty if the employer has a valid reason for not cooperating. Valid reasons for non-cooperation are generally limited to compelling circumstances beyond the employer’s control, such as a seasonal shut-down, general layoff, strike or lockout, or corporate reorganization, or other reasons not related to the work injury. For small employers, valid reasons may also include such things as a death in the family or

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*Employer does not cooperate
(continued)*

unexpected illness or accident. Typically, these circumstances are of short duration.

7. *When WCB levies a penalty, when would it consider paying some or all of the penalty amount to the worker?*

WCB will consider paying the penalty to the worker only when the worker suffers a financial loss due to the employer’s failure to cooperate, and the worker is not eligible for wage loss benefits from WCB. The penalty may be paid either periodically or by lump sum.

8. *What happens if a worker doesn’t cooperate?*

If a worker does not cooperate as required by the legislation, WCB may reduce or suspend the compensation payable to the worker until such time that the worker does cooperate.

WCB will not reduce or suspend compensation if the worker has a valid reason for not cooperating. Valid reasons are generally limited to compelling circumstances beyond the worker’s control, such as a strike/lockout, death in the family, or unexpected illness or accident. Typically, these circumstances are of short duration.

It is not considered non-cooperation when a worker raises a health and safety concern under the *Occupational Health and Safety Act* or the *Canada Labour Code*.

9. *What are an employer’s reinstatement obligations?*

With the exception of those employers and workers to whom s.88.1 does not apply (see Question 3), all employers are obliged to offer to reinstate a worker who:

- a) has been unable to work due to a compensable accident, and
- b) on the date of accident, had been employed by the employer for at least 12 continuous months on a full-time or regular part-time basis (see Question 10).

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*Reinstatement obligations
(continued)*

If a worker needs accommodation to return to work, the employer has a duty to accommodate the worker to the extent that accommodation does not cause undue hardship. Undue hardship must be assessed on the individual facts, and what is undue hardship for one employer may not be for another (for example, a small employer will probably have fewer options and resources than would a large employer). See Application 3 for details on accommodation and undue hardship.

**10. What is considered to be
continuous employment?**

Workers who are hired 12 months or more before the date of accident are considered to be continuously employed unless the 12-month period was interrupted by a work cessation that either the worker or employer intended to sever the employment relationship. Thus, continuous employment may include seasonal workers who are subject to temporary layoffs that are not intended to end the employment relationship.

In general, the following types of work cessation do not break the employment relationship:

- strikes and lock-outs
- sabbaticals, sick leaves, maternity and parental leaves, employer-approved leaves of absence, and vacations
- work-related injuries resulting in time off work
- instances when the employer continued to pay the worker
- layoffs of less than three months, if the worker returns to work for the employer through an employer's offer of re-employment at the time of layoff, or a union hall's hiring process, or any other type of mutual agreement

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11. *Is the employer required to return the worker to the same position?*

Ideally, the employer’s goal is to return the worker to the same work, but that may not always be possible due to the worker’s work restrictions or for valid business reasons. Employers are expected to do the following:

1. When the worker is medically and physically able to perform the *essential duties* of the worker’s date-of-accident employment, the employer must offer to reinstate the worker in that position or offer to provide the worker with a comparable position with earnings and benefits that are not less than the worker was earning on the date of accident.
2. When the worker is unable to perform the essential duties of the worker’s date-of-accident employment, but is medically and physically capable of performing *suitable work*, the employer must offer the worker the first opportunity to accept suitable employment that becomes available.

12. *How does WCB determine if the worker is able to perform the essential duties of the worker’s date-of-accident employment?*

When determining if the worker is medically able to perform the essential duties of the worker’s pre-accident employment, WCB compares the worker’s compensable medical restrictions and capabilities to the essential duties and demands of the work. Essential duties are the duties that are fundamental to the position that the worker must be able to perform, with or without accommodation.

13. *What is a “comparable position”?*

In addition to earnings and benefits, WCB may consider a number of factors when determining if alternative employment is comparable to the pre-accident employment, including:

- the degree of physical and mental effort required

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*Comparable position
(continued)*

- job duties
- hours of work
- the geographic location of the work
- the level of responsibility and supervision of other employees
- skills, qualifications, and experience required
- bargaining unit status
- any other factor that WCB considers relevant in a particular circumstance

Each case is considered on its own merits, and a factor may be more or less important in a particular case, depending on the circumstances.

14. What is “suitable work”?

Suitable work is work that the worker is medically able to do, does not make the injury worse, and will provide benefits to both the worker and the employer. Suitable work may be either permanent or transitional employment that takes into account the worker’s pre-accident employment, aptitudes, skills, and what work is available. It also considers any safety concerns for the worker or co-workers. The worker is encouraged to provide input and supporting research in identifying modified duties. It may be an existing position or modified to adapt to the worker’s restrictions (see Application 4).

When determining whether permanent work is suitable, WCB will also consider whether the work is also available in the general labour market, so that the worker has similar job opportunities with other employers if the employment relationship with the accident employer ends. While this is

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Suitable work (continued)

an important consideration, there are circumstances where it is of less importance than maintaining the relationship with the accident employer (for example, if the worker is very close to retirement or the nature of the worker’s restrictions are such that there are very limited job opportunities).

To determine if the worker is medically able to perform suitable work, WCB compares the worker’s compensable medical restrictions and capabilities to the demands of the work.

15. *What if a worker becomes medically fit to return to the essential duties of his or her pre-accident employment during an employer’s seasonal layoff period?*

If, a worker’s pre-accident employment is subject to seasonal layoff,

and

the worker becomes medically able to perform the essential duties of his or her pre-accident employment during the employer’s seasonal layoff period,

WCB will generally accept that the decision not to offer reinstatement at that time was for a business reason made in good faith that was not affected by the worker’s injury. However, employers are expected to offer reinstatement at the beginning of the usual busy season. There are circumstances under which this may not be appropriate, such as seniority under the collective agreement; corporate restructuring; or if there was clear intent to permanently sever the employment relationship at the end of the previous season.

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16. *What assistance does WCB provide to help the worker and employer?*

WCB will help a worker return to the accident employer when:

- the worker cannot return to the full pre-injury work with the employer without accommodation
- the worker has a temporary or permanent loss in earning capacity
- the employer will need assistance to accommodate the worker in modified or alternative work

WCB provides assistance to both the worker and employer during the worker’s recovery and return to safe employment. WCB monitors the worker’s progress throughout the claim and will work with all parties to resolve issues.

WCB may authorize any reasonable and necessary expenditure, including wage-loss benefits, training subsidies, on-site assessments, job-site modifications, and any other reasonable and necessary cost that will help the worker return to work.

In addition, WCB will investigate any disputes and will either mediate a resolution with the parties or will make a determination based on the facts.

17. *For how long does the employer’s obligation to reinstate continue?*

There is no set time limit on the employer’s obligation to reinstate the injured worker; however, the employer’s ability to hold a position for the worker for an extended period of time may be a factor in determining whether accommodating the worker would result in undue hardship (see Application 3).

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*Duration of employer’s
obligation (continued)*

Usually, if a worker enters into an employment agreement for a specific period of time, the obligation does not extend beyond the end date of the contract or project. However, WCB may consider the availability of other contracts, projects, or work the employer has available, and whether the worker could reasonably have been expected to return to employment with the same employer following a seasonal layoff.

For example, if a construction worker is hired to work on a specific project, the obligation generally does not extend beyond the end date of the project or the component of the project on which the worker was hired to work. However, if the worker’s employment would normally have been continuous, subject to only a seasonal layoff, the employer’s obligation does not end at the end of the season.

In all cases, the employer’s obligation ends if the worker declines an employer’s offer of reinstatement that, in WCB’s opinion, was a reasonable offer that complied with the reinstatement and cooperation provisions. It will also end if the worker voluntarily ends the employment relationship.

18. *How long do employers and workers have to make and decide whether to accept an offer of reinstatement?*

The time frames depend on whether the worker is returning to his/her pre-accident job and, if not, whether the worker needs temporary or permanent alternative suitable employment.

The following time frames take into account the employer and worker’s obligation to cooperate with each other and WCB. If they have cooperated and communicated as required (see Question 5), the fact that the worker is

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*Time frame for making and
accepting an offer of
reinstatement (continued)*

medically fit to return to pre-accident or suitable alternative work should not be unexpected and, in most cases, the employer and worker have the opportunity to consider options in anticipation of the worker’s return. If a union is involved, it is expected that the worker and employer would involve the union in discussion about options, especially when it is anticipated that a job change may be required.

When WCB receives information that confirms the worker is fit for work, WCB will notify the worker and employer. When the employer receives the information about a fit for work date and restrictions, in most cases:

- the worker is expected to be offered the pre-accident job within a day of being notified by WCB
- if a temporary accommodation is required, the employer is expected to offer the worker suitable employment within three days of being notified by WCB, unless this period of time has been otherwise negotiated with WCB
- if the worker requires a permanent modification or a permanent alternative suitable position, WCB will negotiate the time frame with the worker and the employer

Employers who are not able to meet the above time frames (for example, because of unavailability of alternative suitable work) must contact WCB.

See Question 19 for the process to follow if the worker has concerns about the suitability of the offer.

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19. *What if the worker has concerns about the suitability of a reinstatement offer?*

If the worker has concerns that the offer of reinstatement is not suitable for any reason, the worker should tell the employer and see if together they can resolve the concern. If they are not able to do so, the employer and worker must notify WCB. WCB will make the final determination and may arrange for a worksite analysis.

20. *What if there is a conflict with a binding collective agreement?*

If the employer’s reinstatement obligations under the WCA provide greater reinstatement terms than a binding collective agreement, the reinstatement terms of the WCA prevail over the collective agreement. The only exception is that s.88.1 does not displace the seniority provisions of the collective agreement.

An employer should first attempt to offer employment within an injured worker’s collective agreement. However, if the obligation cannot be met within the framework of the worker’s collective agreement, employers must consider employment opportunities outside the collective agreement, including opportunities contained in other collective agreements.

21. *What if, after reinstating the worker, the employer terminates the worker’s employment?*

If an employer reinstates a worker and terminates the employment within six months or while the worker is continuing to receive wage loss compensation, it is presumed that the employer has not fulfilled its obligation. The onus is on the employer to show that the termination was not related to the accident. If there is a dispute as to whether the termination was due to the accident, WCB will make the final determination.

This does not prevent an employer from

- a) refusing to continue to employ a worker,

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*Termination after
reinstatement (continued)*

- b) terminating, laying off, or suspending a worker, or
- c) altering the status of or transferring a worker,

if the employer satisfies WCB that the decision to do so was for a business reason made in good faith, and the decision was not affected by the worker being or having been unable to work as a result of the accident.

**22. *Is the worker eligible for
benefits if there is a work
interruption?***

When a worker who is engaged in suitable work experiences a work interruption such as a change in job requirements, layoff, termination, shutdown, lockout or strike, the worker may be eligible for additional benefits.

When determining whether the worker is eligible for additional benefits, WCB will consider whether there is a loss of earning capacity and, if so, whether or not it is due to the injury.

WCB recognizes that when the work is interrupted temporarily due to economic conditions (labour issues or other factors that affect all workers), the initial loss of earning capacity is not due to the injury. If the worker is expected to return to the previous employment in a reasonable period of time, the worker is not at a disadvantage compared to other workers at that workplace who are also experiencing a loss of earnings.

If the work interruption becomes prolonged to the point where similarly employed workers are pursuing other employment opportunities and the injury places the injured worker at a competitive disadvantage in the general labour market, WCB will determine whether there is further entitlement to wage-loss benefits and rehabilitation services.

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*Work interruptions
(continued)*

When determining whether the loss of earnings was due to the injury, WCB will consider the following questions:

- a) Is the work interruption expected to be temporary or long term?
- b) Is the work interruption a normal cyclical event?
- c) Is the worker at a competitive disadvantage compared to uninjured workers so that, as a result of the worker's injury, the worker cannot effectively compete with other workers in the job market?

If WCB determines that there is a loss of earning capacity because the injury has affected the worker's ability to adapt to the changed workplace conditions, WCB will consider wage loss benefits and vocational services.

23. *What if an employer is unable to reinstate a worker or provide suitable modified work?*

If the employer is not able to accommodate the worker because doing so would cause undue hardship (see Application 3), WCB will provide any necessary vocational services to help the worker become competitively employable in the labour market.

24. *What if a worker believes the employer has not met its reinstatement obligations?*

When there is a dispute about whether the employer has fulfilled its reinstatement obligation to the worker, either the employer or worker, or both, must notify WCB.

When WCB receives such a notification, it will investigate and determine whether the employer has met its obligations. WCB may attempt to resolve the dispute through mediation. This mediation will not be a formal process, however WCB will attempt to work with the employer and worker to resolve the dispute. The outcome

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*Worker believes employer
has not met its reinstatement
obligations (continued)*

of the mediation is not binding and is open to WCB’s review and appeal process if the worker or employer continue to disagree after the mediation process is complete.

WCB will make a determination within 60 days of receiving the notification, but may extend the time period if it considers it necessary.

WCB is not required to investigate or make a determination on the issue if the worker’s notice to WCB is made more than 3 months after the worker’s employment is terminated.

25. When is this policy application effective?

This policy application (Application 2 – Responsibilities of Employers and Workers in Return to Work) is effective September 1, 2018, and applies to all claims with a date of accident on or after that date.