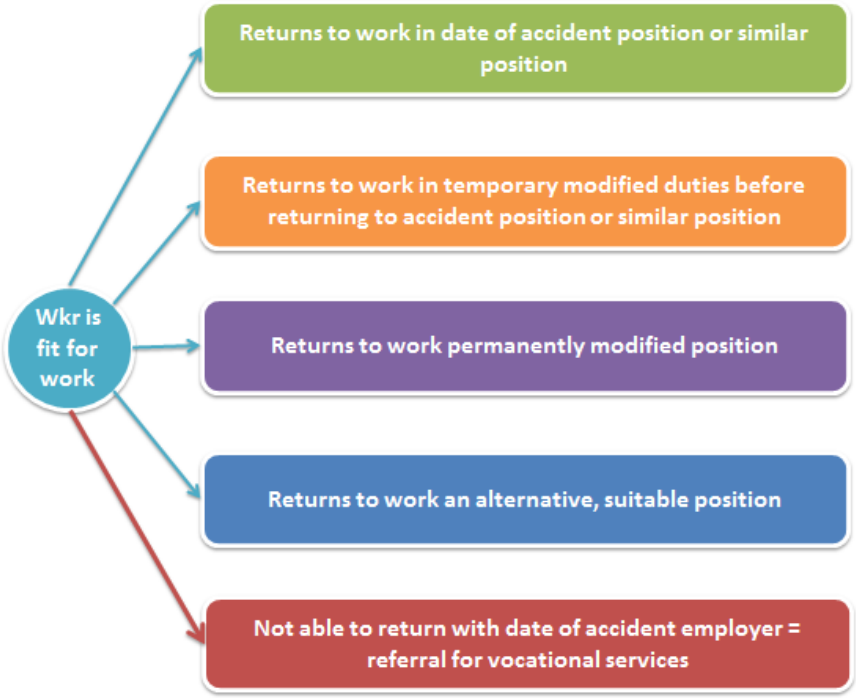
Obligation to Return Injured Workers to Work

Background

After a work injury, return-to-work options for the injured worker could include the following:



The concepts of modified work, permanent accommodation, and 'duty to accommodate' are not new; however, these have now been legislated in the *Workers' Compensation Act* (*WCA*).

New legislation clarifies expectations of workers and employers in regard to return-to-work. In any of these categories where an injured worker is able to return to work, employers in Alberta will be required to reinstate an injured worker, and if necessary will be required to accommodate a remaining disability up to the point of undue hardship

What is WCB's current practice?

Policy 04-05 Part II, Application 2* – Temporary Modified Work Programs outlines the process and provides definitions of temporary modified work and suitable work.

Policy 04-05 Part II, Application 3*, 4*, and 5* outline vocational services for workers who are unable to return to their job as a result of compensable work restrictions.

*****These existing applications will need to be renumbered.

In practice, WCB, employers and workers collaborate to achieve very strong return-to-work results: 93.7%[1] of injured workers returned to their date-of-accident place of employment. Over 80% of workers injured in 2016 accessed modified duties as part of their recovery.

If an employer is not able to provide an injured worker with modified duties, benefits are issued until the worker is able to return to work in their pre-injury capacity or in a new capacity.

WCB can provide the following assistance to workers and employers to facilitate return to work:

- Ergonomic equipment
- Workplace modifications
- On-the-job training or short-term courses for new skills
- Benefit top-up for a gradual return-to-work, or while the worker is learning a new job.

What are the issues?

Under the new legislative provisions, in cases where a worker has been an employee of the company for 12 or more months, employers and workers will be required to ensure injured employees are back to work as soon as they are able to perform their essential job duties in the same job or a job of equal value and pay, or when they are fit for modified work or alternative work in the first available job.

What is WCB proposing?

The intent of the legislation is clear: employers and workers are expected to work together to achieve a return to the same job or an alternative job following a workplace injury, to the point of undue hardship.

[1] 2016

The concept of undue hardship is outlined in Human Rights (HR) Law and includes the following elements:

- Disruption of operations
- Financial costs
- Size and resources of the employer
- Interchangeability of the workforce and facilities
- Health and safety concerns
- Morale problems of other employees brought about by the accommodation
- Substantial interference with the rights of other individuals or groups

WCB is proposing the following:

1. In cases where the worker is fit to perform the essential duties of his or her job within six weeks of a lay-off from work, a return to the date-of-accident employer will be presumed.
2. In all other cases, the hardship concept outlined in HR law will be referenced for the purpose of determining whether the reinstatement requirement may be waived by WCB. For examples, see the following table:

Elements of Undue Hardship	Unlikely to apply	Likely to apply
Disruption of operations	The employee can be accommodated with changes to the physical space that have minimal impact on others. Note: the concept of undue hardship ***may*** apply if there is no productive work available to offer the employee.	Modifying a work space in a way that substantially interferes with workflow may be considered too disruptive.
Financial costs	Costs that do not substantially impact productivity or efficiency of the employer. Overtime or leave costs that the employer can tolerably bear. Expenses incurred to respond to a grievance or minor disruption to a collective agreement.	Costs are so considerable that they significantly impact business operations.
Size and resources of the employer	The employer is large enough that it can afford to support the worker in a wide range of accommodations.	The size of the employer limits the amount or duration of positions the employee could do.

Elements of Undue Hardship	Unlikely to apply	Likely to apply
Interchangeability of the workforce and facilities	The employer has another location where the worker is able to relocate on a temporary or permanent basis.	There are no other locations available. Relocating would have a significant negative impact on the employee.
Health and safety concerns	The accommodation does not present any health or safety concerns to the employee or others.	Accommodation sacrifices the safety of the employee or others.
Morale problems of other employees brought about by the accommodation	Other employees are resentful of the accommodated employee.	Other employees are experiencing health problems due to the accommodation. This could include working significant overtime or taking on much heavier workloads.
Substantial interference with the rights of other individuals or groups	Accommodation position is a coveted position among employees.	Displaces another employee. The employee with the injury is given a position they are not qualified for over other qualified employees.

WCB invites your input

WCB wants to ensure it provides an effective policy framework that enables workers and employers to meet their responsibilities under the proposed legislation and requests your feedback on the proposed drafts.

The posting will be open for comment until **March 6, 2018.**

Alberta WCB Policies & Information

Chapter:
BENEFITS
Subject:
RETURN-TO-WORK SERVICES
Authorization Date:
BoD Resolution

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

1. ***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.

2. ***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

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

Application (continued)

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.

3. ***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 4 – 6).

In addition, employers may have an obligation to accommodate and reinstate the worker (see Questions 7 – 22).

4. ***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.

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

Cooperation provisions for employers and workers (continued)

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
- do such other things that may be prescribed by WCB.

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.

5. ***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, 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.

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

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

Employer does not cooperate (continued)

seasonal shut-down, general layoff, strike or lockout, or corporate reorganization. For small employers, valid reasons may also include such things as a death in the family or unexpected illness or accident. Typically, these circumstances are of short duration.

6. ***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*.

7. ***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 2), 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 8).

If a worker needs accommodation to return to work, the employer has a duty to accommodate the worker to the

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

Reinstatement obligations (continued)

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.

8. ***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
- lay-offs with a mutual agreement that the worker will return to work for the employer
- instances when the employer continued to pay the worker

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

9. ***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.

10. ***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.

11. ***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

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

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.

12. ***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).

NOTE: Application 4 is the current App 2 – Temporary Modified Work. It will be renumbered when this new application comes into effect

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

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

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.

13. ***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 lay-off period?***

If, a worker's pre-accident employment is subject to seasonal lay-off,

and

the worker becomes medically able to perform the essential duties of his or her pre-accident employment during the employer's seasonal lay-off 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.

14. ***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

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

WCB assistance (continued)

- 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.

15. ***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).

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 lay-off.

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

Duration of employer's obligation (continued)

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 lay-off, 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 the 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.

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

The timeframes 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 timeframes 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 4), the fact that the worker is 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.

In light of the above, WCB expects employers and workers to meet the following timeframes:

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

Timeframe for making and accepting an offer of reinstatement (continued)

Worker's Fitness for Work	Employer's Offer	Worker's Decision
Return to the pre-accident job, with no modification	Up to 1 day after notification of worker's fitness to work	Same day
Return to temporary modified work	Up to 3 business days	Same day
Return to pre-accident job with permanent modification	Up to 3 business days	Same day
Return to permanent alternative suitable work	To be negotiated with employer and worker	To be negotiated with employer and worker

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

See Question 17 for the process to follow if the worker has concerns about the suitability of the offer.

17. ***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.

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

18. ***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.

19. ***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,
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.

Alberta WCB Policies & Information

Chapter:
BENEFITS
Subject:
RETURN-TO-WORK SERVICES
Authorization Date:
BoD Resolution

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

20. ***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, lay-off, 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.

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?

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

Work interruptions (continued)

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.

21. ***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.

22. ***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.

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.

Alberta WCB Policies & Information

Chapter:
BENEFITS

Subject:
RETURN-TO-WORK SERVICES

Authorization Date:
BoD Resolution

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

23. ***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.

Alberta WCB Policies & Information

Chapter:
BENEFITS
Subject:
RETURN-TO-WORK SERVICES
Authorization Date:
BoD Resolution

APPLICATION 3: ACCOMMODATION AND UNDUE HARDSHIP

1. ***What are the requirements in the Workers' Compensation Act (WCA) regarding duty to accommodate?***

Section 88.1(3) requires that an employer shall accommodate the work or the workplace to the needs of the worker to the extent that the accommodation does not cause the employer undue hardship.

This provision applies when an employer has an obligation under s.88.1 to offer to reinstate an injured worker (see Application 2, Question 2 and Questions 7 – 19).

2. ***How do the provisions in the WCA interact with requirements of the Alberta Human Rights Act?***

All employers have a duty to modify the work or the workplace to accommodate the needs of the worker under the *Alberta Human Rights Act (AHRA).*

In circumstances where s.88.1 applies, WCB is responsible for determining whether an employer has met its obligation to accommodate the worker to the point of undue hardship. If WCB determines that an employer has not fulfilled its obligation, the employer has the right to request a review or appeal of that decision through the normal WCB processes (see G-2, The Review and Appeal Process).

WCB's jurisdiction to deal with issues of accommodation applies only to the workplace accommodation required for the compensable work injury. If the worker also requires accommodation for other protected grounds under the *AHRA*, employers may have additional accommodation requirements during the return-to-work process. Complaints about accommodation for those other protected grounds should be made to the Alberta Human Rights Commission.

For the purposes of s.22 of the *AHRA*, when WCB is making a determination regarding a complaint about

APPLICATION 3: ACCOMMODATION AND UNDUE HARDSHIP

Interaction with the Alberta Human Rights Act (continued)

failure to accommodate, it must notify the director of the Alberta Human Rights Commission. The Appeals Commission must do the same if a matter under s.88.1 is under appeal.

3. ***What sort of accommodation is the employer expected to provide?***

Employers are required to look for any reasonable accommodations, up to the point of undue hardship, that will meet the worker's needs. The expectations and requirements for accommodation are consistent with those required by human rights law. The type of accommodation required will depend on the injured worker's work restrictions and the nature of the job. Examples of possible accommodations include, but are not limited to, such things as:

- supplying or modifying tools or equipment
- making the premises accessible
- modifying the hours of work or offering flexible work schedules
- moving the worker to a different work location
- altering aspects of the job, such as job duties
- moving the worker to a different job

See Application 2, Question 14, for information on the assistance WCB may provide in the accommodation process.

When considering what accommodation may be required, an important consideration is whether accommodation will enable the worker to perform the essential duties of the position in question.

APPLICATION 3: ACCOMMODATION AND UNDUE HARDSHIP

4. ***What is meant by "essential duties"?***

Essential duties are the duties that are fundamental to the position that the worker must be able to perform, with or without accommodation (see also Application 2, Question 10). Essential duties may also be referred to as bona fide occupational requirements (BFORs).

An example of an essential duty that cannot be accommodated is if a truck driver has a work injury that renders the worker legally blind. Without adequate vision the worker cannot maintain the necessary license or safely operate a vehicle.

When it is impossible to accommodate an essential duty of the pre-accident employment, the employer must explore options for alternative suitable work that the worker can perform, with or without accommodation.

5. ***What is the worker's role in the accommodation process?***

The worker has a duty to cooperate with the employer and WCB during the process. See Application 2, Questions 1 – 7 for details.

The worker also is expected to accept reasonable accommodation that meets the requirements of s.88.1 of the *WCA*. See Application 2 for information. It is not necessary that the proposed accommodation is the worker's preferred choice, provided it fulfills the requirements of s.88.1.

6. ***What is considered to be "undue hardship"?***

Undue hardship is more than inconvenience. The threshold for undue hardship is high – the Canadian Human Rights Commission describes it as when an employer or service provider cannot sustain the economic or efficiency costs of the accommodation.

There are general principles that set out the factors usually

APPLICATION 3: ACCOMMODATION AND UNDUE HARDSHIP

Undue hardship (continued)

considered when assessing undue hardship, but the finding of undue hardship will vary according to the specific circumstances. What is undue hardship for one employer may not be for another. However, unless there are unusual and compelling circumstances, WCB would not consider undue hardship to arise where the worker is fit to return to full pre-accident employment within 6 weeks of the date of accident or, for progressive conditions such as tendonitis, the date of the worker's first absence from work.

7. ***What factors will WCB consider when assessing undue hardship?***

WCB may consider any or all of the following:

1. **Employer size and available resources**
   Employer size can affect the range of accommodation options that the employer can reasonably provide. Usually, a large employer will have more opportunities and greater flexibility than a small employer. Depending on the type of business, employer size may also limit the length of time that an employer is able to hold open a position for the injured worker without significantly impacting the business.
2. **Financial costs**
   To be considered undue hardship, financial costs must be considerable, so that they would substantially interfere with business operations. Employer size and financial situation are considerations in determining whether the cost of accommodation is an undue hardship. External funding from other sources, including WCB, to assist with accommodation should be taken into consideration when evaluating the overall financial impact.

APPLICATION 3: ACCOMMODATION AND UNDUE HARDSHIP

Factors in assessing undue hardship (continued)

3. **Disruption of operations**
   If accommodation would significantly disrupt operations so that it affects the employer's ability to carry out essential business, it may be an undue hardship. For example, an employer does not have to create and pay for a new position if it is superfluous and does not add value or provide a benefit to the employer. A further example is if the workplace is small and necessary modifications to the injured worker's workspace would impede access to other work stations or materials and supplies.

4. **Interchangeability of work force and facilities**
   An employer's ability to move a worker to a different facility or position is a consideration. The more options there are, the more likely it is that the employer can accommodate the worker without undue hardship. When looking at accommodation options, the employer should consider options throughout the organization, not only in the location where the worker was at the time of the accident.

5. **Health and safety concerns**
   An accommodation must meet health and safety requirements and should not create risk for the worker or coworkers. If it does, it would be considered an undue hardship.

6. **Morale problems of other employees due to the accommodation**
   If the problems are simply resentment that the accommodated worker has light or modified duties, it is not undue hardship. In those circumstances, the employer can mitigate the problem by educating all its workers on the principles and benefits of accommodation. If, however, other workers are required to work substantial overtime or much heavier

APPLICATION 3: ACCOMMODATION AND UNDUE HARDSHIP

Factors in assessing undue hardship (continued)

workloads because of the accommodation, so that the increased load negatively affects their health, there may be undue hardship.

7. **Substantial interference with the rights of others**
An accommodation should not interfere significantly with the rights of others or discriminate against them. For example, even though the provisions of s.88.1 may take precedence over a collective agreement, a substantial departure from the terms of the collective agreement could be a serious concern for other employees. However, the other employees would have to show that their objections were based on well-grounded concerns that their rights will be affected. Similarly, if coworkers with appropriate qualifications are not given the opportunity to apply for a vacant position because a worker without qualifications is given the position as an accommodation, there may be undue hardship.

8. ***What should an employer do if it believes that an accommodation would create undue hardship?***

When an employer believes that accommodating an injured worker would create undue hardship, it must contact WCB.

The employer is required to provide supporting evidence to demonstrate that there would be undue hardship (for example, a cost-benefit analysis, including long-term financial impact, if the claimed undue hardship is financial; detailed information about job positions and requirements, if the grounds are lack of any suitable work; etc.). It is not sufficient to claim undue hardship without providing the supporting evidence.

Alberta WCB Policies & Information

Chapter:
BENEFITS
Subject:
RETURN-TO-WORK SERVICES
Authorization Date:
BoD Resolution

APPLICATION 3: ACCOMMODATION AND UNDUE HARDSHIP

9. ***What if WCB determines that a proposed accommodation would create undue hardship?***

If a proposed accommodation would create undue hardship, the employer is not required to provide that accommodation. However, the employer is required to consider if there are other options that would accommodate the injured worker without undue hardship.

10. ***What happens if an employer does not fulfill its duty to accommodate an injured worker?***

When WCB determines that an employer has not fulfilled its duty to accommodate the worker (that is, the employer has not explored the possible options or is not willing to do so), WCB will first try to work with the employer to resolve the issue. If that is not possible, WCB may levy a 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 some or all of the penalty amount to the worker. See also Application 2, Question 5.

In addition, WCB will provide the worker with appropriate wage loss benefits and vocational services, with the goal of helping the worker become competitive in the labour market.

11. ***When is this policy application effective?***

This policy application (Application 3 – Accommodation and Undue Hardship) is effective September 1, 2018, and applies to all claims with a date of accident on or after that date, except when noted otherwise in a specific policy section(s).