
Section
Early and Safe Return to Work

Operational
Policy

Subject
Ensuring Workplace Parties' Co-operation Obligations

Policy

The WSIB informs and educates the workplace parties about their obligations to co-operate in the worker's early and safe return to work, and assists them, when necessary, to meet their obligations.

In those cases where education, case management, mediation (in relevant cases) and a warning about the possibility of a finding of non-co-operation have not resulted in either or both workplace parties meeting their return to work obligations, the WSIB may

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

Guidelines

Education

The WSIB recognizes that the workplace parties' ability to meet their return to work obligations is largely based on the parties being fully informed of, and understanding, those obligations.

Therefore, the WSIB **informs and educates** workplaces and workplace parties about

- their roles and responsibilities in the return to work process
- their co-operation/re-employment obligations (if relevant) under the *Workplace Safety and Insurance Act* (the Act)
- the likely consequences when they do not meet their legal obligations, and
- relevant return to work good practices and return to work resources.

NOTE

The workplace parties co-operation obligations, including their required return to work activities, are set out in 19-02-02, Return to Work: Key Concepts, Definitions, and Responsibilities.

Mediation

The WSIB offers mediation services in cases when

- one or both the workplace parties notify the WSIB of any difficulty or dispute concerning co-operation in the return to work process, or
- the WSIB, on its own initiative, identifies difficulties or obstacles in the workplace parties' return to work activities and progress.

For more on mediation services, see 19-02-03, the WSIB's Role in Return to Work.

Warning a workplace party of non-co-operative behaviour

In those cases where the WSIB is considering making a finding of non-co-operation, the WSIB first warns the workplace party about this possibility. Ideally, this

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communication should be done verbally, so that the WSIB and the workplace party can discuss

- why the decision-maker is considering making a finding of non-co-operation
- what behaviours and activities require change on the part of the workplace party
- the likely consequences if the workplace party doesn't change the behaviours/activities, and
- any legitimate reasons the workplace party may have for not co-operating in the return to work process.

The WSIB confirms in writing, the outcome of its discussion with the workplace party.

If verbal communication is not possible, the WSIB writes to the workplace party to warn him or her of the imminent possibility of a finding of non-co-operation, and requests that he or she contact the WSIB as soon as possible to discuss the situation.

Legitimate reasons for non-co-operation

Worker

Legitimate reasons for worker non-co-operation include, but are not limited to, the terms of a collective agreement, compelling personal reasons such as a death in the family, or unexpected illnesses or accidents.

Even though a worker may have a legitimate reason for not co-operating, his or her wage loss benefits may be adjusted if the employer has offered suitable work and the subsequent wage loss is no longer solely related to the work-related injury/disease.

Employer

Legitimate reasons for employer non-co-operation include, but are not limited to, the terms of a collective agreement, summer or holiday shutdowns, general layoffs, strikes or lock outs, corporate reorganization, and/or financial hardship.

Making a finding of non-co-operation

The WSIB views return to work as a process, consisting of a series of activities along a timeline. Viewed as a process, it is unlikely that a single particular action or behaviour on the part of a workplace party would lead the WSIB to determine that the workplace party is not co-operating in the return to work process.

Instead, the WSIB generally looks to the **pattern of actions and behaviours** of the workplace party. Thus, when determining whether a workplace party is co-operating in the return to work process, the WSIB considers and weighs all of the relevant facts and circumstances, including the degree to which the workplace party has initiated/participated in **required return to work activities** (see 19-02-02, Return to Work: Key Concepts, Definitions, and Responsibilities).

Application of non-co-operation penalties

For a non-co-operation penalty to be levied, the WSIB must be convinced, on a **balance of probabilities**, that a workplace party

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- had knowledge of his or her return to work obligation
- had the capability to carry it out (i.e., there were no legitimate reasons for failing to carry it out), and
- did not carry it out.

Notice

Following a warning, if the WSIB determines that a workplace party is not co-operating in return to work, the WSIB provides **verbal notice** whenever possible, and **written notice** in all cases. Every WSIB notice informs the workplace party

- of the finding of non-co-operation
- of the non-co-operation penalty that will be applied from the **date the written notice comes into effect**, and
- what is required of the workplace party to renew his or her co-operation. For more information on how a workplace party may renew co-operation, see the guideline entitled "Renewing co-operation," below.

The **date that the written notice comes into effect** is five WSIB business days after the date that appears on the written notice. (WSIB business days are Monday to Friday inclusive, excluding public and declared holidays.)

NOTE

In some cases, the worker or employer may renew his or her co-operation

- after the WSIB has verbally notified him or her of the finding of non-co-operation, but
- prior to the actual date that the written notice comes into effect.

In these cases, if the WSIB is satisfied that the workplace party has started co-operating again, the WSIB will not generally proceed to levy the penalty.

Initial penalty - worker

The WSIB **reduces the worker's wage loss benefits by 50%**

- from the date the written notice comes into effect
- until the end of the tenth business day following that date, or
- until the worker starts co-operating again, whichever is earlier.

If the worker starts co-operating again, the WSIB stops the non-co-operation penalty and restores wage loss benefits. Wage loss benefits are restored on the day following the day that the WSIB is satisfied of the worker's renewed co-operation.

Full penalty – worker

If the non-co-operation continues beyond the 10th business day following the date the written notice comes into effect, the WSIB **suspends the worker's wage loss benefits**.

Wage loss benefits remain suspended until the WSIB is satisfied that the worker has started co-operating again. Once it is satisfied, the WSIB **stops the non-co-operation penalty** and restores wage loss benefits. Wage loss benefits are restored on the day following the day that the WSIB is satisfied of the worker's renewed co-operation.

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Initial penalty – employer

The WSIB levies an initial penalty of **50% of the cost of the wage loss benefits to the worker**

- from the date that the written notice comes into effect
- until the end of the tenth business day following that date, or
- until the employer starts co-operating again, whichever is earlier.

If the employer starts co-operating again, the WSIB **stops the non-co-operation penalty**. The non-co-operation penalty is stopped on the day following the day that the WSIB is satisfied of the employer's renewed co-operation.

Full penalty – employer

If the non-co-operation continues beyond the 10th business day following the date that the written notice comes into effect, the WSIB levies a penalty of

- **100% of the cost of the wage loss benefits payable to the worker, plus**
- **100% of any costs associated with providing Labour Market Re-entry (LMR) services to the worker.**

The full penalty continues to be levied until

- the employer has started co-operating again
- LMR services have been completed, with no prospective wage loss, or
- 12 months following the date that the written notice comes into effect, whichever is earlier.

If the WSIB is notified that an employer has started co-operating again, the WSIB stops the non-co-operation penalty on the day following the day that it is satisfied of the employer's renewed co-operation.

Implementation of initial and full employer penalties

Employer non-co-operation penalties are generally considered due and owing to the WSIB effective the date that the written notice comes into effect. (For non-co-operation penalties applied retroactively, see below.) Because non-co-operation penalties can remain ongoing, employers are invoiced on a regular basis.

A non-co-operation penalty levied on an employer is in addition to the ongoing costs of the claim. Such a penalty does not affect a Schedule 1 employer's experience rating.

Renewing co-operation

In cases where a finding of non-co-operation has been made, the WSIB

- encourages the workplace party to start co-operating again, and
- provides assistance, where necessary, to support the workplace party's commitment to start co-operating again (see 19-02-03, the WSIB's Role in Return to Work).

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Based on the particular facts and circumstances of a claim, the WSIB examines whether restarting the return to work process is appropriate. If so, the WSIB can extend another opportunity to co-operate to a previously non-co-operative workplace party.

Workers

The factors that the WSIB considers to determine whether the worker should be given another opportunity to co-operate in the return to work process include, but are not limited to

- the length of time that has elapsed since the finding of non-co-operation
- whether a suitable job is still available
- whether other issues that impacted on the non-co-operation decision have been resolved (e.g., level of impairment)
- any history of prior non-co-operation
- the likelihood the worker will continue to comply with his or her co-operation obligations, and
- the worker's and employer's views and preferences.

Employers

The factors that the WSIB considers to determine whether the employer should be given another opportunity to co-operate in the return to work process include, but are not limited to

- the length of time that has elapsed since the finding of non-co-operation
- whether the worker has started LMR services, and at what stage of the LMR process the employer indicated his or her intention to start co-operating again
- whether the employer is offering to provide suitable work
- any history of prior non-co-operation and/or breaches of a re-employment obligation
- the likelihood the employer will continue to comply with his or her co-operation obligations, and
- the employer's and worker's views and preferences.

Subsequent finding of non-co-operation

If a workplace party demonstrates renewed co-operation, but subsequently fails to continue meeting his or her co-operation obligations in the same claim, the WSIB generally follows the same steps associated with an initial finding of non-co-operation (i.e., warning the workplace party of the possibility of a finding of non-co-operation, followed by a verbal and written notice of non-co-operation).

However, in cases where the WSIB makes a subsequent finding of non-co-operation, the WSIB levies the **full penalty** from the date that the subsequent written notice comes into effect.

Retroactive non-co-operation penalties

The WSIB expects the workplace parties to begin co-operating immediately following the work-related accident or the reporting of an occupational disease, and to continue co-operating, even if the WSIB has not made an initial entitlement decision in the claim.

Following an initial entitlement decision, the WSIB may look to the facts of the particular case to determine whether a workplace party was meeting its relevant co-

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operation obligations from the onset of the work-related accident or the reporting of an occupational disease.

Based on the evidence, if the WSIB determines on a balance of probabilities that

- the workplace party had the knowledge and capability to carry out his or her return to work obligations
- had no legitimate reason for failing to carry out his or her return to work obligations, and
- did not carry out his or her return to work obligations,

the WSIB may make a retroactive finding of non-co-operation. During this retroactive period, only the relevant **initial penalty** would be applied.

Ensuring employers meet their concurrent co-operation and re-employment obligations

Some employers are subject to the re-employment obligation as well as the co-operation obligations. (For more on the re-employment obligation, see 19-04-03, Compliance with the Re-employment Obligation.)

NOTE

An employer's obligation to co-operate in a worker's return to work begins once the work-related injury/disease has occurred. In contrast, an employer's re-employment obligation begins once a worker is medically fit to do the essential duties of the pre-injury job or suitable work, as the case may be.

Different acts or omissions

If an employer breaches both a co-operation obligation and a re-employment obligation, and the respective breaches are for **different acts or omissions**, the WSIB may levy both the associated penalties. (It should be emphasized that the WSIB will generally look to the pattern of actions and behaviours to determine whether the workplace party is co-operating in the return to work process.)

As an example, an employer who fails to maintain communication with the injured worker following the work-related injury/disease may be subject to a non-co-operation penalty. If the worker becomes fit to perform the essential duties of the pre-injury job and the employer fails to offer the pre-injury job or an alternative job that is comparable in nature to the pre-injury job, the WSIB can also levy a re-employment penalty.

Same act or omission

If an employer breaches both a co-operation obligation and a re-employment obligation, and the respective breaches are for the **same act or omission** (for example, failing to offer suitable work that is available), legal principles prevent the WSIB from levying more than one penalty. In these cases, therefore, the WSIB chooses the penalty which is most likely to lead to a positive return to work outcome for the injured worker.

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Choice of penalty

In determining which penalty to impose, the WSIB considers

- the length of the remaining re-employment obligation, and
- the worker's pre-accident net average earnings.

Application date

[Prospective date to be determined]

Document history

This document replaces 19-02-03 dated October 12, 2004.

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19-02-03 dated June 15, 1999

11.2 dated January 1, 1998.

References

Legislative authority

Workplace Safety and Insurance Act, 1997, as amended
Sections 21, 23, 40, 41, 42, 43, 77, 86, 102, 108

Workers' Compensation Act, R.S.O. 1990, as amended
Sections 22.1, 37, 53, 54, 103(4.1), 103(4.2), 109, 133, 137

Minute