New Duty To Cooperate And Maintain Employment Following Workplace Injury Labour, Employment & Human Rights Bulletin



As of January 1, 2024, employers and workers in British Columbia now have a new legal "duty to cooperate" and "duty to maintain employment" under the *Workers Compensation Act* (the "WCA"). These amendments were introduced to the WCA as part of Bill 41 in 2022. The duty to cooperate applies to any workplace injury that occurred on or after January 1, 2022, and the duty to maintain employment applies to any workplace injury that occurred on or after July 1, 2023.

The duty to cooperate requires employers and workers to maintain communication, identify suitable work for the worker, and provide WorkSafeBC with information required to support a return-to-work. There is as an exception to the duty to cooperate where communication between the employer and worker may exacerbate the injury or delay recovery.

An employer who employs 20 or more people and has employed the injured worker for at least 12 months before their injury also has an obligation to maintain that worker's employment. Workers must also not unreasonably refuse suitable work made available by the employer. In these circumstances, the employer must:

- If the worker is fit to carry out the essential duties of the worker's pre-injury work, offer the pre-injury work to the worker or alternative work that is comparable to the worker's pre-injury work and wages.
- If the worker is fit to work but unfit to carry out the essential duties of the worker's pre-injury work, offer the worker the first suitable work that becomes available.

In complying with the above, the employer must, to the point of undue hardship, make any change to the work or the workplace that is necessary to accommodate the worker. The accommodation and undue hardship principles applicable under the WCA are similar to those applicable to duties under the *Human Rights Code*. While the employer must make reasonable accommodations to the pre-injury or suitable alternative work, if possible, it is not required to provide the worker with their preferred accommodation if other reasonable alternatives exist. Establishing that undue hardship exists is a fact specific determination that requires the employer to have reasonably engaged in the accommodation process. Where the barrier to accommodation is primarily financial, WorkSafeBC may provide financial assistance to employers to facilitate reasonable

accommodations.

For seasonal workers or workers on fixed term contracts, these duties would cease at the pre-injury anticipated end of the employment relationship. For workers employed for an indefinite term, most obligations under the duty to cooperate and duty to maintain employment will cease on the second anniversary of the date of injury. However, employers will have an ongoing obligation to provide reasonable accommodations to workers who have returned to work with the employer.

Significantly, the employer is deemed to have breached these obligations if an injured worker is terminated within six (6) months following their placement in a suitable position under these provisions. This deeming provision is subject to the employer establishing, to the Board's satisfaction, that the worker's termination was unrelated to the worker's injury. Where a worker has voluntarily resigned from their employment, the duty to cooperate and duty to maintain employment will generally come to an end.

In unionized workplace, if any of the duty to cooperate or duty to maintain employment obligations conflict with a term of a collective agreement, the worker is entitled to the greater of the benefit from either the collective agreement, or the duty to cooperate and duty to maintain employment provisions of the WCA.

If an employer or worker is not taking steps to comply with their obligations under these provisions, WorkSafeBC will contact them to learn more, discuss the issues and potential barriers to cooperation, and offer support. In rare cases, further escalation or penalties may be required, as laid out in the legislation. If an employer remains non-compliant, WorkSafeBC may apply an administrative penalty based on the amount of the wage-loss or other benefits being paid to the worker. If a worker remains non-compliant, WorkSafeBC may reduce or suspend compensation payments.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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