

# INJURED WORKERS: How to Comply with Return-to-Work Requirements



In an ideal world, your OHS program would prevent workers from ever getting injured or ill on the job. But despite your best efforts, workers are still occasionally going to get hurt or sick. And when they do, the best thing you can do is help them heal and return to work as quickly as possible. Supporting your workers' return-to-work efforts and easing their transition back into the workplace not only makes good business sense, but also is required by law. We'll explain the law on return to work and what you need to do to comply with an employer's return-to-work duties.

## THE LAW ON RETURN TO WORK

This [chart spells out the general employers' return-to-work duties under the OHS and workers' comp laws in each jurisdiction](#). There are two approaches:

## 7 Specific Duty Jurisdictions

Seven jurisdictions—Fed, MB, NL, NS, ON, PE and YT—specifically impose duties on employers when it comes to an injured worker's return to work. With one exception, this duty is included in the jurisdiction's workers' compensation law and/or regulations. Because there's no federal workers' comp regime, the return-to-work duties for federally regulated

employers are included in the OHS law, that is, the *Canada Labour Code* and *Canada Labour Standards Regulations*. These jurisdictions generally impose two broad duties on employers (which we'll discuss in detail below):

- Duty to cooperate with the return-to-work process, such as by staying in touch with the worker while he's out and providing the workers' comp board with any requested information; and
- Duty to re-employ the injured worker when he's able to return to the workplace.

## 7 Implied Duty Jurisdictions

In the remaining seven jurisdictions—AB, BC, NB, NT, NU, QC and SK—employers don't have specific return-to-work duties under the OHS or workers' comp laws. But across Canada, employers have a duty under the human rights laws not to discriminate based on disability. This discrimination ban means employers can't fire a worker because he got injured on the job and they must accommodate an injured worker to allow him to return to work. Thus, employers in these jurisdictions essentially have a duty to help an injured worker return to work.

### RETURN TO WORK REQUIREMENTS

There's much overlap between the specific **Results of employer return-to-work requirements** spelled out in some workers' comp laws and **Work Programs** the general duties imposed by human rights law, especially when it comes to the duty to re-employ an injured worker. So complying with the specific requirements from the seven jurisdictions noted above will help employers across the country satisfy their obligations when it comes to helping an injured worker return to work. In a recent poll on [OHSInsider.com](https://www.ohsinsider.com), we asked you to rate your company's return-to-work program. Here are the

Here's a detailed look at those results:  
requirements.

## Duty to Cooperate

In NL, ON, PE and YT, the workers' comp law requires an employer to cooperate in the return to work process. Ontario's requirement is typical and says that the employer of an injured worker must co-operate in the worker's early and safe return to work by:

- Contacting the worker as soon as possible after the injury occurs and maintaining communication throughout the period of his recovery and impairment;
- Attempting to provide suitable employment that's available and consistent with the worker's functional abilities and that, when possible, restores his pre-injury earnings;
- Giving the workers' comp board such information as it may request concerning the worker's return to work; and
- Doing anything else as may be required by the regulations.

It's a good idea for all employers to follow the above general guidelines when a worker gets injured or ill. For example, studies have shown the importance of maintaining contact with an injured worker while he's out. An injured worker's recovery may be hampered if he feels cut

- Good—we do a good job getting workers back on the job but could do better. (54%)
- Excellent—we do a great job of helping workers get back to work quickly and safely. (32%)
- Fair—we do what we're required to do by law and not much more. (7%)
- What return-to-work program' (7%)

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off or abandoned by his employer. So ensure that someone, such as the worker's supervisor, the safety coordinator or a representative from the HR department, stays in regular contact with the injured worker during his recovery.

## **Duty to Re-Employ Worker**

All seven jurisdictions with specific return-to-work requirements for employers impose a duty to re-employ the injured worker when he's able to return to the workplace. There are several elements of this duty:

**Who the duty applies to.** The duty to re-employ applies to workers who were absent due to an injury or illness and who, when they got injured or sick, had been employed by the employer continuously for at least a year. So if an injured worker had been on staff for only a few months when he got hurt, you're not obligated to re-employ him once he's better.

The workers' comp laws typically include exclusions from the duty to re-employ, such as certain:

- Employers, such as those who regularly employ fewer than 20 (NL, NS, ON, PE, YT) or 25 (MB) employees;
- Industries, such as construction; and
- Workers, such as volunteers or casual emergency workers.

**When the duty is triggered.** The duty to re-employ is generally triggered when the employer is notified by the worker or the workers' comp board that the worker is medically fit to return to work in some capacity.

**When the duty ends.** The re-employment duty doesn't last forever. For example, for federally regulated employers, it ends 18 months from the date the worker is fit to return to work. The other jurisdictions end the duty on the earliest of the following dates:

- Two years after the date of the accident or injury (MB, NL, NS, ON, PE, YT);
- Six months after the worker's able to perform the essential duties of his pre-injury job or other suitable work (MB);
- One year after the worker' medically able to perform the essential duties of his pre-injury job (NL, ON, YT); or
- The date on which the worker would have retired (MB), reaches the age at which a worker becomes entitled to benefits under the *Old Age Security Act* (YT) or reaches age 65 (NL, NS, ON, PE).

In addition, in NS, PE and YT, if an employer offers to re-employ an injured worker once he's recovered and the worker rejects that offer, the employer is no longer bound by the duty to re-employ as it relates to that worker.

**Work to be provided.** When an injured worker is able to return to work, there are generally three possible types of work you must offer him:

- *Pre-injury job.* If the worker is able to perform the "essential duties" of his pre-injury job, you must offer to re-employ him in his prior position.
- *Alternative employment.* If you can't reinstate the worker in his prior position, you must offer him "alternative employment," which is generally defined as employment comparable to his pre-injury position in terms of the nature of the work, earnings, qualifications, opportunities and other respects.
- *Suitable work.* If the worker is medically able to work but not to perform the essential duties of his pre-injury job, you must offer him the first opportunity to accept "suitable work" that becomes available. "Suitable work" is generally considered work that the worker has the skills to perform, is medically fit to perform and which doesn't pose a health or safety hazard to him or

his co-workers.

If the employer and injured worker disagree about his fitness to return to work and the nature of the work he's medically able to perform, the workers' comp board will intervene and make those determinations.

**Duty to accommodate.** The workers' comp laws codify the duty to accommodate established by the human rights laws. That is, they require an employer to accommodate the work or the workplace to suit the needs of the returning worker to the extent that such accommodations don't cause the employer undue hardship. The duty to accommodate applies to all three types of work you may have to offer a worker returning from an injury. So if a worker can return to his pre-injury job provided you modify his work station, you'll have to make the necessary changes unless they're so costly or would so radically alter the workplace that they constitute an undue hardship.

***Insider Says:*** For a look at how courts determine what's undue hardship, see "[Winners & Losers: When Is Changing Workers' Duties So They Can Return from Injury 'Undue Hardship'?](#)" April 2009, p. 16. For information on a worker's role, see "[Recent Case Reinforces Worker Duty to Cooperate in Accommodation Process.](#)"

## **Ban on Firing Because of Injury**

In addition to imposing the above duties on employers, the workers' comp laws bar employers from firing workers because they've become injured or ill. In fact, if an employer re-hires an injured worker and then fires him within six months of his return to the workplace, there's a presumption that the employer did so because of the injury and thus didn't fulfil its re-employment duties. The presumption's purpose is to prevent employers from pretending to satisfy the duty to re-employ an injured worker by taking him back with the intention

of letting him go after a short time.

The workers' comp law does allow employers to rebut this presumption by proving that the termination wasn't tied to the injury or illness. For example, if you rehired an injured worker and then fired him four months later because he stole company property, threatened to kill his supervisor or committed a serious safety infraction, you'd likely be able to rebut the presumption.

**Insider Says:** For more information on properly disciplining workers and avoiding reprisal claims, go to the OHS Insider's [Discipline & Reprisals Compliance Centre](#).

## Penalties for Violations

Violating the above duties can be costly. For example, the workers' comp laws generally say that if the workers' comp board determines that an employer didn't fulfill its return-to-work obligations to a worker, it may impose a penalty on the employer up to the amount of the worker's net average earnings for the 12 months immediately before the worker went out due to his injury or illness.

### BOTTOM LINE

Neither an employer or its workers want workplace injuries to occur, but they happen. And when they do, it's incumbent on employers to step up and assist the injured worker both while he's out recovering and when he's ready to return to the workplace in some capacity.

### [box]More Return-to-Work Information on the Way

In a recent survey, you told us you wanted more information on return to work. And we heard you. This article is just our first attempt to fulfil your needs. In the coming months, both on [OHSInsider.com](#) and in the *Insider*, we'll be giving you more information and tools on this important topic, such as how to

develop an effective return-to-work program, how to make the business case for such a program, a model fitness to work form, a model modified work policy and much more. In the meantime, here's information on return to work that's currently available:

- [Recorded webinar on the Ontario return-to-work rules](#)
- ["Brief Your CEO: How Far Return-to-Work Programs Must Go to 'Accommodate' Injured Workers,"](#) Sept. 2011, p. 8.
- ["Using Supervisors to Improve the Return-to-Work Process, Part 1,"](#) Feb. 2007, p. 14.
- ["Supervisors and the Return-to-Work Process, Part 2,"](#) March 2007, p. 14.
- ["Making the Business Case for Safety: Adapting Return-to-Work Programs for Workers Working Nonstandard Schedules,"](#) April 2008, p. 13.[/box]