

# Must Employers Re-Employ Workers After Non-Work Injuries?



All injured workers are entitled to accommodations but not necessarily reinstatement.

In addition to being cost effective, implementing a return-to-work process is essentially mandatory in the 9 jurisdictions where employers have a duty to re-employ workers who suffer work-related injuries and who are medically capable of performing their pre-injury duties. Most of those jurisdictions also say that employers must make accommodations enabling workers to perform those or equivalent jobs.

**Workers Comp Duty to Re-Employ:** Federal, Manitoba, New Brunswick, Newfoundland, Nova Scotia, Ontario, Prince Edward Island, Qu bec, Yukon

**No Workers Comp Duty to Re-Employ:** Alberta, British Columbia, Northwest Territories, Nunavut

But there's more to return to work than workers comp. Human rights laws in all parts of Canada require employers to accommodate a worker's disabilities to the point of undue hardship. And unlike workers comp, a worker's right to accommodations under human rights laws applies to all disabilities, not just those resulting from a workplace injury or illness.

**Question:** What are your return-to-work obligations when a worker is entitled to accommodations under human rights laws but not under workers comp? To answer that, consider the following scenario.

## SITUATION

Two individuals employed by ABC Manufacturing, a company that has locations all across Canada, suffered injuries that caused them to miss almost a year of work. The good news is that both are eager and have received medical clearance to return to work.

1. Oscar, who works in Ontario, wants to return to work from a non-work-related injury
2. Nelly, who works in Nova Scotia, wants to return from a work-related injury

## QUESTION

Which of the following workers must ABC Company accommodate to the point of undue hardship?

1. Olga
2. Nelly
3. Both of the above
4. Neither of the above

## ANSWER

4. Both workers are entitled to accommodations regardless of whether their injuries are work-related under workers comp

## EXPLANATION

**Punchline:** The duty to accommodate a disabled worker under human rights laws applies regardless of the worker's accommodation rights under workers comp. The Canadian Supreme Court laid down this rule in a 2018 case called *Qu bec (CNESST) v. Caron*, 2018 SCC 3, involving a teacher who wanted to return to work from a work-related elbow injury. But there were no suitable jobs the teacher could do. So, the company would have had to accommodate the teacher by shuffling things around and creating a special job suitable for his capabilities.

The teacher's problem was that while Qu bec workers comp laws require an employer to rehire injured workers, they don't require them to make accommodations for them. Refusing to take no for an answer, the teacher claimed the company had to honour his accommodation rights under human rights law. And the high court agreed. Accommodation of a person's disabilities is a core Charter right that overrides any limitations contained in the workers comp laws, it concluded. Accordingly, both workers in our scenario are entitled to accommodations and C. is the right answer.

**A. Olga is entitled to accommodations** because her injury, while not work-related for purposes of workers comp, still counts as a disability under human rights laws which take precedence over workers comp.

**B. Nelly is entitled to accommodations** under both sets of laws since her injury is work-related for purposes of workers comp and constitutes a disability under human rights laws.

## Takeaway: Accommodation Doesn't Necessarily Mean Re-Employment

Being entitled to accommodations doesn't necessarily mean being entitled to being reinstated to the same or equivalent position after an injury or illness. Accommodations aren't required if they'd impose undue hardship. The question of whether reinstating a particular worker varies case by case based on the worker's medical capabilities, qualifications and the individual circumstances of the company. Thus, for example, creating a special administrative position for a machinist might be reasonable for a huge company like Air Canada but not for a small landscaping firm.

But while no 2 situations are exactly the same, the one thing that never changes is the employer's duty to do an individualized assessment of the worker's capabilities and qualifications and whether suitable positions exist or can reasonably be created to accommodate those capabilities and qualifications.