

Return to Work Compliance Game Plan



Protecting workers from injury and illness should be the first imperative of any [OHS program](#). Vocational rehabilitation and ensuring workers' swiftest and safest possible return to work after a work-related injury is the fallback objective when prevention fails. It's also a [legal requirement](#). Employers have a duty not only to cooperate in the return-to-work (RTW) process but also offer injured workers suitable employment when they're medically able to return. RTW is a tricky process with multiple layers, most of which raise compliance challenges under not only OHS and workers comp but privacy, human rights and other laws. Here's a 10-step Game Plan you can follow to ensure compliance and achieve optimal RTW outcomes.

The Basic Principles of RTW & Vocational Rehabilitation

Employers should have a [written policy](#) setting out the basic ground rules and processes to be followed to give workers the best chance to return from work-related injuries in a quick and safe manner. Regulatory requirements and best practices dictate that the vocational rehabilitation and RTW process follow certain [underlying principles](#) that you should state in your Policy, including your company's commitment to ensure that:

- The process is initiated without delay;
- The process is carried out in conjunction with the worker's capabilities and treatment demands;
- Injured workers not only cooperate but play an active role in their own RTW;
- The process is applied differently to each worker depending on the worker's individual capabilities and circumstances;
- Reasonable and necessary work and workplace accommodations are made to allow the worker to return; and
- Steps are taken to ensure the injured worker's confidentiality.

What the Workers Comp Laws Require

Employer's RTW and vocational rehab duties stem from the particular province's workers compensation laws. Noncompliance with these RTW rules can result in [administrative monetary penalties](#) (AMPs) and other penalties. Workers who don't comply also risk having their injury benefits reduced or suspended. While requirements vary by jurisdiction, there are 2 basic RTW duties:

Duty 1. Duty to Cooperate in RTW Process

The first duty of employers is to cooperate with the injured worker and provincial workers comp board (which we'll refer to as the "Board") in the RTW process. Most jurisdictions (Alberta, Saskatchewan, Northwest Territories and Nunavut are the lone exceptions) specifically require employers to:

- Contact the worker as soon as practicable after the injury;
- Maintain [communication](#) with the worker throughout the recovery process;
- Identify suitable work that is comparable to the

worker's pre-injury job and, if possible, provides the same wages;

- Provide the Board any information it requires in relation to the worker's return to work; and
- Do any other things the Board requires in connection with the RTW process.

Workers are also required to cooperate in the RTW process by:

- Contacting the employer as soon as practicable after the injury;
- If requested, helping the employer to identify suitable work the worker can do;
- Accepting suitable work the employer offers;
- Providing the Board any RTW information it requires; and
- Doing any other things the Board requires in connection with the RTW process.

Duty 2. Duty to Re-Employ Injured Workers

To put teeth into the process, every jurisdiction but Alberta, Saskatchewan, Northwest Territories and Nunavut require employers to actually re-employ workers who suffer work-related injuries when they're medically capable of returning, which we'll explain under Step 5 below. It's also important to note that the Board plays a pivotal role in resolving disputes that arise during the RTW process, particularly with regard to the injured worker's functional capabilities and types of jobs they're able to safely perform.

Take 10 Steps to Comply with RTW Requirements

Employers should have a written policy setting out the basic ground rules and processes to be followed to give workers the best chance to return from work-related injuries in a quick and safe manner and ensure compliance with RTW and other legal

requirements that we'll discuss below. Here are the 10 steps to take.

Step 1. Establish & Maintain Communication with Injured Worker

The RTW process begins when the worker and employer meet their respective duty to notify the other of the work-related injury. You must maintain communication with the worker over the course of the recovery period.

Step 2. Designate a RTW Case Manager

While not expressly required by law, Best Practice dictates that you designate a case manager to serve as the primary contact with injured workers and responsibility for carrying out the RTW process. Duties of the RTW case manager, which may be a [supervisor](#), [co-worker](#) or other person from within the organization or an outside person, typically include:

- Working with the worker and doctors to get a medical assessment of the injured worker's functional capabilities;
- Developing a RTW plan that provides work or suitable alternative work based on the worker's functional abilities and that's in sync with the vocational rehab plan;
- Carrying out and making necessary revisions to the RTW plan;
- Coordinating with all of the other principles in the RTW process, including doctors, union reps, the Board, insurers, etc.; and
- Helping the injured worker apply for workers comp and other benefits.

Step 3. Verify Worker's RTW & Re-Employment Rights

Workers comp RTW and re-employment rights are subject to limitations that vary by jurisdiction:

- Injury must be work-related and covered by workers comp (All);
- Returning worker must be medically capable of doing the essential duties of the job (All);
- Employer must have at least 20 workers (BC, NB, NL, NS, ON, PEI, YK);
- Employer must have at least 25 workers (MB); and
- Injured worker must have been continuously employed for at least 12 months before the injury (BC, MB, NB, NL, NS, ON, PEI, YK).

Compliance Pointer: Keep in mind that injured workers who don't meet RTW and re-employment criteria might still be entitled to accommodations to the extent their injuries or illnesses, whether work-related or not, constitute "disabilities" under human rights laws. **Example:** A worker who's been employed at a company with 10 workers for only 6 months wants to return after suffering a mobility-impairing back injury during a pickup basketball game after work. The worker doesn't have RTW or re-employment rights under workers comp; however, because the injury is a disability, human rights laws would still require the employer to accommodate the worker to the point of undue hardship.

Step 4. Assess Injured Worker's Functional Capabilities

As noted above, the duty to re-employ an injured worker applies only if the worker is capable of performing the essential functions of the job. So, the first crucial step in the RTW process is to assess what the worker is and isn't

capable of doing. The problem is that the [medical information you need to make such an assessment is protected by privacy laws](#). The basic rule:

You're allowed to require injured workers to provide this information as long as you limit [your request](#) to the essential information you need to determine that they're capable of performing the job safely and effectively. You're not allowed to request a diagnosis or other information that doesn't directly affect a worker's capabilities, such as information about mental health to determine whether a worker with a back injury is capable of lifting heavy objects.

Compliance Strategy: Have the RTW case manager give the worker a blank form called a functional abilities assessment for the worker's doctor or health professional to fill out. Check if the Board in your jurisdiction has a standard assessment form that you're required to use, such as the WSIB Functional Abilities Form for Early and Safe Return to Work ([Form 2647A](#)) in Ontario. The case manager also needs to be sure that the worker signs the consent enabling the doctor or therapist to provide the requested protected health information for purposes of the assessment.

Step 5. Offer Injured Workers Suitable or Modified Work

After getting back the completed assessment, formulate a preliminary [RTW plan offering](#) for the injured worker suitable employment, that is, appropriate work that won't endanger their health and safety and that they're capable of doing, considering their functional abilities and employment qualifications, which may include modified work. **First Choice:** Reinstate injured workers to their pre-injury job or to alternative employment that's similar to the pre-injury job and, if [practicable](#), pays at least the same wages. **Second Choice:** If injured workers are capable of working but not

capable of performing the essential duties of the pre-injury job, re-employment rules require you to offer them the first suitable employment that becomes available.

Step 6. Make Accommodations to the Point of Undue Hardship

In evaluating the employment options for workers returning from injury, you must be prepared to make [accommodations to the job and workplace](#). Examples of reasonable accommodations that might be required, depending on the circumstances:

- Changing the job duties, such as removing heavy lifting chores for workers returning from spinal injury;
- Bundling job duties to create a new position that the worker is capable of performing;
- Providing special equipment, such as ergonomic tools or workstations, enabling the injured worker to do the job safely;
- Making physical changes to the workplace, such as installing ramps or other accessibility features; and
- Allowing the injured work to take additional breaks or time off to attend rehab or medical appointments.

You don't have to make accommodations that would impose undue hardship. The problem is that it's not always clear when accommodations cross the line from reasonable to undue hardship. Incurring a cost isn't enough. To be deemed undue hardship, the accommodation must impose an excessive and unreasonable burden, harm the business or put the worker or another person in danger. One clear example would be hiring injured workers who aren't capable of safely and efficiently performing the essential functions of a job.

Step 7. Finalize the RTW Plan

Once injured workers agree to the arrangement, set out the details into a vocational rehab/RTW plan. In some

jurisdictions, the Board must approve the RTW plan; in others, you need only notify the Board once all sides have agreed to the plan.

Step 8. Implement the RTW Plan

The final phase of the RTW process is to implement the vocational rehab/RTW plan. To achieve success, the case manager should:

- Notify all managers, supervisors, co-workers and other affected parties in the workplace about the plan;
- Ensure that managers and supervisors keep detailed records [monitoring the worker's performance](#);
- Review the performance records and RTW data generated;
- Maintain regular communications with the employee; and
- Negotiate any modifications necessary to keep the plan on course.

Step 9. Be Wary of the 6-Months' Non-Termination Window

It's illegal to terminate, demote, discipline or otherwise adversely treat or [take reprisals](#) against workers because they suffer a work injury or exercise their RTW and re-employment rights. In most jurisdictions, terminating a worker within 6 months of a return to work is presumed to be a violation of the employer's duties of cooperation and re-employment. However, employers can rebut the presumption by proving that termination was unrelated to the work injury. **Bottom Line:** You can fire returning workers during the 6-month window but only for legitimate reasons that aren't related to the injury. Just be cognizant of the presumption and keep careful records documenting your reasons for terminating returning workers during the window period.

Step 10. Prepare a RTW Early Exit Strategy

Where it exists, the duty to cooperate and re-employ workers who suffer work-related injuries is limited in duration:

When Employer's Duty to Re-Employ Injured Workers Expires

Jurisdiction	Duty to Re-Employ Ends
Federal	18 months after date medical practitioner certifies that worker is capable of returning to work, with or without limitations
Alberta	N/A
British Columbia	The second anniversary of the injury date if the worker hasn't returned to work or isn't carrying out suitable employment by then
Manitoba	After whichever comes first: (a) 2 years after the day of the accident; (b) 6 months after the worker is medically able to perform the essential duties of the pre-accident employment or other suitable work; and (c) the date the worker would have retired from that employment
New Brunswick	(a) 1 year after the date a worker was entitled to workers comp benefits, if the employer employed fewer than 20 workers at the beginning of that period, or (b) 2 years after the date a worker was entitled to workers comp benefits, if the employer employed 20 or more workers at the beginning of that period

Jurisdiction	Duty to Re-Employ Ends
Newfoundland	After whichever occurs earliest: (a) 2 years after the date of disability; (b) 1 year after worker is medically able to perform the essential duties of pre-injury employment; or (c) the date the worker reaches age 65
Nova Scotia	1. After whichever of the following comes first: (a) 2 years after the date of disability; or (b) date the worker turns 65; or 2. The employer offers the worker appropriate re-employment and the worker refuses the offer
Ontario	After whichever comes first: (a) second anniversary of date of injury; (b) 1 year after worker is medically able to perform the essential duties of the pre-injury employment; or (c) date the worker turns 65
Prince Edward Island	After whichever comes first: (a) 2 years after the date of the accident; or (b) date the worker turns 65
Québec	(a) 1 year from date of start of continuous absence if employer had 20 or fewer workers at start of period; or (b) 2 years from date of start of continuous absence if employer had >20 workers at start of period
Saskatchewan	N/A
Northwest Territories	N/A
Nunavut	N/A

Jurisdiction	Duty to Re-Employ Ends
Yukon	After whichever comes first: (a) 2 years after the date of work-related injury; (b) 1 year after the worker is medically able to perform the essential duties of pre-injury employment; or (c) the date the worker reaches the age of eligibility to apply for Old Age Security Act benefits

Source: Bongarde

Employer RTW and re-employment duties may also end early where an injured worker refuses to cooperate. **Caveat:** It's up to the Board and not the employer to determine that the worker has refused to cooperate.

Takeaway

There's one more crucial part of vocational rehab and RTW: education. You want to promote awareness of your program. This will go a long way to helping with recruiting and retention. And because educating employees about RTW can be difficult after they sustain injuries and illnesses, letting workers know that you provide vocational rehab and RTW *before* they actually need it lays the groundwork and helps you implement the program later on.