Cassels

BC Employers Subject to New Duties to Cooperate and Maintain Employment After Workplace Injuries Effective January 1, 2024

Michelle McKinnon

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With effect from January 1, 2024, employers in British Columbia will be required to comply with the new duty to cooperate and maintain employment under the British Columbia *Workers Compensation Act*. Below we provide a brief summary of what BC employers need to know before the new obligations come into effect on January 1, 2024.

When Does the Duty to Cooperate and Maintain Employment Apply?

The new legal duties to cooperate and maintain employment will apply to any workplace injury, including mental disorders, that results in a worker becoming disabled from earning their full wages at their pre-injury work.

The new legal duties will also apply retroactively to claims made prior to January 1, 2024, as follows:

- The duty to cooperate will apply in relation to a worker who sustained an injury no more than two years before January 1, 2024.
- The duty to maintain employment will apply in relation to a worker who sustained an injury no more than six months before January 1, 2024.

What Does the Duty to Cooperate Involve?

The duty to cooperate creates obligations for workers and employers to cooperate with each other, and with WorkSafeBC, to identify and make suitable work available to workers in a timely and safe manner following an injury.

An employer's duty to cooperate will include:

- Contacting the worker as soon as practicable after the worker is injured;
- Maintaining communication with the worker as appropriate in the circumstances;

- Identifying suitable work for the worker that, if possible, restores the worker's full wages;
- Providing WorkSafeBC with information it requires in relation to the worker's return to, or continuation of, work; and
- Where reasonable, making available to the worker the suitable work the employer has identified.

The worker will have similar obligations to contact the employer following an injury and to work with the employer to identify suitable work. Importantly, a worker cannot unreasonably refuse to accept suitable work that is made available by the employer.

If a dispute arises between an employer and worker about a worker's return to work or suitable work, WorkSafeBC can be notified and will then make a determination within 60 days.

What Does the Duty to Maintain Employment Involve?

The duty to maintain employment will apply when the following conditions are met:

- As with the duty to cooperate, the worker has become disabled from earning full wages at their pre-injury work due to a workplace injury;
- The injured worker has been continuously employed with the employer for at least 12 months; and
- The employer regularly employs 20 or more workers.

The nature and scope of the employer's obligation to maintain employment will depend on whether the injured worker is *fit to carry out the essential duties* of their pre-injury work or whether the injured worker is fit to work in some other capacity.

- If a worker is *fit to return to their pre-injury work*, the employer will be required to offer either that pre-injury work or a comparable alternative.
- If the worker *cannot perform their pre-injury job*, but is otherwise fit to work in another capacity, the employer will be required to offer the first suitable work that becomes available.

Employers will also be required to make any changes necessary to the work or workplace to accommodate an injured worker (the Duty to Accommodate) unless the changes create an undue hardship for the employer. The scope of the Duty to Accommodate is similar to the duty to accommodate under human rights legislation.

The duty to maintain employment will end on the second anniversary of the worker's injury if the worker has not returned to work by that date. If the worker is carrying out suitable work by the second anniversary of the date of injury, the employer's obligation to offer the pre-injury or alternative work ends. If the worker is carrying out pre-injury work, alternative work, or suitable work by the second anniversary of the date of

injury, the employer's Duty to Accommodate will continue past the second anniversary if accommodations are needed to allow the worker to perform their pre-injury work, alternative work, or suitable work.

If an employer terminates a worker's employment within 6 months after the worker begins carrying out their pre-injury work, alternative work, or suitable work, the employer will be deemed to have failed to comply with their duty to maintain employment, unless the employer can establish that the termination was not related to the worker's injury.

How Does the Duty to Maintain Employment Apply to Fixed Term Contracts?

The duty to maintain employment is not intended to extend a fixed term employment contract beyond its agreed term. That said, if there has been a pattern of continuous renewals of the fixed term employment contract over a period of time, then WorkSafeBC may find that the duty to maintain employment will extend beyond the fixed term of the employment contract.

How Does this Apply to Unionized Employers?

The new duty to maintain employment will override collective agreement terms, other than terms with respect to seniority, if they provide a greater benefit to the worker than the terms of the collective agreement.

Conclusion

Employers should review and update their existing practices and policies with respect to return to work obligations following a workplace injury. Employers should also ensure that managers and others involved in the return to work process receives training on these new duties before they become effective.

For unionized employers, we recommend reviewing your Collective Agreement to determine whether the new duty to maintain employment will apply or whether the terms of the Collective Agreement will still govern.

If you have any questions, please contact any member of our Employment & Labour Group.
