

Return to Work: *The Workers' Compensation Act, 2013*

The goal of the Saskatchewan Workers' Compensation Board (WCB) is always to return an injured worker to normal life activities, including work, in a timely and safe manner. The return-to-work (RTW) process is a partnership between the injured worker, employer, health-care provider and the WCB. Under Saskatchewan's Workers' Compensation Board Act, both employers and injured workers have legal obligations for participating and cooperating in the rehabilitation process, including RTW.

Under *The Workers' Compensation Act, 2013*, a worker has a legal obligation to cooperate with the WCB in the development of, and participation in, a return-to-work plan that will help them return to suitable productive employment. The WCB determines if benefits for injured workers are to be continued, suspended, reduced, or terminated if there is not cooperation in a RTW plan, dependent on the reasons for non-cooperation.

Duties of worker

51 A worker shall:

- (a) take all reasonable action to mitigate the worker's loss of earnings resulting from an injury; and
- (b) if the circumstances require, cooperate with the board in the development of a rehabilitation plan that is intended to return the worker to a position of independence in suitable productive employment.

2013, c.W-17.11, s.51.

Under *The Workers' Compensation Act, 2013*, an employer has a legal obligation to notify the WCB of work injuries, and cooperate in facilitating the timely return to work of an injured worker. When any person intentionally fails to notify the WCB of a worker's return to work, the WCB has the right to seek penalty against that person.

Duty of employer to notify board of injury

52 Within five days after the date on which an employer becomes aware of an injury that prevents a worker from earning full wages or that necessitates medical aid, the employer shall notify the board in writing of:

- (a) the nature, cause and circumstances of the injury;
- (b) the time of the injury;
- (c) the name and address of the injured worker;



- (d) the place where the injury happened;
- (e) the name and address of any physician who attends the worker for his or her injury; and
- (f) any further particulars of the injury or claim for compensation that the board may require.

2013, c.W-17.11, s.52.

Duty of employer to cooperate to achieve worker's return to employment

53 An employer shall cooperate with the board and the worker to achieve the early and safe return of an injured worker to his or her employment.

2013, c.W-17.11, s.53.

RTW: DUTY TO ACCOMMODATE

Duty to accommodate is a legal obligation defined by case law, labour standards and human rights legislation. Duty to accommodate requires an employer to make every reasonable effort, short of undue hardship, to accommodate a person protected against discrimination by human rights legislation.

In Canada, an employer cannot discriminate on the basis of prohibited grounds, which includes temporary or permanent disability, whether occupational or non-occupational.

Duty to accommodate is not a WCB regulation. The WCB cannot say, for any given case, whether or not the duty applies, or whether an employer's legal obligations have been met to the point of undue hardship.

In the event of a dispute about duty to accommodate involving an injured worker, the courts or a Saskatchewan Human Rights Commission tribunal would determine whether the duty to accommodate had been met.

A disabled worker's refusal of an employer's reasonable offer of accommodation may have an impact on an employer's duty to accommodate.

The Saskatchewan Human Rights Code

Section 9

"Every person and every class of persons shall enjoy the right to engage in and carry on any occupation, business or enterprise under the law without discrimination on the basis of a prohibited ground."

Section 16(1)

"No employer shall refuse to employ or continue to employ or otherwise discriminate against any person or class of persons with respect to employment, or any term of employment on the basis of a prohibited ground."



The Saskatchewan Employment Act

Employer must reassign employee or modify employee's duties:

2-41 An employer shall modify an employee's duties or reassign the employee to other duties if:

- (a) the employee becomes disabled and the disability would unreasonably interfere with the performance of the employee's duties; and
- (b) it is reasonably practicable to do so.

2013, c.S-15.1, s.2-41.

Undue Hardship

An employer is legally required to accommodate a disabled employee up to the point of undue hardship.

Undue hardship refers to the limit of an employer's capacity to accommodate without experiencing an unreasonable amount of difficulty based on health, safety and/or financial considerations. Typically, undue hardship occurs when an employer cannot sustain the economic or efficiency costs of an accommodation.

There is no standard formula for determining undue hardship. Each employee's accommodation situation is unique and must be evaluated individually.

The Supreme Court of Canada has provided guidelines as to what might constitute undue hardship. A court or human rights tribunal takes these guidelines into consideration when deciding.

An employer cannot just investigate whether an existing job is a suitable accommodation option. An employer must look at all other reasonable alternatives, including, but not limited to:

- Modifying job descriptions, hours of work, work speed, workstations and work environments
- Providing technical and mechanical aids, ergonomic enhancements and training

An employer is required to carefully review all options before deciding that accommodation would cause undue hardship. An employer cannot claim undue hardship based on assumption or opinion, but must provide evidence to prove undue hardship.

Generally, the disabled employee is responsible for requesting accommodation, but in some situations the employer may have a responsibility to initiate the accommodation process. An employee may not be able to identify and/or express his/her need for accommodation. In such circumstances, a failure to accommodate complaint may be successful, even if the employee did not clearly request accommodation, if it can be argued that the employer should reasonably have known of the need, but failed to act.

If an employer is unsure of whether it has gone far enough in attempting to accommodate a disabled employee, the employer should seek legal advice.

A documented RTW process can assist an employer in meeting the duty to accommodate. A documented RTW process provides a structure to follow for identifying and providing alternate/modified work, and the tools to document the accommodation process.



Duty to Accommodate and Union Involvement

In a unionized workplace, an employer is required to work with the union(s) in defining accommodations if:

- the proposed accommodation will affect the rights (e.g. seniority rights) of other employees under collective bargaining agreements, and/or
- the employee tells the employer he/she wants union representation present during accommodation option discussions.

In a unionized workplace, the union has a responsibility to cooperate with an employer's reasonable efforts to accommodate a disabled worker within the organization, and ensure that any collective agreement does not prevent accommodation.

