Backgrounder on RTW policies and procedures in NL vs. other Canadian provinces

This document synthesizes the findings of an environmental scan undertaken to examine and compare return to work (RTW) policies and procedures in Newfoundland and Labrador to those in four other provinces (Quebec, Ontario, Manitoba, and British Columbia) and those at the federal level. It is intended to provide background information to panelists and participants attending the 3rd session of the Newfoundland and Labrador Dialogue on Return to Work.

About the NL Dialogue on Return to Work

The Newfoundland and Labrador Return to Work Dialogue is a multi-stakeholder, multi-phased dialogue consisting of four, two-hour virtual sessions in fall 2022 and winter 2023. Its overall goals and objectives include:

a) transferring to Newfoundland and Labrador key findings from recent and ongoing research on RTW being carried out in other parts of Canada;

b) reflecting on the potential relevance of these findings for our understanding and approach to RTW in Newfoundland and Labrador;

c) presenting and providing an opportunity for multi-stakeholder commentary on findings from an environmental scan of policy and practices related to RTW across Canadian provinces compared to NL; and,

d) an opportunity to discuss overall insights from the dialogue and future research priorities on RTW in NL.

The Dialogue is co-sponsored by the *Policy and Practice in Return to Work Partnership* (PPRTW) based at the University of Ottawa and by Memorial University's SafetyNet Centre for Health and Safety Research. The PPRTW Partnership is jointly funded by the Social Sciences and Humanities Research Council and by the Canadian Institutes for Health Research. Originally established and led by the late Professor Katherine Lippel, Distinguished Research Chair in Occupational Health and Safety Law, PPRTW focuses on particular challenges around return to work for growing segments of the Canadian (and Newfoundland and Labrador) labour force. These segments include the precariously employed, immigrant workers, and internally and internationally mobile workers including temporary foreign workers.

In Sessions 1 and 2, researchers from Newfoundland and Labrador and other parts of Canada presented findings from their research on RTW and labour market re-entry.

1. **Session 1:** This session introduced the larger project, Policy and Practice and Return to Work and kicked off the Dialogue with presentations that highlighted the complexity and some of the challenges of RTW after work-related injury and illness. Researchers from NL and across Canada presented their findings on the processes that influence the success of RTW programs generally, for immigrant workers, and for workers with musculoskeletal or mental health conditions.
2. **Session 2:** This session focussed on the challenges of implementing RTW programs in particular types of work situations, some of which are becoming more common in the NL context.

Researchers from NL and across Canada presented their findings from studies of RTW in small businesses and precariously employed workers, mobile workers (e.g., inter-provincial construction workers, seafarers working in the maritime industry), and workers with particular vulnerabilities (i.e., those employed under the Temporary Foreign Workers Program in agriculture and other sectors).

Session 3 will shift the focus of the Dialogue to other factors that might influence RTW and its outcomes for injured or ill workers – namely, the legislation, regulations, policies, procedures (i.e., administrative practices), and services that govern how RTW is managed in NL and other Canadian provinces. It will include a presentation that compares certain aspects of the legislative and policy context for RTW in NL to four other provinces (Quebec, Ontario, Manitoba, and British Columbia), a panel discussion of the presentation's findings, followed by an open discussion and dialogue.

The presentation for Session 3 will be framed around five key questions:

1. How is early and safe RTW defined in legislation and policy?
2. What are the roles of the various parties in the RTW process? What are their obligations?
3. To whom does the legislation and policy apply? To whom does it not apply?
4. What are the penalties if the workplace parties don't comply with their obligations?
5. What happens if there is a dispute between the workplace parties?

To answer these questions, information will be drawn from the findings of an intensive environmental scan undertaken to (a) examine and compare RTW policies and procedures in the five provinces, and (b) place these policies and practices in the context of the research evidence. A more detailed decription of the scan, how it was conducted, and its findings will be integrated into the final report.

A brief description of how the environmental scan was undertaken

The scan sought to identify and compare the legislation and policy-related factors that might influence RTW and its outcomes for injured workers in NL with those of four other Canadian provinces (Quebec, Ontario, Manitoba, and British Columbia). Information was collected from online sources. For each province, enabling statutes and downstream policy instruments[1] were identified and retrieved using searches of official government and workers' compensation authority websites, as well as online portals that gather information on legislation and policy[2]. Sites were bookmarked and any relevant documents were downloaded. To ensure that the findings were also inclusive of workers under federal jurisdiction, relevant policy instruments at the federal level were also scanned.

Relevant legislation and regulations were first examined in detail to identify any provisions related to RTW. Downstream policy and administrative practice documents were then reviewed to determine how the five systems have operationalized RTW under their statutory duty to serve injured workers and their employers. Information was then summarized in a series of tables that compared specific aspects of the

[1] Includes regulations, policies, procedures, practice directives and guidelines.

[2] The Canadian Legal Information Institute (https://www.canlii.org/en/) and the Association of Workers' Compensation Boards of Canada (https://awcbc.org/en/).

RTW process. The scan did not include a comparison of the type of compensation paid (e.g., wage loss, functional impairment, etc.), the types of benefits payable (e.g., lump sum payments, disability awards, etc.), or other procedural issues (e.g., early acceptance, waiting periods, the measurement of earnings' loss, the establishment of compensation rates, treatment approaches, etc.).

Background: the legislative and policy context for RTW

In Newfoundland and Labrador, as in the rest of Canada, provisions governing RTW are principally found in three legal frameworks: workers' compensation, occupational health and safety, and human rights. In addition to these three frameworks, there are some provisions in the laws and policies that protect temporary foreign workers that have implications for RTW; these are found at the federal level and at the provincial level in Quebec, Ontario and British Columbia.

- **Workers' compensation:** Laws and policies made in the context of this legal framework are intended to achieve the over-arching goal of RTW – namely, to enable an injured worker to safely return to work, ideally in their pre-injury employment or suitable alternate employment at their pre-injury wages. Quebec is the only province that enshrines RTW as a worker's *right* to be reinstated in their pre-injury employment or to be reassigned to equivalent employment.
- **Occupational health and safety:** Laws and policies made in the context of this legal framework are intended to achieve the principle that all workers have the right to a safe work environment. In Canada, these laws are based on the internal responsibility system (IRS), the philosophy that all workplace parties[3] share direct responsibility for ensuring a safe and healthy worksite. One of the core features of an IRS is that responsibilities increase with increasing authority and control, with employers typically having the most responsibilities. The specific workplace parties deemed to have a role are reflected in the general duty clauses of the *Occupational Health and Safety Act* and regulations – and vary by province. For example, the *Act* and regulations in NL set out general duty clauses that apply to employers, workers, supervisors, suppliers, prime/principal contractors, self-employed persons, and owners. In Alberta, the general duty clauses not only apply to most of these parties, but also to temporary staffing agencies.
- **Human rights:** Laws and policies made in the context of this legal framework are intended to achieve the principle that all persons should have equal opportunity "to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society…". Under these laws, discrimination in employment based on disability is prohibited. In Canada, human rights are protected under the Constitution and by federal, provincial, and territorial legislation. The rights afforded under this legislation are consistent with those set out in international and multilateral treaties to which Canada is a party (e.g., United Nations human rights convenants and conventions, International Labour Organization conventions, among others).

Framing the discussion for Session 3 of the Dialogue

To set the stage and provide a springboard for discussion, this section synthesizes the findings of the

[3] employers, supervisors, workers, suppliers, service providers, owners, contractors, prime contractors, self-employed persons and temporary staffing agencies

environmental scan to answer the following five questions:

1. How is "early and safe RTW" defined in legislation and policy?
2. What are the roles of the various parties in the RTW process? What are their obligations?
3. To whom does the legislation and policy apply? Are there those to whom it does not apply?
4. What are the penalties if the workplace parties don't comply with their obligations?
5. What happens if there is a dispute between the workplace parties?

Answers to each question are framed by first summarizing what is done In Newfoundland and Labrador, followed by a brief description of what is done in the two other provinces with requirements for "early and safe" RTW (i.e., Ontario and British Columbia).

Question 1: How is "early and safe RTW" defined in legislation and policy?

In Newfoundland and Labrador, the legislative provisions governing "early and safe" RTW (ESRTW) are found in Sections 89 to 89.4 of the *Workplace Health, Safety and Compensation Act* and are interpreted in 19 policies and 14 procedures. Neither the legislation nor the downstream policy/practice instruments provide a formal definition of what is meant by "early and safe" RTW. In Policy RE-01 (Overview – Return to Work), Workplace NL articulates that the goal is to "safely return the worker to employment or employability that is comparable to the pre-injury level as soon as possible" and provides the following examples of what ESRTW could involve: modified work, easeback to regular work, transfer to an alternate job or trial work to assess the worker's capability. Some of these terms are defined in Policy RE-18:

- **Modified work:** Changing the job duties of the pre-injury position required to accommodate the worker's functional restrictions as a result of the injury. Modified work includes altering or removing some duties; however, the worker is still working primarily in his or her pre-injury position.
- **Easeback to regular work:** A gradual return to pre-injury hours of work achieved by increasing the number of hours worked over a defined time frame agreed upon by the workplace parties utilizing the functional abilities information relating to the worker. While the pre-injury hours of work vary, the pre-injury duties are the same.
- **Alternative work:** A different job or bundle of duties (not the pre-injury job or duties) that are suitable and are provided to accommodate a worker who has temporary or permanent functional restrictions as a result of the injury.
- **Alternative duties:** Alternate duties are non-pre-injury duties within the worker's functional abilities.

The only other provinces that reference "early and safe" RTW are Ontario and British Columbia. In Ontario, the legislative provisons governing ESRTW are found in Sections 40 to 42 of the *Workplace Safety and Insurance Act* and are interpreted by 11 policies and 1 administrative practice. In British Columbia, the legislative provisons governing ESRTW are found in Sections 154.1 to 154.6 of Bill 41, *Workers Compensation Amendment Act (No.2), 2022*, which received royal assent in November 2022. At present, these amendments have not yet taken effect and, as a result, there are currently no policies or

practice directives that interpret the new provisions[4]. Like NL, neither the legislation nor the downstream policy instruments in Ontario and British Columbia provide a formal definition of the meaning of "early and safe".

Question 2: What are the roles of the various parties in the RTW process? What are their obligations?

In all five jurisdictions, the role of the various workplace parties in the RTW process is addressed in in either legislation and/or policy. NL is the only jurisdiction that sets out the role of the worker, the employer, the healthcare provider, and the workers' compensation authority in policy and procedure. Ontario's policies describe the role of the worker, the employer and the workers' compensation authority; while British Columbia's describe the role of the workers' compensation authority in the context of vocational rehabilitation and RTW. No jurisdiction explicitly addresses the role of the supervisor in the ESRTW process or in RTW more generally. For the three provinces with requirements for "early and safe" RTW, the roles and obligations for each of the workplace parties is summarized below.

Employer's role and obligations

In Newfoundland and Labrador, the *Workplace Health, Safety and Compensation Act* imposes a duty on the employer to co-operate in ESRTW, an obligation to re-employ an injured worker, and a duty to accommodate the work or the workplace for the injured worker. Similar duties and obligations are seen in the Ontario legislation and the recent legislative amendments in British Columbia – although there are subtle differences in how the provisions are worded.

Employer's duty to co-operate:

In Newfoundland and Labrador, Section 89(1) of the *Workplace Health, Safety and Compensation Act* imposes a duty on employers to co-operate in the ESRTW of a worker injured in their employment. Under this section, an employer is required to contact the worker as soon as possible after the injury occurs, maintain communication throughout the period of the worker's recovery, provide suitable employment that is available and consistent with the worker's functional abilities and that where possible restores the worker's pre-injury earnings, give WorkplaceNL information it may request concerning the worker's RTW, and do other things that may be prescribed in regulations. Policy RE-19 (Construction Industry) clarifies that the duty to co-operate applies to employers engaged primarily in construction and their workers who perform construction work. Policy RE-02 (The Goal of Early & Safe Return to Work and the Roles of the Parties) sets out that all employers are "obligated to co-operate in worker's early and safe return to suitable and available employment while the worker is receiving active medical rehabilitation for a work injury". It also defines some of the terms that appear in the legislation and the over-arching policy statement and clarifies that 'any information requested by WorkplaceNL' includes information about any disputes or disagreements which arise during the ESRTW process. The policy also states, in regards to the employer's obligation to provide suitable and available employment, that the employer is responsible to pay the worker's salary earned during the ESRTW process and notes that WorkplaceNL will pay the differential, if any, between the salary earned during ESRTW and 85% of

[4] British Columbia does have 18 policies that provide guidance to case managers on aspects of return to work more generally and vocational rehabilitation.

the worker's net pre-injury earnings subject to the maximum compensable ceiling. Policy RE-19 (Construction Industry) states that the duty to co-operate applies to employers primarily engaged in construction.

In Ontario, Section 40(1) of the *Workplace Safety and Insurance Act* imposes a duty on the employer of an injured worker to co-operate in the ESRTW of the worker; Section 40(3) imposes a duty to co-operate on employers engaged primarily in construction; and, Section 40(4) imposes a duty to co-operate on the actual employer of an emergency worker, not on their deemed employer. Under Section 40(1), an employer is required to contact the worker as soon as possible after the injury occurs, maintain communication throughout the period of the worker's recovery and impairment, attempt to provide suitable employment that is available and consistent with the worker's functional abilities and that when possible restores the worker's pre-injury earnings, give the WSIB such information as it may request concerning the worker's RTW, and do other things that may be prescribed. Policy 19-02-08 (RTW Co-operation Obligations) states that "the injury employer and worker are expected to work together to return the worker to their pre-injury job with any necessary accommodation or to another job within the worker's functional abilities". It also defines some of the terms used in the legislation and clarifies that injury employers are obliged to co-operate by initiating early contact with the worker, maintaining appropriate communication with the worker throughout their recovery, to offer the worker the job when an available job is identified as suitable for the worker, and giving the WSIB all relevant information concerning the worker's RTW. The policy notes that in cases where the worker is not functionally capable of performing any type of work, the injury employer is expected to maintain regular communication with the worker in preparation for a future return to work. It also sets out the length of time that the co-operation obligations apply to the workplace parties – namely, from the date of injury until the earlier of: the worker's loss of earnings (LOE) benefits can no longer be reviewed by the WSIB[5]; there is no longer an employment relationship between the workplace parties[6]; the WSIB is satisfied that suitable work with the injury employer is not available, will likely not become available, or will not continue to exist in the reasonably foreseeable future; or the WSIB is satisfied that the injury employer has met its co-operation obligations by offering suitable work and the worker does not return to the job following the finding that the job is suitable.

In British Columbia, Section 154.2(1) of Bill 41, *Workers Compensation Amendment Act (No.2), 2022* imposes a duty on an employer to cooperate with the injured worker and WorkSafeBC in the worker's early and safe return to, or continuation of, work. Under this section, an employer is required to contact the worker as soon as practicable after the worker is injured; maintain communication with the worker; identify suitable work that, if possible, restores the full wages the worker was earning at their pre-injury work; provide WorkSafeBC with information it requires in relation to the worker's return to, or continuation of, work; do any other thing required by WorkSafeBC. Section 154.2(3) further states that these obligations do not apply if, "having regard to all of the circumstances, contact and communication between the employer and the worker are likely to imperil or delay the worker's recovery". As noted previously, these provisions have not yet come into effect and at present, there are no policies interpreting them.

[5] According to the policy, this is usually at 72 months post injury; but the co-operation obligations may apply longer if the LOE benefits quality to be reviewed post 72 months.

[6] Because the worker voluntarily quits or the injury employer terminates the employment for reasons unrelated to the work-related injury/disease or the worker's claims for benefits.

Newfoundland and Labrador is the only jurisdiction to define the meaning of "co-operation" in both policy and procedure. Policy RE-02 defines co-operation to mean "maintaining effective communication throughout the period of the worker's recovery, working towards identifying suitable and available employment for the worker, and fulfilling reporting obligations". Procedure 33 (Workplace Party Cooperation to Early and Safe Return to Work) reiterates that "in general" this is what co-operation means. It goes on state that the workplace parties are considered to be co-operating when "they are arranging early and safe return to work, participating in early and safe return to work, and resolving issues related to early and safe return to work". Procedure 33 defines the following additional terms: effective communication, reasonable assistance (in the context of the requirement that the worker assist the employer to identify and provide suitable employment), and return to work plans.

- **Effective communication:** The procedure does not prescribe the frequency, method, and content of communication between the workplace parties prior to and during the ESRTW process, but recommends that they make telephone contact at least once per week during the ESRTW process.
- **Reasonable assistance:** Examples of reasonable assistance include: providing information, suggesting modifications to the pre-injury job, or reviewing work sites and processes to identify suitable employment opportunities.
- **Return to work plans:** The procedure indicates that ESRTW are "progressive, outline suitable employment for the worker, and are received by WorkplaceNL from the employer within one week of receiving the worker's functional ability information".

Employer's obligation to re-employ:

In Newfoundland and Labrador, under Section 89.1(1) of the *Workplace Health, Safety and Compensation Act*, an employer of a worker who has been unable to work as a result of an injury must offer to re-employ the worker. This requirement only applies if the worker was employed continuously for at least one year immediately prior to the date of injury and if the employer regularly employs more than 20 workers. For employers with a duty to re-employ, the *Act* also sets out conditions of re-employment in two specific circumstances: the first is when a worker is medically able to perform the essential duties of their pre-injury employment; the second is when a worker is medically able to perform suitable work but is unable to perform the essential duties of his or her pre-injury employment. In the former, the employer must offer to (a) re-employ the worker in the position that the worker held on the date of injury or (b) offer to provide the worker with alternative employment of a nature and at earnings comparable to the worker's employment on the date of injury. In the latter, the employer must offer the worker the first opportunity to accept suitable employment that may become available with the employer. Under Section 89.1(8), the employer's obligation lasts for two years after the date of disability, one year after the worker is medically able to perform the essential duties of their pre-injury employment, or the date on which the worker reaches 65 years of age – whichever is earliest.

The *Workplace Safety and Insurance Act* in Ontario also requires an employer of an injured worker to re-employ them as part of the RTW process. The legislative provisions in Ontario regarding the obligation to re-employ and the duration of the obligation are worded exactly the same as in Newfoundland and Labrador. Policy 19-02-09 (Re-employment Obligations) clarifies that an injury employer's obligation

starts when it receives notice that a worker is medically able to perform the essential duties of either their pre-injury employment, or suitable work.

In British Columbia, Bill 41, *Workers Compensation Amendment Act (No.2), 2022* also has a requirement that an employer of an injured worker re-employ them as part of the RTW process. While the legislative provisions have the same intent as NL and Ontario, there are some subtle differences in wording. For example, under Section 154.3(1), the worker has to have been employed by the employer on a full- or part-time basis for a continuous period of at least 12 months before the date of injury. In contrast to the legislation in NL and Ontario which refers to the worker being "medically able" to perform the essential duties of their pre-injury employment or to perform suitable work but unable to perform the essential duties of , the legislation in British Columbia refers to the worker being "fit to work" in the same circumstances. The legislation does not define "fit to work" and at present, there are no policies to interpret its meaning. All of the employer's obligation to re-employ end on the second anniversary of the date the worker was injured if the worker has not returned to work by that date. Where an employer re-employed a worker deemed fit to carry out the essential duties of their pre-injury work, their obligations end on the second anniversary of the injury date if the worker is carrying out suitable work by that date.

Employer's duty to accommodate:

In Newfoundland and Labrador, an employer with a re-employment obligation under the Act has a duty to accommodate the work or the workplace to the extent that the accommodation does not cause the employer undue hardship. The legislation in Ontario has a similarly worded duty to accommodate, while the legislation in British Columbia states that the employer must "to the point of undue hardship, make any change to the work or the workplace that is necessary to accommodate a worker".

NL and Ontario provide definitions of accommodation in policy. Although there are slight differences in wording, accommodation is essentially defined as a change, adaptation or modification to the terms and conditions of work (e.g., reorganization or reduction of work hours), work duties or workplace (e.g., modified duties, physical changes to the work area), or equipment required to perform the job. In Newfoundland and Labrador, Policy RE-18 (Hierarchy of return to work and accommodation) sets out the following considerations for determining the need for modifications or assistive devices: the tasks or activities to be performed; the worker's functional abilities; any non-work related disability, handicap, or condition the worker may have; any modification or device necessary for the performance of the job tasks or activities; and other factors that may affect the worker's ability to perform the job duties. In Ontario, Policy 19-02-07 (RTW Overview and Key Concepts) emphasizes that accommodation results in a job that is consistent with the worker's functional abilities and that it is an "individualized process and fact dependent, taking into account the nature of the work/workplace, the worker's abilities and limitations, and the essential duties and requirements of the worker's pre-injury job and other jobs with the injury employer". Under the policy, if a worker can perform the essential duties of their pre-injury job with accommodation (or if a job becomes available that can be made suitable through accommodation) and the accommodation doesn't cause the employer undue hardship, the employer must provide the accommodation to allow the worker to remain at or return to work.

The policies on accommodation in NL and Ontario make reference to their respective human rights statutes and/or the *Canadian Human Rights Act*. For example, Newfoundland and Labrador's policies

note that under human rights legislation, employers have an obligation to accommodate and re-employ injured and disabled workers, while Ontario's policies note that the workplace parties are expected to comply with relevant provincial and federal legislation during the RTW process. Under the provincial human rights codes, physical and/or mental disability/handicap is a prohibited grounds of discrimination. Employers and other workplace parties (including employment agencies) are prohibited from discriminating on the basis of disability and prohibited actions include the refusal to employ, the refusal to continue to employ, harassment and other forms of discrimination.

Both NL and Ontario provide guidance on how to determine what constitutes undue hardship and place the onus of proof onto the employer for demonstrating that undue hardship exists. In Newfoundland and Labrador, Policy RE-07 (Undue Hardship) requires the following factors to be taken into consideration in the determination of undue hardship: the health and safety of the worker or co-workers; the nature and cost of the accommodation needed; the overall financial resources of the employer making the reasonable accommodation; the number of persons employed by the employer; the effect on expenses and resources of the employer; the overall financial resources, size, number of employees, and type and location of facilities of the employer (if the facility involved in the reasonable accommodation is part of a larger entity); the type of operation of the employer, including the structure and functions of the employer's workforce; the geographic relationship between the worker's current employment and that of the proposed accommodation offered by the employer; the impact of the accommodation on the employer's operations; and other relevant factors. In Ontario, Policy 19-02-07 (RTW Overview and Key Concepts) sets out that the three factors listed in the Ontario Human Rights Code are to be considered: the cost of accommodation, the health and safety needs of employees and/or customers, and any outside sources of funding that may be available to the injury employer. Under the policy, the employer is expected to provide supporting evidence to demonstrate this (e.g., a cost-benefit analysis that includes the long-term financial impact if the claimed undue hardship is financial).

Worker's role and obligations

In Newfoundland and Labrador, the *Workplace Health, Safety and Compensation Act* sets out that the worker has a duty to co-operate in ESRTW. A similar duty is seen in the Ontario legislation and the recent legislative amendments in British Columbia. Although Manitoba's legislative and policy framework does not include provisions for "early and safe" RTW, it does impose a duty for the worker to co-operate in RTW, rehabilitation, and disability management. As previously mentioned, Quebec is the only province that enshrines RTW as a worker's *right* to be reinstated in their pre-injury employment or to be reassigned to equivalent employment.

Worker's duty to co-operate:

In Newfoundland and Labrador, Section 89(2) of the *Workplace Health, Safety and Compensation Act* imposes a duty on workers to co-operate in their ESRTW. Under this section, a worker is required to contact the employer as soon as possible after the injury occurs; maintain communication throughout the period of their recovery; assist the employer, as may be required or requested, to identify suitable employment that is available and consistent with their functional abilities and that, where possible, restores their pre-injury earnings; accept suitable employment when identified; give WorkplaceNL the

information it may request concerning their RTW, and do other things that may be prescribed in regulations. As noted above, Policy RE-02 (The Goal of Early & Safe Return to Work and the Roles of the Parties) sets out that all workers are "obligated to co-operate in worker's early and safe return to suitable and available employment while the worker is receiving active medical rehabilitation for a work injury". The policy states that "workers are eligible to receive appropriate benefits while co-operating in their active medical rehabilitation and in the progressive early and safe return to work process" and clarifies that 'any information requested by WorkplaceNL' includes information about any disputes or disagreements which arise during the ESRTW process.

In Ontario, Section 40(2) of the *Workplace Safety and Insurance Act* imposes a duty on the injured worker to co-operate in their ESRTW; Section 40(3) imposes a similar duty to co-operate on workers who perform construction work. Under the first section, a worker is required to contact the employer as soon as possible after the injury occurs; maintain communication throughout the period of their recovery and impairment; assist the employer, as may be required or requested, to identify suitable employment that is available and consistent with their functional abilities and that, when possible, restores their pre-injury earnings; give the WSIB such information as it may request concerning the worker's RTW, and do other things that may be prescribed. As noted above, Policy 19-02-08 (RTW Co-operation Obligations) states that "the injury employer and worker are expected to work together to return the worker to their pre-injury job with any necessary accommodation or to another job within the worker's functional abilities". It further clarifies that workers are obliged to co-operate by initiating early contact with the injury employer, maintaining appropriate communication with the injury employer throughout their recovery, assisting the injury employer (as required or requested) to identify suitable work that is available and consistent with their functional abilities, giving the WSIB all relevant information concerning their RTW, and participating in all aspects of their RTW assessments and plans. The policy also notes that in cases where the worker is not functionally capable of performing any type of work, they are expected to maintain regular communication with their injury employer in preparation for a future return to work.

In British Columbia, Section 154.2(2) of Bill 41, *Workers Compensation Amendment Act (No.2), 2022* imposes a duty on a worker to cooperate with the employer and WorkSafeBC in their early and safe return to, or continuation of, work. Under this section, a worker is required to contact the employer as soon as practicable after the injury; maintain communication with the employer; assist the employer, on request of the employer, to identify suitable work that, if possible, restores the full wages the worker was earning at their pre-injury work; provide WorkSafeBC with information it requires in relation to the worker's return to, or continuation of, work; do any other thing required by WorkSafeBC. Section 154.2(3) further states that these obligations do not apply if, "having regard to all of the circumstances, contact and communication between the employer and the worker are likely to imperil or delay the worker's recovery". As noted previously, these provisions have not yet come into effect and at present, there are no policies interpreting them.

Healthcare provider's role

Newfoundland and Labrador is the only province that sets out in policy the role of the healthcare provider in the ESRTW process. All others have supplemental resources on their websites that describe their specific roles in the RTW process. Policy RE-02 (The Goal of Early and Safe Return to Work and the Roles of the Parties) states that the healthcare provider is responsible for providing the workplace

parties and WorkplaceNL with functional abilities information, providing the worker and WorkplaceNL with medical information, identifying the most appropriate method of treatment for the injury, ensuring the worker receives timely treatment, and ensuring RTW is discussed throughout recovery. Procedure 33 (Workplace Party Cooperation to Early and Safe Return to Work) clarifies the steps to be taken if a Case Manager determines that a healthcare provider is not meeting these responsibilities.

Workers' compensation authority's role

In Newfoundland and Labrador, the *Workplace Health, Safety and Compensation Act* sets out that the role of the workers' compensation authority in the ESRTW process includes facilitating the rehabilitation and RTW of injured workers, monitoring the progress of the workplace parties on returning the worker to work, resolving disputes or disagreements, and, levying penalties against the employer and/or the worker where it is determined that the workplace parties have failed to comply with their obligations in the ESRTW process. Policy RE-02 further clarifies that WorkplaceNL has responsibility for facilitating the shared responsibilities of the workplace parties in ESRTW by: communicating to the workplace parties their statutory obligations to co-operate; ensuring that RTW plans achieve the hierarchy of RTW priorities[7]; monitoring activities, progress, and co-operation of the workplace parties; proactively managing the medical rehabilitation of the worker in consultation with the worker and the healthcare provider(s); determing compliance with the statutory obligations to co-operate and re-employ (where applicable); offering/providing dispute resolution; and communicating regularly and effectively with the workplace parties and healthcare providers. The policy also states that where disputes or disagreements arise, WorkplaceNL will facilitate self-reliance of the workplace parties and remove barriers in the ESRTW process by providing information to assist in assessing the workplace[8], information regarding job/workplace accommodations, and the offer of mediation services[9].

In Ontario, the *Workplace Safety and Insurance Act* sets out similar roles for the WSIB. Policy 19-02-07 clarifies that the role of the WSIB is to proactively support the workplace parties in the RTW process and provide early support and services where recovery and RTW barriers occur. Specifically, its role is to support the workplace parties by providing health recovery support, education and advice, case management, accommodation assistance, dispute resolution, and ensuring compliance with co-operation obligations and re-employment obligations (if any). If challenges arise that impact the worker's RTW that the workplace parties cannot resolve on their own, the WSIB first conducts a RTW assessment that is initially used to determine if the worker is or will be medically able to return to their pre-injury job (with or without accommodation) or to a new job, and then (if necessary) develops a RTW plan that outlines the assistance and services the worker requires to enable their return to work. Both activities are done in collaboration with the workplace parties (or authorized representatives) and the worker's treating healthcare professional (where necessary).

In British Columbia, Bill 41, *Workers Compensation Amendment Act (No.2), 2022* sets out the following roles for WorkSafeBC in relation to ESRTW: determinining if either of the workplace parties have failed

[7] As set out in Policy RE-18 (Hierarchy of Return to Work and Accommodation), the priorities in the hiearchy are as follows: pre-injury job with modifications, essential duties of pre-injury job, pre-injury job modified work, ease back to pre-injury job, and alternate work.

[8] In terms of the worker's functional abilities, skills, knowledge, and fitness to work.

[9] If requested by either of the workplace parties or if determined by WorkplaceNL that it would be helpful.

to comply with their statutory obligations in the ESRTW process; resolving disputes regarding compliance; making a determination on whether (a) the worker is fit to carry out suitable work or fit to carry out the essential duties of the worker's pre-injury work and (b) suitable work is available, where the employer and the worker disagree with each other; and, imposing an administrative penalty on an employer if it is satisfied on a balance of probabilities that the employer has failed to comply with the duty to co-operate or the duty to maintain employment. As previously noted, these amendments have not yet taken effect and, as a result, there are currently no policies or practice directives that interpret these provisions.

Question 3: To whom does the legislation and policy apply? Are there those to whom it does not apply?

All workers and employers are required to co-operate in ESRTW

The statutory duty to co-operate in the ESRTW process applies to all workers and all employers in Newfoundland and Labrador. The same is true in Ontario and British Columbia. In Newfoundland and Labrador, Policy RE-19 (Construction Industry) makes it explicit that the duty to co-operate applies to employers engaged primarily in construction and their workers who perform construction work. The policy clarifies the classifications of employers that are considered to be engaged primarily in construction and workers that are considered to be workers who perform construction work.

Some employers and workers are excluded from the obligation to re-employ

While the statutory obligation to co-operate applies to all workers and all employers, the same is not true for the obligation to re-employ. In Newfoundland and Labrador, employers who regularly employ fewer than 20 workers are excluded from the obligation to re-employ, as are certain classes of employers or industries excluded by regulation. This exclusion also applies in Ontario and British Columbia. The one exception to this requirement in both Newfoundland and Labrador and Ontario is the construction sector.

Those to whom the obligation to re-employ applies

In both Newfoundland and Labrador and Ontario, an employer with a re-employment obligation must offer to re-employ an injured worker who (a) had been continuously employed by the employer for one year immediately prior to the injury date and (b) is medically cleared to work.

- In Newfoundland and Labrador, Policy RE-05 (Re-employment Obligation) clarifies that workers who are hired one year or more before the date of injury are considered to be continuously employed, unless the year was interrupted by a work cessation[10] intended by the worker or the injury employer to sever the employment relationship. It also sets out that conditions by which

[10]Under Policy RE-05, the employment relationship is not considered to be broken by following types of work cessation: strikes and lock-outs; sabbaticals, sick leaves, parental leaves, leaves of absence, and vacations; work-related injuries resulting in time off work; layoffs of less than three months, if the worker returns to work for the employer through an employer's offer of re-employment at the time of layoff, or through a union hall's hiring process; or layoffs of more than three months, if the worker returns to the employer through an offer of re-employment or a union hall hiring process, and a date of recall was stipulated, and the recall occurs, the employer continued to pay the worker, the employer continued to make benefit payments for the worker pursuant to the provisions of a retirement, pension, or employee insurance plan, or, the employee received, or was entitled to, supplementary employment insurance benefits.

seasonal workers, casual workers, and contract workers would be considered to be continuously employed.

- In Ontario, Policy 19-02-09 (Re-employment Obligations) clarifies that workers are considered unable to work if, because of the work-related injury/disease, they are absent from work, work less than regular hours, and/or require accommodated work that pays, or normally pays, less than their regular pay, regardless of whether the injury employer reimburses a worker for an actual loss of earnings or not. Under the policy, workers who are hired one year or more before the date of injury are considered to be continuously employed, unless the year was interrupted by a work cessation[11] intended by the worker or the injury employer to break the employment relationship. The policy states that generally the number of workers employed by the injury employer on the date of injury is considered the number of workers regularly employed. It also clarifies that "in cases where the injury employer has numerous geographically distinct plants or branches, or employs workers who work outside Ontario or outside of Canada, only workers whose earnings must be reported to the WSIB for premium purposes are included when determining the number of workers regularly employed". The policy also sets out how the obligation to re-employ is applied is special cases, like fixed term contracts, emergency workers, seasonal employment, temporary employment agencies, and successor employers.
    - **Fixed term contracts:** Under the policy, the injury employer of a fixed term contract worker is only required to re-employ the worker in the pre-injury job, an alternate job that is comparable, or suitable work, for the remainder of the fixed term employment contract that was interrupted by the work-related injury/disease. However, in cases where an injury employer has routinely extended or renewed a worker's fixed term employment contract in the past, with no actual break in employment, the WSIB may conclude that the re-employment obligations extend beyond the end of the fixed term employment contract for the normal duration of the re-employment obligation.
    - **Emergency workers:** Under the Act and the policy, if an emergency worker is the employee of a regular employer covered under the WSIA and receives benefits, the regular employer is responsible for complying with the re-employment obligation. The deemed (emergency) employer however, reimburses the regular employer for the costs of meeting the re-employment obligation. This requirement applies to a member of a municipal volunteer brigade, a volunteer ambulance brigade, or an auxiliary member of a police force, as these workers are considered as though they are emergency workers for re-employment purposes.
    - **Seasonal employment:** Under the policy, the WSIB reviews the past hiring practices of the injury employer to determine whether the employer intended to continuously employ the seasonal worker for the purposes of establishing if the condition of one year of continuous employment before the date of injury has been met. If the workplace parties or the WSIB questions whether the number of workers employed on the date of

[11] The WSIB does not consider the employment relationship to be broken by following types of work cessation: strikes and lock-outs; sabbaticals, sick leaves, parental leaves, leaves of absence, and vacations; work-related injuries/diseases resulting in time off work; layoffs of less than three months, if it is shown that the intention of the workplace parties was for the worker to return to work for the injury employer, or through a union hall's hiring process; or layoffs of more than three months, if the recall date was stipulated, and the recall occurs.

the worker's injury fairly represents the number of workers regularly employed, the WSIB determines the average number of workers employed in each of the 12 or fewer months that make up the full regular season of the injury employer's operation before the date of the injury. If there are 20 or more workers in the majority of the months of the full regular season, the 20 or more workers re-employment condition is considered to have been met. When calculating the length of the re-employment obligation period, the off-season period is not excluded. However, during the off-season period the injury employer's re-employment obligation is not in effect, nor is the employer subject to a re-employment penalty.

- **Temporary employment agencies:** Under the policy, the re-employment obligation applies to temporary employment agencies if the worker was continuously on the temporary employment agency's placement roster for at least 12 months prior to the date of injury. It is not necessary that the worker be continuously on work assignments during this period. A temporary employment agency meets the re-employment obligation to offer the pre-injury job, or an alternate job that is comparable, by returning the worker to the employment placement roster for normal rotation to job assignments. The temporary employment agency meets the re-employment obligation to offer suitable work by returning the worker to the employment placement roster and attempting to place the worker in the first opportunity for suitable work that becomes available.
- **Successor employers:** Under the policy, if the successor employer is the same legal entity as the original employer, re-employment obligations generally attach to the successor employer. If, however, the successor employer is a different legal entity than the original employer, re-employment obligations generally do not attach to the successor employer.

- In Ontario, Policy 12-04-08 says that workers participating in the "Commonwealth Caribbean/Mexican Seasonal Agricultural Workers Program" have WSIB coverage, which begins as soon as they reach the agreed-upon point of departure in their homeland and remains in place until they return home. This means that temporary foreign agricultural workers would be entitled to ESRTW provided the requirements of Policy 19-02-09 are met.

Question 4: What are the penalties if the workplace parties don't comply with their obligations?

The Acts in all three provinces allow for administrative penalties to be levied for non-compliance with the obligations to co-operate and to re-employ.

Penalties for failure to co-operate

In Newfoundland and Labrador, penalties will be levied against a worker or employer for not co-operating when it is determined they don't have a "legitimate" reason. Neither the policy nor the procedure provide examples of "legitimate" reasons.

- **Worker penalties:** Under Policy RE-02, the worker's benefits shall be reduced, suspended or terminated "where within one week from the notification by WorkplaceNL, the worker fails to demonstrate co-operation to the satisfaction of WorkplaceNL and does not have a legitimate

reason for not co-operating". However, Procedure 33 notes that "usually, a worker's benefits would not be suspended due to non-cooperation – they would be reduced or terminated. Benefits will be terminated when a finding of non-cooperation has been applied against a worker. Where there are legitimate reasons for non-cooperation, benefits may be reduced or suspended in accordance with other appropriate policies."

- **Penalties against the employer:** Under Policy RE-02, a financial penalty will be levied on the employer "where within one week from the notification by WorkplaceNL, the employer fails to demonstrate co-operation to the satisfaction of WorkplaceNL and does not have a legitimate reason for not co-operating". Penalties levied are for the period of non-cooperation and could include the worker's full wage loss benefits paid by WorkplaceNL to the worker[12]; the full cost of the labour market re-entry assessment, if required; or the full cost of the labour market re-entry plan, if one is required to help the worker become market ready. These penalties continue until the date the employer cooperates, the worker's benefit entitlement ends, or the worker's wage loss benefit entitlement entds – whichever comes first.

In Ontario, workers and employers may be penalized for not co-operating if it is determined that they don't have a "compelling" reason. Under Ontario's Policy 19-02-08, compelling reasons for employer non-compliance include: summer or holiday shutdown, general layoff, strike or lockout, and/or corporate reorganization; and in the case of small employers, a death in the family or an unexpected illness or accident. Examples of compelling reasons for worker non-compliance include: post-accident non-work-related changes in circumstances such as an unexpected illness or injury, death in the family, or jury duty. The policy notes that for both worker and employer non-compliance, these circumstances are typically of short duration.

- **Worker penalties:** Under Policy 19-02-08, worker penalties are levied in a phased approach. An initial penalty is levied ten calendar days after the date of the written notice, reducing the worker's wage loss benefits by 50%. This penalty continues for 14 calendar days or until the worker starts co-operating again, whichever is earlier. If non-cooperation continues beyond 14 days after the initial penalty, a full penalty is levied. The amount of the full penalty is determined by whether the non-cooperation impacts a RTW plan with training or other RTW plan/activity. In the former case, the RTW assessment and/or the plan is terminated and the worker's wage loss benefits are reduced to reflect the earnings the worker would have been capable of earning had they completed the plan. In the latter case, the WSIB suspends the worker's wage loss benefits. Wage loss benefits remain reduced or suspended until the worker starts co-operating again. Wage loss benefits are increased or started again as of the date there is evidence confirming the worker's renewed co-operation.
- **Employer penalties:** Under Policy 19-02-08, employer penalties are also levied in a phased approach. The WSIB levies the full penalty if the non-co-operation continues beyond 14 calendar days after the date of the initial penalty. The full penalty is based on the following: 100% of the cost of the wage loss benefits payable to the worker, plus 100% of any costs associated with providing RTW services to the worker. The full penalty continues to be levied until the date the injury employer starts co-operating again, the date no further wage loss benefits are payable

[12] Procedure 33 notes that this penalty will be levied on a bi-weekly basis. For all wage loss benefit penalties levied, an additional penalty amounting to 12.5% of wage loss benefits will also be charged against the employer on a bi-weekly basis.

and no RTW services are being provided, or 12 months from the date the initial penalty was levied – whichever comes first.

In British Columbia, under Bill 41, *Workers Compensation Amendment Act (No.2), 2022*, a worker's benefits may be reduced or suspended for failure to co-operate. An admistrative penalty may be imposed on an employer if WorkSafeBC is satisfied on a balance of probabilities that the employer has failed to co-operate. The penalty must not be greater than the maximum wage rate as determined under the *Workers Compensation Act*. At present, there are no policies in place interpreting this legislative provision.

Penalties for failure to comply with the obligation to re-employ

In Newfoundland and Labrador, the *Workplace Health, Safety and Compensation Act* states that where WorkplaceNL decides that an employer has not fulfilled their obligations to re-employ the injured worker, a penalty may be levied on the employer in an amount not exceeding the amount of the worker's net average earnings for the 12 months immediately preceding the beginning of the loss of earnings as a result of the injury. WorkplaceNL may also make payments to the worker for a maximum of one year as if the worker were entitled to payments under section 74 of the Act. Policy RE-09 (Re-employment Penalties and Payments) clarifies that generally the penalty is based on the workers's actual net average earnings with the pre-injury employer and that the amount is not subject to the maximum compensable earnings amount. The penalty is applied from the start date of the re-employment obligation. The penalty may be reduced if the employer subsequently meets the re-employment obligation, or does not meet the re-employment obligation, but offers the worker suitable work. In the former case, the reduced penalty is calculated on the basis of the number of weeks (or part weeks) that the employer does not meet the re-employment obligation. In the latter case, the penalty will be reduced by 50% or by 75% respectively if the employer does not meet the re-employment obligation but offers the worker suitable work at a wage loss or at no wage loss.

A similar penalty may be levied in Ontario under the *Workplace Safety and Insurance Act* if the WSIB decides that the employer has not fulfilled the employer's obligations to the worker. Policy 19-02-09 (Re-employment Obligations) clarifies that generally, a re-employment penalty is levied based on the amount of the worker's actual net average earnings for the year before the injury. This amount is not subject to the ceiling used in the calculation of LOE benefits. When a re-employment penalty is applied, it is apportioned based on the length of the remaining obligation period at the time the breach occurs. The penalty may be reduced for injury employers who have breached their re-employment obligations but subsequently come into full or partial compliance. In the former case, if the injury employer subsequently comes into full compliance and continues to comply fully for the remainder of the obligation period, the penalty will be based on the number of weeks the employer did not meet their re-employment obligations. In the latter case, if the injury employer subsequently comes into partial compliance the penalty may be reduced by 50% if the employer offers suitable work at no wage loss, or by 25% if the employer offers suitable work at a wage loss. The penalty is only reduced if the employment is maintained for the remainder of the obligation period.

In British Columbia, under Bill 41, *Workers Compensation Amendment Act (No.2), 2022*, WorkSafeBC may pay to a worker, for a period of up to one year, an amount equal to the compensation to which the worker was entitled under the *Workers Compensation Act* for temporary total disability *or* temporary

partial disability, as applicable. At present, there are no policies in place interpreting this legislative provision.

Penalties for concurrent failure to comply

The policies in Ontario state that if an injury employer breaches both a co-operation and re-employment obligation during overlapping periods in the same claim, the WSIB will apply a single penalty. In these cases, the WSIB will levy the higher penalty.

Question 5: What happens if there is a dispute between the workplace parties?

All three provinces have similar provisions under their legislation for resolving disputes and disagreements in the ESRTW process between the workplace parties. These disputes and disagreements may be in regards to the duty to co-operate or the obligation to re-employ. In each province, the Act requires that (a) the worker or the employer notify the workers' compensation authority and (b) the authority to first attempt to resolve the dispute through mediation. Where mediation is not successful, the Act requires that the workers' compensation authority decide the matter within 60 days after receiving the notice or within such longer period as the Board determines.