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# *Workers' Compensation and Human Rights: How and when they intersect*

*The webinar will begin at 9:00 a.m. EST – June 4, 2024*

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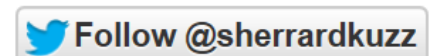
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# *Agenda*

## ■ **Workers' Compensation and Human Rights**

- Overview of basic obligations

## ■ **Returning an Employee to Work**

- Re-employment obligations and discrimination

- Suitable work and accommodation

- Frustration of contract

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# *Agenda*

## ■ **Intersection of Workers' Compensation and Human Rights**

- Jurisdictional issues and conflict between the regimes
- Procedure for parallel cases
- Impact of a decision in one forum on another forum

## ■ **Possible Pitfalls and Practical Tips**

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# ***WORKERS' COMPENSATION AND HUMAN RIGHTS***

# *Workers' Compensation and Human Rights*

## *~ Overview and Purpose*

- One purpose of Workers' Compensation Legislation (“WCL”) is to facilitate return to work and recovery of workers who have suffered from a workplace injury
- Purpose of Human Rights Legislation (“HRL”) is to protect persons from discrimination in employment on the basis of a “protected ground”
  - Disability is a protected ground

# *Jurisdictional Issues*

*~ Which Legislation Applies?*

**Workers' Compensation  
Legislation**

**Workplace injury**  
that does **not** cause  
disability or  
limitation requiring  
accommodation

Workplace injury  
requiring  
accommodation

**Human Rights Legislation**

Worker requires  
accommodation for  
**non-workplace**  
injury or illness

# *Workers' Compensation and Human Rights*

## *~Overview of Basic Obligations*

- Legal obligations under workers' compensation and human rights legislation overlap
  
- Obligations under workers' compensation legislation:
  - Report accident
  - Work reintegration and duty to offer re-employment
  - Duty to cooperate in an early return to work program
  
- Obligations under human rights legislation:
  - Duty to inquire
  - Duty to accommodate to the point of undue hardship

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# *Workers' Compensation*

## *~ Employer Obligations - Report Accident*

- Employers generally must report an accident if a worker requires medical treatment (outside of first aid), and/or meets various other criteria
- Timing depends on province – *e.g.*, BC and AB are 72 hours; ON is 3 business days



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# *Workers' Compensation*

## *~ Employer Obligations - Work Reintegration*

- Employer and worker must both cooperate with workers compensation board
- Employer must facilitate an early return to suitable and available employment
- Work must be within worker's functional abilities at pre-injury earnings (if possible)

# *Workers' Compensation*

## *~ Employer Obligations - Re-employment*

- Seven provinces impose a duty to re-employ injured worker after workplace injury
  - Duty depends on certain factors (*e.g.*, length of worker's service, number of workers "regularly employed" by the employer)
  
- Duration of re-employment obligation varies by province. Generally until earliest of:
  - Two years from date of injury
  - One year from point worker can perform essential duties

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# *Workers' Compensation*

## *~ Employer Obligations - Re-employment*

- Worker refuses to return to suitable work (construction only)
- Worker reaches age 65
- Penalties if employer breaches re-employment obligation

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# *Human Rights*

## *~ Employer Obligations*

- Human rights obligations arise when an individual has a disability
  
- Main obligations for employer:
  - Avoid discriminatory conduct
  - Duty to inquire
  - Duty to accommodate to point of undue hardship
  
- No reporting obligation

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# *Human Rights*

## *~ Employer Obligations - What is a Disability?*

- Must fall within the statutory definition of a protected “disability” under human rights legislation
  
- Defined to cover a broad range and degree of conditions, both permanent, long-term, or temporary:
  - List is non-exhaustive
  - Includes physical and mental impairment
  - Work-related and non-work-related injuries
  - Includes perception of a current or past disability

# *Human Rights*

## *~ Employer Obligations - What is a Disability?*

- May be temporary, long term or permanent
- May not be considered disability if the ailment or illness:
  - Is not ongoing or permanent
  - Does not prevent a person from performing significant life functions or of their job and
  - Does not create a perception that it is debilitating
- Duties under human rights regime are based around preventing discrimination on basis of disability

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# *Human Rights*

## *~ Employer Obligations - Duty to Inquire*

- Even if not raised by employee, in certain circumstances, employer has ‘duty to inquire’ about possible disability
- Failure to do so may be a breach of the duty to accommodate

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# *Human Rights*

## *~ Employer Obligations - Duty to Accommodate*

- Employer has duty to accommodate established medical restrictions and limitations to the point of undue hardship:
  - ‘Undue hardship’ is a very high standard to meet:
    - Intolerable financial costs
    - Serious disruption to business
    - Health and safety risks
  
- Duty to accommodate is invoked when the employee raises the need for accommodation, or when the need for accommodation is apparent



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# *Human Rights*

## *~ Employer Obligations - Duty to Accommodate*

- Duty is substantive and procedural
- Must be highly individualized, tailored to employee's needs
- May require changes to terms and conditions of workplace or job functions
- Must provide reasonable, not perfect accommodation
- Employee has duty to accept reasonable accommodation, even if it is not preferred

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# ***RETURNING AN EMPLOYEE TO WORK***

# *Return to Work Obligations*

## *~ Overview*

- Workers' Compensation: employer must facilitate an early return to suitable and available employment within worker's functional limitations at pre-injury earnings (if possible)
- In addition to workers' compensation rules, human rights laws of **all** jurisdictions require an employer to accommodate a worker's disabilities to the point of undue hardship

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# *Return to Work Obligations*

## *~ Intersection with Human Rights*

- If an employee has an injury that is compensable and one that is not, the duty to accommodate requires employer to consider roles appropriate for both sets of restrictions
- Employer should be proactive in offering modified or alternate duties to ensure it meets its procedural obligation to search for meaningful accommodation

# *Return to Work Obligations*

## *~ Duty to Cooperate – Workers’ Compensation*

- Initiate early contact
  
- Maintain communication
  
- Identify and secure suitable return to work opportunities
  
- Provide Workers’ Compensation Board (“WCB”) with return-to-work information
  
- Provide WCB with information regarding disputes
  - Employer cannot adjudicate

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# *Return to Work Obligations*

## *~ Re-Employment Obligation*

- In most provinces and territories
  
- Applies to injury employer if worker:
  - Has been unable to work, and
  - Has been employed with injury employer for at least one year (non-construction only; construction employer must re-employ regardless of length of service)
  
- Does not apply to a non-construction employer that regularly employs fewer than 20 workers (25 in MB)

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# *Return to Work Obligations*

## *~ Re-Employment Obligation*

- Applies once worker is medically able to perform the essential duties of their pre-injury employment
  
- Employer must either:
  - Offer to re-employ worker in worker's pre-injury position,  
or
  - Offer the worker alternative employment of comparable nature and earnings to the worker's employment on the date of injury

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# *Return to Work Obligations*

## *~ Re-Employment Obligation – Essential Duties*

- To determine the essential duties of a worker's pre-injury job, WCB will consider “job outcome” or “essence” of job
  
- Factors considered:
  - Frequency each duty is undertaken
  - Proportion of time spent at each duty
  - Effect on job outcome if a duty is removed
  - Current job description
  - Normal productivity expected in the job



# *Return to Work Obligations*

## *~ Re-Employment Obligation – Suitable Work*

- Employer must facilitate early return to suitable and available employment within worker's functional limitations
  
- “Suitable Work” is generally defined as:
  - ❑ Safe
  - ❑ Productive
  - ❑ Consistent with a worker's functional abilities
  - ❑ If possible, restores worker's pre-accident wages

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# *Return to Work Obligations*

## *~ Re-Employment Obligation – Available Work*

- “Available Work” is defined as:
  - With the accident employer
  - At the pre-injury worksite
  - At a comparable worksite arranged by the employer

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# *Return to Work Obligations*

## *~ Re-Employment Obligation*

- In ON, re-employment obligation lasts until earliest of:
  - ❑ Two years from date of injury (for NB and QC employers with less than 20 workers - one year)
  - ❑ One year from point worker can perform essential duties (6 months for MB)
  - ❑ Worker refuses to return to suitable work (construction only)
  - ❑ Worker reaches age 65

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# *Return to Work Obligations*

- Worker must cooperate in work reintegration process, including providing medical information
- If there is a dispute or the parties need assistance, the WCB will step in to assist and adjudicate
- If return to work fails, WCB will consider retraining worker for work in the wider labour market

# *Return to Work Obligations*

## *~ Penalty*

- If employer re-employs a worker in accordance with this obligation and terminates employment within six months, employer is **presumed** not to have fulfilled the re-employment obligation
- Employer may rebut the presumption by demonstrating the termination of employment was not related to the injury

# *Frustration of Contract*

- Employment relationship comes to an end, through the fault of no one, because it is ‘frustrated’ by outside circumstances (*i.e.*, the worker’s disability)
- Medical evidence necessary to support the position the employment relationship is frustrated
- Must indicate there is **no reasonable prospect** the employee will be able to return to work in **the reasonably foreseeable future**
  - Some decisions apply “within a reasonable time”

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# *Return to Work Obligations*

## *~ Intersection with Human Rights*

- Duty to accommodate under human rights legislation is broader than WCB obligations:
  - ❑ It is ongoing and does not expire
  - ❑ Covers all injuries and illness, not just those work-related
  - ❑ It applies to all workplaces
  - ❑ Suitable employment may not satisfy duty to accommodate under human rights
  - ❑ Results in larger monetary awards

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# *Return to Work Obligations*

## *~ Intersection with Human Rights*

- May be able to use findings of workers' compensation board regarding suitable work as evidence in any human rights matter
- Human rights matter is based on violation of human rights duties, *not* violation of workers' compensation duties, but the latter may be evidence of the former



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***INTERSECTION OF  
WORKERS' COMPENSATION  
AND  
HUMAN RIGHTS  
DECISIONS***

# *Jurisdictional Issues*

## *~ Conflict in Returning to Work*

- Fulfilling the requirements of WCL does not mean HRL is also fulfilled
  
- Duty to accommodate is broader than re-employment obligation:
  - Ongoing and does not expire
  - Suitable employment under the re-employment obligation may not satisfy duty to accommodate under HRL
  - May face a human rights complaint despite complying with all workers compensation obligations

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# *Jurisdictional Issues*

## *~ Conflict in Returning to Work*

- There is a financial incentive to return an employee to work after an injury covered by the workers' compensation ("WC") regime:
  - An employer may make a business decision to return worker to a position where it might not otherwise employ someone
  - The failure to provide a similar opportunity to a worker not covered by the WC regime may not be discriminatory – but it may still be a failure to accommodate

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# *Jurisdictional Issues*

## *~ Forum*

- If injured worker alleges employer failed to comply with WCL, worker may file claim with provincial WCB
- If allegation of failure to comply with HRL, worker may file claim with provincial Human Rights Tribunal or Commission
- Injured worker may file claims in both forums

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# *Jurisdictional Issues*

## *~ Choice of Forum*

- Employers typically cannot choose forum
- Employer reporting obligations under WCL lead to WCB being alerted of injury
- Conversely, employee must take action to start human rights procedure

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# *Jurisdictional Issues*

## *~ Remedies*

- WCB awards benefits (loss of earnings, non-economic loss, work transition etc.) to injured worker and may impose financial penalties on employer
- HRT awards backpay, reinstatement, and/or general damages

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# *Jurisdictional Issues*

## *~ Who Has Jurisdiction?*

- The Supreme Court of Canada has held that HRL is “quasi-constitutional” and prevails over other legislation
  - WCB must comply with HRL when adjudicating claims
  
- Ongoing claim at WCB cannot oust HRT’s jurisdiction to adjudicate application alleging violation of HRL
  - “Exclusive jurisdiction” clause in many provincial WCL
  
- However, HRT may defer or dismiss application

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# *Procedure for Parallel Cases*

## *~ Deferral*

- What happens when injured worker files claim with WCB and HRT?
  - Option A: nothing, if the respective claims involve separate issues (*i.e.*, do not overlap)
    - Both claims proceed as normal
  - Option B: employer may wish to defer one claim until the other proceeding finishes



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# *Procedure for Parallel Cases*

## *~ Deferral*

- HRT can generally defer application until conclusion of other proceeding dealing with substantively same issue
- Purpose of deferral is to avoid concurrent legal proceedings, which may lead to inconsistent decisions from different tribunals
- WCB may adjourn matters and make own procedures for dealing with claims

# *Procedure for Parallel Cases*

## *~ Deferral Procedure*

- Employer must request to defer application, usually including:
  - Request for dismissal/deferral
  - Reasons for request
  - Relevant documentary evidence
  
- Opposing side may respond, usually including:
  - Position on request and submissions in support of position
  - Additional facts relied upon
  - Relevant documentary evidence

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# *Procedure for Parallel Cases*

## *~ Deferral Considerations*

- HRT will consider factors, including:
  - ❑ Subject matter of other proceeding
  - ❑ Nature of other proceeding
  - ❑ Types of remedies available in other proceeding
  - ❑ Whether it would be fair to defer having regard to status of both proceedings and steps taken to pursue them

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# *Procedure for Parallel Cases*

*Bolivar Velastegui v Nailor Industries, 2017 HRTO 1075*

- Worker filed claim with WSIB seeking entitlement to chronic pain disability and alleged failure to accommodate at HRTO
- Employer requested deferral pending outcome of WSIB claim
- HRTO found issue at WSIB (chronic pain) directly relevant to human right claim regarding failure to accommodate

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# *Procedure for Parallel Cases*

*Bolivar Velastegui v Nailor Industries, 2017 HRTO 1075*

■ HRTO granted deferral

*While an ARO has ruled on some of the applicant's claim, no such decision has been made on an equally important aspect of the case, namely, whether the applicant suffers from chronic pain disability as a result of his workplace injuries. In my view, this issue is directly relevant to the applicant's human rights claim that the respondent has failed to properly accommodate his disability. This issue could be brought before an ARO sufficiently expeditiously to allow the Application to proceed in a timely manner.*

# *Procedure for Parallel Cases*

## *~ Deferral Considerations*

- No guarantee human rights tribunal (“HRT”) will defer application
- May be partial deferral (*i.e.*, one issue can proceed and one deferred until other proceeding complete)
- Request for deferral takes time
- If deferral request rejected, must proceed with the application despite fact another claim is ongoing

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# *Procedure for Parallel Cases*

## *~ Reactivating Deferred Proceeding*

- In ON, one party must request to reactivate a deferred proceeding
- HRT may decline to reactivate if other proceeding already dealt with the substantive issue

# *Impact of Decision in One Forum*

## *~ Dismissal*

- What if decision from one forum is released while claim in another forum is ongoing?
  - Option A: nothing, if decision involves separate issue
    - Ongoing claim proceeds as normal
  - Option B: employer may wish to request dismissal of ongoing claim



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# *Impact of Decision in One Forum*

## *~ Dismissal*

- HRT has discretion to dismiss an application when another proceeding has appropriately dealt with the substance of the application
- Purpose is to avoid duplication of legal proceedings or re-opening of human rights facts and issues that have already been dealt with elsewhere (“doctrine against re-litigation”)

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# *Impact of Decision in One Forum*

## *~ Dismissal*

- WCB will not dismiss claim because HRT has issued decision on substantively same issue – difference in remedies
- Injured worker covered under WCL has the right to make claim for benefits and to have that claim adjudicated by WCB on the merits

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# *Impact of Decision in One Forum*

## *~ Dismissal Procedure*

- Similar procedure as request for deferral
- Must explicitly request dismissal of application with supporting reasons and documentation
- Other party has chance to respond to request to dismiss
- HRT also has power to unilaterally dismiss

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# *Impact of Decision in One Forum*

## *~ Dismissal Considerations*

- HRT will consider factors, including, whether:
  - ❑ Other adjudicator had jurisdiction to decide human rights issues
  - ❑ Previously-decided issue same as HRT application
  - ❑ It makes sense to expend resources to relitigate same dispute
  - ❑ It would be unfair in all circumstances

# *Impact of Decision in One Forum*

## *~ Dismissal Considerations*

- No guarantee dismissal will be granted
- May be partial dismissal (*i.e.*, one issue dismissed and other proceeds for adjudication)
- Dismissal request takes time
- If dismissal request rejected, must proceed with the claim

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# *Impact of Decision in One Forum*

*Ellis v. Ontario (Solicitor General), 2020 HRTO 748*

- HRTO dismissed Application because of previous decision by WSIB Case Manager on same issue
- Relevant question was whether employer failed to accommodate worker's disability when it offered her work at specific location (Toronto South)
- Worker claimed she required placement at different location (Toronto East)

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# *Impact of Decision in One Forum*

## *Ellis v. Ontario (Solicitor General), 2020 HRTO 748*

- Essence of application was whether placement at Toronto South accommodated disability
- WSIB reviewed medical evidence and determined worker's disabilities could be accommodated at Toronto South
- Application dismissed - HRTO found applicant was unhappy with WSIB proceeding and attempting to re-litigate same issue

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# ***POSSIBLE PITFALLS AND PRACTICAL TIPS***



# *Practical Tips*

- When there is an injury:
  - ❑ Keep in regular communication with the worker and WCB
  - ❑ Document all communication in writing (including telephone logs)
  - ❑ Clearly explain to worker steps in return-to-work process
  - ❑ Request regular medical updates on worker's functional abilities
  - ❑ Provide job description to worker's health professionals
  - ❑ Send offers of modified work in writing
  - ❑ Address problems in a fair and timely manner
  - ❑ Monitor worker's return to work and recovery

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## *Practical Tips*

- Be prepared to explain in workers' compensation context that duty to accommodate is broader and the WCB should take a holistic approach to a worker's restrictions
- Do not rely on WCB's determination that employer's return to work efforts were suitable, to insulate employer from a human rights claim regarding the duty to accommodate
- Document all return to work meetings involving WCB; may be important in future human rights complaint

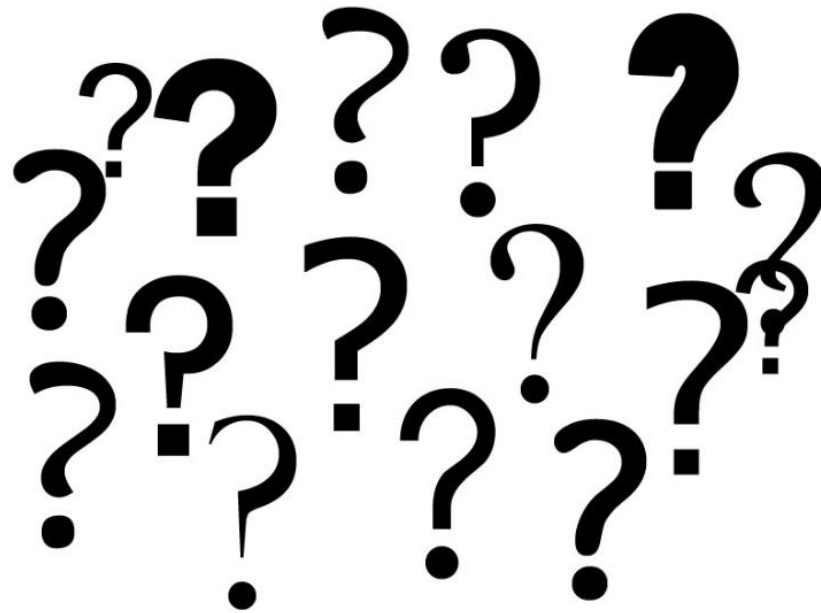
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# *Practical Tips*

- Don't forget that:
  - ❑ Duty to accommodate is broader than re-employment obligation
  - ❑ Workers are required to participate in the process
  - ❑ Workers cannot “pick and choose” accommodation
  - ❑ Employer is entitled to adequate medical information

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# Questions





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