



EXPERIENCE RATING RETROFIT: WSIB PROPOSES TO RETROACTIVELY EXPAND THE NEER WINDOW TO 4 YEARS AND OVERHAUL LABOUR MARKET REENTRY

Ryan J. Conlin

In a move that may catch many employers by surprise, the WSIB has announced a proposal to retroactively expand the NEER (New Experimental Experience Rating) window from 3 to 4 years. The proposed changes would impact claims which occurred on or after January 1, 2008.

What is NEER?

Generally speaking, the NEER experience rating system applies to most private sector employers outside the construction industry with annual WSIB premiums of more than \$25,000.

NEER is fairly complex, but basically operates by comparing an employer's actual WSIB claim costs over a 3 year period, to the accident costs the WSIB expects the employer to have over this period.

If the employer's actual claim costs are lower than expected, then the employer is eligible for a refund. Conversely, if the employer's costs are higher than what the WSIB expected, then the employer will be levied a surcharge. Costs that incurred outside the 3 year NEER window discussed do not impact the employer's refund or surcharge calculation.

The Proposed Change to the NEER Window

The WSIB is proposing to change the NEER window from 3 to 4 years and is seeking to retroactively impose the change on claims occurring on or after January 1, 2008. This means that NEER employers will be responsible for an additional year of claims costs for all claims occurring after January 1, 2008.

The WSIB publicly stated that the rationale for this change is that employers in the NEER program have no financial incentive to continue efforts to re-employ injured workers beyond three years, after the NEER review window closes. The WSIB believes that some employers retained injured workers until the NEER window closed, at which time the workers were referred to costly WSIB retraining programs without any cost consequence to the employer.

The proposed changes to the NEER window should also result in a significant revenue increase for the WSIB, which one would anticipate would go towards retiring the Board's staggering

unfunded liability. It is my view that the Board's need for additional revenue played a significant role in the decision to expand the NEER window.

It is very likely that the NEER window will be expanded to 4 years. I recommend that all NEER employers base their approach to claims management on the assumption of a 4 year window for all currently active claims. Employers should also be aware that this may not be the end for the expansion of the NEER window. A senior executive of the WSIB has publicly stated that the Board may ultimately end up expanding the NEER window to six years at some point in the future.

Effective Management of Long-Term Disabled Employees: How to Navigate the Legal Minefield

December 2, 2010 at the Marriott Toronto Vaughan Hotel

Presenters: Allison L. Taylor and Ryan J. Conlin

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Strategies for Responding to the 4 Year NEER Window

- Employers must now revisit their strategies for both existing and future claims. I have set out below some practical ideas on how to pro-actively address the challenge of a 4 year NEER window:
- Review your NEER statement and identify the claims which have a significant risk of incurring claim costs beyond three years. Assess whether the employer is or will be able to permanently accommodate any of these employee.
- Make a realistic assessment of those employees where accommodation or return to work does not seem likely. For such employees determine if the employer can assist in developing an effective and efficient work reintegration program. Determine if there are other positions available with other businesses associated with the employer. Assess whether the employer may have suitable work in the future.

- Ensure the employer maintains contact with all employees currently receiving loss of earnings benefits or who have not returned to work after an accident. Ensure that the employer has an up to date Functional Abilities Form (FAF) and the worker is continuing to cooperate with the Early and Safe Return to Work process.
- Recognize that the WSIB is aware of the practice of employers terminating employees after the NEER window expires. Employers should anticipate that any such decision will likely receive greater scrutiny from the WSIB and the Human Rights Tribunal than was the case in the past.
- Recognize that participation in worker appeals is now more important than ever. Historically, it has not been uncommon for workers to successfully appeal adverse WSIB decisions after the NEER window closes, which means the benefits awarded do not cost the employer anything. The expansion of the NEER window makes it more likely that employers will face NEER costs as result of successful worker appeals. Employers must ensure that they participate in worker appeals where benefits may be awarded within the NEER window.

Experience Rating Retrofit: How to Manage Claims with a 4 Year NEER Window and New Work Reintegration Policies

December 16, 2010 at the Delta Toronto Airport West

Presenters: Ryan J. Conlin and Ian A. Bergeron

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Labour Market Re-Entry Overhaul-Interim Policies

The WSIB has also announced comprehensive reforms to the Labour Market Re-Entry program (“LMR”). LMR was a WSIB program provided by external providers which re-trained injured workers who were unable to return to their pre-accident jobs to perform other work.

The program was criticized by both labour and management for being too costly and being ineffective at achieving the goal of retraining workers to obtain suitable work. The WSIB has publicly stated that there were many complaints that LMR did not offer high quality training and education programs and that employers did not consider the credentials offered by the training programs to be credible.

The Board has issued interim policies which come into force on December 1, 2010. These interim policies will be in effect pending a stakeholder consultation process. The Board will finalize the interim policies after the completion of the consultation process. It is my view that it is unlikely that the consultation process will result in any significant substantive changes to the interim policies.

LMR Overhaul-Work Reintegration

As of December 1, 2010 LMR will be renamed Work Reintegration and be subject to an entirely new regime of policies. Copies of the interim policies are available on the WSIB's website at <http://www.wsib.on.ca/wsib/wsibsite.nsf/public/PolicyWR>.

The following is a summary of the major changes that are relevant to employers:

- Most Workplace Reintegration placements will be with community colleges or licensed private career colleges. A number of the former LMR training providers will no longer be used.
- The WSIB can impose significant penalties on employers for non-cooperation with the return to work process. These penalties are separate and apart from the re-employment penalty under section 41 of the WSIA. Potential examples of non-cooperating include refusing to meet or communicate with the Board or the worker, failing to provide adequate/accurate information about potential suitable work or behaving in an abusive manner towards the worker or the Board's representatives. These penalties will apply in situations where the employer is not cooperating but has not terminated the worker. As a matter of policy, the Board will put the employer on notice that it intends to impose a penalty and offer a chance to correct the situation before imposing the penalty. In the worst cases, the Board has the power to impose a penalty in the amount of the actual costs of the claim.
- The WSIB has included reference to the Human Rights Code accommodation obligation in the policies. The Human Rights Tribunal has held that the accommodation obligation under the Code is broader than the Board's re-employment obligation. Policy 19-02-02 states that the WSIB "expects" all parties to comply with the Code accommodation obligations. However, the Board has also indicated that it

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“respects” the primacy of the Human Rights Tribunal. This suggests that the Board will not be trying enforce the Human Rights Code through the return to work process.

- The WSIB will be attempting to facilitate return to work meetings at much an earlier stage (within 12 weeks of the date of the accident at the latest). In theory, this means that workers will not be allowed to be off work for months at a time without at least considering return to work options.
- The Board is going to be introducing a streamlined appeal process for return to work issues. In theory, this means that appeal decisions will be issued very quickly with respect to return to work issues. It has been my experience that WSIB appeals ordinarily take months or even years to reach a final decision.

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