

Proposed Revisions to Section 60-1.15 (Return to Work Program)
of the
Proposed Workplace Safety and Loss Prevention Incentive Program
Regulations

We have carefully reviewed Section 60-1.15 of the Proposed Workplace Safety and Loss Prevention Incentive Program (“WSLPIP”) Regulations and have grave concerns about the structure of the Return to Work Program regulation, the potential for its enforcement, and its impact on individual workers.

In essence, the proposed regulation would offer employers a discount in their workers’ compensation costs in exchange for creating and implementing a Return to Work Program (“RTW Program”) that meets with Department of Labor (DOL) approval. In theory, such programs would benefit employees by providing a path to return to work at modified or full duty as appropriate, and would benefit employers by permitting service to be rendered by injured workers within their capabilities.

Unfortunately, the proposed regulation lacks sufficient specificity to ensure that adequate RTW Programs would be created. Even more critically, the proposed regulation is completely lacking in any enforcement mechanism if an employer does not comply with the RTW program it submitted to DOL or if such a program is misapplied to an individual worker. While DOL may terminate its approval of the employer’s RTW program or decline to renew its approval, this is of little benefit to the individual injured worker who may be adversely affected either in the workplace or in a workers’ compensation claim by improper application of a Return to Work Program.

The impact of an RTW Program on individual workers is different from the impact of Safety Programs or Drug and Alcohol Programs under the regulations. The success or failure of the latter programs may be measured more generally and they may be modified over time to improve their efficacy or performance. In the case of RTW programs, however, the employer’s offer of a return to work plays an important role in the worker’s employment status and in the worker’s claim for benefits under the Workers’ Compensation Law. Benefits may be reduced or terminated depending on a worker’s efforts to find suitable work. As a result, if the employer’s RTW Program is not administered fairly or properly, there may be a specific negative impact on a particular worker. The existing regulations offer no effective remedy for such a worker, and there is some question whether any remedy would be effective. As a result, we would prefer to eliminate RTW Programs from the proposed WSLPIP regulations.

In the alternative, the regulation must be clarified to define the type of work that may be properly offered to an injured worker and to provide for notice to be given to parties who may be in a position to assist and advise the worker. It must also be amended to provide a specific mechanism to adjudicate the question of whether a RTW Program is being correctly applied in any given situation. Our specific suggestions appear below, with new text appearing in **bold**.

Section 60-1.15 Return to Work Program

- (a) An acceptable Return to Work Program facilitates an employee's return to work as soon as medically possible after a job-related injury or illness. A Return to Work Program provides fair and consistent practices for accommodating the needs of employees who have become ill or injured on the job or have sustained a temporary or permanent partial disability covered by the Workers' Compensation Law in order for such employees to make a timely and safe return to work. Nothing in these regulations precludes the employer from extending its Return to Work Program for an illness or injury not covered by the Workers' Compensation Law. However, extending a Return to Work Program to injuries or illnesses not covered by the Workers' Compensation Law will not entitle the employer to an additional Incentive.
- (b) Services related to a Return to Work Program may be provided directly by the employer, jointly between the employer and the union, through a union that represents the employer's employees, or through a contract with an outside provider.
- (c) A Return to Work Program shall be in writing and shall include, but need not be limited to, the following elements:
 - (1) An employer's statement of commitment to providing, safe, gainful, and meaningful employment to employees as soon as medical possible following an on-the-job injury or illness.
 - (i) **“safe” means that the employment will not expose the injured worker to new hazards that are likely to result either in new injury or illness or an aggravation of the injury or illness that led to the employee's participation in the Return to Work Program.**
 - (ii) **“gainful” means that the employee is properly compensated by the employer for the work performed by the employee under the Return to Work Program.**
 - (iii) **“meaningful” means that the work assigned to the employee is reasonably related to a significant business activity of the employer. Punitive or “make-work” assignments shall not be considered “meaningful” employment.**
 - (2) A plan for communication with all parties including the injured worker, the medical provider, the collective bargaining representative, if any, the insurer, **the employee's attorney, if any**, and the Board, in

order to facilitate return to work. The communication must be made in accordance with applicable privacy laws;

- (3) A policy and procedure for returning injured workers to the workplace which is communicated to all employees and collective bargaining representatives in writing and in a timely manner;
- (4) Policies and procedures that focus on **safely** returning the employee to his or her pre-injury employment and accommodating the needs of that employee with regard to a new position at the employer, and which do not cause undue hardship on the parties or violate an existing collective bargaining agreement.
- (5) A policy and procedure for ensuring the involvement of the injured or ill employee in all aspects of the return to work process;
- (6) A policy and procedure for ensuring the involvement of the recognized representatives of each collective bargaining unit, where applicable, in the Return to Work Program;
- (7) A policy and procedure for ensuring that the injured employee's medical provider is involved in the return to work process and is given information which will assist in determining the injured worker's ability to return to the pre-injury job, a modified job, or a suitable alternative work assignment at the employer in a timely manner;
- (8) A process for the development and implementation of a written individual return to work plan by the employer, the employee, **the employee's attorney, if any**, and the recognized collective bargaining representative, where applicable;
- (9) A policy to return an injured worker to the pre-injury job at the appropriate time as soon as it is medically determined **by the treating physician** that the employee is capable of performing the essential duties of their pre-injury or pre-illness job;
- (10) A policy and procedure to make reasonable efforts to accommodate the worker's work-related injury or illness so that the post-injury job is consistent with the worker's functional abilities, with the goal of offering the employee alternative suitable and available work that is comparable in nature and earnings to the worker's pre-injury job. **In considering whether alternative work is suitable and comparable in nature to the worker's pre-injury job, the following factors shall be considered; alternative work that materially deviates from these factors shall not be considered suitable or comparable:**

- (i) **The worker's pre-injury job title;**
 - (ii) **The physical requirements of the worker's pre-injury job title;**
 - (iii) **The intellectual requirements of the worker's pre-injury job title;**
 - (iv) **The level of supervisory authority associated with the worker's pre-injury job title;**
 - (v) **The worker's seniority or length of employment;**
 - (vi) **The worker's age;**
 - (vii) **The worker's education;**
 - (viii) **The worker's previous work experience;**
 - (ix) **The worker's pre-injury salary;**
 - (x) **Whether any proposed alternative work would violate the provisions of any relevant collective bargaining agreement;**
 - (xi) **The geographic location of the worker's pre-injury job;**
- (11) A policy and procedure for referring an employee to a vocational assessment and for providing vocational services if the injured or ill employee cannot **safely** perform the essential duties of the pre-injury job or a suitable alternative job at the employer;
- (12) A procedure for monitoring the employee's progress, recovery, and return to work, **with notice to the employee's treating physician, recognized collective bargaining representative, if any, and attorney, if any;**
- (13) Strategies for maintenance and promotion of the program;
- (14) An evaluation component that includes realistic and measurable criteria to determine the appropriateness and effectiveness of the program and operations; and
- (15) Designation of a Return to Work Program contact at the employer for use by employees seeking to participate in the Return to Work Program.
- (d) The final, approved Return to Work Program plan shall be provided to the designated employee representative(s) in each workplace location or to the recognized representative of each collective bargaining unit, where applicable, and shall be made available to all employees upon request.
- (e) **Upon application by the employer or the injured worker, the New York State Workers' Compensation Board shall hear and determine the following issues:**

- (1) Whether alternative work offered pursuant to a Return to Work Program is safe;**
 - (2) Whether alternative work offered pursuant to a Return to Work Program is gainful;**
 - (3) Whether alternative work offered pursuant to a Return to Work Program is meaningful;**
 - (4) Whether alternative work offered pursuant to a Return to Work Program is suitable and comparable in nature to the worker's pre-injury job, based on the criteria of subsection (c)(10) of this section.**
 - (5) Whether the employer has provided notice to the necessary parties as required by this section.**
- (f) In hearing and determining applications brought pursuant to subsection (e) of this section, the Workers' Compensation Board is authorized to obtain a medical and/or vocational evaluation of the injured worker by a New York State Center for Occupational and Environmental Medicine. Such consultation shall be performed at the expense of employer's workers' compensation insurance carrier, or if self-insured, at the expense of the employer, subject to the applicable Workers' Compensation medical fee schedule. The Board may use the medical and/or vocational opinion of the Center for Occupational and Environmental Medicine for advisory purposes.**
- (g) Hearings and decisions of the Workers' Compensation Board pursuant to this section shall be taken in accordance with applicable provisions of the Workers' Compensation Law and the rules and regulations of the Workers' Compensation Board, including appeals.**