

DISCUSSION PAPER

1. TITLE

Retroactivity Limits on Employer Registration Effective Dates

2. ISSUE

At issue are concerns that the current retroactivity limit with respect to the effective date of employer registrations is not an appropriate incentive to limit employer non-compliance with reporting requirements. Given these concerns, a review of the Registration of Employers policy in the *Assessment Manual* (“AM”), has been undertaken to consider whether the current policy with respect to the effective dates of employer registrations is adequate in terms of equitable collection of assessments.

3. BACKGROUND

In accordance with section 38 of the *Workers Compensation Act* (“Act”), all employers must register with WorksafeBC - Workers’ Compensation Board (“WCB”) unless exempt from the scope of Part 1 of the *Act*.

AM Item AP1-38-1, *Registration of Employers*, provides that, where an employer fails to register with the WCB in accordance with the *Act*, the effective date of registration for assessment purposes will, except where otherwise provided, be the date the employer first employed workers. If registration with the WCB was required in a previous year, the effective date will only go back as far as January 1st of the preceding year.

AM Item AP1-38-1 further provides that, “if there is evidence that the employer deliberately avoided registration by such means as misrepresentation, false statements or ignoring registration requests, a prior date may be used.”¹

4. DISCUSSION

Under the *Act*, workers receive the benefit of workers’ compensation coverage regardless of whether their employer has registered with the WCB. Further, employers reap the benefit of limitation of legal actions against them by workers, despite not being registered with the WCB. This raises an equity issue in that those employers who have not complied with the registration requirements reap

¹ Given the difficulty in proving that an employer’s failure to register was due to misrepresentation, false statements or ignoring registration requests, a prior date is rarely, if ever, used in practice.

the same benefits and protection of workers' compensation coverage as employers who have met their registration and remittance obligations.²

To address the issue of inequity among employers resulting from non-compliance with registration obligations, all workers' compensation jurisdictions across Canada set employer registration effective dates retroactively where registration was required at a prior date. Not only does this ensure some degree of restitution, or recovery of the costs borne by the workers' compensation system as a result of the failure to register, retroactive registration effective dates also serve to deter non-compliance with registration obligations.

The degree of restitution and deterrence afforded by a policy of setting the effective date retroactively is limited by how far back the effective date may be set. The Assessment Department is concerned that the current policy of limiting the retroactivity of registration effective dates to only go as far back as January 1st of the preceding year is not adequate in terms of equitable collection of assessments. That is, the present limit fails to deter non-compliance with registration obligations and prevents adequate restitution in cases where the employer failed to register with the WCB prior to January 1st of the preceding year.

Limitations are placed on retroactive effective dates to prevent too onerous an administrative burden being placed on employers by requiring retention of payroll/financial records for unlimited periods of time. Limitations also avoid the possibility of financially crippling an employer when, due to oversight, an employer fails to register with the WCB for a prolonged period, resulting in several years of outstanding remittances.

Policy relating to registration of employers must aim to satisfy the principles of deterrence and restitution while also recognizing the practical need to place a reasonable limit on such retroactivity. Policy may set the effective date of registration for assessment purposes as the date the WCB becomes aware of the employer's failure to register, but this would not satisfy the principles of deterrence and restitution. Conversely, policy may set the effective date of registration as the date the employer first employed workers, but this would result in onerous record-keeping requirements on employers (in order to determine applicable remittances) and have the potential to financially cripple employers where registration with the WCB would have been required several years earlier.

² The Assessment Department is unable to provide statistics with respect to the number of employers who are currently in breach of the registration requirements, but note that this is a common occurrence which the WCB often becomes aware of when a claim is received.

5. OTHER JURISDICTIONS

To assist in identifying options for amendment to the Registration of Employers policy, ten other Canadian workers' compensation jurisdictions were surveyed to determine what limits each applies for retroactively setting employer registration effective dates. Every jurisdiction provides for some degree of retroactivity to the effective date of employer registrations where an employer has failed to register.

The attached table at Appendix A categorizes the various jurisdictions by the limit they place on retroactivity of employer registration effective dates. The table also notes those jurisdictions where there is discretion to set the effective date of registration earlier than the jurisdiction's limit in cases where the employer engaged in fraud or misrepresentation.

One option is to follow the most commonly applied limit in practice/policy across the surveyed jurisdictions and adjust the limit on retroactivity to allow the registration effective date to be set as far back as January 1st, **three** years prior, in those cases where registration with the WCB was required prior to that date.³ This option would also reflect the time limit provided for in the WCB's policy relating to classification changes.⁴

Another option is to adjust the limit on retroactivity to allow the registration effective date to be set as far back as January 1st, **six** years prior, in those cases where registration with the WCB would have been required prior to that date. This approach would reflect the WCB's policy and practice with respect to audits which requires that employers retain payroll records and source documents for a minimum of six years from the end of the last year to which the particulars relate. Using a six year limit would not prejudice employers as this is consistent with the Canada Revenue Agency's ("CRA") legislative requirement with respect to retention of records and books of account.

The option of adjusting the limit on retroactivity to allow the registration effective date to be set as far back as January 1st, three years prior still leaves a "gap" where those employers who should have registered previous to that date would still benefit from a period of workers' compensation coverage for which no assessments were paid. Adjusting the limit to allow the registration effective date to be set as far back as January 1st, six years prior would allow the Assessment Department to set a greater number of registration effective dates which accurately reflect the date the employer should have registered.

³ This is the policy/practice in the Northwest Territories, Nova Scotia, Prince Edward Island and the Yukon.

⁴ AM Item AP1-37-3, *Classification Changes*, provides that where the change in classification is the result of non-compliance and the classification change will lead to an increase in the base rate, the classification change may be effective up to three (3) years before the date of the decision to change the firm's classification.

Additionally, adjusting the limit on retroactivity to allow the registration effective date to be set as far back as January 1st six years prior would also have a greater deterrent effect than a three year limit in that employers would be more likely to comply with registration requirements rather than potentially be faced with six years of outstanding assessments when the effective date of registration is set.

It is noted that Newfoundland's Workplace Health Safety and Compensation Commission previously had the same policy as the British Columbia WCB with respect to retroactivity of employer registrations. However, four years ago, in response to information indicating that accountants and lawyers were advising their clients not to register in a timely manner in order to save money, their practice changed to retroactively assess all new registrations up to the maximum of six years, without exception. If the firm operated for less than six years, the firm is assessed for all years up to six years.⁵

6. OPTIONS AND IMPLICATIONS

Option 1: Status quo

Under this option, no amendment would be made to *AM* Item AP1-38-1, *Registration of Employers*. In cases where an employer fails to register with the WCB, the furthest the WCB could go back is January 1 of the preceding year.

Implications

- Policy would not address the inequity resulting from employers (and their workers) being afforded the protection and benefits of the workers' compensation system despite not having registered with the WCB.
- Restitution would remain limited to the recovery of assessments only as far back as January 1st of the preceding year.
- The Registration of Employers policy would continue to have little deterrent effect on non-compliance with employer registration requirements.
- No changes would be required to the WCB's On-Line Registration system.

Option 2: **Extend the Retroactivity Limit on the Effective Date of Employer Registrations to go back as far as January 1st of three years prior to the current year**

Under this option, *AM* Item AP1-38-1 would be amended to provide that, "If registration with the Board would have been required in a previous year, the

⁵ This is also the limit the Workers' Compensation Board of Alberta applies when setting retroactive employer registration effective dates.

effective date will go back as far as January 1st of three years prior to the current year.” This is consistent with a number of other Canadian jurisdictions.

Implications

- Policy would go further to address the inequity resulting from employers (and their workers) being afforded the protection and benefits of the workers’ compensation system despite not having registered with the WCB.
- Restitution would be extended to allow recovery of assessments as far back as January 1st of three years prior to the current year.
- The amended Registration of Employers policy may have slightly greater deterrent effect on non-compliance with employer registration requirements by having the potential to cause three to four years of outstanding assessments to come due upon the setting of the effective date.
- Changes would be required to the WCB’s On-Line Registration system.
- A communication strategy would need to be undertaken by the Assessment Department to ensure non-registered employers are aware of the amended retroactivity provision and the potential impact on liability for outstanding assessments.
- A sudden increase in unregistered employers coming forward to register prior to the effective date of the policy amendment may result in an administration burden on the WCB in terms of completing additional registrations.

Option 3: Extend the Retroactivity Limit on the Effective Date of Employer Registrations to go back as far as January 1st of six years prior to the current year

Under this option, AM Item AP1-38-1 would be amended to provide that, “If registration with the Board would have been required in a previous year, the effective date will go back as far as January 1st of six years prior to the current year.” This is consistent with the current policies of New Foundland and Alberta as well as the Canada Revenue Agency’s rules regarding retention of records.

Implications

- As with Option 2, but:
- Restitution would be extended to allow recovery of assessments as far back as January 1st of six years prior to the current year.

- This option would go further to address the inequity resulting from employers (and their workers) being afforded the protection and benefits of the workers' compensation system despite not having registered with the WCB.
- This option would have greater deterrent effect on non-compliance with registration requirements by having the potential to cause six to seven years of outstanding assessments to come due upon the setting of the registration effective date.
- In cases where the WCB goes back the maximum of six years, this has the potential to financially cripple an employer.

7. CONSULTATION

Stakeholders are invited to provide feedback on the discussion paper, options, draft policy, and any additional comments that may be relevant to the issue.

Stakeholder comments will be accepted until **January 20, 2006**. When responding, please provide your name, organization, and address. Comments may be sent by mail, fax or e-mail to:

By mail: Deborah Viccars
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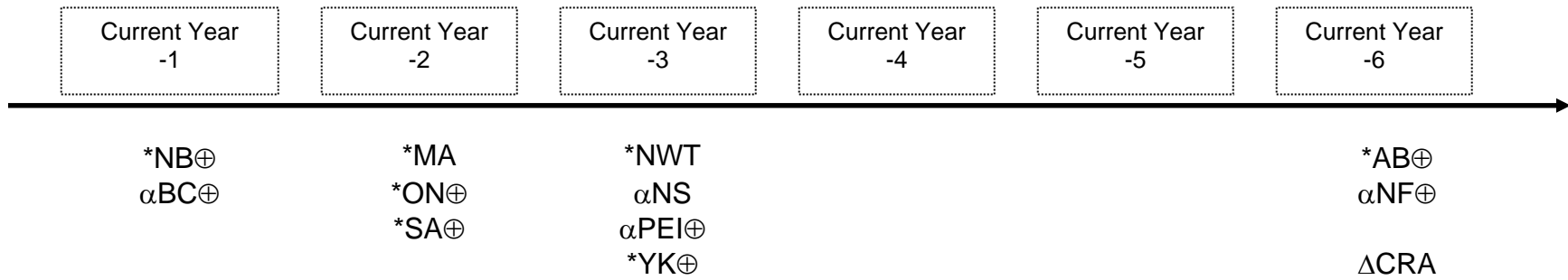
By fax: 604 279-7599

By e-mail: policy@worksafebc.com

WorkSafeBC's governing body, the Board of Directors, will consider the options expressed by stakeholders before it adopts any amendments to the current policies.

Please note that all comments become part of the Policy and Research Division's database and may be published, including the identity of organizations and those participating on behalf of organizations. The identity of those who have participated on their own behalf will be kept confidential according to the provisions of the *Freedom of Information and Protection of Privacy Act*.

APPENDIX A



Legend:

- ⊕ Jurisdiction may go back further for fraud/misrepresentation
- * Limit set by practice
- α Limit set by policy
- Δ Limit set by legislation