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Via email

October 06, 2017

Ms. Kate Lamb, Chief Corporate Services Officer
Workplace Safety & Insurance Board
200 Front Street West
Toronto ON M5V 3J1

Dear Ms. Lamb:

Re: Rate Framework Policy Consultation

A. Preamble and introduction: The need to regroup and start fresh:

1. At the joint **Chair Advisory Group** ["CAG"] meeting September 28, 2017 it became clear that either the proposed rate framework policies:

    a. advanced propositions and reflected results that WSIB policy officials intended but were unable to effectively and clearly explain both with respect to the need and the result; or

    b. advanced propositions that presented a plethora of unintended consequences,

    c. such that, regardless of the results being intended or unintended, parts of the proposed policies were ill-conceived and/or poorly drafted or both.

2. This observer believes it is more the former than the latter and the proposed policies represent an institutional objective to override legitimate and *bona fide* corporate organizational choices with the primary purpose to maximize the scope of employer taxation.

3. WSIB officials were unable to adequately explain the "mischief" being corrected. While asked on several instances the "why" behind the policies, that is, what the Board is attempting to "fix", WSIB policy officials were unable to adequately respond.

4. In the absence of these explanations, one is therefore left with only one reasonable conclusion – under the guise of rate framework, the WSIB is attempting to slice through legal and proper corporate organizational choices to maximize WSIB revenue collection prowess, fueled by an inherent institutional indifference to the lawful business reasons behind a company's business organizational choices and business practices.

5. The RFR draft policies seem to commence with a false premise that WSIB taxation exposures rest large as motivating reasons for organizational structural decisions. This is simply not the case.

6. This communication is not to be considered to be a full and final response to the proposed policies. A full response is neither possible or appropriate at this juncture. In the CAG

discussion, WSIB officials admitted several times that the Board must "rethink and redraft" as a result of comments presented by the CAG members.

7. It must be remembered that the CAG meeting itself was not a consultation vehicle recommended by WSIB policy officials, no matter how pivotal and essential the meeting turned out to be. The WSIB administration's preferred and expected consultation process was to simply rely on written submissions. The CAG meeting was arranged only in response to stakeholder demand advanced at an earlier **Construction Industry Advisory Committee** ["CIAC"] meeting.

8. This is instructive. It demonstrates that the WSIB administration possessed a high degree of confidence in the proposed policies.

9. The proposed suite of policies must be annulled and withdrawn and the process recommenced afresh. The following process is respectfully suggested:

   a. The WSIB officially withdraw the proposed policies and so announce.

   b. The policies should be redrafted as required, and accompany an extensive background document that explains with clarity and precision the "why" behind the policies.

   c. Prior to the next stage of public release, the revised suite of policies and the accompanying extensive background document should be disclosed to the CAGs and no sooner than twenty-one (21) days after that disclosure another CAG feedback session is to be arranged.

   d. After the 2nd CAG feedback meeting, and after the WSIB suitably considers and incorporates where appropriate any recommendations/suggestions from the CAGs, the revised policies should then be released for a broader public consultation.

10. This preamble closes with a reminder of the encouraging words of WSIB President Teahen expressed at the **2017 WSIB AGM** which in effect, suggested that the primary motivation of all that the WSIB does is to advance stakeholder interests and to "*make things easier*." It is respectfully suggested that the rate framework policies advance an alternate narrative.

11. Tax reform is a timely subject sparking a national debate. Kevin Milligan, Professor, Vancouver School of Economics, in a recent article addressed the benefits of "tax neutrality" as a desired taxation objective, writing: "*Neutrality is desirable because it allows people to make decisions based on the business merits, rather than having their decisions distorted by taxation*".[1] As is clearly shown in this response, the proposed policies represent a stark rejection of this objective.

B. A comment on the revamped Schedule 1 as presented in O. Reg. 470/16

1. Since inception, the organization instructions for workplace safety and insurance ["WSI"] coverage in Ontario has been: *every industry is excluded unless expressly included by Schedule 1*.

[1] See: http://blogs.ubc.ca/kevinmilligan/2017/09/04/taxation-of-passive-income-in-a-private-corporation/

2. The rate framework policies and regulations will change that to: *every (new) industry is included unless expressly excluded by Schedule 1*.

3. Without speaking to the policy soundness or unsoundness of such an approach, and without commenting on the policy efficacies of either approach, this represents a profound and significant structural adjustment.

4. Yet, there was no focus on this point throughout the rate framework consultations from the commencement of this exercise almost five (5) years ago.

5. Again, without commenting on the efficacy of this policy choice, and both organizational options possess inherent benefits and risks, it is strongly and respectfully suggested that this impacts WSIB goodwill. Since this was/is clearly an organizational feature that the Board favoured, as it represents a profound change to the coverage structure, it is respectfully suggested that the Board owed a clear and unambiguous duty to consult on this element before any change was implemented. The absence of this process, contextually assessed against the backdrop of the consultation exercise now underway, erodes stakeholder confidence.

C. A comment on "streamlined and simple" rhetoric

1. From the outset of the rate framework exercise, the WSIB has touted this as being a "*streamlined and simpler classification structure*."

2. In **RFR Paper 1** (at page 4), the Board declares:

> ## Preliminary Rate Framework Key Goals:
>
> 1. **Clear and Consistent:** A new streamlined and simpler classification structure that is clear and consistent in its application as a foundation.

3. At page 7:

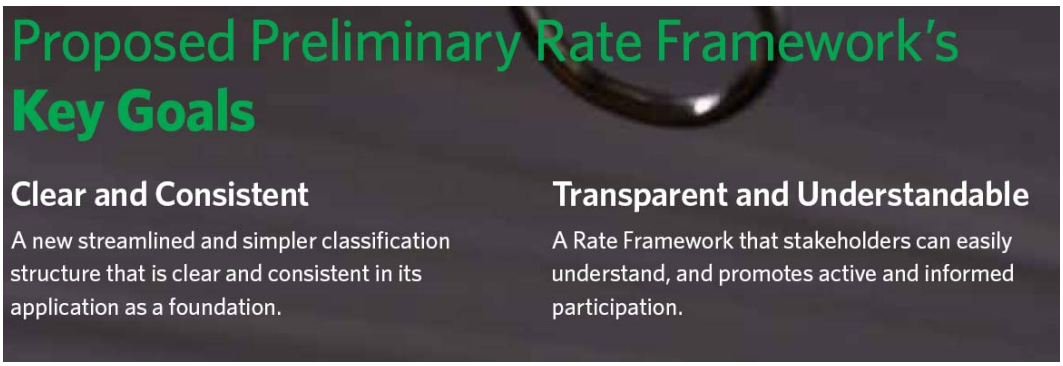
> ## Step 1 – Employer Classification
>
> ### North American Industry Classification System
>
> The proposed preliminary Rate Framework seeks to replace the WSIB's current employer classification system with a 22 class structure adapted from the 2012 North American Industry Classification System (NAICS), the most recent version of the NAICS, which is updated every five years. The proposed classification structure is based on significantly fewer employer groupings for the purpose of setting premium rates, compared to the current 155 RG and 840 CU structure. It is intended to create a structure that is simple and understandable.

4. In RFR Paper 2 (at page 5):

PAPER 2 | CURRENT STATE ANALYSIS

Mr. Stanley recommends an integrated system that includes an improved classification scheme based on the North American Industry Classification System (NAICS), which is very different from the existing approach – it is intended to be simple, transparent and easier to administer. His recommendations include the following highlights:

5. In RFR Paper 3 (at page 5):



6. At page 8:

Proposed Preliminary Rate Framework

The proposed preliminary Rate Framework seeks to replace the WSIB's current employer classification system with a 22 class structure adapted from the 2012 NAICS, the most recent version of the NAICS. The proposed classification structure is based on significantly fewer employer groupings for the purpose of setting premium rates, compared to the current 155 RGs and 840 classification unit structure. It is intended to create a structure that is simple and understandable.

7. At page 9:

In creating the proposed 22 classes, the WSIB considered the Key Goals of the proposed preliminary Rate Framework, in particular that a classification system should be simple to understand and not require frequent or extraordinary maintenance. By advancing significantly fewer employer groupings than exist in today's classification system, the proposed structure is designed as a streamlined, simple classification scheme compared to the current classification system. At the same time, grouping

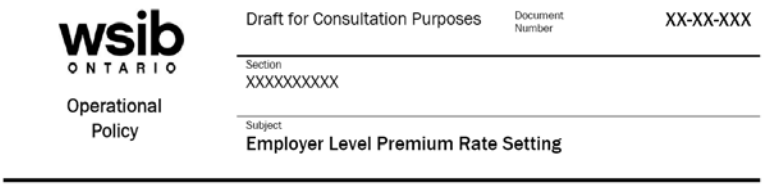
8. In the Q&A document on the WSIB website explaining the need for the changes:

> **What are the key goals of the reforms?**
> - Clear and Consistent: A new streamlined and simpler classification structure that is clear and consistent in its application as a foundation.

9. And, from the WSIB website announcing the current policy consultation process:

> ## Q. What is the rate framework?
>
> A. The rate framework is an innovative rate setting structure intended to increase the transparency of the premium rate setting process to better align employer premium rates with actual costs of the system. The rate framework will change the way Schedule 1 employers are classified, and how premium rates are set and adjusted. The rate framework includes:
>
> - a streamlined and simpler classification structure

10. I now draw your attention to the proposed WSIB policy "Employer Level Premium Rate Setting" in the draft suite of policies.



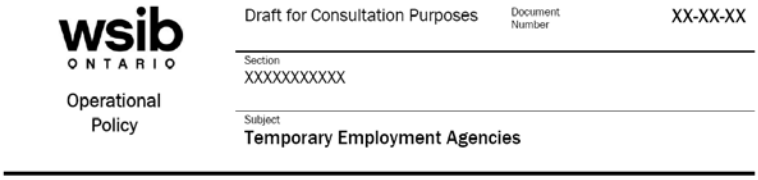
11. I challenge the WSIB to locate a single employer who is able to read that policy, understand its implications for the employer and conclude that the policy is "simpler".

12. I respectfully counter however that "simplicity" is not necessarily an essential organizational feature of a workers' compensation classification scheme. Fairness comes to mind as a more important overarching objective.

13. However, by claiming that rate framework represents a simpler and streamlined classification scheme, when on its very face it is clear and obvious that it is anything but, the Board stakes its institutional reputation on sloganeering. It is suggested that the Board either drop the claim, rate framework is more rather than less complex, or, in fact make it simpler (which would require a major redesign).

14. Saying it does not make it so.

D. Temporary Employer Agencies


wsib ONTARIO
Operational Policy
Draft for Consultation Purposes
Document Number XX-XX-XX
Section XXXXXXXXXX
Subject Temporary Employment Agencies

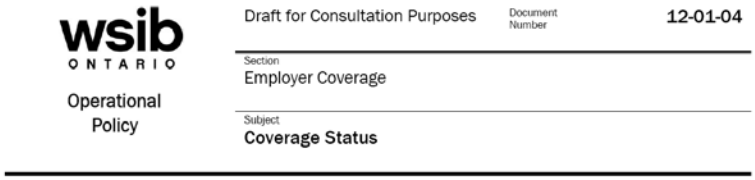
1. I refer to page 1, para. 2, and page 2 under "Classification Information." A Temporary Employment Agency ("TEA") is required to obtain classification information from a client employer ("CE").

2. Fair enough. But the following paragraph is problematic.

> The WSIB will change a client employer's classification based on relevant classification and premium adjustment rules. If the classification change is applied to any period (including past periods) in which the client employer used workers supplied from a TEA, the TEA's classification during that period, with respect to those supplied workers, is changed to align with the client employer.

3. It is respectfully suggested that if the information was/is provided by the CE and relied upon by the TEA in good faith and if the CE information was previously accepted by the WSIB and the WSIB endorsed the classification, the Board's approach is unfair to the TEA (and is likely precluded by the doctrine of legitimate expectations).

E. Coverage Status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Operational Policy
Draft for Consultation Purposes
Document Number 12-01-04
Section Employer Coverage
Subject Coverage Status

1. I refer to page 1, para. 1, the reference to "substantial connection to Ontario." This is not defined and must be. The concept is vague and need not be. The related policies 12-04-12 Non-Resident Workers and information on the WSIB website is equally unhelpful and imprecise.

2. Refer to page 3 (see excerpt below):

> **Exclusions from mandatory coverage**
> In addition to the specific industries excluded from mandatory coverage, an operation that would otherwise be included in Schedule 1 is excluded from mandatory coverage if it is not carried on as a business or trade or for profit or gain. An exception is made if the operation is considered a part of, or incidental to, another business activity falling under a Schedule 1 industry.
>
> The WSIB will only exclude an operation that otherwise would be included in Schedule 1 from mandatory coverage when the operation operates as part of a non-covered business activity, and both of the following conditions are met:
> 1. The operation in its entirety is not carried on as a business or trade in its own right. Its products, facilities, or services must operate exclusively for individuals or entities whose business is with the larger non-covered operation incorporating the business activity in question, and not in any way with the public at large.
> 2. It must be demonstrated, and the WSIB must be satisfied, that the operation is not specifically set up to make a financial profit, regardless of whether or not it makes a financial profit, and does not operate for direct or indirect business gain.
>
> Unless the above conditions are met, the operation is considered mandatory under Schedule 1, and classified accordingly

3. This language is cumbersome and convoluted, with the intended application exceedingly unclear. The application of this excerpt must be explained, the intent made clear and the language redrafted for an easier and clearer read.

4. Refer to page 3 (see excerpt below):

> **Coverage for part of an operation**
> **Employer with mandatory and non-mandatory business activities**
> When an employer is engaged in multiple business activities where one is in Schedule 1 under Part 1 (mandatory coverage) and another is in Schedule 1 under Part 2 (non-mandatory coverage), the workers engaged in both business activities are mandatorily covered.

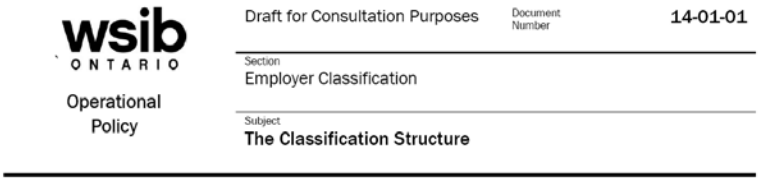
5. It is respectfully submitted that the policy contains a drafting error. Clearly, the Board intends that workers engaged in *either* business activity are mandatorily covered. But, the wording does not direct this. The express words make it clear that only those workers "*engaged in both business activities are mandatorily covered*." This means that if a worker is engaged in only one of the business activities, that worker is not subject to mandatory coverage. This is easily corrected.

6. Refer to page 4 (see excerpt below):

> - The operation is situated at a different location from the rest of the operation (in most cases operations at different mailing addresses are considered to be at different locations).

7. It is respectfully submitted that there is no policy need for different locations. Payroll segregation has been, is and will be a sufficient mechanism.

F. The classification structure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Operational Policy
Draft for Consultation Purposes
Document Number 14-01-01
Section
Employer Classification
Subject
The Classification Structure

1. Refer to page 4. As noted at the CAG meeting, the inordinate focus on ancillary operations is incongruous to the primary structural organizational concept of predominance. There is little need to be at all concerned with ancillary functions when it is the predominant business activity that attracts the classification.

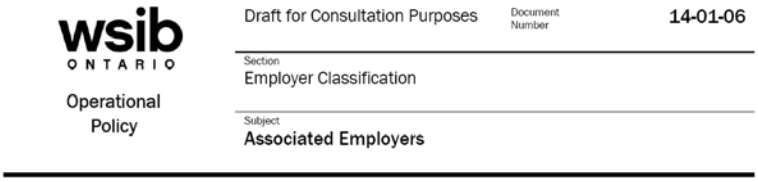
2. With respect to the policy details, as earlier noted, distinct locations is a needless requirement and payroll segregation is a sufficient delineator.

3. Refer to page 5 (see excerpt below):

> If the business activities are in different classes, the aggregated payroll is classified in the 6-digit NAICS code that corresponds to the class or subclass with the highest class average premium rate (for exceptions, see Small employers, below).

4. Yet, it is the *predominant* business activity that attracts the classification for the company. This suggests otherwise.

G. Associated employers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Operational Policy
Draft for Consultation Purposes
Document Number 14-01-06
Section
Employer Classification
Subject
Associated Employers

1. Refer to page 1. It is respectfully suggested that most of the terms deployed are vague and of ambiguous meaning, a fatal flaw in such a policy document.

2. Terms such as “co-operative business relationship” (page 1) and “supportive of each other” (page 2) mean whatever the WSIB chooses. Worse, the terms are so loose and without definition that situationally they can be applied in different ways.

3. Of particular concern though is the following (at page 3):

> **Associated employers in construction**
> If two or more employers are associated, and one carries on business in construction, and the other(s) does not engage in construction activities, the entirety of both employers' operations are subject to compulsory coverage in construction industry rules (see 12-01-06, Expanded Compulsory Coverage in Construction), even if the entire operations of one or more of the associated employers are not predominantly classified in any of the subclasses of Class G.

4. Consider this example (examples of this type are plentiful):

   a. Two brothers (test of affiliation met) own different businesses.
      i. Ted owns a trucking company
      ii. Fred owns a construction company
      iii. Neither brother owns shares in or participates in the other brother's business.

   b. Among other business contracts, the trucking company transports the equipment for the construction company on a fair-market-value fee-for-service basis (the test for "supportive of each other" is met and thus the "test for co-operation" is met).

   c. As per the policy, the companies are now associated.

   d. The trucking company engages 200 owner-operators who are legitimately considered by the WSIB to be *bona fide* independent operators and thus, but for this policy, are not subject to compulsory coverage under the WSIA.

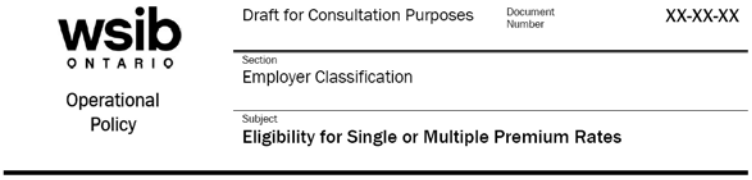
   e. Under policy 14-01-06 all of the transport independent operators are now immediately subject to mandatory coverage unlike any otherwise similarly situate trucking company but for the family relationship to construction. Ted's business either refuses to be engaged in any commercial contract with Fred's business (a needless and excessively restrictive requirement impeding Ted's freedom of contract), or folds under the weight of the oppressive and distinctively unfair $\$1.2^{+}$ million premium not borne by Ted's competition.

5. At the CAG meeting WSIB officials confirmed that the policy would direct this result and refused to assert that the result was not intended. I conclude that the result was the intended fruit of the policy.

6. The result is absurd. This is exorbitant taxation of such a level that it lacks Adam Smith's inherent metaphorical consent. In any other setting, and perhaps even in this one, this level of taxation would inspire revolt.

7. This alone represents a WSIB policy design flaw of such magnitude that on this one example alone, the policies should be withdrawn. If the administration affirms this result, it is respectfully requested that direct and express guidance be sought from the WSIB Board of Directors ("BOD"). It is unfathomable that the WSIB BOD would support this result.

H. Eligibility for single or multiple premium rates


wsib ONTARIO
Operational Policy
Draft for Consultation Purposes
Document Number XX-XX-XX
Section
Employer Classification
Subject
Eligibility for Single or Multiple Premium Rates

1. See page 1 (see excerpt below):

> **Predominant class**
> An employer classified in more than one 6-digit NAICS code in different classes is generally assigned a predominant class and is assigned a single premium rate.
>
> The predominant class is generally the class with the largest share of insurable earnings, however, the WSIB may consider other information if, in the WSIB's opinion, it better describes the employer's predominant class.

2. The sentence ". . . *the WSIB may consider other information* . . ." offers no instruction or explanation or examples of what that other information may or would be and how it would be influential. As it is written, the policy direction is thwarted absent this information.

3. Refer to page 2 (see excerpt below):

> **Eligibility for multiple premium rates**
> An employer classified in more than one 6-digit NAICS code may have the NAICS codes assessed separately, provided the employer meets all of the following criteria:
>
> 1. The business activity classified in a 6-digit NAICS code must be significant.
>
> The business activity is **significant** if it meets all of the following conditions:
> a) generates an annual insurable earnings of at least five times the maximum insurable earnings ceiling for the premium year, and
> b) generates at least 25% of the employer's total annual insurable earnings.

4. Application of the proposed 25% rule will result in absurd applications. It is clear that the policy intent is a requirement of "significance". But, it is respectfully suggested that "significance" is not determined simply through an application of a relative intra-focused corporate analysis.

5. Consider this example. Presume but for the 25% rule the tests for multiple premium rates is met:

   a. **Business Activity A:**
      i. 2,000 employees with a $160 million payroll ($80,000 per worker)
      ii. 5% risk = $8.0 million in premiums

   b. **Business Activity B:**
      i. 400 employees with a $32 million payroll ($80,000 each)
      ii. 1% risk (if assessed alone)
      iii. Premium should be $$320,000 but the Board will charge $1.6 million.

6. Business Activity B while only 20% the size of Business Activity A is nonetheless, by any objective standard, significant.

7. Taxation policies ought not to result in such swings based on the application of strictly arbitrary factors. If the primary policy requirement is "significance" then the threshold must be designed void of the false influence of a relative comparator.

I. Employer premium adjustments

wsib ONTARIO

Operational Policy

Draft for Consultation Purposes | Document Number 14-02-06

Section: Employer Accounts

Subject: **Employer Premium Adjustments**

1. Refer to page 3 (see excerpt below):

> **Unlimited adjustments**
> The WSIB may make unlimited premium **debit adjustments** to an employer's account under the following circumstances:
> - if it has been determined that the employer committed a fraudulent act
> - if it has been determined that the employer committed an offence under the WSIA.

2. Not only does this represent a massive retrenchment on current policy, it needlessly undercuts and undermines the Board policy promise of premium stability and predictability.

3. Moreover, there will be unintended consequences of more extensive employer claims appeal participation that even currently experienced.

4. The constraints in contemporary policy should be applied to the proposed policies. There is no need for a change.

J. Concluding comments

1. I conclude where I began. The policies must be withdrawn and the process recommended earlier adopted. As drafted, these policies will present a taxation regime of unprecedented volatility coupled with structural unfairness all of which will, at a minimum, undermine stakeholder confidence, and perhaps could go as far as inspiring taxpayer revolt, all of which can be avoided with a sober second review.

Yours truly,

L.A. Liversidge