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Briefing Note: Rate Framework Policy Suite

September 2017 versus April 2018

Presented:
April 12, 2018
in preparation of April 16, 2018
Joint CAG meeting

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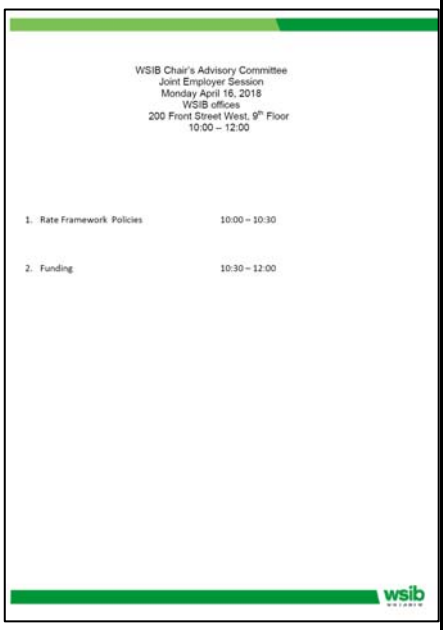
A. Introduction and purpose of this memorandum


WSIB Chair's Advisory Committee
Joint Employer Session
Monday April 16, 2018
WSIB offices
200 Front Street West, 9th Floor
10:00 – 12:00

1. Rate Framework Policies 10:00 – 10:30
2. Funding 10:30 – 12:00

wsib

1. After the introduction of a suite of **Rate Framework Review** ["RFR"] policies in September, 2017, which were heavily criticised by the employer community, the Board regrouped and redrafted the policies.

2. A joint **Chair's Advisory Group** ["CAG"] meeting has been convened for Monday April 16, 2018. Only 30 minutes has been allowed for a discussion of the policies.

3. This suggests that the Board has a high level of confidence in the policies.

4. LAL met with Sean Baird ("SB"), at Sean's request, on Tuesday, April 10.

5. As expressed in an email following the meeting:

> **Overall opinion:** The revisions respond to several of the core criticisms set out in my October 6, 2017 letter to Kate Lamb (attached for reference). A few new drafting issues are apparent, but with the exception of one, these are not earth-shattering. **The new policies correct the most egregious problems with the first policy suite**. I found Sean and his associate more open and amenable to commentary that was apparent in the first meeting last September. The meeting was constructive. Several suggestions were noted and they agreed to review them. In other cases, I gave them a "heads-up" as to what would likely be addressed at next Monday's CAG meeting. This is a good sign.

6. This briefing note is drafted to assist in the April 16 CAG meeting. It will focus on the most significant changes (there was several "word-smithing" type adjustments to curtail some redundancies, and these will not be addressed), and highlight any remaining/ongoing or new concerns, and provide a few suggestions for questions to be posed at the meeting.

7. The briefing note will address each of the seven policies. I will outline the initial LAL recommendations as set out in the October 6, 2017 letter ("**LAL Letter**"), the core changes, if any, any recommendations, and my opinion on the efficacy of the policy.

8. This report is designed simply to assist in Monday's meeting and is not to be construed as a full analysis of the RFR policies.

9. As there is limited time devoted to this in the CAG meeting, it is suggested that any questions posed focus on core and significant issues. It is unlikely that the WSIB will be amenable to any suggestions that would materially alter the approval timetable. They likely seek to "*get on with it.*"

B. Temporary Employment Agencies

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Operational Policy

Draft for Consultation Purposes | Document Number: XX-XX-XX

Section: XXXXXXXXXXX

Subject: **Temporary Employment Agencies**

1. Several word-smithing changes were made due to redundancy.

2. Refer to page 2, "**Client Employers not included in Schedule 1**"

Client employers not included in Schedule 1
A TEA that supplies workers to:
- a Schedule 2 client employer, or
- a client employer that is not mandatorily covered under Schedule 1 and has not applied for Schedule 1 coverage,

is classified in the premium rate setting class the WSIB determines best represent the business activity of the client employer.

3. I referred to **O. Reg. 175/98, s. 12** (see below) in the meeting with SB.

OPERATIONS CARRIED ON PARTLY AS A BUSINESS

12. The payroll of workers engaged in operations carried on partly as an industry under Schedule 1 and partly as an industry not under Schedule 1 shall be rated and dealt with by the Board as if all the operations were under Schedule 1. O. Reg. 175/98, s. 12.

4. I asked SB if the drafters considered s. 12. I indicated that my opinion was that it likely would not apply, however an express WSIB position should be sought.

5. With respect to the September Draft, the **LAL Letter** noted:

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).

6. The WSIB responded to this suggestion. The para. now reads:

> If a TEA is supplying workers to a client employer and the client employer's premium rate setting class changes, the TEA's classification, with respect to those workers, also changes to align with the client employer. The change is applied going forward from the point the TEA is made aware of the change.

7. **LAL Opinion:** This is satisfactory. There are no other issues with this policy.

C. Coverage Status

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Operational Policy

Draft for Consultation Purposes | Document Number: 12-01-04

Section: Employer Coverage

Subject: **Coverage Status**

1. Refer to page 1, "**Policy**." In the **LAL Letter**, I wrote:

> 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. The Board responded and the revised policy now reads:

> **Policy**
>
> Employers who operate in Ontario generally require WSIB coverage for their workers. WSIB coverage provides employers with legal protections if a workplace injury occurs, and provides injured workers a variety of benefits and services.
>
> Employers who have business activities covered under Schedules 1 (Part 1) and 2 of *Ontario Regulation 175/98* require mandatory coverage.
>
> Ontario employers with business activities listed in Schedule 1, Part 2 do not require mandatory coverage, but have the ability to apply for WSIB coverage for their workers.

3. **LAL Opinion:** This is satisfactory.

4. Refer to page 3, "**Exclusions from mandatory coverage**." In the LAL Letter, I wrote:

> 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.

5. The Board responded and the policy now reads:

> **Exclusions from mandatory coverage**
> An operation that is otherwise in Schedule 1, Part I is excluded from mandatory coverage if the operation forms part of a non-mandatory business activity and meets both the following:
> 1. The entirety of the operation supports a non-mandatory business activity,
> and
> 2. The operation is not organized as a business in its own right to make a financial profit or gain.

6. The new language is an improvement, although I requested that SB briefly explain the specific application being sought.

7. Refer to page 5, "**Employer with multiple non-mandatory business activities.**" In the **LAL Letter**, I wrote:

> 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.

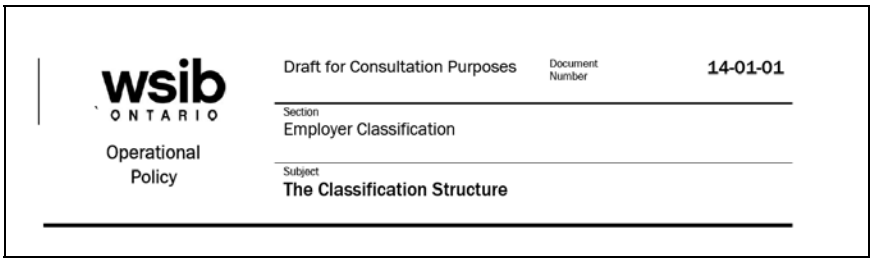
8. This is still a problem. The revised policy reads (at page 5):

> - 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).

9. **LAL Opinion:** I advised SB this should be adjusted. Payroll segregation should be sufficient. It should be raised at the meeting. This though "*is not a hill to die on*."

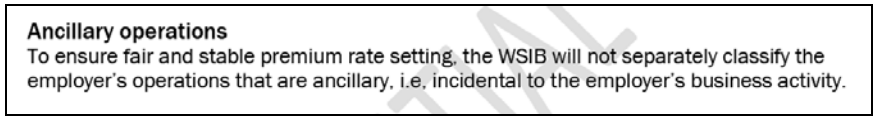
10. There are no other issues with this policy.

D. The Classification Structure


wsib ONTARIO
Operational Policy
Draft for Consultation Purposes
Document Number 14-01-01
Section
Employer Classification
Subject
The Classification Structure

1. Several changes have been made. The revised policy for the most part is acceptable with two exceptions.

2. Refer to page 3, "**Ancillary Operations**." The revised policy reads:


Ancillary operations
To ensure fair and stable premium rate setting, the WSIB will not separately classify the employer's operations that are ancillary, i.e. incidental to the employer's business activity.

3. In the meeting with SB, I questioned the use of the phrase, "*To ensure fair and stable premium setting . . .*" The policy then explains that ancillary operations are not classified separately. I presented the following points:

   a. All WSIB policies are presumed to advance a goal of fairness.

   b. It is however subjective to categorize the classification of ancillary operations in this manner as "fairer." Many employers argue otherwise (particularly with respect to administrative payroll).

   c. Moreover, the scheme is set out in regulation (**O. Reg. 175/98**), and as regulations supersede policy, a WSIB "fairness" policy statement is redundant.

4. **LAL Opinion:** The words, "*To ensure fair and stable premium setting, the*" should be struck from the policy.

5. Refer to page 5, "**Aggregated Payroll**." The revised policy reads:

> **Aggregated payroll**
> If an employer with more than one business activity cannot maintain segregated payrolls and records the insurable earnings of all workers with no regard to the business activity in which each worker is engaged, the payroll is considered aggregated. Employers with an aggregated payroll are not eligible for multiple classifications.

6. The use of the word (1st line) "*cannot*" is problematic. If one "cannot" then, of course, one "will not". However, if one "does not" that doesn't necessarily mean one "cannot". The WSIB really means "does not."

7. **LAL Opinion:** Change "cannot" to "does not".

8. There are no other issues with this policy.

E. Associated Employers

> wsib ONTARIO
> Operational Policy
>
> Draft for Consultation Purposes — Document Number: 14-01-06
> Section: Employer Classification
> Subject: **Associated Employers**

1. The **Liversidge Letter** suggested the terms in this policy were vague and ambiguous:

> 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.

2. **LAL Opinion:** This element has been corrected.

3. The **Liversidge Letter** advanced a particular concern with respect to "**Associated employers in construction**":

> 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. **LAL Opinion**: This element has been corrected. This section has been expunged from the revised policy.

5. The revised policy (at page 2), uses the term "*relative majority*." SB could not explain the use of this term.

> For the purposes of this policy:
> - a person, group of persons, or partnership **controls** a corporation if enough voting shares in relation to the holdings of other shareholders are held by or for the benefit of the person, group of persons or partnership, in order to elect a relative majority of the board of directors.
> - a **related group** is a group of individuals each of whom is related to all the other members of the group.

6. **LAL Opinion:** "Relative majority" must be either defined or changed to "majority."

7. A new section (at page 3) "**Transferring experience**" is <u>very problematic</u>.

> **Transferring experience**
> If an employer sells or transfers all or part of a business to an affiliated employer, the WSIB will transfer the insurable earnings and claims experience to the affiliated employer if they hire a worker within 12 months of the sale or transfer.
>
> If an employer (one and the same person) closes and then re-opens within a 12 month period, the WSIB will transfer the insurable earnings and claims experience to the re-opened employer.
>
> The transfer of experience will occur if the **affiliated or reopened** employer retains substantially the same of **any two** of the following:
> - employees;
> - clients;
> - suppliers;
> - business processes and equipment;
> - health, safety and disability management programs;
> - management team.
>
> Under this section, the transfer of experience will occur regardless of whether the employer registers the business under a new name, produces new articles of incorporation, or obtains a new WSIB account number.
>
> For more information on how experience transfers, see XX-XX-XX, Closures.

8. This is new. The policy creates a new and distinctive set of rules for associated employers that is not applied to other business ownership transactions.

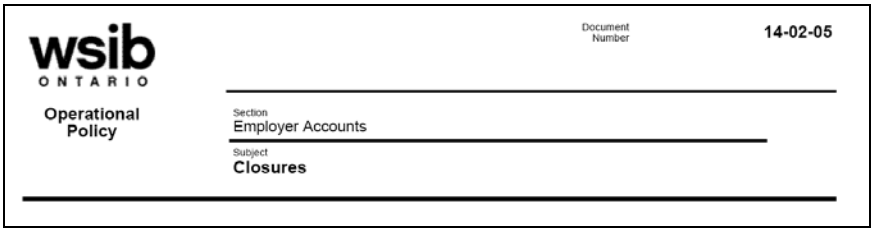
9. A case for this distinctive treatment has not been advanced.

10. The *Workplace Safety & Insurance Act* speaks to the question of successor employers in ss. 146(1) & (2):

> **Obligations of successor employers**
>
> 146 (1) This section applies when an employer sells, leases, transfers or otherwise disposes of all or part of the employer's business either directly or indirectly to another person other than a trustee in bankruptcy under the Bankruptcy and Insolvency Act (Canada), a receiver, a liquidator under the Winding-up and Restructuring Act (Canada) or a person who acquires any or all of the employer's business pursuant to an arrangement under the Companies' Creditors Arrangement Act (Canada). 1997, c. 16, Sched. A, s. 146 (1); 2017, c. 34, Sched. 45, s. 3.
>
> **Liability of person**
>
> (2) The person is liable to pay all amounts owing under this Act by the employer immediately before the disposition.1997, c. 16, Sched. A, s. 146 (2).

11. Sections 146(1) & (2) only addresses "*all amounts owing*" up to the point of sale. The proposed policy does much more but only for associated employers.

12. The existing WSIB policy, **"Document Number 14-02-05, Employer Accounts, Closures" (April 01, 2016)** is consistent with WSIA s. 146 but not the proposed policy. The proposed policy is introducing a new and significant approach.


wsib ONTARIO
Operational Policy
Document Number 14-02-05
Section Employer Accounts
Subject Closures

13. **LAL Opinion:** This element requires attention. This element should be removed from the RFR policies. A stand-alone policy discussion coordinated within the stakeholder community is required. This is not an essential element to RFR, and must be addressed in a suitable and comprehensive manner. The proper "policy place" for this element is the "**Employer Accounts: Closure**" policy, not the RFR policies.

F. Employer Premium Adjustments

wsib ONTARIO

Operational Policy

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

Section: Employer Accounts

Subject: **Employer Premium Adjustments**

1. The **Liversidge Letter** advised:

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.

2. The policy has been revised but not for the better. See page 2 and 3.

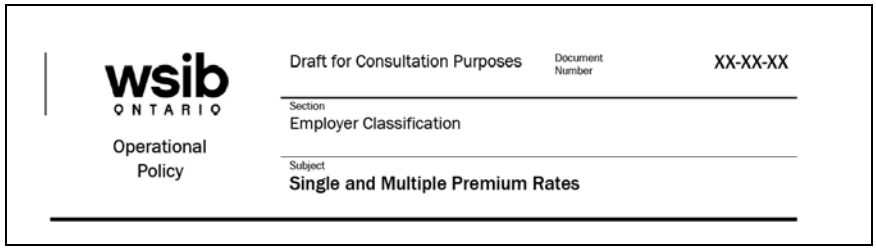
Decision affecting claim count or claim costs
The WSIB may make premium **credit adjustments only** to an employer's account **back to January 1 of the third prior year** on a decision affecting claim count or claim costs, under the following circumstances:
- second injury enhancement fund (SIEF) relief
- a change in claim counts or claim costs due to a WSIB error
- a change of accident date
- a claim amalgamation
- reversal of entitlement to a claim.

Premium **credit and debit adjustments** may also be made to an employer's account **back to January 1 of the third prior year** when:
- a transfer of costs is authorized according to 14-01-05, Transfer of Costs
- the WSIB determines that insurable earnings transfers are required from one employer to another.

In these cases, the employer who is approved for cost relief will receive a credit on their account, and the employer receiving the costs will have a debit adjustment applied to their account.

3. **LAL Opinion:** Three (3) years should be changed back to seven (7) years.

G. Single and Multiple Premium Rates



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Operational Policy

Draft for Consultation Purposes

Document Number XX-XX-XX

Section
Employer Classification

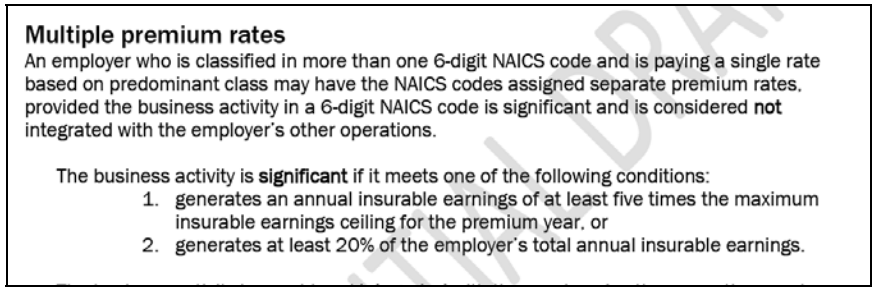
Subject
Single and Multiple Premium Rates

1. This policy is greatly improved.

2. The **Liversidge Letter** noted that:

> 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.

3. The revised policy responds to this concern and alters the meaning of "significance."



Multiple premium rates

An employer who is classified in more than one 6-digit NAICS code and is paying a single rate based on predominant class may have the NAICS codes assigned separate premium rates, provided the business activity in a 6-digit NAICS code is significant and is considered **not** integrated with the employer's other operations.

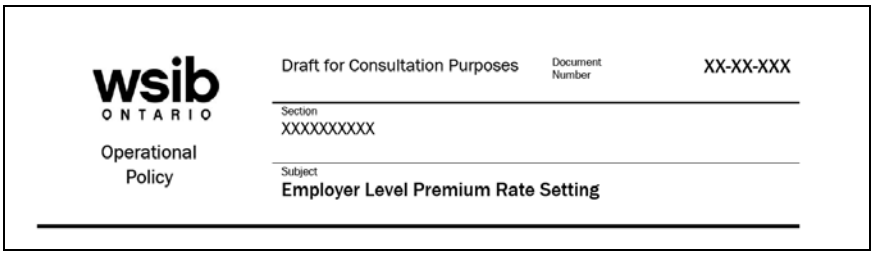
The business activity is **significant** if it meets one of the following conditions:

1. generates an annual insurable earnings of at least five times the maximum insurable earnings ceiling for the premium year, or
2. generates at least 20% of the employer's total annual insurable earnings.

4. Not only is the previous 25% threshold adjusted to 20% (an improvement) but more significantly the use of the conjunctive ***"or"*** in the above excerpt drastically alters the application of the policy.

5. **LAL Opinion:** This policy is now satisfactory. The earlier absurd results have been removed.

H. Employer Level Premium Rate Setting



1. Revisions have been made to ostensibly simplify the language (according to the Board). Whether this has been achieved is a subjective conclusion.

2. This policy though explains the "nuts and bolts" of RFR adjustments, is not simple (the program is exceedingly complex) and cannot be simply explained.

3. The **Liversidge Letter** did not comment on the precursor policy. There is no need for comment on the revised policy.

L.A. Liversidge
April 12, 2018