

The Liversidge e-Letter

An Executive Briefing on Emerging Workplace Safety and Insurance Issues

November 5, 2007

An Electronic Letter for the Clients of L.A. Liversidge, LL.B.

5 pages

WSIB reinstates “Voluntary Registration Program” *This long-sought step restores employer fairness*

Last year, I pressed the need for a return of the
“*Voluntary Registration Program*”
(employers *voluntarily* registering should be treated more fairly)
WSIB Chair Mahoney championed the issue and
promised a fairer way
Last week, the Board fulfilled this promise

Employers voluntarily coming forward must be treated better than those that wait to be found out

When I appeared before the *Standing Committee on Government Agencies* on February 27, 2007 [see the February 28, 2007 issue of *The Liversidge e-Letter*], this is part of what I said:

Of late, the Board has been eager to promote a joint initiative between the WSIB and the Canada Revenue Agency, CRA, to ensure increased employer compliance, *and nobody can quarrel with that objective. Employers who do not pay their premiums should be found out and duly assessed.* While this initiative ought to continue unabated, the Board in my view foolishly abandoned a program called the *voluntary registration program*, which allowed for fairer treatment of non-compliant employers who voluntarily come forward.

As a result, and as I explained in a recent senior communication to the board, “*those employers that voluntarily come forward and those that wait to be found out are treated exactly the same way.*” This is, quite frankly, ridiculous.

Employers who voluntarily come forward should be treated better than those who wait to be found out. That’s not just simple justice, although it is; that is also prudent WSIB administration.

At first, the Board’s officials resisted returning the VRP

I had been calling for a return of the Voluntary Registration Program [“VRP”] for some time (implemented by former WSIB Chair Glen Wright, it was cancelled a few years ago). *The WSIB administration resisted.* Frankly, my requests fell on deaf ears. It was not until I raised this at the Standing Committee that the issue “got legs”. The WSIB Chair then took the lead. My argument for the VRP is set out in the April 12, 2007 issue of *The Liversidge e-Letter*.

L. A. Liversidge Executive
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Sign up today

Morning program: Sign-up form page 4

Afternoon program: Sign-up form page 5

The details of the “new” VRP

The WSIB has profiled the introduction to the VRP on its website. For full details, go to the WSIB website at: www.wsib.on.ca/wsib/wsibsite.nsf/public/VoluntaryReg

I will present the basic details of the VRP in this issue of **The Liversidge e-Letter**. Here, in a nutshell, is the “new” VRP:

VRP applies to: This excerpt is right off the press from the Board’s new **Policy Document 14-02-15, Employer Accounts, Voluntary Registration**.

When an employer is non-compliant with respect to its registration obligations **and while remaining undiscovered by the WSIB**, comes forward to voluntarily disclose the non-compliance, the WSIB *may*: waive penalties; refrain from investigating and/or laying applicable provincial offences charges and, require the payment of retroactive premium, interest free, from the effective date of registration only.

The Board defines “voluntary disclosure” as “*a non-compliant employer approaches the WSIB on its own initiative to disclose its status and to register*”.

VRP does not apply to: The new VRP policy applies only to **new employer registrations**. This means that an employer only partially in compliance will get no solace in the VRP. This is just plain strange (and frankly, illogical). The policy also does not apply to:

Employers who have been identified for registration before their voluntary disclosure as the result of i) WSIB registration activity; ii) the WSIB/Canada Revenue Agency [“CRA”] information exchange agreement; iii) Regulatory Services referrals; iv) audit discoveries; v) action line referrals (anonymous telephone calls); vi) revenue recovery activities; viii) WSIB coverage decisions resulting from classification reviews; ix) claims made where employer is not registered; and, x) “any other means of identification”.

A complicated two-stage phase-in: For reasons which I do not understand, the WSIB has decided to implement a “two phase” approach. The Board kick-offs the new VRP with a brief period (5 months) of “full amnesty” (up to March 31, 2008), followed by the permanent program of partial amnesty. *I think that this is a mistake*. It works against the Board’s own interests. **Full amnesty on a permanent basis is the way to go**. I will make that case in a moment. First, more details on the two-pronged approach. **Period of full amnesty, October 29, 2007 - March 31, 2008**

During this period the date of voluntary disclosure is the “effective date of registration”. This is simple enough. In the 1st “full amnesty” phase the “effective date of registration” is the date the employer comes forward (if before March 31, 2008).

Partial amnesty, “current plus one year”: April 1, 2008 and onwards

Under current WSIB policy (which still survives – it is supplemented by, not supplanted by, the VRP) a non-compliant employer will be assessed for premiums for the current year, plus two previous years, plus interest, plus applicable penalties. And, there is the ability in certain cases

for the Board to pursue prosecution (where the fines are very extreme and in addition to the “administrative remedies”).

The “permanent program” provides a partial amnesty. This means that there will be no penalties for not reporting, no reconciliation interest on retroactive premiums, and no prosecution under the *Provincial Offences Act* at the time of registration.

For the permanent program, the “effective date for registration” is the date of first hire, *or* January 1 of the year preceding the date of voluntary registration, whichever is later. This means employers will be required to pay premiums for the current year plus one prior year. The Board gives a few examples:

WSIB Example 1

Voluntary disclosure is made July 1, 2008. First hire was Feb. 10, 2008. The effective date of registration is Feb 10, 2008.

WSIB Example 2

Voluntary disclosure is made July 1, 2008. First hire was Feb. 10, 2007. The effective date of registration is Feb 10, 2007.

WSIB Example 3

Voluntary disclosure is made July 1, 2008. First hire was Feb. 10, 1997. The effective date of registration is Jan. 1, 2007.

The VRP is a step forward – but not the “full step” it could and should have been

At the outset, while I congratulate the Board, and the Board’s leadership for championing this issue, and while I support the VRP initiative, frankly *it could and should have been more*.

The focus of the proposed policy should be adjusted: “Phase 1” got it right – there should be no retro-reach

The Board would have been far better served just to keep the VRP quite simple, make the benefits more significant and in that way, give a large and real incentive for those employers voluntarily coming forward. The “Phase 1 approach” (no retroactive reach) is in my firm view, a preferred way to go.

“No retro” is sound and has legs (or the Board never would have adopted the idea, even if temporarily)

Obviously, the idea has considerable merit, or else the Board would never have adopted it at all, if even on a transitional basis. So, it warrants further exploration, and leads to this question: *Why is the WSIB averse to a “no-retro” approach to the VRP on a permanent basis?*

I understand the thinking behind a limited retro approach (I disagree with it – but I understand it)

The Board seems to be influenced by the contrast between the non-compliant employer and the compliant employer, and less by the contrast between the non-compliant employer voluntarily coming forward and the non-compliant employer that waits to be found out. I think the Board sees the VRP as a “middle ground” approach and has acquired some institutional comfort in that.

The VRP distinguishes the “non-compliant employer” with the already “compliant employer”

It seems to be the case that an underlying element of the new VRP policies rests in the need to distinguish the non-

compliant employer who now voluntarily comes forward with the employer who “followed the rules” from the outset. In other words, a principle being advanced is this: *a non-compliant employer, even if voluntarily coming forward, should not receive a complete “free ride” for past periods of non-compliance.*

I understand this mindset. I though disagree with it in the context of the goal being sought. This thinking runs counter to the principal objective behind the development of the VRP in the first place.

The Board must be mindful of the policy goal behind the VRP

The policy object of the VRP is not to ensure that non-compliant and compliant employers are treated distinctively. Rather, it is to ensure that all non-compliant employers have strong incentives to voluntarily come forward. Once this policy concept is accepted as the principal objective of the VRP, the need for *any* retroactive reach is vitiated.

A better approach (is still possible)

While these policies were being drafted by the WSIB, since I had started this train rolling with my February 28, 2007 appearance before the Standing Committee on Government Agencies (see the February 28, 2007 issue of **The Liversidge e-Letter**), I offered some input. Graciously, the Board received it. Some of my advice was taken. Some of it not. But, to the Board’s credit, they did make some adjustments to earlier proposals. (*ed.*, While I have no “inside track” to confirm this, I am certain that the Chair’s office was influential in the development of the VRP in the first place and equally influential in the design of adjustments. In his March 1st appearance before the Standing Committee, Mr. Mahoney wholeheartedly endorsed the idea and clearly was its champion within the Board. Frankly, as I noted earlier, before this sponsorship, the WSIB administration just wasn’t all that interested. Actually, they flat out rejected the idea. I’ll take credit for putting the idea back on the issue agenda and giving it some profile. But, *Mr. Mahoney gets full credit for spearheading this through the Board*, a style consistent with his commitment to small business.)

This would have been a far superior approach (and ever so simple – and fair): **Adopt the “Phase 1” approach a the permanent policy**; an employer’s premium liability commences from the date the company voluntarily comes forward, with no retrospective reach [or if the Board just can’t wean itself totally off a diet of retroactive enforcement, how about a very limited retrospective assessment of not more than three (3) months].

The objective is to treat the employer voluntarily coming forward much better than the one which waits

In this way, the non-compliant employer which voluntarily comes forward is significantly distinguished from the non-compliant employer which waits to be found out. This suggestion frankly is more consistent with the policy objectives of the VRP.

The key to the policy is “incentives”

The key principle behind the VRP is to provide compulsorily covered employers with an opportunity to come forward and register their business with the WSIB

under more “favourable terms” than a company otherwise would likely be subject to.

An unintended result may be delayed compliance

There is a real problem with the “*current year plus one*” VRP approach. Take a look again at “*WSIB Example 3*” (on page 2). If a company comes forward, say on November 30, 2008, and has been in business for two or more years before that, they will be assessed back to January 1, 2007, almost two years of premiums (but they of course get a reprieve from interest and penalties).

But if that company waits for just another month and comes forward the first business day in January, 2009, they will be assessed back to January 1, 2008.

I strongly urge the Board to fix this anomaly

This makes no sense. If the purpose of the VRP is to encourage employers to come forward as early as possible, and incentives are used as the inducement, the policy is actually encouraging certain non-compliant employers to wait just a bit longer. Given this, I suspect that the once the permanent VRP is operational, the VRP will be more used earlier in the year than later in the year.

No company should get an advantage or disadvantage based on the date that the company decides to come forward. **Worse, the technical workings of the policy should not discourage compliance – the very goal being sought!**

If an employer “waits to be found out” and cooperates with the WSIB upon being audited or otherwise discovered, under existing WSIB policy the exposure is limited to the “*current year plus two previous years*”, regardless of the length of time that particular employer has been in business. The idea therefore of limiting the historic liability or exposure of a delinquent employer, whether one voluntarily comes forward or not, is well entrenched WSIB policy.

The proposed exposure is less for the employer voluntarily coming forward, but not dramatically so. It should be.

Here is a better way: Either adopt “Phase 1” as the permanent policy model, or as already suggested, if some retro-enforcement is deemed an essential quality in the Board’s mind (as appears to be the case), have a blanket retroactive assessment of three months (with all of the other requisite inducements), regardless of the date of compliance. In other words,

LAL Example 1: Voluntary disclosure is made July 1, 2008. First hire was Feb. 10, 2008. Effective date is April 1, 2008.

LAL Example 2: Voluntary disclosure is made July 1, 2008. First hire was Feb. 10, 2007. Effective date is April 1, 2008.

LAL Example 3: Voluntary disclosure is made July 1, 2008. First hire was Feb. 10, 1997. Effective date is April 1, 2008.

My unsolicited advice to employer trade associations

Get the word out. Get your members in full compliance. *Move fast.* With the WSIB/CRA initiative, the non-compliant employer will eventually be found out.

Upcoming issues of The Liversidge e-Letter: Anatomy of a WSIB Audit, followed by, A WSIB Classification Horror Story, and then “I am from the Board and I am here to help”.

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WSIB Policy & Reform Conference

November 21, 2007 9:30 A.M. – 12:00 P.M.
Centre for Health & Safety Innovation
5110 Creekbank Road, Mississauga

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As a valued client and colleague, you may bring up to three (3) people from your organization:

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is scheduled for:

November 21, 2007 1:45 P.M. – 4:45 P.M.

Centre for Health & Safety Innovation

5110 Creekbank Road, Mississauga

Ask yourself these basic questions: Do you understand how NEER works? Do you know how the Board calculates expected future costs? Overheads? Can you do these calculations?

Do you know how to determine the cost-effectiveness of a return to work plan? Can you determine the investment return of RTW expenditures? Do you know if it is cost-effective to even ask for Second Injury Fund relief? Can you calculate the cash impact of a WSIB decision? Can you present a business case for management intervention and resource allocation? Do you understand the impact of claim limits? Of firm limits?

If you answered “NO” to any of these questions, you are not using the power of NEER.

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