

BRITISH COLUMBIA REGIONAL OFFICE

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May 15, 2019

Sent Via Email: policy@worksafebc.com and fax 604-279-7599

Christina Wendel, Senior Policy & Legal Advisor
Policy, Regulation and Research Division
WorkSafeBC
P.O. Box 5350, Stn. Terminal
Vancouver, BC. V6B 5L5

Dear Ms. Wendel:

Re: WorkSafeBC (“WCB”) Consultation
Proposed Housekeeping Amendments to Assessment Manual
Worker Position – Canadian Union of Public Employees (BC)

I. INTRODUCTION:

Thank you for requesting stakeholder feedback on the proposed housekeeping amendments to the Assessment Manual.¹ If there are any consequent changes or additions to any other related sections, law, Regulations, and / or Policy, we request that these be remitted to stakeholders for feedback.

CUPE is Canada’s largest Union with over 680,000 members across the country and more than 70 offices.² CUPE represents workers in many sectors including health care, emergency services, education, early learning and child care, municipalities, social services, libraries, utilities, transportation, airlines and more. There are nearly 97,000 members in over 160 Locals in BC.³

¹ See <https://www.worksafebc.com/en/law-policy/public-hearings-consultations/current-public-hearings-and-consultations/housekeeping-amendments-assessment-manual>

² See <https://cupe.ca/>

³ See <https://www.cupe.bc.ca/>

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General Vice-Presidents/Vice-présidences générales

II. OVERVIEW OF CUPE’S POSITION AND PRELIMINARY CONCERNS:

II.I.I. Overview of Position on Proposed Changes:

CUPE is partially able to agree to the proposed changes for the reasons contained in this submission.

There were several changes made that are not housekeeping in nature but are substantial changes to Policy. Housekeeping changes refer to correction of spelling mistakes, correcting grammar issues, moving sections of language where that move does not change the intent or application of the language, etc. Substantive changes refer to law and policy that are made in order to administer, as per Black’s Law Dictionary, 2nd Edition, for example. As per Section 4 WHAT IS THE POLICY OBJECTIVE IN ADDRESSING THE ISSUE, housekeeping refers to:

“...in editorial changes to language as well as renumbering sections, parts, and divisions of the Act. The policy objective of the proposed housekeeping amendments to the Assessment Manual is to ensure the policies reflect the changes in the legislation”

The WCB did not explain what the specific changes in the legislation were and how each housekeeping (substantive) change was related to these changes.

The changes that were substantive changes include: Disclosure of Assessment Information (AP8-349-1); Experience Rating (AP5-247-1); and Definitions (generally)(AP1-1-1; AP1-1-3(2)(h); AP1-1-7; AP5-258-1, etc).

There are several minor spelling mistakes such as “ma” versus “may” in Collection of Assessments (2)(6).

III. BACKGROUND TO CONSULTATION:⁴

As per the WCB:

“2. ISSUE

At issue are the proposed amendments to the Assessment Manual that will be required to reflect anticipated revisions to the Workers Compensation Act (“Act”).

3. WHAT IS THE NATURE OF THE PROBLEM?

The Act is being reviewed by the Office of the Legislative Counsel as part of a standard statute revision process. A full statute revision of the Act will have a broad impact to WorkSafeBC and our stakeholders, including the requirement to update every document and resource across all areas of business, to ensure they reflect the legislative change.

⁴ The changes are not included in the Appendices of this submission due to the length of the proposed document (over 248 pages).

4. WHAT IS THE POLICY OBJECTIVE IN ADDRESSING THE ISSUE?

Changes made pursuant to the Statute Revision Act will result in editorial changes to language as well as renumbering sections, parts, and divisions of the Act. The policy objective of the proposed housekeeping amendments to the Assessment Manual is to ensure the policies reflect the changes in the legislation.

5. BACKGROUND

On May 16, 2018, Legislative Counsel delivered proposed revisions to the Act to the Clerk of the British Columbia Legislative Assembly, which were then referred to the Select Standing Committee on Parliamentary Reform, Ethical Conduct, Standing Orders and Private Bills by the Legislative Assembly (“Committee”).

The Committee will examine the proposed revisions, and if it approves them, the changes will come into force by regulation.

5.1 Statutory Revision A statute revision provides an opportunity to ensure an act is written in a manner that clearly and consistently reflects the intent of the Legislature, and that is readable and accessible to the public.

The revision involves:

- making minor amendments to clarify the Legislature’s intent;
- rewriting provisions so that they are clear, consistent, gender-neutral and avoid long, dense sentences;
- renumbering provisions to eliminate both gaps in numbering because of repealed sections and section numbers involving decimals (e.g., section 5.1);
- re-organizing the order of parts, divisions and sections; and
- updating and correcting cross-references and grammar.

The purpose of the statute revision process is not to make changes to the law or policy reflected in the legislation. The statute revision process precludes Legislative Counsel from making any substantive changes to legislation. Any policy issues identified during the review process must be addressed through separate amendments in the Legislature.

6. DISCUSSION

WorkSafeBC’s Policy, Regulation and Research Division (“PRRD”) has prepared a revised Assessment Manual reflecting the statute revisions. These changes are all housekeeping in nature, meaning there is no change in the substance of the applicable law or policy.

WorkSafeBC’s senior executive member responsible for policy development is authorized by WorkSafeBC’s Board of Directors (“BOD”) to unilaterally make certain housekeeping amendments to published policy documents. However, given the far-reaching impact of the anticipated statute revision and consequential policy amendments, the PRRD is publishing the draft revised Assessment Manual reflecting the statute revisions for external information and consultation. It is attached as Appendix ‘A’.

The draft revised Assessment Manual reflects the BOD’s policies as they read March 27, 2019. If any policies are added or removed from the Assessment Manual before the legislative changes come into effect, the PRRD will reflect these amendments in the consequential policy revision.

During the course of preparing the draft revised Assessment Manual, the PRRD identified a few areas requiring more in-depth analysis to determine whether further policy development beyond simple housekeeping is required to reflect the statutory revision. These issues will be dealt with separately and further consultation undertaken, if policy change beyond housekeeping is considered necessary.”

IV. ORGANIZATION POSITION:

CUPE agrees in part to some of the proposed changes. The changes that are not agreed to are discussed below in Section V.

V. REASONS FOR ORGANIZATION POSITION:

The following are CUPE’s primary concerns and arguments regarding the proposed changes. The following are the most significant examples of substantive changes and general issues that need to be addressed. The WCB stated that the changes were housekeeping and not substantive in nature as per:

“5. BACKGROUND:”

“The purpose of the statute revision process is not to make changes to the law or policy reflected in the legislation. The statute revision process precludes Legislative Counsel from making any substantive changes to legislation. Any policy issues identified during the review process must be addressed through separate amendments in the Legislature.

6. DISCUSSION

WorkSafeBC’s Policy, Regulation and Research Division (“PRRD”) has prepared a revised Assessment Manual reflecting the statute revisions. These changes are all housekeeping in nature, meaning there is no change in the substance of the applicable law or policy.”

V.I. General Concerns - Definitions:

There is a need for consistency in terms of certain terms and definitions. The following terms require a consistent definition between Assessments, Prevention and Compensation:

- Principal
- Contractor
- Sub-contractor
- Labour Contractor

This is in reference to following areas of the Assessment Manual, for example (not an exhaustive list):

- Coverage under Act – Descriptions of Terms: AP1-1-1
- Coverage under Act – ITEM: AP1-1-3 Distinguishing Between Employment Relationships and Relationships Between Independent Firms: AP1-1-3(2)(h)(page 2 of 5)
- Coverage under Act – Labour Contractors: AP1-1-7
- Contractor Liability: AP5-258-1

The definitions in the Assessment Manual at AP1-1-1 are not contained in Section 1 – Definitions of the OHS Regulations⁵ nor are they contained in the OHS Regulation Guidelines⁶ or Part 1 – Definitions of the Act⁷.

If these definitions are going to be added to the other areas of law, Regulation, Guidelines, etc, CUPE asks for an additional Consultation requesting stakeholder feedback on these definitions. CUPE, and worker advocates, have concerns regarding these definitions.

V.II. Experience Rating: AP5-247-1 (page 1 of 7):

The issue is the term “establish” which is not the same as the term “impose”.

⁵ See <https://www.worksafebc.com/en/law-policy/occupational-health-safety/searchable-ohs-regulation/ohs-regulation/part-01-definitions>

⁶ See <https://www.worksafebc.com/en/law-policy/occupational-health-safety/searchable-ohs-regulation/ohs-guidelines/guidelines-part-01#FB8AE98BAD0142D793845A46D8B8F91D>

⁷ See http://www.bclaws.ca/civix/document/id/lc/statreg/96492_01#section1

The proposed language states:

2. THE ACT

Section 42**247 (in part)**:

- (1)** The Board must establish subclassifications, differentials and proportions in the rates as between the different kinds of employment in the same class, as may be **the Board** considered just, ~~and where~~
- (2)** ~~If~~ **if** the Board ~~thinks~~ **considers that** a particular industry or plant is ~~shown to be so~~ **such** circumstanced or conducted that the hazard or cost of compensation differs from the average of the class or subclass to which the industry or plant is assigned, the Board
 - (a)** ~~must confer or impose on that industry or plant~~ **establish** a special rate, differential or assessment **for that industry or plant** to correspond with the relative hazard or cost of compensation of ~~that~~ **the** industry or plant, and
 - (b)** ~~for that~~ **the** purpose **referred to in paragraph (a)**, may also adopt a system of experience rating.

January 1, 2013 **[TBD]**

AP1-42**5-247-1**
Page 1 of 7

As per several dictionary references, there is a difference between the two terms in question:

“Establish”⁸

“(1) To settle firmly, to fix unalterably; as to establish justice, which is the avowed object of the constitution.

(2) To make or form; as to establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies, which evidently does not mean that these laws shall be unalterably established as justice.

⁸ See <https://thelawdictionary.org/establish/>

(3) To found, to create, to regulate; as: “Congress shall have power to establish post-roads and post- offices.”

(4) To found, recognize, confirm, or admit; as: “Congress shall make no law respecting an establishment of religion.”

(5) To create, to ratify, or confirm; as: “We, the people,” etc., “do ordain and establish this constitution.” 1 Story, Const. J 454. And see Dickey v. Turnpike Co., 7 Dana (Ky.) 125; Ware v. U. S., 4 Wall. 632, 18 L. Ed. 389;D. S. v. Smith, 4 N. J. Law, 33. Establish ordinarily means to settle certainly, or fix permanently, what was before uncertain, doubtful, or disputed. Smith v. Forrest, 49 N. H. 230.” (Emphasis added)

CUPE recognizes that there are conflicting definitions for “establish”. One definition states:

“To settle firmly, to fix unalterably” or “settle certainly, or fix permanently, what was before uncertain, doubtful, or disputed”

The second states:

“to create, to regulate”

Does the WCB intend to have the language mean that there will be a mandatory, firmly settled special rate or there will merely be a creation and regulation of the special rate, differential or assessment? In comparison, impose means:

“Impose”⁹

“to place a tax or a levy or a burden on a person.”

The current wording refers to the levying of a special rate, differential or assessment on employers, for example.

Whichever term(s) is used requires a footnote with a specific definition to avoid confusion, especially if there are appeals.

VI.III Disclosure of Assessment Information: AP8-349-1 (page 3 of 4):

The issue is the term “responsible for” which is not the same as the term “oversees”.

⁹ See <https://thelawdictionary.org/impose/>

The proposed language states:

PRACTICE

The Board's FIPP Office ~~is responsible for~~ **oversees** the Board's ~~application of~~ **organizational compliance with FIPPA**. Generally, if disclosure is granted in the normal course of business, it need not be referred to the FIPP Office. The department that holds the information can usually decide whether information is of a type that can be released in the normal course of business. In any case where information cannot clearly be released under the normal course of business, the matter is referred to the FIPP Office.

Requests within the Assessment Department for disclosure of the experience rated assessment rate of an individual firm, the total assessment charged to a firm, and the total claims costs charged to a firm for assessment purposes must be directed to the Manager, Assessment Policy.

~~Requestors can also be referred directly to the FIPP Office. Such requests should be in writing and directed to the Freedom of Information Coordinator.~~

Under section 75 of *FIPPA*, a fee may be charged where more than three hours is required to locate and retrieve a record of which disclosure has been requested.

July 2, 2004 **[TBD]**

AP1-958-349-1
Page 3 of 4

As per several dictionary references:

"Responsible"^{10, 11}

"To say that a person is "responsible" means that he is able to pay a sum for which he is or may become liable, or to discharge an obligation which he may be under. Farley v. Day. 20 N. H. 531; People v. Kent, 100 111. 655, 43 N. E. 700; Com. v. Mitchell. 82 Pa. 349. A promise to be "responsible" for the contract of another is a guaranty rather than a suretyship. Bickel v. Auner, 9 Phila. (Pa.) 499." (Emphasis added)

And,

"to answer for an act done, and to repair any injury it may have caused." (Emphasis added)

¹⁰ See <https://thelawdictionary.org/responsible/>

¹¹ See <https://thelawdictionary.org/responsibility/>

“Oversees” (Oversee)¹²

“2a: INSPECT, EXAMINE *oversees* all new machinery

b: to watch over and direct (an undertaking, a group of workers, etc.) in order to ensure a satisfactory outcome or performance : SUPERVISE” (Emphasis added)

The WCB’s Freedom of Information and Protection of Privacy Office¹³ should “answer for an act done” and “discharge an obligation” (being “responsible” for) as opposed to merely “watch over and direct” (“oversees”). This would make it more consistent with other agencies. The Office of the Information & Privacy Commissioner (BC) states:

“Established in 1993, the Office of the Information and Privacy Commissioner provides independent oversight and enforcement of BC's access and privacy laws...”¹⁴ (Emphasis added)

The Office of the Information and Privacy Commissioner provides oversight and enforcement. While the WCB may argue that “oversight” is the same as “oversees”, the Office of the Information and Privacy Commissioner also provides “enforcement” which is very different than “oversees” and more akin to being “responsible for” as per the current wording. The WCB should be consistent with the Office of the Information and Privacy Commissioner. This is supported by the *Freedom of Information and Protection of Privacy Act*,¹⁵ Part: Purposes of the Act, Section (2)(1)(a), which states:

“Purposes of this Act

2 (1)The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by

(a)giving the public a right of access to records,

(b)giving individuals a right of access to, and a right to request correction of, personal information about themselves,

(c)specifying limited exceptions to the rights of access,

(d)preventing the unauthorized collection, use or disclosure of personal information by public bodies, and

(e)providing for an independent review of decisions made under this Act.”
(Emphasis added)

Overseeing the FIPP obligations does not make the WCB any more accountable; it is a dilution and weakening of the current language and incompatible with the Office of the Information and Privacy

¹² See <https://www.merriam-webster.com/dictionary/oversee>

¹³ See <https://www.worksafebc.com/en/contact-us/departments-and-services/fipp-office>

¹⁴ See <https://www.oipc.bc.ca/about/about-us/>

¹⁵ See http://www.bclaws.ca/Recon/document/ID/freeside/96165_01#section2

Commissioner’s (BC) and the WCB’s Freedom of Information and Protection of Privacy Office stated functions, namely:

“Our office handles Freedom of Information requests and ensures that we protect your privacy.”^{16, 17}

Figure 1:

ACCESS TO INFORMATION AND PROTECTION OF PRIVACY AT WORKSAFEBC

WHEN AND HOW YOU CAN ACCESS INFORMATION FROM WORKSAFEBC



WORKING TO MAKE A DIFFERENCE
worksafebc.com

The key purposes of the *Freedom of Information and Protection of Privacy Act* (FIPPA) are to increase government accountability and protect personal privacy by:

- Giving the public a right of access to records
- Giving individuals a right of access to, and a right to request correction of, personal information about themselves
- Specifying limited exceptions to the rights of access
- Preventing the unauthorized collection, use, or disclosure of personal information by public bodies, and
- Providing for an independent review of decisions made under the FIPPA

EXCEPTIONS

The FIPPA recognizes that there are situations when information should not be released. WorkSafeBC must refuse to disclose a record if:

- It reveals cabinet confidences (limit of 15 years)
- Disclosure is harmful to business interests of a third party (such as trade secrets)
- Disclosure is harmful to personal privacy

All other exceptions are discretionary. WorkSafeBC decides whether to release the information by determining if:

- The record reveals advice and recommendations developed by or for a public body or a minister
- The record contains legal advice that is subject to solicitor/client privilege
- Disclosure is harmful to law enforcement
- Disclosure is harmful to the financial or economic interests of WorkSafeBC or another public body
- Disclosure is harmful to individual or public safety
- The information will be published or released within 60 days

THE PUBLIC INTEREST

There may be certain circumstances when the public interest overrides the above exceptions. For instance, where there is a serious environmental, health, or safety hazard, the FIPPA requires that WorkSafeBC disclose this, whether or not a formal request for information has been made.

YOUR PRIVACY

An important principle of the FIPPA is that personal information held by public bodies such as WorkSafeBC should be protected from unauthorized collection, use, and disclosure.

Restrictions on the collection of personal information

Under the FIPPA, WorkSafeBC cannot collect personal information unless it is authorized to do so. Subject to some exceptions, personal information must be collected from the individual directly. When personal information is used, WorkSafeBC must take reasonable steps to ensure that it is accurate.

Right of access

You have a right to access your own information held by WorkSafeBC, except in limited circumstances.

Restrictions on the use and disclosure of personal information

WorkSafeBC cannot use or disclose personal information except as permitted in the FIPPA. Generally, personal information can be used only for the purpose for which it was collected, for consistent purpose, or with your consent. Personal information may be used for research purposes, within strict guidelines.

When do I ask for information under the FIPPA?

First contact the department you think has the information. If the department cannot provide you with what you need in our normal course of business, you then have the option of filing a formal FIPP request for information through WorkSafeBC’s Freedom of Information and Protection of Privacy Office (see address below).

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¹⁶ See <https://www.worksafebc.com/en/contact-us/departments-and-services/fipp-office>

¹⁷ See <https://www.worksafebc.com/en/about-us/fairness-privacy/protection-of-privacy>

Where can I find more information?
 A directory of government records is available at your local library and in provincial and municipal government offices to help you locate the type of information you want. This directory includes an index of WorkSafeBC records.

As a worker with a WorkSafeBC claim, how do I make a formal request for my personal information contained in WorkSafeBC records?
 If you'd like a copy of your WorkSafeBC claim file, complete a Request for Disclosure form (25M13) available online at WorkSafeBC.com. Or send a written request specifying your name, claim number, address, and telephone number to WorkSafeBC Disclosures (see address below).

While all of a claimant's personal information is usually in the WorkSafeBC claim file, sometimes there are other WorkSafeBC records that contain personal information. To get these records, send your written request (specifying your name, claim number, address, and telephone number) to the WorkSafeBC FIPP Office.

How do other people, such as employers, relatives of deceased workers, and union representatives file a formal FIPP request for information?
 A request must be in writing and be sufficiently detailed to enable an experienced WorkSafeBC employee to locate the record. The request may be submitted in a letter or by filling out a Freedom of Information request form. WorkSafeBC staff in the FIPP Office will help you clarify your request.

How long does it take to get a response?
 With few exceptions, the time limit within which WorkSafeBC must respond to properly formulated requests is 30 business days.

How do I ask for correction of my own information?
 You should first contact the WorkSafeBC department that holds the record directly. If there is any question about the accuracy of the changes or if the manager declines to make a change, you have the right to ask for correction of your own information by writing to the WorkSafeBC FIPP Office. State clearly what the error is, how you want it corrected, and, if possible, where the error occurs.

How do I file a privacy complaint?
 If you think your privacy has been violated, you may, at your discretion, send your complaint to the WorkSafeBC FIPP Office, or to the Office of the Information and Privacy Commissioner.

CONTACT INFORMATION
WorkSafeBC FIPP Office
 PO Box 2310 Stn Terminal, Vancouver BC V6B 3W5
 Phone 604 279-8171 / fax 604 279-7401

WorkSafeBC Disclosures Department
 PO Box 4700 Stn Terminal, Vancouver BC V6B 1J1
 Fax 604 276-3102

Office of the Information and Privacy Commissioner
 Online www.oipc.bc.ca
 Toll-free phone 1 800 663-7867

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The WCB is required to abide by FOIPPA as per its' own statement in Figure 2 – Privacy Statement of WorkSafeBC:¹⁸

¹⁸ See <https://www.worksafebc.com/en/resources/about-us/guides/privacy-statement?lang=en>

Figure 2:



Privacy Statement of WorkSafeBC

WorkSafeBC (the Workers' Compensation Board of B.C.) is a public body subject to the Freedom of Information and Protection of Privacy Act ("the FIPPA").

Privacy

Privacy is defined as the rights and obligations of individuals and organizations with respect to the collection, use, retention, and disclosure of personal information.

Personal information

Personal information is defined as recorded information about an identifiable individual. WorkSafeBC is responsible for personal information in its custody and under its control.

Collection

WorkSafeBC collects personal information pursuant to its mandate and authority under the Workers Compensation Act ("the WCA"). WorkSafeBC limits the collection of personal information to what is needed for its business purposes.

Where practically possible, personal information will be collected directly from the individual the information is about.

WorkSafeBC makes every reasonable effort to ensure that the personal information collected is accurate and complete.

Use of personal information

WorkSafeBC ensures that personal information in its custody and under its control is used only for the purpose for which that information was obtained or compiled or for a use consistent with that purpose. Information may also be used for other purposes with the individual's consent or as authorized by the FIPPA.

Retention of personal information

The FIPPA provides that personal information in the custody or under the control of a public body used to make a decision affecting the person be retained for at least one year so that the affected individual has a reasonable opportunity to obtain access to that personal information. WorkSafeBC meets this requirement and keeps most personal information, like claim file records, for a longer period of time as appropriate.

Whichever term(s) is used requires a footnote with a specific definition to avoid confusion, especially if there are appeals.

V.IV. Collection of Assessments: AP5-264-1(2)(6):

There is a minor spelling mistake "ma" versus "may".

VI. CONCLUSION:

The WCB stated in the Discussion Paper that the proposed changes were only housekeeping in nature, however, there appears to be a substantial change to multiple areas. There also needs to be more definitions and consistency of definitions across areas of Policy and Regulation.

CUPE reserves the right to comment on how these changes apply to the OHS Regulations, related Policies, the *Act*, Policy (RSCM), Guidelines and the Practice Directives.

Respectfully submitted,



Tom McKenna
CUPE National Health & Safety Representative and WCB Advocacy

CC: Paul Faoro, President, CUPE BC Division
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