

POLICY BRIEF WORKERS' COMPENSATION

JUNE, 2019

The On the Move Partnership (OTM) has been conducting the first comprehensive study of the spectrum of employment-related mobility in Canada from extended daily commuting to long distance travel to work, including across provincial or even national boundaries, and the related absence from home.

OTM includes more than 50 researchers from 17 disciplines and 22 universities across Canada and internationally, working with more than 30 community partners.

OTM is based at the SafetyNet Centre for Occupational Health & Safety Research at Memorial University and is funded by the Social Sciences and Humanities Research Council of Canada, InnovateNL (Government of Newfoundland and Labrador), the Canada Foundation for Innovation, and numerous universities and partners.

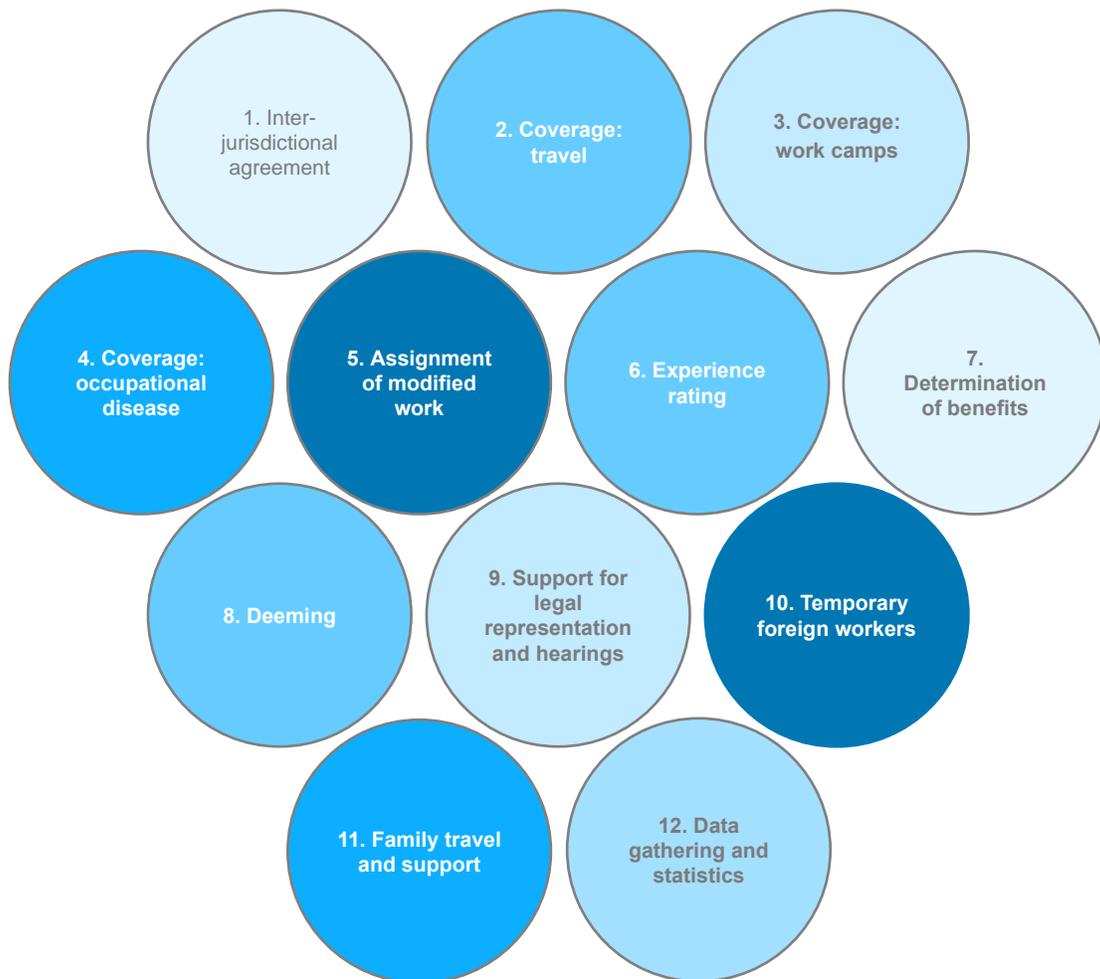
BACKGROUND

Many On the Move Partnership (OTM) studies have identified implications of their research for policy: government policies and programs at the federal, provincial, regional, or local municipality level, as well as policy issues for employers and unions at the organizational/corporate level. Policy briefs have been prepared on a number of topics, often cutting across multiple aspects of OTM research.

This policy brief identifies key policy recommendations related to workers' compensation coverage issues that affect mobile workers.

The policy brief will be of interest to federal and provincial governments and to industry, labour and those who serve and support mobile workers and their families. It is based primarily on work done by researchers and partners in six provincial jurisdictions: British Columbia, Alberta, Ontario, Québec, Nova Scotia, and Newfoundland and Labrador.

POLICY RECOMMENDATIONS TO ALL REGULATORS RESPONSIBLE FOR WORKERS' COMPENSATION LAW AND POLICY



1. Inter-jurisdictional agreement

The inter-jurisdictional agreement currently fails to protect all workers injured at work in Canada and this is particularly problematic for workers suffering from occupational disease. It would be helpful to examine the strengths and weaknesses of the agreement in light of our research in order to improve protections so that workers do not fall through the cracks because they are inter-provincially mobile. Aside from the issue of occupational disease, specific provisions in each province determine which province has jurisdiction on a given case, but these provisions are asymmetrical rather than mirroring the provisions in neighbouring provinces, which leads to the possibility that no province has jurisdiction on an injury to a given individual caused by work in Canada. Nothing indicates that this is the intention of the regulators, so there is room for improvement with regard to this highly technical question that leads to individual cases of injustice and unnecessary litigation.

2. Coverage: travel

Policy and practice in the application of coverage for injury occurring during travel is uneven within some jurisdictions. For example, the scope of coverage for business travel is broader than the scope of coverage for workers who travel to remote worksites on a regular basis. Those injured during business travel have better coverage, and we suggest that the scope of coverage granted to business travellers be extended to other mobile workers travelling to remote worksites within Canada.

Policy and practice in the application of coverage for injury occurring during various categories of travel is uneven between jurisdictions. While each province is sovereign, we suggest that the disparities between policies and practices in different provinces be brought to the attention of those responsible for policy so that they have the opportunity to revisit their policies in light of practices in other provinces.

3. Coverage: work camps

Policy and legislation relating to coverage of injuries incurred in work camps and housing provided by employers is uneven, and in some cases regulatory protections are non-existent. This has repercussions for both workers' compensation and occupational health and safety. While each province is sovereign, we suggest that the disparities between policies and practices in different provinces be brought to the attention of those responsible for policy so that they have to opportunity to revisit their policies in light of practices in other provinces.

4. Coverage: occupational disease

Coverage for occupational disease involving exposures in several provinces is unclear in some cases, and it appears that exposures in other provinces are sometimes ignored when determining causation. This leads to unfairness when workers work in different provinces or in more than one country. Attention should be placed on the mechanisms by which exposures to toxic substances, noise and other conditions that lead to occupational disease are considered in adjudication of disease claims in order to ensure equitable application of the regulatory and policy protections regardless of the mobility of the workers.

5. Assignment of modified work

When mobile workers are injured they have fewer opportunities to undertake light work when the work site is distant from their home. Policy should be explicitly adapted to the mobile workforce in order to ensure equitable protection in the application of return to work policies so that the worker who returns to his or her home community, be it in the same province, elsewhere in Canada, or in another country, is not penalized because he or she wishes to recover at home. Early and safe return to work practices need to be adapted so that the mobile workforce is not forced to choose between their right to benefits and their right to return home during the acute phase of their injury.

6. Experience rating

Experience rating rules should be adapted so as to avoid penalizing employers for allowing their mobile employees to return home to heal during the period of acute disability.

7. Determination of benefits

In determining benefits some provinces have maximum insurable earnings while others don't. When the worker lives in a province with low maximum insurable earnings and works in a province where maximum insurable earnings are high or not capped, the option to accept compensation in the home province forces the worker to be compensated at a far lower rate than that provided in the province where injury occurred and compensation grossly underestimates the worker's earning capacity. This appears to be inequitable, given that a mobile worker living within the same province as the workplace will not be penalized in the same way if he chooses to return home after injury.

8. Deeming

After an injured worker has recovered, determination of salary replacement benefits for the loss of earning capacity, in most provinces, is based on a calculation that considers earnings at the time of the injury that are then compared to deemed potential earnings after recovery, and if the deemed earnings are lower the worker has the right to a recurrent indemnity based on the difference between the two. If an injury occurs in a jurisdiction where wages are higher than in the worker's home province, the issue for the mobile workforce is to establish whether, in determining the residual earning capacity of the worker, the compensation authorities should look to the labour market where the injury occurred or the labour market where the worker resides. In determining benefits in the context of the deeming process, many provinces consider the labour market in which the injury occurs in order to determine the residual earning capacity of the worker living outside the jurisdiction. This leads to workers being deemed capable of earning a salary that would be impossible to earn, given their limitations, in their home province or their home country. Some appeal decisions have refused to apply this principle and have determined earning capacity in light of the local labour market in which the worker lives. This better reflects the real residual earning capacity of the worker and we recommend that policy be revised in all jurisdictions to follow this lead. The problem is particularly acute in the case of temporary foreign workers who cannot aspire to obtain a visa to work in Canada if they are disabled, but it is also problematic for workers from provinces where wages are lower than in the province in which they are injured.

9. Support for legal representation and hearings

Better protection for workers living outside the province in which they are injured would include improved access to legal support from specialists in workers' compensation and would include the possibility of participating in hearings in person, with economic support to ensure participation.

10. Temporary foreign workers

Temporary foreign workers have the right to workers' compensation even if they return to their home countries, however, they may not be sufficiently aware of their rights, and doctors treating these workers in Canada do not always know that they have the right to workers' compensation. Our study has found that organizations such as the Office of the Worker Advisor, in those provinces in which that organization exists, have very uneven knowledge of the existence of temporary foreign workers in their provinces. Some are experts in the representation of temporary foreign workers while others have no knowledge of their existence and do not provide any outreach activities for that population. Given the presence of temporary foreign workers across Canada, it is important that the information as to their presence be provided to provincial regulators, and that those regulators and services that are responsible for workers' compensation proactively seek to support these workers both for the

prevention of injury and in their compensation claims. Some provinces have been addressing this issue while others have not.

11. Family travel and support

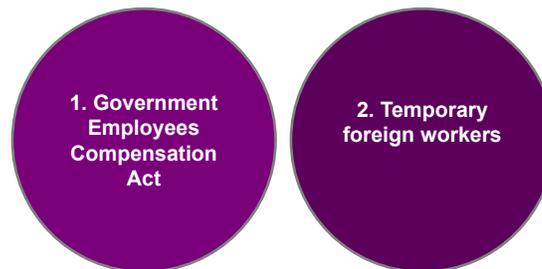
Some compensation boards have exemplary practices in supporting spouses who need to take time off to look after an injured worker, and there are cases we heard of where spouses were brought in by the compensation board to stay with the injured worker during treatment or, in the case of a fatality, a spouse was brought to the province in which the fatality occurred to better understand what had happened. These practices were not universal, and it would be desirable that best practices be shared so that all workers and their families who need this type of support receive the same support.

12. Data gathering and statistics

We found it difficult to obtain statistics on interprovincial workers and on temporary foreign workers who had sustained compensable injuries in a given jurisdiction. Data gathering with regard to these populations does not appear to be consistent between compensation boards and it would be desirable to have improved data relating to these workers in terms of number of claims by workers domiciled outside the province (accepted or denied), duration of benefits, medical and rehabilitation costs, etc.



POLICY RECOMMENDATIONS TO THE FEDERAL REGULATOR



1. Government Employees Compensation Act

Mobile workers whose claims are governed by the *Government Employees Compensation Act* are sometimes disadvantaged because their exposures to contaminants, noise, or other factors that lead to disability or disease occur in different provinces and the provincial adjudicators fail to adequately consider exposures in the other provinces. This should be more effectively addressed in legislation, policy or by multi-lateral agreements in order to ensure that these workers are not disadvantaged as compared to mobile workers whose exposures all occur in the same province.

2. Temporary foreign workers

The authorities responsible for the various temporary foreign worker programs should ensure that workers be made aware of their rights to workers' compensation and that the relevant agencies in the provinces be made aware of the presence of temporary foreign workers in those provinces and of the importance of ensuring they are informed of their rights and supported in their claims by the relevant provincial agencies and professionals, including doctors who provide treatment for injured workers.



POLICY RECOMMENDATIONS TO PROVINCIAL REGULATORS

Temporary foreign workers

Quebec has recently adopted legislation requiring permits for recruiters of temporary foreign workers and requiring permits for temporary employment agencies as well. Among our findings is that when temporary employment agencies place workers in a province outside of the province in which the agency is based, the workers' compensation claim, if they are injured, takes on new levels of complexity. To avoid such problems it would be advisable that permits granted to temporary employment agencies and recruiters of temporary foreign workers be restricted to placement of workers within the jurisdiction where the agency has a permit. This could apply to other provinces that have also enacted legislation requiring a permit to operate a temporary employment agency or a recruitment agency for temporary foreign workers.

POLICY RECOMMENDATIONS TO UNIONS

Language in collective agreements

Coverage under workers' compensation legislation requires that, to be compensable, an injury arise out of and/or in the course of employment (depending on the province). Injuries related to transit or to living conditions are often the subject of disputes and in order to determine coverage the compensation boards will look at a number of factors including provisions in the contract or the collective agreement regarding remuneration during travel, for example. When negotiating such provisions unions should bear in mind their impact on eventual coverage under workers' compensation legislation, and to ensure coverage they should specify that travel time is working time, waiting time during split shifts is working time, and they should determine when living conditions in facilities either provided by the employer or paid for by the employer are considered to be working conditions.

POLICY RECOMMENDATIONS TO EMPLOYERS

Language in collective agreements and employment contracts

Coverage under workers' compensation legislation requires that, to be compensable, an injury arise out of and/or in the course of employment (depending on the province). Injuries related to transit or to living conditions are often the subject of disputes and in order to determine coverage the compensation boards will look at a number of factors including provisions in the contract or the collective agreement regarding remuneration during travel, for example. When negotiating such provisions employers should bear in mind their impact on eventual tort liability if coverage under workers' compensation legislation is denied. To ensure protection from tort liability via coverage under workers' compensation schemes they should specify that travel time is working time, waiting time during split shifts is working time, and they should determine when living conditions in facilities either provided by the employer or paid for by the employer are deemed to be considered as working conditions.



OVERVIEW OF METHODS USED IN THE RESEARCH

We focused on six provincial jurisdictions: British Columbia, Alberta, Ontario, Québec, Nova Scotia, and Newfoundland and Labrador. These jurisdictions were chosen among the 14 different regulatory regimes in Canada because they include the three largest jurisdictions, British Columbia, Ontario and Québec, and they also include two jurisdictions that are likely to import workers from out of province (British Columbia and Alberta), as well as two of the most important providers of inter-provincial labour, Newfoundland and Labrador, and Nova Scotia.

Using classic legal analysis of regulatory frameworks governing occupational health and safety and workers' compensation in these jurisdictions, and the associated administrative tribunal decisions, we identified key categories of regulatory provisions that either present challenges when applied to the mobile workforce or that appear to address their needs.

Parallel to the legal research, we explored issues related to the application of the regulatory provisions through a qualitative study based on key informant interviews in the same jurisdictions, a study undertaken in two stages. At the outset, in order to identify the issues to be studied, we held a two day consultation meeting in Toronto in June 2013, where we invited five key informants specialized in Canadian occupational health and safety and workers' compensation law and policy to discuss the challenges, remedies and success stories related to the protection of the occupational health and safety of mobile workers, to help us to frame the parameters of the study. The proceedings were audio-recorded and consensus as to the main issues identified in the discussion was obtained by noting these on screen as the discussion unfolded.

This consultation was complemented by analysis of the literature and consultation of legislative frameworks in the selected Canadian provinces in order to illustrate the issues raised. The workers' compensation research first focused on analysis of legislation, policy and administrative tribunal decisions involving mobile workers in the six provinces of interest. We then explored the priority issues in both occupational health and safety and workers' compensation with regulators and other key informants in order to identify challenges and solutions in light of the literature and the results of our interviews. In total twenty key informant interviews took place between 2015-2018, and several were group interviews. Key informants included representatives of employers and unions, practicing lawyers, medical practitioners, as well as senior staff from workers' compensation boards and regulators responsible for occupational health and safety for a total of 47 people and 20 interviews.

Aside from the interviews, some organizations preferred to answer questions in writing. The process was iterative, and we revisited some jurisdictions during the course of the study in light of regulatory changes and changes in government that affected the legislation and policy we were studying. Further information was gathered from observing public meetings with specialists in workers' compensation or work disability prevention, particularly with regard to workers' compensation and return to work.



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Policy Synthesis – Workers Compensation prepared by:

Katherine Lippel Canada Research Chair in Occupational Health and Safety
Law, University of Ottawa, Civil Law Section; Policy lead, On
the Move Partnership

