LC 675
2015 Regular Session
10700-016
8/21/14 (CJC/ps)

D R A F T

SUMMARY

Modifies circumstances under which injured state worker has right to reinstatement or reemployment with employer at injury.

Declares emergency, effective on passage.

A BILL FOR AN ACT

Relating to employment of injured workers; amending ORS 659A.052; and declaring an emergency.

Be It Enacted by the People of the State of Oregon:

SECTION 1. ORS 659A.052 is amended to read:

659A.052. (1) For the purpose of administration of ORS 659A.043 and 659A.046**, if an injured worker has been determined to be medically stationary and**:

(a) [*An*] **The** injured worker **was** employed at the time of injury by any agency in the legislative department of the government of this state**, the injured worker** shall have the right to reinstatement or reemployment at any available and suitable position in any agency in the legislative department.

(b) [*An*] **The** injured worker **was** employed at the time of injury by any agency in the judicial department of the government of this state**, the injured worker** shall have the right to reinstatement or reemployment at any available and suitable position in any agency in the judicial department.

(c) [*An*] **The** injured worker **was** employed at the time of injury by any agency of the executive or administrative department of the government of this state**, the injured worker** shall have the right to reinstatement or re-

NOTE: Matter in **boldfaced** type in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted. New sections are in **boldfaced** type.

employment at any available and suitable position in any agency of the executive or administrative department.

(2) Notwithstanding ORS 659A.043 and 659A.046, an injured worker referred to in subsection (1) of this section has preference for entry level and light duty assignments with agencies described in subsection (1) of this section. The legislative and judicial departments of the government of this state may adopt rules to define entry level and light duty assignments. The Administrator of the Personnel Division by rule shall adopt a process to identify entry level and light duty assignments within the executive or administrative department of the government of this state.

(3) In accordance with any applicable provision of ORS chapter 240, the Administrator of the Personnel Division shall compel compliance with this section and ORS 659A.043 and 659A.046 by any agency of the executive or administrative department of the government of this state.

(4) As used in this section, "medically stationary" has the meaning given that term in ORS 656.005.

<u>SECTION 2.</u> This 2015 Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 2015 Act takes effect on its passage.

2015 Agency Legislative Concept

Agency #/Concept #: LC 0675
Placeholder? ☐ Yes ☒ No
Date: 9/16/2014

Agency: **Dept. of Administrative Services**
Division/Program: Enterprise Goods and Services, Risk Management
Concept Subject or Title: Reinstatement and Reemployment of Injured Workers

Concept Contact Person: Penny Evans **E-Mail:** Penny.EVANS@oregon.gov **Phone:** 503-373-1585
Agency Legislative Coordinator: Barry Pack **E-Mail:** barry.PACK@oregon.gov **Phone:** 503-378-2168

1. Problem (Completely describe the problem you propose to solve.)

Following the passage of HB 2778 in the 2009 session of Legislature, ORS 659A.052 was enacted. These Bureau of Labor and Industry statutes apply only to state agencies, pertain to the reinstatement and reemployment of injured state employees in other agencies and are in addition to the statutes for reinstatement and reemployment of injured workers that apply to all employers.

In response to the new statutes the Department of Administrative Services of the state of Oregon promulgated administrative rules detailing the process for state agencies to use when reinstating and reemploying injured workers. The rules direct state agencies to provide placement of an injured worker in another state agency when the agency is unable to provide permanent work that meets the injured worker's permanent restrictions. In practice, these permanent placement rules are implemented when the injured worker becomes medically stationary and all permanent restrictions are known.

In 2013 the state received notice of an injured worker discrimination lawsuit for not temporarily reemploying a worker in a different state agency. The Department of Justice determined the state's practice was vulnerable because the statutes do not use medically stationary as a distinguishing characteristic for looking outside the agency at injury for the temporary reinstatement and reemployment of injured workers.

By not enacting the changes to statute represented in this concept, the state faces the potential for employment discrimination claims every time it does not look statewide for temporary placements of injured workers when implementing its reinstatement and reemployment procedures.

2. Proposed Solution (Completely describe what the concept does to fix the problem. Do not include proposed statute changes here.)

The concept clarifies that a state worker must be medically stationary before being reemployed in a different agency. When deemed medically stationary by their attending physician, the full suite of permanent restrictions for an injured is known and becomes the best time for the state to explore permanent suitable and available placement. This concept:

- Reduces undue hardship on employees while in their healing process.
- Eliminates the need to change current practices in order to reduce the risk of lawsuit by injured workers.
- Eliminates the need to expand job placement staff and logistical resources to identify and place injured workers in temporary available and suitable work in other agencies.

3. Proposed Changes to Statute (Please attach your best attempt at proposing changes to statute to accomplish your goal; however, Legislative Counsel may draft alternate language.)

The proposed Legislative Counsel amendment of ORS 659A.052 is attached.

4. Has this been introduced in a prior session? ☒ No ☐ Yes Years(s) Bill#(s)

Does this amend current law or programs? ☐ No ☒ Yes (Specify) Amends Bureau of Labor and Industries laws while retaining current reinstatement and reemployment administrative practices for state workers.

Is this related to a legal decision? ☒ No ☐ Yes (Case cite, AGO No. date, etc. – *attach copies*) Relates to a legal opinion provided during a lawsuit.

5. Stakeholders and/or Other Affected Agencies who are Aware of Your Concept

Agency:	Contact Person:	Phone:
Workers' Comp Division, DCBS	Cara Filsinger	503-947-7582
Bureau of Labor & Industries	Anna Braun	971-673-0786
Management-Labor Advisory Committee	Theresa Van Winkle	503-947-7867
Department of Justice	Sylvia Van Dyke	503-947-4600
Legislative Counsel	Charles Cheek	503-986-1243

LC 677
2015 Regular Session
10700-017
9/11/14 (CJC/ps)

D R A F T

SUMMARY

Includes acceptance of settlement for vocational benefits as event that terminates injured worker's right to reemployment or reinstatement.

A BILL FOR AN ACT

Relating to termination of injured worker's right to return to employment with employer at injury; creating new provisions; and amending ORS 659A.043 and 659A.046.

Be It Enacted by the People of the State of Oregon:

SECTION 1. ORS 659A.043 is amended to read:

659A.043. (1) A worker who has sustained a compensable injury shall be reinstated by the worker's employer to the worker's former position of employment upon demand for such reinstatement, if the position exists and is available and the worker is not disabled from performing the duties of such position. A worker's former position is available even if that position has been filled by a replacement while the injured worker was absent. If the former position is not available, the worker shall be reinstated in any other existing position that is vacant and suitable. A certificate by the attending physician or a nurse practitioner authorized to provide compensable medical services under ORS 656.245 that the physician or nurse practitioner approves the worker's return to the worker's regular employment or other suitable employment shall be prima facie evidence that the worker is able to perform such duties.

(2) Such right of reemployment shall be subject to the provisions for

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seniority rights and other employment restrictions contained in a valid collective bargaining agreement between the employer and a representative of the employer's employees.

(3) Notwithstanding subsection (1) of this section:

(a) The right to reinstatement to the worker's former position under this section terminates when whichever of the following events first occurs:

(A) A medical determination by the attending physician or, after an appeal of such determination to a medical arbiter or panel of medical arbiters pursuant to ORS chapter 656, has been made that the worker cannot return to the former position of employment.

(B) The worker is eligible **for** and participates in vocational assistance under ORS 656.340 **or has accepted compensation for vocational assistance benefits in a settlement agreement in lieu of participating in vocational assistance**.

(C) The worker accepts suitable employment with another employer after becoming medically stationary.

(D) The worker refuses a bona fide offer from the employer of light duty or modified employment that is suitable prior to becoming medically stationary.

(E) Seven days elapse from the date that the worker is notified by the insurer or self-insured employer by certified mail that the worker's attending physician or a nurse practitioner authorized to provide compensable medical services under ORS 656.245 has released the worker for employment unless the worker requests reinstatement within that time period.

(F) Three years elapse from the date of injury.

(b) The right to reinstatement under this section does not apply to:

(A) A worker hired on a temporary basis as a replacement for an injured worker.

(B) A seasonal worker employed to perform less than six months' work in a calendar year.

(C) A worker whose employment at the time of injury resulted from re-

ferral from a hiring hall operating pursuant to a collective bargaining agreement.

(D) A worker whose employer employs 20 or fewer workers at the time of the worker's injury and at the time of the worker's demand for reinstatement.

(4) Notwithstanding ORS 659A.165, a worker who refuses an offer of employment under subsection (3)(a)(D) of this section and who otherwise is entitled to family leave under ORS 659A.150 to 659A.186:

(a) Automatically commences a period of family leave under ORS 659A.150 to 659A.186 upon refusing the offer of employment; and

(b) Need not give additional written or oral notice to the employer that the employee is commencing a period of family leave.

(5) Any violation of this section is an unlawful employment practice.

SECTION 2. ORS 659A.046 is amended to read:

659A.046. (1) A worker who has sustained a compensable injury and is disabled from performing the duties of the worker's former regular employment shall, upon demand, be reemployed by the worker's employer at employment which is available and suitable.

(2) A certificate of the worker's attending physician or a nurse practitioner authorized to provide compensable medical services under ORS 656.245 that the worker is able to perform described types of work shall be prima facie evidence of such ability.

(3) Notwithstanding subsection (1) of this section, the right to reemployment under this section terminates when whichever of the following events first occurs:

(a) The worker cannot return to reemployment at any position with the employer either by determination of the attending physician or a nurse practitioner authorized to provide compensable medical services under ORS 656.245 or upon appeal of that determination, by determination of a medical arbiter or panel of medical arbiters pursuant to ORS chapter 656.

(b) The worker is eligible **for** and participates in vocational assistance

under ORS 656.340 **or has accepted compensation for vocational assistance benefits in a settlement agreement in lieu of participating in vocational assistance**.

(c) The worker accepts suitable employment with another employer after becoming medically stationary.

(d) The worker refuses a bona fide offer from the employer of light duty or modified employment that is suitable prior to becoming medically stationary.

(e) Seven days elapse from the date that the worker is notified by the insurer or self-insured employer by certified mail that the worker's attending physician or a nurse practitioner authorized to provide compensable medical services under ORS 656.245 has released the worker for reemployment unless the worker requests reemployment within that time period.

(f) Three years elapse from the date of injury.

(4) Such right of reemployment shall be subject to the provisions for seniority rights and other employment restrictions contained in a valid collective bargaining agreement between the employer and a representative of the employer's employees.

(5) Notwithstanding ORS 659A.165, a worker who refuses an offer of employment under subsection (3)(d) of this section and who otherwise is entitled to family leave under ORS 659A.150 to 659A.186:

(a) Automatically commences a period of family leave under ORS 659A.150 to 659A.186 upon refusing the offer of employment; and

(b) Need not give additional written or oral notice to the employer that the employee is commencing a period of family leave.

(6) Any violation of this section is an unlawful employment practice.

(7) This section applies only to employers who employ six or more persons.

SECTION 3. The amendments to ORS 659A.043 and 659A.046 by sections 1 and 2 of this 2015 Act apply to claims in which an injured worker is eligible for vocational assistance benefits filed on or after

the effective date of this 2015 Act.

2015 Agency Legislative Concept

Agency #/Concept #: LC 0677
Placeholder? ☐ Yes ☒ No
Date: 9/16/14

Agency: **Dept. of Administrative Services**
Division/Program: Enterprise Goods and Services, Risk Management
Concept Subject or Title: Reinstatement and Reemployment of Injured Workers

Concept Contact Person: Penny Evans **E-Mail:** Penny.EVANS@oregon.gov **Phone:** 503-373-1585
Agency Legislative Coordinator: Barry Pack **E-Mail:** barry.PACK@oregon.gov **Phone:** 503-378-2168

1. Problem (Completely describe the problem you propose to solve.)

Bureau of Labor and Industries statutes ORS 659A.043 through 659A.046 provide injured workers with the right to a job by their employer when they are released to work by a physician. These are known as reinstatement and reemployment rights for injured workers. These statutes also provide a list of situations that will terminate an injured worker's reinstatement and reemployment rights. One of the listed terminating situations is when an injured worker is eligible for and participates in a vocational assistance program.

A similar situation to this termination of rights exists when an injured worker is eligible for vocational assistance benefits and receives compensation for it in a settlement in lieu of participation in a program. However, this situation does not terminate an injured workers' reinstatement and reemployment rights because it lacks the participation component stated in the statute.

The state of Oregon is one of a handful of employers in this state who pay all workers' compensation costs for the first ten years of a claim including all vocational assistance benefit costs and all settlement costs. By not enacting the proposed changes to statute, the state continues to pay twice for vocational assistance retraining benefits for many of these injured workers – once as a settlement cost that includes vocational assistance compensation and again for on-the-job training when the worker is reemployed in another position in state government in compliance with reinstatement and reemployment statutes.

2. Proposed Solution (Completely describe what the concept does to fix the problem. Do not include proposed statute changes here.)

The proposed amendment eliminates the potential of some employers' double exposure to the costs of injured worker retraining. The proposed language recognizes the injured worker's right to accept a settlement that includes the value of retraining and allows them to repurpose that money how they deem necessary for their situation. The proposed amendment at the same time recognizes the employer's contribution as fulfilling their obligation to the injured worker and ends their reinstatement and reemployment rights with that employer.

3. Proposed Changes to Statute (Please attach your best attempt at proposing changes to statute to accomplish your goal; however, Legislative Counsel may draft alternate language.)

The proposed Legislative Counsel amendment of ORS 659A.043 through 659A.046 is attached.

4. Has this been introduced in a prior session? ☒ No ☐ Yes Years(s) Bill#(s)

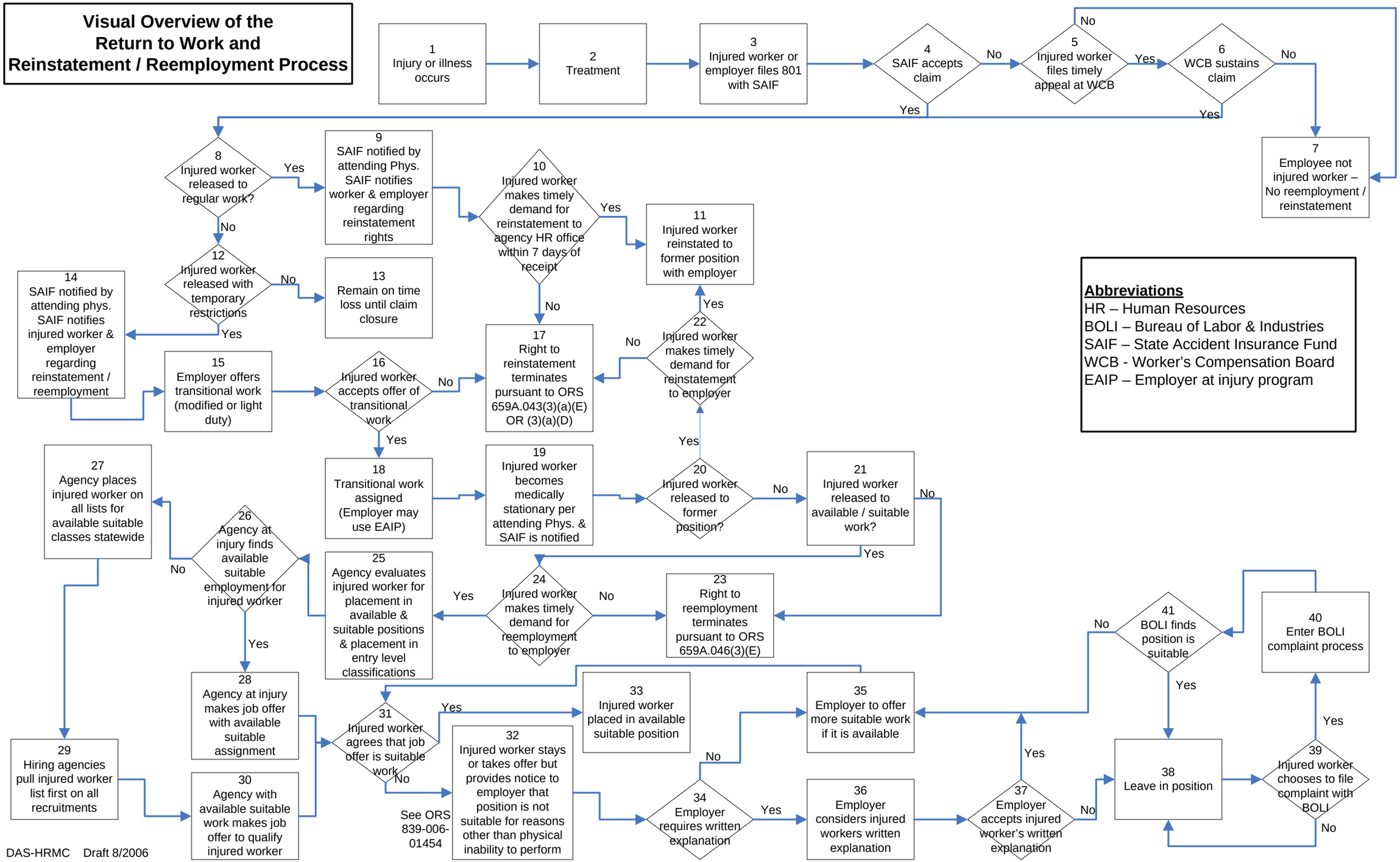
Does this amend current law or programs? ☐ No ☒ Yes (Specify) Amends Bureau of Labor and Industry Laws.

Is this related to a legal decision? ☒ No ☐ Yes (Case cite, AGO No. date, etc. – *attach copies*)

5. Stakeholders and/or Other Affected Agencies who are Aware of Your Concept

Agency:	Contact Person:	Phone:
Workers' Comp Division, DCBS	Cara Filsinger	503-947-7582
Bureau of Labor & Industries	Anna Braun	971-673-0786
Management-Labor Advisory Committee	Theresa Van Winkle	503-945-7867
Department of Justice	Sylvia Van Dyke	503-947-4600
Legislative Counsel	Charles Cheek	503-986-1243

Visual Overview of the Return to Work and Reinstatement / Reemployment Process



Abbreviations

HR – Human Resources
BOLI – Bureau of Labor & Industries
SAIF – State Accident Insurance Fund
WCB - Worker's Compensation Board
EAIP – Employer at injury program

DAS-HRMC Draft 8/2006