

I V . The Obligation to Rehire: Issues, Impacts, and Alternatives

A common emphasis in all state workers' compensation systems is the importance of returning the injured employee to work as soon as medically feasible. There is general consensus that this is a shared responsibility among all system participants, as prompt return to work reduces medical and indemnity costs, deters litigation, and increases the likelihood the injured worker will maintain gainful employment for the long term. Thus, early return to work is the desired outcome for employers, injured workers, carriers, and consumers, who ultimately bear the cost of workers' compensation in the price of goods and services.

Florida's comprehensive 1993 workers' compensation reform legislation included a variety of provisions designed to encourage return to work. This chapter focuses on one small section of the statute that has proved to be highly controversial: the obligation to rehire (s. 440.15(6), F.S.). This provision is an attempt to facilitate return to work by penalizing large employers who fail to reinstate or rehire their injured employees. The brief subsection of the statute mandating the obligation to rehire is presented in its entirety below:

(6) OBLIGATION TO REHIRE. If the employer has not in good faith made available to the employee, within a 100-mile radius of the employee's residence, work appropriate to the employee's physical limitations within 30 days after the carrier notifies the employer of maximum medical improvement and the employee's physical limitations, the employer shall pay to the division for deposit into the Workers' Compensation Administration Trust Fund a fine

of \$250 for every \$5,000 of the employer's workers' compensation premium or payroll, not to exceed \$2,000 per violation, as the division requires by rule. The employer is not subject to this subsection if the employee is receiving permanent total disability benefits or if the employer has 50 or fewer employees.

As of August 2000, almost seven years since the passage of the 1993 reform legislation, there is still no division rule in effect for administering the obligation to rehire (OTR) mandate, and no penalty has ever been assessed against an employer for violating the statute. The division has received 21 referrals from injured workers claiming OTR violations, one of which was withdrawn. Eleven referrals have been investigated; ten of these cases are awaiting penalty determination, while the employer was deemed to have met the OTR requirements in one case. The remaining referrals are still under investigation. Controversy regarding interpretation and implementation of the OTR arose during public workshops held early in 1994 and has mounted ever since, thwarting efforts to construct a rule reflecting consensus among affected parties. In response to Division Director Charles Williams' concern that no progress has been made toward implementing this statutory provision, attempts to generate a rule were renewed this year. Proposed rule 38F-57 was promulgated in the February 4, 2000, edition of the *Florida Administrative Weekly*, with an announcement of a rule-development workshop to be held at the division on February 29, 2000. Discussion at this well-attended workshop both confirmed and supplemented earlier controversies still surrounding the intent, interpretation, and implementation of this por-

tion of the statute. The obstacles impeding development of a rule may signal a real need for legislative reconsideration of the OTR.

The present chapter discusses the major controversies that have stalled rule development since the reforms and examines the arguments opposing the newly proposed rule. Stepping back from the immediate debate, it presents employment and return-to-work data to determine if there is an objective basis for targeting employers with 51 or more employees, while excluding those with 50 or fewer employees. Finally, it offers suggestions for re-examining the obligation to rehire provision in light of available data and both long-standing and recent controversies.

Initial Controversies

In the flurry of activity surrounding rule development in the months after the reforms were passed on November 29, 1993, the OTR provision was somewhat obscured by other legislation requiring urgent action by the division. Alluded to only briefly at two public workshops held in 1994, four problematic areas identified by participants in early discussions of this provision were:

- Data issues: access, time lags, definition, and confidentiality
- Residence issues
- Employer identity
- “Good faith” efforts

Data Issues: Access, Time Lags, Definition, and Confidentiality

The transcript from a public workshop on Rule Chapter 38F-24 sponsored by the division’s Bureau of Monitoring and Audit on April 4, 1994, records a momentary reference by division management to several potential problems associated with assessing fines

against certain employers who fail to rehire their injured workers. Curiously, there is no record of audience response when these problems were cited. These difficulties centered on the logistics for determining which employers fit the 51-or-more-employees criterion. First, in order to routinely categorize employers by number of employees, the division would need ready access to an up-to-date, accurate database containing employment records for all employers in the state for a designated time period. The Unemployment Insurance (UI) database, which contains quarterly wage data for approximately 98% of Florida employers,¹ was suggested as a plausible resource. The division representative also pointed out that allowable time delays in reporting injuries to the division might aggravate data access problems, as the UI wage data may no longer be stored and/or accessible to the division by the time the employment level needs to be determined.

Defining the precise criteria for calculating employment levels was held to introduce a variety of complex problems, as well. For example, early rule discussions that took place even before the workshop apparently centered on narrowing the pool of targeted employers to those with “consistent” employment of at least 51 employees for “90 percent of the regular work days or [one] calendar year immediately preceding the date of accident.”² Clearly, in the early months following passage of the reforms, the statute’s lack of clarity in defining the target employers was already inviting confusion.

These data-related issues initially raised at the April 4, 1994, workshop are still relevant today. In fact, data access for determining employment levels from the UI system may become even more complicated due to legislation passed in the 2000 legislative session that transferred UI tax functions to the Department of Revenue and related data systems to the Department of Management Services. This action modifies the data exchange between UI and the Division of Workers’ Compensation (DWC) from intra- to inter-agency. Technological and organizational

changes that will arise in connection with implementing this new legislation are currently unclear, and their impact on the exchange of data between the UI data system and DWC is unknown.

The insertion of the term “consistent” in early rule discussions attempting to define employment levels spoke to the reality of volatile employment that is typical among many Florida employers, whose business is often seasonal due to tourism, agricultural production cycles, or other factors characteristic of Florida’s economy. Even employers with relatively stable employment levels could experience an unforeseen downturn due to an overall recession or a local shutdown caused by weather problems ranging from droughts to hurricanes. By contrast, employers with historical patterns of employment below 51 employees might hire several hundred workers for a specific assignment over a period up to a year. Additionally, determining a defensible time period during which employment is expected to be consistent introduces more confusion. For example, is the division charged with assessing fines on employers who have 51 or more employees during the month/quarter of the workplace injury, for a certain time period leading up to and including the injury date, for a specific period including and subsequent to the injury date, or for some combination of these time intervals? Should exceptions be made for employers with employment levels historically below 51 employees who temporarily increase staff for a short period of time? If so, on what basis are these employers required to provide long-term job security to a worker hired only temporarily?

Regardless of the time parameters chosen and exclusions allowed, acceptable lag times between the injury itself and the reporting of the injury to the division, exacerbated by backlogs in data entry or technical system problems, could translate to substantial delays between the occurrence of workplace injury and the assessment of a fine to the employer, as alluded to at the workshop. Indeed, carriers delinquent in reporting could unintentionally play a role in deferring penalty assessments against some of their cov-

ered employers! The greater the time lag between infraction and penalty, the less likely the penalty would function as a deterrent to behavior.

Even if the data accessibility, definition, and time lag hurdles were overcome, however, using UI data to determine employer assessability for OTR penalties raises yet another issue not addressed in early discussions: confidentiality. Although divisions within a single government agency or among agencies are often permitted to share data, subject to certain restrictions, the ultimate purpose for accessing the data cannot violate underlying confidentiality laws. In this instance, using employer-supplied data for the express purpose of enforcing an obligation to rehire is arguably illegal.

Residence Issues

The transcript from a subsequent workshop on the same rule documents discussion of ambiguity in the wording of the phrase “within a 100-mile radius of the employee’s residence.” In contrast to the lack of response to data issues raised at the earlier workshop, the audience at the April 22, 1994, session entered into a dialogue on conceivable, diverse interpretations of legislative intent on this issue. One attendee asserted that the OTR provision seems to imply that the employee’s residence and the job site are fairly close to each other; often, this is not the case. Migrant workers, for example, travel from one portion of the state to another, or even among several states. Other types of workers may be brought in from other states for a temporary assignment. Several participants felt that the legislature may have intended for the term “residence” to include a temporary residence for the duration of the job. A suggestion that the statutory language be modified to include “unless otherwise agreed to by the parties” was offered. Another attendee felt the word “residence” should be replaced by “job site,” while yet another felt clarification was needed to include the phrase “temporary residence” to cover such instances.³

Employer Identity

A participant at the April 22, 1994, workshop brought up the lack of clarity in the provision in stating whether the work to be “made available to the employee” had to necessarily be with the employer of injury. There was disagreement among attendees as to whether the statute implied that employers must rehire the injured worker themselves or whether it allowed for appropriate work from another employer.

Good Faith

The term “good faith” occurs frequently throughout the statute and is both a central point of controversy and an invitation to litigation due to its ambiguity and lack of specificity. Without a clear definition or method of measurement, “good faith” efforts are subject to a plethora of disparate interpretations. A great deal of the frustration inherent in rule development centers on clarifying what this terms means within the context of a statutory provision and how it can objectively be measured to avoid litigation.

Outcome of Early Controversies

Lack of consensus and fervent opposition stymied rule promulgation during the first 18 months after the reform legislation was passed. When Rule Chapter 38F-24 was published and became effective on May 14, 1995, it included no reference to the OTR—mute testimony to the inability to reach consensus on the complex issues emerging from such a terse portion of the statute. It should be noted that then Governor Lawton Chiles issued two executive orders in 1995 designed to achieve his goal of abolishing 50% of all government rules over a two-year period in order to alleviate the burden on Florida employers.⁴ Every agency was hesitant to introduce new rules in this political atmosphere. This probably contributed in some measure to the dormant status of the OTR issue for several years.

Recent Controversies

Rule Chapter 38F-57, proposed earlier this year, represented the division’s first formal attempt to implement the OTR provision. Addressing early controversies, the rule seeks to specify the meaning of “good faith” and to assess penalties on employers with “consistent” employment of 51 or more employees. “Consistency” is specified as having this level of employment for 90% of the “regular work days for [one] calendar year immediately preceding the date of accident.”⁵ For new employers, the time period begins with the starting date of the business. Five subsections delineate the choice of criteria employers must follow to avoid penalty for failing to make a “good faith” effort to rehire the injured worker. The employer must do *one* of the following tasks within 30 days of notification from the carrier that the employee has reached maximum medical improvement (MMI) and notice of the employee’s physical limitations:

- Offer, in writing, a job consistent with the employee’s physical limitations
- Refer the employee to at least five other employers who have stated in writing that they have work available consistent with the employee’s physical limitations
- Provide the employee with a full range of employment services from a licensed company for a period of at least 30 days
- Determine that the employee has secured “suitable gainful employment” elsewhere
- Request and receive agreement for full re-employment services from the carrier⁶

The proposed rule instructs the DWC to impose a fine up to \$2,000⁷ when employers do not meet at least one of the five criteria. Exceptions are allowed only when there is evidence of employee misconduct, carelessness, negligence, or willful violation of employer rules. Finally, the rule gives carriers 15 days to notify the employer of the employee’s reaching MMI and any physical limitations that persist be-

yond that point.

The audience at the February 29, 2000, rule-development hearing hosted by the Bureau of Rehabilitation and Medical Service (BRMS) included employers, attorneys, and representatives from labor, business associations, and the Workers' Compensation Oversight Board. New issues raised at this public workshop held just weeks after the proposed rule was published, plus other concerns mentioned in recent interviews with division management and staff, include the following:

- Burden to employers
- Provision of employment services
- Fairness
- Penalties inconsistent with legislative intent
- Rehire period
- Use of the term "rehire"
- Settlement conditions contrary to OTR
- Invitations to litigation

Burden to Employers

Several participants at the February workshop were in agreement regarding the burden to employers in complying with the terms of the proposed rule. Their arguments focused on the fact that many employers subject to the OTR provision hire only workers with specific skills, such as painters, electricians, or mechanics. Because they have limited staff for administrative work, or they contract out for such services, compliance with the rule would require these employers, in effect, to create an unneeded position that would be an ongoing cost burden. Even when the employee can return to the same work in due time, having to hold a critical position open for months, even a year or longer, poses tremendous difficulties for employers. Several workshop participants felt that the terms for dismissing an employee, thereby relieving the employer of the OTR, were too strict; there are other, less stringent but valid, reasons for dismissing an employee—such as the injured worker's inability or un-

willingness to perform assigned tasks. None of these scenarios was viewed as conducive to creating a business-friendly atmosphere for current and potential employers in Florida. Employers in attendance felt there were already too many diverse and confusing laws burdening employers without adding another one.

Provision of Employment Services

Employers and employer representatives at the February workshop strongly objected to having to take on the role of an employment service by seeking and securing five written statements from other employers with suitable employment opportunities. This liaison/referral arrangement made them extremely uncomfortable, putting them in the awkward position of seeking help from competitors or business associates. It would also be time-consuming, requiring expertise they neither have nor choose to acquire. One member of the audience wondered what would happen if five potential employers could not be found, despite a concerted effort on the part of the employer. Of even greater concern to another attendee was the employers' potential exposure to liability if they referred employees who subsequently committed a crime while working for the new employer.

Fairness

One workshop participant felt that most large employers already try to bring workers back after workplace injury and are being unfairly targeted for government regulation. Penalizing employers up to \$2,000 would also impose a far greater economic burden on employers with just over 50 employees than for those with 500 or more employees, which raises another equity issue in regard to fine assessment. These smaller employers may also have more difficulty bearing the cost of creating modified-duty jobs or holding positions open for injured workers, due to a more limited and less diversified staff. Acquiring referrals to other employers would be a greater burden for these

employers, as well. Beyond the target group, however, there was the question raised by another attendee as to why employers with less than 51 employees were not subject to the same statutory mandate, particularly the large pool of Florida employers with less than 10 employees.

Penalties Inconsistent with Legislative Intent

Workshop attendees pointed out that, if the intent of the legislators was to assist injured workers in returning to and maintaining gainful employment, assessing penalties on employers would not necessarily help to attain this worthy goal. The employer may simply accept the fine, which in itself would not help the worker return to work.

Rehire Period

Workshop participants wondered if, after accommodating the physical limitations of the injured worker, the employer was obligated to provide continuous employment for the life of the employee, even if problems arise that are unrelated to the injury. The statute makes no mention of the length of the rehire period, opening the door for additional confusion and potential litigation.

Use of the Term “Rehire”

Objections were raised at the workshop about the word “rehire,” as it implies that the worker was fired or laid off after the workplace injury. Employees returning to their jobs are not “rehired” but continuing their former employment. This lack of precision has fueled arguments that the OTR provision applies only to workers whose employment was officially terminated after injury. There was general consensus at this year’s workshop that the legislative intent was to simply bring injured workers back to their former jobs or to modified jobs with the employer of injury when-

ever possible.

Settlement Conditions Contrary to OTR

The surge of settlements ushered in by the reforms raised another issue. Some Judges of Compensation Claims (JCCs) have signed settlement orders that include a general release agreement stipulating that the employee *not* return to work with the employer of injury. This arrangement may be contrary to the OTR provision if the employer has more than 50 employees. One attendee sought clarification as to whether these washouts would officially absolve the employer’s obligation to comply with the OTR mandate, while negating any and all penalties already assessed for noncompliance. If this is the case, the OTR becomes substantially diluted in a workers’ compensation system flooded by settlements.

Pertinent to this issue, the division recently took a small random sample of settlement orders to determine the prevalence of three types of items deemed inappropriate: general release agreements, Americans with Disabilities Act (ADA) waivers, and confidentiality clauses. General release agreements run counter to the fundamental intent of workers’ compensation—namely, to facilitate return to work—as well as possibly violating the OTR, depending on the size of the employer. ADA waivers override federal statute, while confidentiality clauses, in which the workers’ divulging the terms of the settlement results in forfeiture of the award, are not grounded in statute. Thus, all three items are matters over which JCCs have no authority. Covering six-month intervals from January 1992-July 1998 order dates, results showed that 15% of January 1993 washout orders included one or more of these three types of inappropriate provisions; this percentage rose to 20% for both July 1995 and January 1996 orders and to 25% for July 1998 orders.⁸ Despite the small sample size, the persistence of these items over time is demonstrated. In another sample of 380 settlement orders signed after March 1, 2000, 90 orders (23.7%) included general release agreements,

6 orders (1.6%) included ADA waivers, and 9 orders (2.3%) included confidentiality clauses.⁹ Thus, of the three types of inappropriate items included in settlement orders, the general release agreement is by far the most prevalent among recent orders sampled.

Other Invitations to Litigation

In addition to issues already mentioned that open the door to litigation, two other possibly contentious areas were mentioned by workshop attendees. First, how will employer objections to the OTR be formally handled? This had not yet been considered. A union representative voiced a second concern that collective bargaining agreements may be in conflict with the OTR. Since the federal government set a precedent in determining that collective bargaining agreements supersede the ADA, this attendee felt it highly likely they will decide employees get a “better deal” with unions than with the OTR. Another attendee appeared to speak for many in asserting that there is more potential for litigation over the OTR than over late payments to injured workers.

Current Status

In August of this year, responsibility for enforcement of the OTR was transferred from BRMS to the Bureau of Compliance (BOC), but the two bureaus continue to work together in handling referrals and defining a process for fully implementing the provision once an administrative rule is promulgated. The process currently flows as follows: Complaints about OTR violations are initially handled by BRMS, who contacts the employer, carrier, and injured worker and attempts to facilitate an amicable resolution. An informal fact-finding inquiry follows, and during this time BRMS offers rehabilitation services to the injured worker to facilitate return to work. BRMS then submits a detailed report of their findings to BOC for their review in making a determination of whether the OTR

requirement had been met. If BOC determines that additional information is required in their decision-making process, trained investigators will conduct additional inquiries with appropriate parties in the case. After all pertinent facts in the case are gathered and a determination is made, trained investigators who affirm violations of the OTR will issue penalty assessment orders when warranted, whereupon BOC would assume responsibility for enforcing the order. In situations where there is no infraction of the OTR Rule, the case will be closed and a written notice would be provided to the affected parties. The BOC is charged with reviewing the newly proposed rule and holding public workshops. There have been no additional public workshops since February 29, 2000, and none are planned for the immediate future.

A 1999 lawsuit attempted to force the division to make a rule for implementing the OTR. Division management is resolute that the OTR can be enforced without a rule and stands ready to testify as to the complex problems inherent in the current provision that have stalled rule development. In the meantime, however, Director Charles Williams is encouraging all parties involved to make an earnest attempt to develop a rule that is palatable, workable, and fair to employers, without inviting additional litigation in the workers’ compensation system. Whether the moral authority of the law, or the potential sanction of a relatively small fine, can induce any significant change in employer behavior, even if a rule can be established, is an open question. If consensus is once again unattainable, the division can provide the legislature with evidence of two conscientious attempts to develop a rule for implementing the OTR. The division takes no official position on repealing the OTR provision, although there are many advocates for repeal.

Data Analysis

To better assess the potential effectiveness of the OTR provision in fostering return to work, this

section introduces data profiling the general employment picture in Florida for 1994, a representative year, and examining return-to-work patterns for various employer groups according to the average number of employees over the course of a year. Employment data are derived from the ES202 employment and wage file for 1994. The ES202 stores data reported quarterly to the Florida Department of Labor and Employment Security by employers in the State of Florida who are covered by federal and state unemployment compensation (UC) laws. It records employer characteristics such as ownership—i.e., private versus several levels of government—number of units (locations), Standard Industrial Classification (SIC) Code, monthly counts of employees, and quarterly wages, along with the Federal Employer Identification Number (FEIN) of the employer. Return-to-work patterns are generated in the division using a methodology that matches workers' compensation claims to quarterly UC wage records to determine if a given injured worker resumed employment within the four-quarter period after the quarter of injury. If the worker's average quarterly earnings during this pe-

riod equal 80% or more of his/her pre-injury average quarterly earnings, the return to work is considered successful.¹⁰ For this report, 1994 employment data from the ES202 were matched on FEIN to return-to-work data for 1994 injuries to isolate return-to-work rates for employers who would have been impacted in the first year after the reforms if the OTR provision had been enforced.

Table B4.1 provides an overall picture of employment and wages in Florida for 1994, distributing employers by the business ownership classification. Ownership categories are listed in descending order according to the number of employers. Florida is clearly dominated by private employers, who represent over 99.5% of all employers, with four categories of government employers collectively comprising less than half a percent of all employers in the state. Notice that this distribution shifts when comparing the percentages of employees included in each ownership category. Over 85% of Florida workers are in the private sector. Local government employees represent 9.5%, and state government employees 3.28%,

Table B4.1

***Florida 1994 Employment and Wages
Distribution of Private and Government Sectors***

Ownership Category	# of Employers¹	% of All Employers	Estimated # of Employees²	% of All Employees	Total Wages	% of Total Wages
Private	371,621	99.54%	5,201,848	85.21%	\$114,660,597,100	82.43%
Local Government	1,198	0.32%	580,018	9.50%	\$15,438,784,137	11.10%
State Government	288	0.08%	200,454	3.28%	\$4,499,332,839	3.23%
Federal Government	237	0.06%	121,449	1.99%	\$4,467,731,013	3.21%
International Government	13	0.00%	804	0.01%	\$28,876,637	0.02%
Totals	373,357	100.00%	6,104,573	100.00%	\$139,095,321,726	100.00%

¹ # of Employers is a count of all ES202 records with reporting unit number = 0 (single units and master units of multi-units). Multiple records with the same UC account number are collapsed into one record. For the most part, these represent employers who are single units in one quarter and multi-units in another quarter over the course of the year. These employers are counted as multi-units.

² # of Employees is the sum of average employment for all employers. Average employment is computed by dividing total employment over 12 months by the number of months with employment > 0.

Source: Office of Labor Market Statistics, ES202 Employment and Wage File

of all workers, although their employers make up a mere .32% and .08%, respectively, of all employers. This comparison shows that local and state government include some of the larger employers. Wages generally correspond to the employee distribution, but local and federal government workers' aggregate wages are higher relative to employment levels than the private sector, which includes most minimum wage workers. Since federal employers are not subject to the Florida workers' compensation law, this category will be excluded from further analysis.

Table B4.2 distributes employer and employee counts for non-federal employers according to over-

all size groupings of "1-50" and "51+" employees, as the OTR provision applies only to the latter group. The "0" group includes employers who reported wages without employment or who had no employment for 1994. State government is the only ownership category with the majority of employers, close to 71%, in the "51+" group. Local government has a fairly even distribution between the two size groups, though smaller employers outnumber larger employers by 4.6 percentage points using this definition. Notice the stark difference in the private cohort, where employers with 51 or more employees comprised just 3.5% of all employers in 1994—the bulk of the 3.7% of all non-federal employers in this size group. This attests that

Table B4.2

Florida 1994 Non-Federal Employment by Size Group within Ownership Category

Ownership Size Group ¹	# of Employers	% of All Employers	Estimated # Employees	% of All Employees
Private	371,621	100.0%	5,201,848	100.0%
0	14,219	3.8%	0	0.0%
1-50	344,497	92.7%	1,973,788	37.9%
51 +	12,905	3.5%	3,228,060	62.1%
Local Gov't	1,198	100.0%	580,018	100.0%
0	1	0.1%	0	0.0%
1-50	626	52.3%	10,048	1.7%
51 +	571	47.7%	569,970	98.3%
State Gov't	288	100.0%	200,454	100.0%
0	2	0.7%	0	0.0%
1-50	83	28.8%	1,506	0.8%
51 +	203	70.5%	198,948	99.2%
International Gov't	13	100.0%	804	100.0%
0	0	0.0%	0	0.0%
1-50	8	61.5%	192	23.9%
51 +	5	38.5%	612	76.1%
Total Non-Federal	373,120	100.0%	5,983,124	100.0%
0	14,222	3.8%	0	0.0%
1-50	345,214	92.5%	1,985,534	33.2%
51 +	13,684	3.7%	3,997,590	66.8%

¹ The "0" size group includes employers who reported wages but no employment or who had no employment for 1994.

Source: Office of Labor Market Statistics, ES202 Employment and Wage File

the OTR provision does indeed apply to only a very small segment of Florida employers. Notice, however, that the 3.5% of private employers in the “51+” group includes just over 62% of the entire state workforce. More dramatically, almost 99% of local and state government employees may be impacted by the provision. The number of employees potentially affected may provide justification for limiting the OTR to this small segment of large employers—namely, it stands to impact two of every three (66.8%) workers in Florida, as shown in the last row, rightmost column of the table.

In order to examine the relative success of employees in getting back to work following injury, Table B4.3 displays counts of employers who had lost-time workers’ compensation claims for 1994 injuries and the total number of lost-time cases.¹¹ Once again, the data are organized into size groups within ownership categories. The narrow vertical shaded column serves to separate data related to employers on the left from data related to injury cases on the right. State government is excluded here because most of its 288 employers are grouped under a single FEIN—i.e., the State of Florida. Thus, individual employers could not be identified as the employer of injury via a match to the claims data and subsequently grouped by size. Fortunately, this grouping anomaly occurs only in state government; however, since this ownership category has the highest percentage (70.5%) of targeted employers (as seen above in Table B4.2), it will be important to establish a method of identifying the employer of injury in the state government sector for future analysis of the impact of the OTR.

Focusing on the columns on the left side of the vertical bar, notice that the second column of Table B4.3 shows that 21,777 private employers could be identified by FEIN as having at least one lost-time claim for a 1994 injury. The top percentage in column five shows that these private employers with lost-time claims represented just 5.9% of all 371,621 private employers. Consequently, almost 94% of private employers had no reported lost-time workers’ com-

pensation claims for 1994 injuries. Distributed by size, less than one-third (32.3%), or 7,035, of the 21,777 private employers of injury had 51 or more employees, as shown in the third column. Over twice as many (67.4%), or 14,686, private employers of injury were *not* subject to the OTR. Returning to column five, where the denominator shifts to all employers by size group, observe that that well over half of all private employers in Florida with 51 or more employees had reported lost-time injuries for 1994, a stark contrast to the mere 4.3% of employers with less than 51 employees. Had the OTR provision been stringently enforced for 1994 injuries, it could have impacted 54.5% of all Florida private employers with 51 or more employees, even though these 7,035 employers represented less than one-third of all private sector employers with reported lost-time injuries.

The columns to the right of the vertical bar display breakouts of the number of lost-time cases by ownership and employer size class. 59,105 lost-time injuries occurred in businesses owned by the 21,777 private employers of injury in 1994. Nearly two-thirds (65.2%) of these private sector injuries occurred in companies with over 50 employees. These 38,526 cases represent injured workers the OTR was intended to help return to work. Over one-third, or 20,427 injured workers, would not have been affected by the statutory provision. The rightmost column shows that, regardless of the size of the employer, only about 1% of Florida workers in the private sector experienced a lost-time injury in 1994.

In the local government sector, employers with 51 or more employees represent even higher percentages of employers of injury (77.7%) and of all employers (71.8%), while sustaining the lion’s share (97.9%) of lost-time injuries. The single large employer in the international government category had six lost-time claims for 1994. Due to its small size and a lack of clarity as to how many of these 13 employers are subject to the Florida statute at any given time, this category will be excluded from the remaining analysis.

Table B4.3

***Florida Employers with Lost-Time Cases
and Number of Lost-Time Cases in 1994
by Ownership and Size Group***

Ownership Size Group	# Employers with LT Cases ¹	Percentage Distribution of Employers with LT Cases	Total # Employers	Employers with LT Cases as a Percentage of All Employers	# LT Cases	Percentage Distribution of LT Cases	Estimated # Employees	Rate of LT Cases
Private	21,777	100.0%	371,621	5.9%	59,105	100.0%	5,201,848	1.1%
0	56	0.3%	14,219	0.4%	152	0.3%	0	-
1-50	14,686	67.4%	344,497	4.3%	20,427	34.6%	1,973,788	1.0%
51 +	7,035	32.3%	12,905	54.5%	38,526	65.2%	3,228,060	1.2%
Local Gov't	528	100.0%	1,198	44.1%	9,148	100.0%	580,018	1.6%
0	0	0.0%	1	0.0%	0	0.0%	0	-
1-50	118	22.3%	626	18.8%	194	2.1%	10,048	1.9%
51 +	410	77.7%	571	71.8%	8,954	97.9%	569,970	1.6%
International Gov't	1	100.0%	13	7.7%	6	100.0%	804	0.7%
0	0	0.0%	0	-	0	0.0%	0	-
1-50	0	0.0%	8	0.0%	0	0.0%	192	0.0%
51 +	1	100.0%	5	20.0%	6	100.0%	612	1.0%

¹ Only those employers matching on FEIN are included in these counts. The FEIN is missing on less than 1% of claims records and on 1.3% of ES202 records. Some non-matches may be due to data entry error.

Source: Office of Labor Market Statistics, ES202 Employment and Wage File, and Division of Workers' Compensation Claims File as of March 20, 2000.

In summary, Tables B4.1 - B4.3 revealed that in 1994:

- Over 99.5% of all employers and over 85% of all employees in Florida were in the private sector;
- Employers with 51 or more employees comprised just 3.7% of all non-federal employers but employed nearly 67% of the non-federal workforce;
- 54.5% of large private employers and 71.8% of local government employers with 51 or more employees experienced lost-time injuries;
- 65.2% of lost-time cases in the private sector and 97.9% of lost-time cases in local government occurred with employers subject to the OTR.

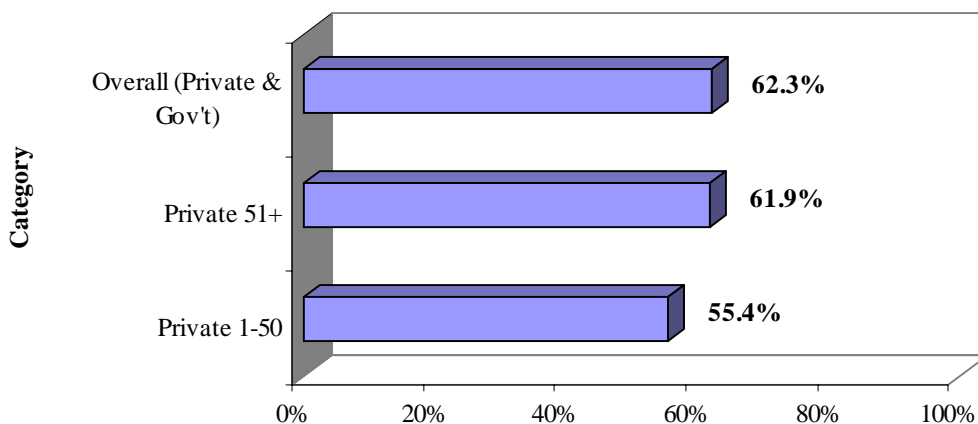
From these data, it may appear logical to conclude that an obligation to rehire provision specifically designating employers with 51 or more employees in

the private and local government sectors is a reasonable approach in that the majority of injured workers could potentially benefit, while only a very small proportion of employers would be subject to government regulation. However, data presented thus far show only where most lost-time injuries *occurred* in 1994. Determining return-to-work outcomes for those injured workers is crucial to judging the appropriateness of targeting these employers for regulation that implicitly assumes poor return-to-work outcomes.

Figure B4.1 displays the overall return-to-work rate for workers with reported 1994 lost-time injuries in the top bar. Precisely, this rate means that 62.3% of all Florida workers with 1994 injuries returned to work during the four-quarter period subsequent to the injury quarter and earned average quarterly wages equal to 80% or more of their pre-injury average quarterly wage. Below the overall rate, com-

Figure B4.1

Return to Work at 80% of Pre-Injury Wage: Overall 1994 Rates Compared to Rates for Two Private Sector Employer Size Groups



Percent of All Injured

Source: Office of Labor Market Statistics, ES202 Employment and Wage File; Division of Unemployment Compensation Wage Files; and Division of Workers' Compensation Claims File as of March 20, 2000

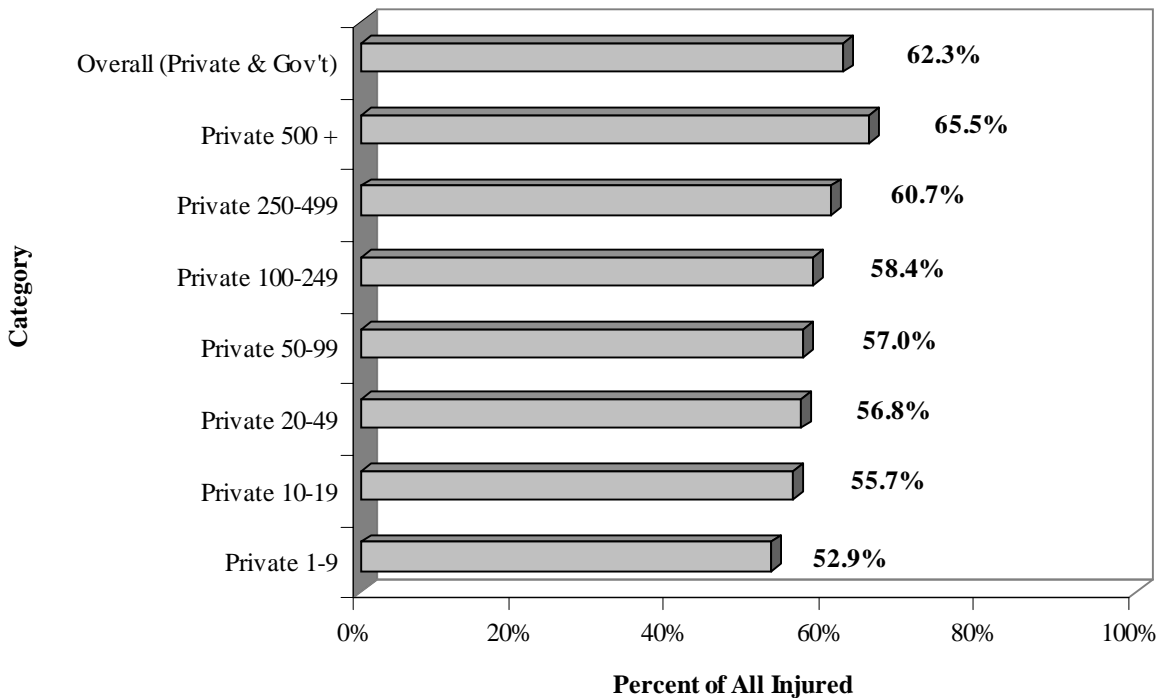
parable rates for private employers with 51 or more employees and 1-50 employees, respectively, are displayed. Workers injured at companies owned by large employers had a return-to-work rate of 61.9% by this definition, slightly below the overall rate, while workers injured at smaller businesses had a notably lower rate of 55.4%, compared to the overall rate. Thus, the rate for the large employer cohort was 6.5 percentage points higher than the rate for employers with less than 51 employees. Clearly, the private employers in the target group that would have been affected by enforcement of the OTR provision had a significantly higher return-to-work rate than the rest of private employers who would not have been subject to

the OTR at all.

Figure B4.2 takes the return-to-work analysis a step further by grouping private employers into seven discrete size categories to more effectively pinpoint employers with the lowest return rates. In this breakout, the largest employers with 500 or more employees had the highest return rate of 65.5%—3.2 percentage points above the overall average rate—and influenced the overall rate in a positive direction. Notice the drop of 4.8 percentage points for the next largest size group with 250-499 employees, followed by more gradual declines as the employer size decreases. Thus, the larger the size group, the higher the

Figure B4.2

***Return to Work at 80% of Pre-Injury Wage:
Overall 1994 Rates Compared to Rates for
Seven Private Sector Employer Size Groups***



Source: Office of Labor Market Statistics, ES202 Employment and Wage File; Division of Unemployment Compensation Wage Files; and Division of Workers' Compensation Claims File as of March 20, 2000

return-to-work rate for 1994 injuries in the private sector. The rates stabilized at 56-57% for the three size groups covering employment between 10 and 99.

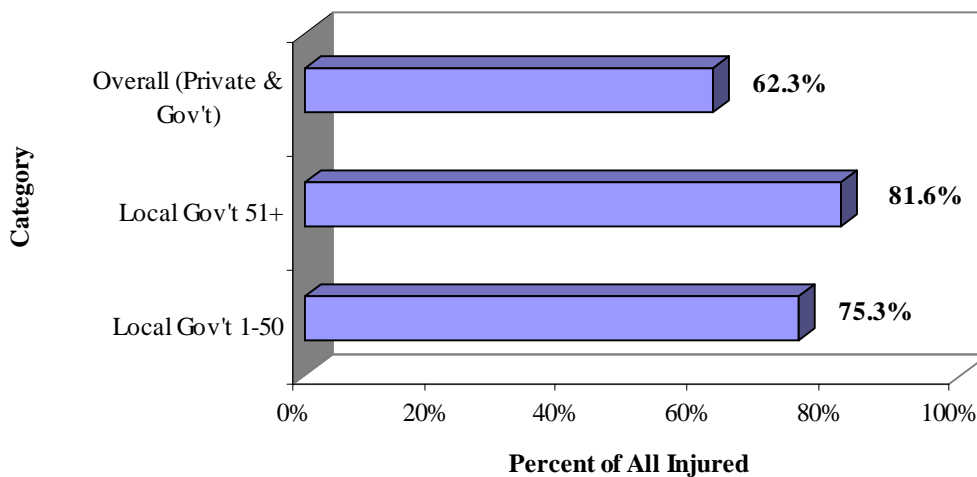
Recall that a participant at the February workshop questioned why the OTR did not apply to all employers, particularly the large pool of employers with less than 10 employees. The bottom bar in Figure B4.2 shows the lowest return-to-work rate of 52.9% for this group of small employers, which represented over 78% of all employers in 1994, or 292,322 of 373,357 Florida employers. Thus, close to four of every five employers in Florida did indeed have less than 10 employees. If this group were further subdivided to exclude the 208,823, or nearly 56%, of employers not subject to the workers' compensation law—namely, those employers with less than four employees¹²—the remaining 83,499, or over 22%, of employers with 4-9 employees registered a 53.4%

return-to-work rate. Undoubtedly, these employers would have encountered the greatest difficulty complying with the OTR if the provision were broadened to apply to all employers required to carry workers' compensation insurance, regardless of size.

Figures B4.3 and B4.4 present comparable data for the local government sector. Notice in Figure B4.3 that return-to-work rates were significantly higher for local government employers, regardless of the general size group, compared to the overall 62.3% rate, which is shaped by the dominant private sector. The large employer group's 81.6% rate outpaces the smaller group by 6.3 percentage points, mirroring the relative trend in the private sector between the two size groups. Six of the seven more discrete size groups in local government, portrayed in Figure B4.4, exceeded the overall rate, as well. Both of the largest size groups had rates of about 82%, with the 20-49

Figure B4.3

**Return to Work at 80% of Pre-Injury Wage:
Overall 1994 Rates Compared to Rates for
Two Local Government Employer Size Groups**



Source: Office of Labor Market Statistics, ES202 Employment and Wage File; Division of Unemployment Compensation Wage Files; and Division of Workers' Compensation Claims File as of March 20, 2000

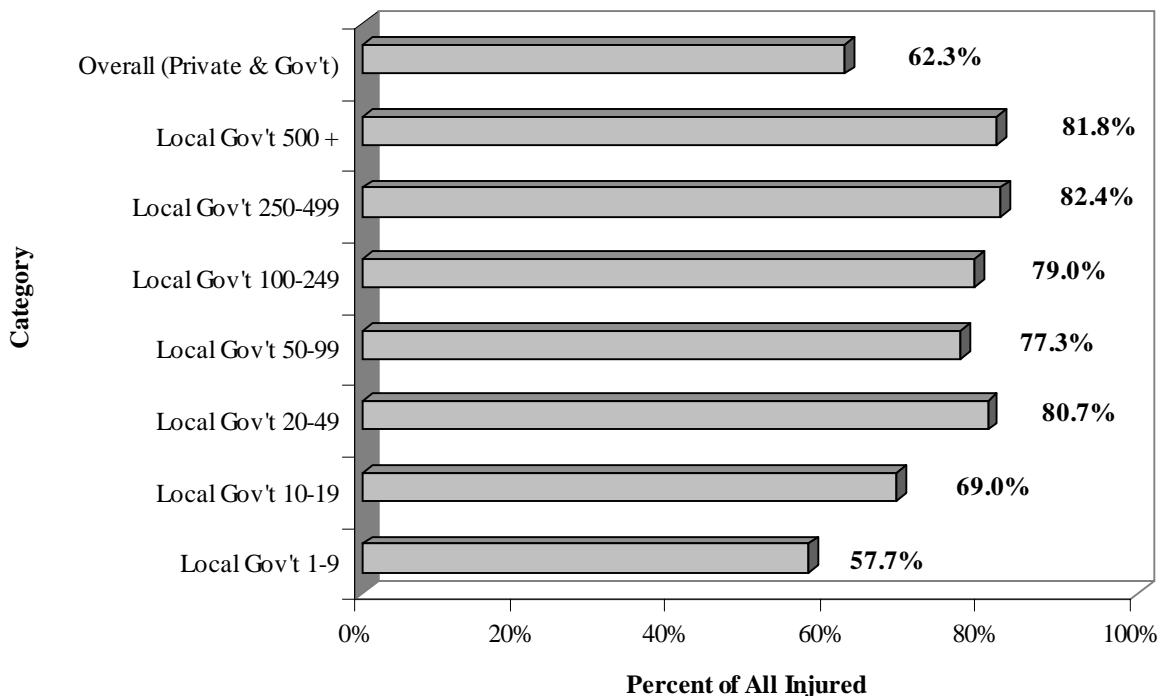
group ranking third, at 80.7%. Only the smallest cohort of employers with 1-9 employees dropped below the overall return-to-work rate; however, at 57.7%, even this group surpassed the rates for all four private sector groups with less than 100 employees. These data indicate that employees in local government achieved a remarkably high level of success in returning to work at an adequate wage level after injury, suggesting that the OTR in these cases may be a solution for which there is little underlying problem.

By requiring injured workers to both return to work and to earn wages equivalent to at least 80% of their pre-injury average wage in order for the return to

be considered successful, the division's methodology imposes a more stringent definition than the OTR provision. There is no mention of a minimal wage level or its relationship to pre-injury earnings in the OTR mandate. Thus, employers who "rehire" injured workers at any wage level would be in compliance, which may not be the outcome legislators intended. Coinciding with this unrestrictive definition, Figures B4.5-B4.8 present another version of return-to-work rates that removes the wage criterion altogether, showing the percentage of workers with 1994 injuries who returned to work at any wage during the four-quarter period subsequent to the injury quarter. This analysis more clearly identifies the proportion of employers who

Figure B4.4

**Return to Work at 80% of Pre-Injury Wage:
Overall 1994 Rates Compared to Rates for
Seven Local Government Employer Size Groups**



Source: Office of Labor Market Statistics, ES202 Employment and Wage File; Division of Unemployment Compensation Wage Files; and Division of Workers' Compensation Claims File as of March 20, 2000

would have been targeted for penalties for failing to rehire workers injured in 1994.

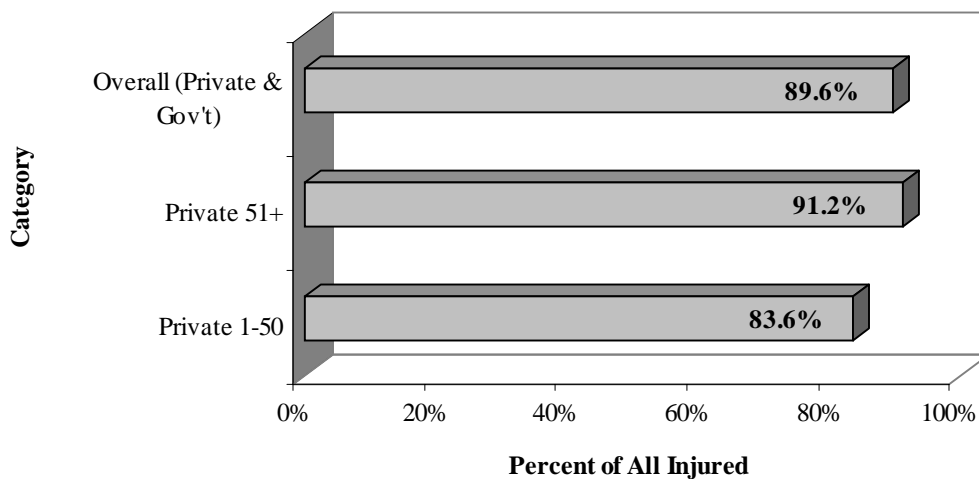
Figure B4.5 shows an overall return-to-work rate of 89.6% in the top bar, indicating that only about one in ten injured workers did not return to work at all during the year after the injury quarter. Employees of private sector companies meeting the OTR criteria for large employers had an even higher 91.2% rate of return at any wage. The 83.6% rate for smaller employers lags behind the rate for large employers by almost eight percentage points. This is an important distinction, as the data reveal that the OTR would have served a maximum of only 8.8% of employees in private industry in 1994. In reality, it would have served an even smaller portion of non-returnees because some of these injured workers may have chosen not to return to work for a variety of reasons. Some may have opted to retire, return to school, become self-em-

ployed, work for the federal government, leave the state, enlist in the military, postpone working again beyond one year after injury, or made other decisions to discontinue working for a Florida employer represented in the UI database. It is incorrect to assume that every injured worker wants to return to work for the previous employer; some may choose other options, including not working at all. Worker choice is not considered in either the OTR statutory provision or the newly proposed rule.

To substantiate that some employees not returning to work may do so of their own volition, Table B4.4 displays a distribution of those workers with 1994 injuries who had not returned to work at any wage level within one year of the quarter of injury. These 6,473 non-returnees were matched with numerous databases as of the fourth quarter of 1998 to get a sense of what happened to them during the years fol-

Figure B4.5

***Return to Work at Any Wage:
Overall 1994 Rates Compared to Rates for
Two Private Sector Employer Size Groups***



Source: Office of Labor Market Statistics, ES202 Employment and Wage File; Division of Unemployment Compensation Wage Files; and Division of Workers' Compensation Claims File as of March 20, 2000

lowing their workplace injury. Notice that over 28% of these injured workers were working four years subsequent to the injury year, and over 62% of those working were employed full-time. Their quarterly earnings averaged \$4,132, with full-time workers achieving a quarterly average wage level of \$5,870. About 2% were in school; 63.5% of those students were in community college and 57.4% were employed while attending school. A few of the workers injured

in 1994 were employed in the military or in federal civilian jobs, while 4% were either in prison or supervised by the Department of Corrections. 8% were on food stamps, and 2% were receiving temporary assistance for needy families, although about one in four of these individuals was also employed. These data do not include non-returnees with 1994 injuries who left the state, retired, worked for an employer not resident in the UI database, started their own business, or

Table B4.4

**1998 Outcome Data for Non-Returnees at Any Wage
1994 Injuries**

Total 1994 Non-returnees, Any Wage:		6,473			
Total with Outcome Data:		2,433		37.6%	
Employment			Receiving Public Assistance		
# Employed	1,836	28.4%	TANF **	101	1.6%
<i>Average Quarterly Earnings</i>	<i>\$4,132</i>		...and employed	24	23.8%
# Estimated Full Time *	1,140	62.1%	Food Stamps	510	7.9%
<i>Average Full Time Earnings</i>	<i>\$5,870</i>		...and employed	131	25.7%
Federal Civilian Employment	11	0.2%			
Military Employment	1	0.0%			
Continuing Education			Department of Corrections		
# Students	115	1.8%	Incarcerated	52	0.8%
# Post-Secondary	24	20.9%	Supervised	199	3.1%
# Community College	73	63.5%			
# State University	15	13.0%			
# Independent College	3	2.6%			
# Students Employed	66	57.4%			

Note: Percentages in boldface use total non-returnees in the denominator. All others are percentages within subcategories.
Source: Division of Workers' Compensation Claims File as of January 31, 2000, and Division of Unemployment Compensation Wage Files; Florida Education and Training Placement Information Program (FETPIP) as of 4th quarter 1998

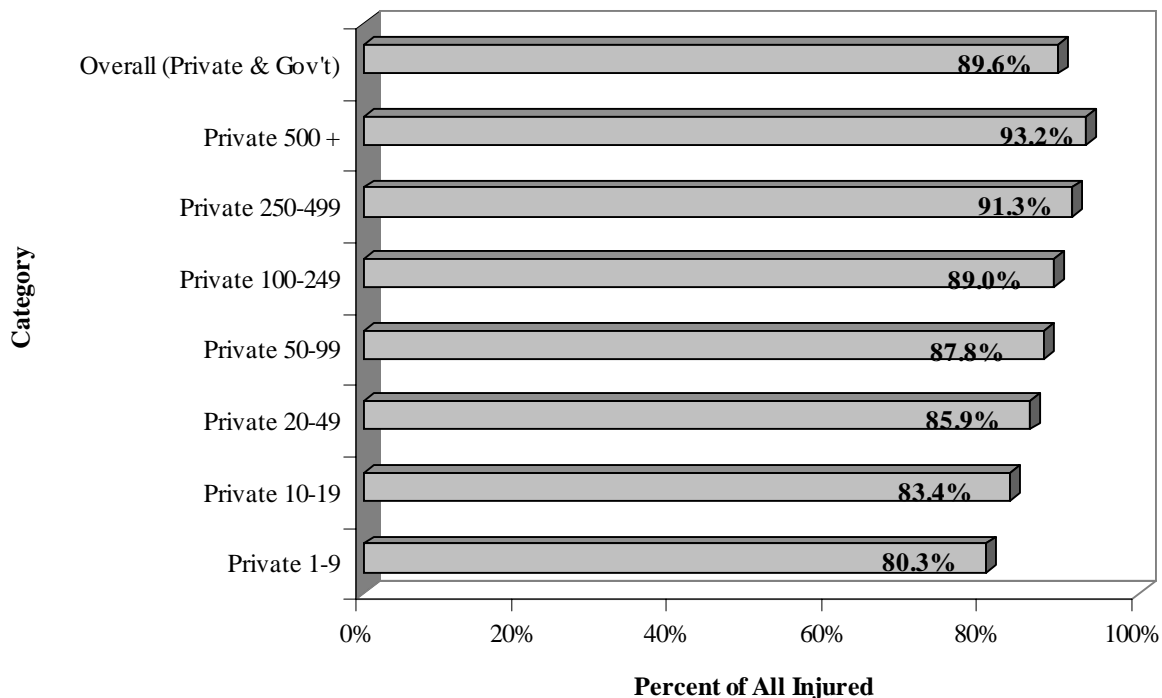
simply chose not to work at all. Factoring in that group of non-returnees, one can reasonably conclude that a portion of the 8.8% of private industry employees who did not return to work, as inferred from Figure B4.5, would not have returned to work even if the employer offered to rehire them. This would reduce even further the population potentially benefiting from the OTR.

to-work rates at any wage level among seven discrete size categories. Notice that employees working for companies with 250 or more employees returned at a rate that exceeded the overall rate of 89.6%: 93.2% for employers with 500 or more employees and 91.3% for employers with 250-499 employees. Although the rates decline with each successively smaller size category, even the smallest employer group brought eight of every ten injured workers back to work. If

Figure B4.6 distributes private sector return-

Figure B4.6

***Return to Work at Any Wage:
Overall 1994 Rates Compared to Rates for
Seven Private Sector Employer Size Groups***



Source: Office of Labor Market Statistics, ES202 Employment and Wage File; Division of Unemployment Compensation Wage Files; and Division of Workers' Compensation Claims File as of March 20, 2000

employers with less than four employees were excluded from the smallest group, the rate for employers with 4-9 employees was 81.8%. These data confirm that the vast majority of injured workers do return to work, and larger employers appear to be doing a better job than smaller employers in bringing about this desired outcome.

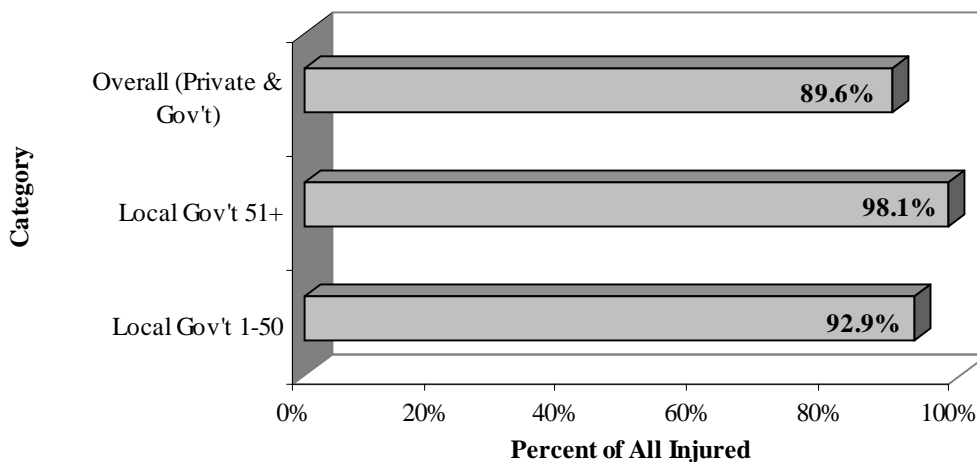
Comparable rates for the local government sector show that an impressive 98% of workers injured in 1994 returned to work for larger employers subject to the OTR, and nearly 93% returned to smaller employers, as shown in Figure B4.7. Thus, less than 2% of workers in local government could have been served by the enforcement of the OTR provision of the statute. Broken out by seven discrete employer size groups in Figure B4.8, *all* local government employers exceeded the overall 89.6% return-to-work

rate at any wage level. Factoring in the portion of workers who may have opted not to return to work, there is little evidence of a return-to-work problem in this sector. Clearly, the local government sector achieved great success in bringing their workers back to work, without the OTR mandate.

Data presented in this report indicate that injured employees who worked for large private sector employers subject to the OTR in 1994 returned to work at an adequate wage level at a higher rate than injured employers working for smaller private sector employers. In the local government sector, the return-to-work rate at an adequate wage level rate was well above the overall statewide rate across all but the smallest employer size group. When the wage adequacy criterion is removed, return-to-work rates were high across all employer size categories, and the local

Figure B4.7

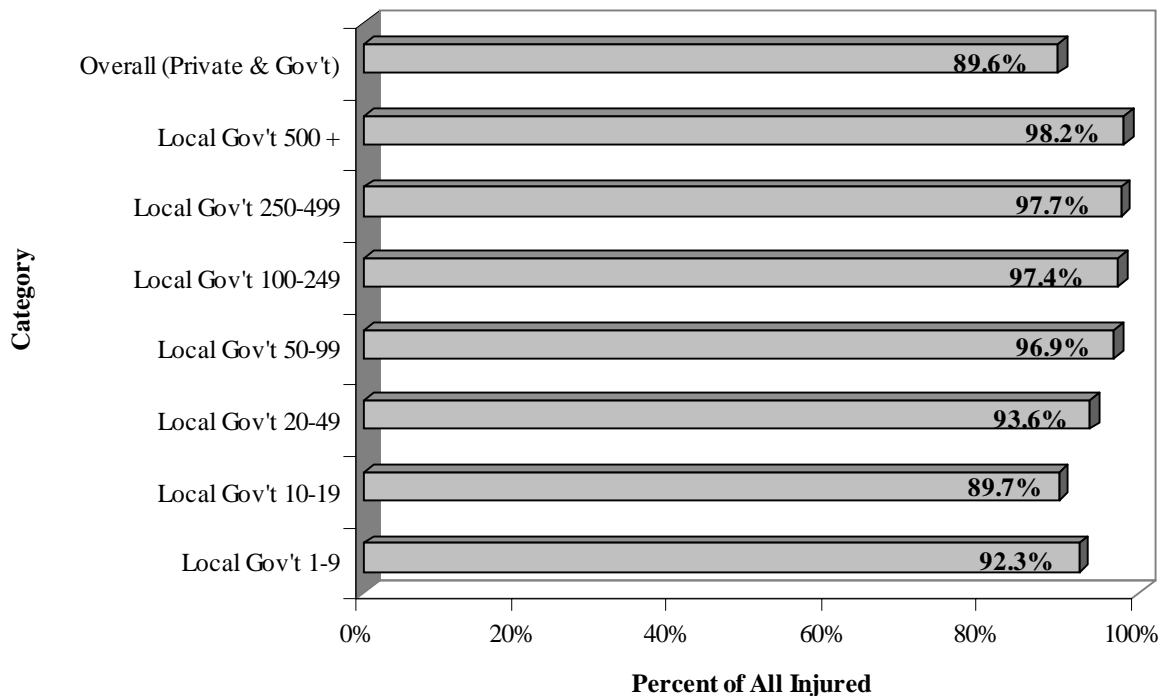
***Return to Work at Any Wage:
Overall 1994 Rates Compared to Rates for
Two Local Government Employer Size Groups***



Source: Office of Labor Market Statistics, ES202 Employment and Wage File; Division of Unemployment Compensation Wage Files; and Division of Workers' Compensation Claims File as of March 20, 2000

Figure B4.8

**Return to Work at Any Wage:
Overall 1994 Rates Compared to Rates for
Eight Local Government Employer Size Groups**



Source: Office of Labor Market Statistics, ES202 Employment and Wage File; Division of Unemployment Compensation Wage Files; and Division of Workers' Compensation Claims File as of March 20, 2000

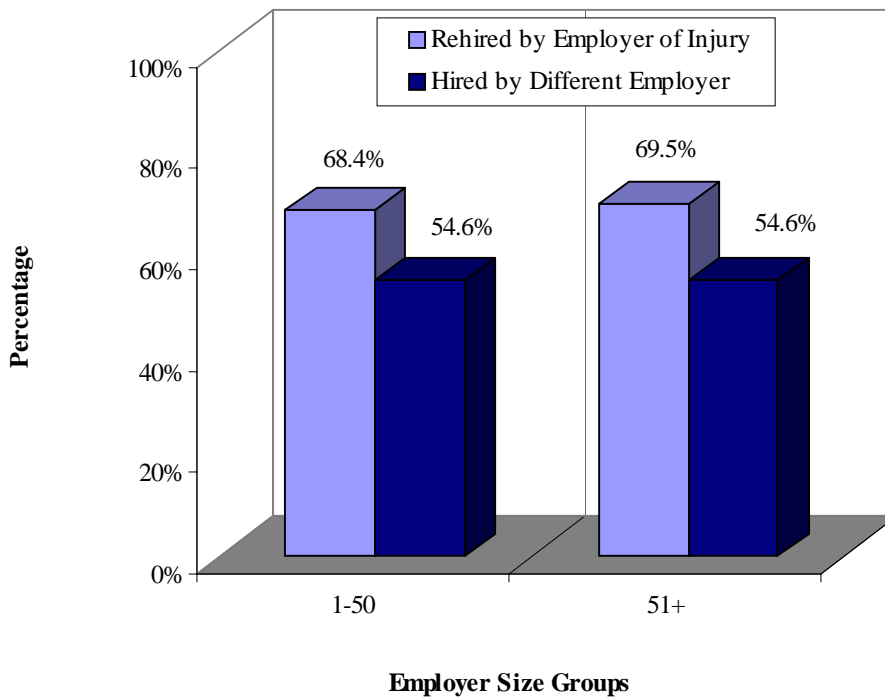
government sector was exemplary in achieving desired return-to-work outcomes. This rate is the better measure for isolating workers the OTR was intended to serve because the provision makes no reference to wage adequacy.

Ironically, wage adequacy for returning workers—a worthy goal *not* expressly addressed by the OTR—is a desirable outcome that *can* be correlated with “rehiring.” This is accomplished by separating returning workers with 1994 injuries who achieved an adequate wage level post-injury into two groups: those

returning to the workforce with the same employer as the employer of injury—i.e., those who are “rehired”—and those hired by a different employer subsequent to injury. In Figure B4.9, return-to-work rates for these two groups of workers in the private sector are compared according to the overall size category of the employer of injury. Notice that 54.6% of returnees hired by different employers reached a wage level of 80% or more of their pre-injury earnings, regardless of the size of the employer of injury. Returnees rehired by the employer of injury, however, were significantly more successful in reaching an adequate wage

Figure B4.9

***Return to Work at 80% of Pre-Injury Wage:
Rehired Returnees versus Returnees Hired
by a Different Employer
(Private Sector)***



Source: Office of Labor Market Statistics, ES202 Employment and Wage File; Division of Unemployment Compensation Wage Files; and Division of Workers' Compensation Claims File as of March 20, 2000

level; once again, the size of the employer was not a key factor, as 68.4% of employees working for smaller employers and 69.5% of employees working for large employers, as defined by the OTR, achieved 80% of pre-injury earnings. In this scenario, returning to work with the same employer following injury resulted in wage adequacy for a much larger proportion of returnees than returning to work with another employer for workers injured in 1994. This outcome was not a function of the size of the employer of injury.

Conclusions

If the OTR had been rigorously enforced in 1994, it would have applied to just 3.7% of the 373,120 non-federal employers in the State of Florida. In the private sector, just 3.5% of 371,621 employers would have been subject to penalty for failing to rehire their injured workers, compared to 47.7% of 1,198 local government employers and 70.5% of 288 state

government employers. Thus, the OTR targeted a very small percentage of private employers, about half of local government employers, and the majority of state government employers. These large employers with 51 or more employees collectively employed two-thirds of all non-federal workers in the state—nearly four million workers. Close to two-thirds of all lost-time injuries occurred in companies with 51 or more employees.

These employment and injury data tell half the story, identifying large employers (as defined by the OTR) as a very small portion of the employer population, while pinpointing the concentration of workplace injuries among their employees. The OTR provision implies that workers injured while employed by these large employers experience particular difficulties returning to work. However, examination of two kinds of return-to-work measures for the private and local government sectors reveals the other half of the story: There is a direct correlation between employer size and rate of return—namely, the larger the employer size group, the higher the return-to-work rate. In both the private and local government sectors, injured workers in companies with over 50 employees returned to work at an adequate level of earnings at rates more than six percentage points higher than rates for employees of all smaller companies combined. Compared to the overall rate of 62.3%, the private sector rate for large employers was 61.9%, while the local government sector boasted an 81.6% rate. Broken out into seven discrete size groups, return-to-work rates for local government exceeded the overall rate in all but the smallest category of employers with 1-9 employees. At 65.5%, the rate for private employers with 500 or more employees surpassed the overall 62.3% rate, while rates for the six remaining size groups dropped below the overall rate, declining with each successively smaller size group.

Since the OTR has no stipulation regarding the relative wages at which workers are to be rehired in order for employers to avoid a fine, return to work at any wage level was also compared among employer

size groups to specifically isolate the population of workers most in need of assistance in returning to work. This analysis showed that nearly nine of every ten injured workers in Florida returned to work within one year of injury—a very high rate of return by any standard. Return rates for large employers subject to the OTR were 91.2% and 98.1% for the private and local government sectors, respectively. This means that only 8.8% of injured workers employed by large private firms, and a mere 1.9% of workers employed by large local government entities, constituted a population in need. Because some non-returnees choose not to return to work for a variety of reasons, the true population in need is even smaller. Comparable return rates for workers in companies with less than 51 employees were 83.6% for private employers and 92.9% for local government employers. These data show high rates of return for large private employers and for all local government employers, regardless of size. Even the 83.5% return-to-work rate for smaller private employers is quite high and not indicative of a pervasive problem requiring government regulation.

Collectively, these employment and return-to-work data send a mixed message for the OTR provision. From the standpoint of equity, it is arguable that the statute seeks to regulate those employers least in need of regulation, particularly in the local government sector. In the private sector, it is the smaller, not the larger, employers whose return-to-work rates fall increasingly below the average. On the other hand, employees of the larger (51+) private employers constitute a substantial majority of all private employers' injured workers not reaching 80% or more of their pre-injury wage level in the year following their injury. For 1994 injuries, these "non-returnees" of private employers totaled 22,660, of which 14,002, or 61.8%, had worked for the larger private employers.¹³ With this distribution in mind, it could be argued that limiting the OTR to the larger employers ensures its applicability to the majority of injured workers in need of re-employment assistance. Moreover, as a practical matter, the larger employers are more likely to have the organizational size and differentiation of tasks to

comply with the OTR without hardship. However, the data show that over nine of every ten workers injured in these large companies did, in fact, return to work, which means that, at most, 8.8% of these workers needed re-employment assistance. Indeed, an even smaller percentage constituted a genuine population in need, as a portion of these non-returnees chose not to return to work. The area in which rehiring *does* influence a positive outcome, regardless of the size of the employer, is in expanding the pool of returning workers who reach an adequate wage level. However, the goal of the OTR in its current format is simply return to work, not wage adequacy.

Suggestions for Re-examining the OTR Provision

The obligation to rehire provision may have emerged from the Special Legislative Session in the fall of 1993 as an attempt to assuage the overall negative impact of the reforms on injured workers, whose benefits were severely reduced in both weekly amount and duration. Even though the 3.7% of non-federal employers with over 50 employees targeted by the OTR accounted for two-thirds of all non-federal employees, regulation of these specific employers does not appear to have been drawn from either an objective analysis of need or a realistic estimation of the likelihood of meeting a need. Data discussed above indicate that potential beneficiaries of the OTR constitute only a tiny minority of injured workers. Areas of substantially greater need, such as poorer return-to-work rates of smaller employers and return to work at inadequate wages, are not addressed in the mandate. Moreover, the difficulties of implementing the OTR and the questionable prospect that it will significantly change employer behavior raise concerns that the provision may generate more costs than benefits. Overall, it is not difficult to conclude that the OTR represents a worthy intention that deserves policy initiatives more likely to be effective.

Findings summarized in this chapter have indicated areas of greatest need. Controversies surrounding the OTR suggest that rewards and incentives rather than fines will better enlist the cooperation of employers in striving for desired goals. Combining these insights into a program that focuses on one or more of the following objectives may be worthy of consideration:

- Rewarding employers whose return-to-work rates exceed the average rates of employers of comparable size and who improve their relative rates each year;
- Sharing with all employers the best practices of exemplary employers whose philosophies and strategies have consistently resulted in above average return-to-work rates among their peers;
- Providing financial reimbursement to identified groups of smaller employers in accommodating the physical limitations of injured workers with ongoing impairments; and
- Rewarding employers who bring their injured workers back to work at wages equal to 80% or more of their pre-injury wage.

Such an approach avoids the complex problems and controversies inherent in the OTR and the enforcement problems yet to come if a rule is promulgated. It shifts the focus from the negative application of a fine to the positive provision of employer incentives for facilitating the self-execution of the workers' compensation law. Most importantly, it is driven by trends substantiated by available data. The wide range of controversies raised in connection with the OTR over the past seven years can serve to provide guidance in setting up a program that is deliberately designed to include the following characteristics:

- Clearly defines the methodology and time parameters for measuring return-to-work;
- Assures that data tied to that methodology are accessible, current, and reliable;
- Explicitly designates employers who may qualify for financial rewards when improving their re-

turn-to-work rates;

- Sets up a funding source for the provision of financial assistance and/or incentives to smaller employers who bear the greatest burden in setting up modified duty jobs for returning workers; and

- Designs a process and mechanism for rewarding, in a timely manner, all employers who bring workers back to work at an adequate wage level for a specified period of time following injury.

Florida can benefit from the experience of a few other states that have attempted to provide innovative incentives to employers for promoting return to work. Oregon, for instance, instituted an “Employer-at-Injury” program in 1993 that may serve as a general model. This program rewards employers who bring workers back to light duty jobs while the claim is still open. Such employers may qualify for reimbursement of up to 50% of a worker’s wages for up to three months, up to \$2,500 for work site modification, up to \$1,000 for specialized tools or equipment, and up to \$400 for special clothing. Temporary total disability payments to the injured worker are eliminated during the period of wage subsidy. The cost of these subsidies, funded by a tax on employers and workers, compared to the estimated savings from reduced indemnity payments, resulted in a net system savings to employers of about \$6.5 million in 1997. The program boosted return-to-work rates for participating employers by about seven percentage points over rates for non-participating employers. While some employers abused the process by retaining workers just long enough to collect wage subsidies, then laying them off, lessons from the Oregon experience could help to prevent similar abuses in a Florida adaptation of this kind of program. Using the data presented in this report, a program might be tailored for Florida to include a wage adequacy criterion and specific requirements for an extended period of re-employment, during which the employer could qualify for either premium reductions or reimbursement of premiums paid for that worker for a certain period of time. Alternately, a Florida program might include a

process whereby small employers purchasing special equipment to enable return to work could be reimbursed the full price of all division-approved equipment after the worker has successfully returned to work for a minimum of two full quarters, earning 80% or more of their earnings during the quarter prior to injury. If UI data were used to make this calculation, six months is the earliest reasonable time frame for making such an assessment, as time must be allowed for reporting and processing employer wage data.

A word of caution may be in order when considering incentives to promote desired employer behavior. There is little evidence that employers are taking full advantage of existing statutory incentives such as premium discounts for setting up a drug-free workplace. One possible reason may be that the financial reward would arrive far too long after the desired behavior to constitute a genuine incentive. To avoid this, any initiative including financial assistance and rewards should emphasize timeliness in order to be effective.

Return of the injured worker to work at the earliest feasible time is a cornerstone of workers’ compensation. It is also an elusive goal for which no known policy or program has ever achieved complete success. Initiatives that focus on the injured worker, such as rehabilitation and re-employment services, exist in tandem with initiatives involving employers, such as obligations and incentives, to incrementally improve the rate at which injured workers return to work. These multiple and various approaches will not likely be supplanted by a single, encompassing panacea. Here it is only suggested that the impulse behind the OTR might be more fruitfully channeled into a twofold approach aimed both at assisting smaller employers in accommodating the special needs of returning workers with physical limitations and at providing incentives to all employers for returning injured workers to work at wage levels comparable to their pre-injury wages.

Footnotes

¹Office of Labor Market Statistics, Department of Labor and Employment Security.

²Transcript for Monitoring and Audit Workshop, Rule Chapter 38F-24, held on April 4, 1994, pp. 39-40.

³Transcript for Monitoring and Audit Workshop, Rule Chapter 38F-24, held on April 22, 1994, pp. 37-38.

⁴Executive Order 95-74, issued 2/27/95, directed repeal of rules that were obsolete, procedural, and unnecessary. Executive Order 95-256, issued 7/12/95, included a directive to agencies to take immediate steps to repeal rules in order to carry out Executive Order 95-74 and to review rules that were unduly cumbersome, restrictive, or punitive.

⁵*Florida Administrative Weekly*, Volume 26, Number 5, February 4, 2000, Rule 38F-57.002(1), p. 431.

⁶*Ibid.*, Rule 38F-57.002(2), p. 431.

⁷The \$2,000 penalty cap probably originated from the estimated cost of re-employment services for one injured worker at the time the reforms were written.

⁸Division of Workers' Compensation, *Performance Indicators for Judges of Compensation Claims*, p. 8.

⁹*Ibid.*, p. 12.

¹⁰For a full description of the division's return-to-work methodology, refer to the 1996 publication *Defining, Measuring, and Predicting Return to Work in Florida*. A copy can be ordered from the division's page on the website "www2.myflorida.com/les/wc."

¹¹The employer FEIN had to be present on both the ES202 and the WC claims record in order to be included in this table. If either file was missing the FEIN or if the FEIN was incorrect on one of the files, no match occurred. Thus, some employers with lost-time claims could not be identified.

¹²Construction employers with 1 or more employees are required to have workers' compensation unless they receive an exemption. Just 1% of the 1,649 employers in the smallest group of employers were in construction. The remaining 99% are employers who either have more than three employees over the long term or voluntarily choose to have workers' compensation coverage.

¹³There were 22,741 non-returnees with 1994 injuries in the private sector, but 81 of those worked for employers with reported employment = 0. Since these employers could not be grouped into size categories, those 81 employees are not included.