Client Services Procedure Manual

Procedure: 39.00
Subject: Re-employment Obligation

39.01 Workplace Re-integration Process

The re-employment obligation is one of three components in the return to work model. Early and safe return to work (ESTRW) and labour market re-entry (LMR) are the other two components. Prior to engaging the re-employment obligation, the workplace parties have already been active in the early and safe return to work process. Thus, communication regarding the worker's recovery and functional abilities has already occurred, and any early and safe return to work programming is underway (for details on early and safe return to work, refer to Policies RE-01 through RE-03 and the associated procedures).

LMR services ensure workers have the skills, knowledge and abilities to re-enter the labour market. The objective is to restore the worker's earnings as close as possible to pre-injury. These services may be utilized at any point in the claim to facilitate safe and suitable return to work.

The ESRTW component is intended to commence during the physical recovery from the work injury. When work injury recovery has plateaued medically and the worker is fit for either the essential duties of the pre-injury job or for suitable employment, then the workplace re-integration process will be initiated. LMR services may be used to facilitate return to work, or to explore other safe and suitable positions with the injury employer during the ESRTW and permanent accommodation.

Policy RE-05 Re-employment Obligation outlines the process for determining essential duties and suitable employment. Suitable employment for re-employment purposes is determined the same as for ESRTW discussed in Procedure 34.00 Suitable and Available Employment.

The following sections provide guidelines to follow to determine the re-employment obligation.

39.02 Who has a Re-employment Obligation?

All employers have a duty under human rights legislation to accommodate a worker who has been unable to work as a result of an injury. In addition to this duty to accommodate, there are additional responsibilities on those employers who are subject to the re-employment obligation under section 101 of the Workplace Health, Safety and Compensation Act, 2022 (the Act).

An employer who regularly employs 20 or more workers is obligated to re-employ if the injured worker has been employed continuously with that employer for at least one year prior to the injury.

An employer will be considered as one employer for determining the re-employment obligation where:

- It has groups of companies or firms which are assessed as a single employer or are grouped for experience rating, or
- It operates several different businesses in different rate codes.

For example, where an employer operates several sites or locations across the province and a worker is injured at a site that employs less than 20 workers, that employer is obligated to re-employ if:

- The total number of workers regularly employed for all sites combined is 20 or more; and
- The injured worker has been employed continuously for at least one year prior to the injury.

The decision maker may consult with Assessment Services where there is doubt, disagreement, or insufficient information to establish whether:

- Numerous firm or account numbers relate to one employer;
- An employer has multiple sites or branches; and
- The employer regularly employs 20 or more workers.

Workers who are Regularly Employed

Policy RE-05 Re-employment Obligation provides the formula(s) used to determine the number of workers regularly employed (including a distinct formula for seasonal employment). Generally, the number of workers employed on the day of injury, as reported on the Form 7, is considered to be the number of workers regularly employed. For many employers, this is a fairly constant number throughout the year. However, the decision maker may require further information where there is doubt about the number of regularly employed workers, or where the workplace parties raise concerns. This information is obtained by making a referral to the Audit Team Lead in the Assessment Services Department. The decision maker will determine the average numbers of workers employed in the 12 months prior to the injury after the Assessments Services Department provides the information.

The following provides an example of the formula used to determine the number of regularly employed workers:

Example A: Number of Workers Regularly Employed

Months of employer operation	Average number of workers employed in each of the 12 months before worker's injury	7 months with the highest number of average workers
January	12	
February	25	✓
March	18	
April	22	✓
May	25	✓
June	12	

Months of employer operation	Average number of workers employed in each of the 12 months before worker's injury	7 months with the highest number of average workers
July	27	✓
August	27	✓
September	25	✓
October	19	
November	18	
December	25	✓
Number Regularly Employed		Average: 25.1

Example A illustrates that the employer has seven months where 20 or more workers are regularly employed. Therefore, this employer is obligated to re-employ.

Workers who are Casually Employed

Workers may be hired on a casual basis. For example, a tile setter may be called to perform two hours of work for specific duties on a contract. For the purpose of calculating the number regularly employed, that worker will be included in the average number for the month. However, where the casual worker was called on more than one occasion within the same calendar month, the casual worker is only counted once for that month.

Workers who are Seasonally Employed

The following provides an example of the formula used to determine the number of workers employed for seasonal employment:

Example B: Seasonal Employment

Months of employer operation	Average number of workers employed in each of the 12 or fewer months of regular season of operations	Months of employer's operation where 20 or more workers are employed
January	No Operation	
February	No Operation	
March	No Operation	
April	6	
May	16	
June	20	✓
July	27	✓
August	27	✓
September	27	✓
October	16	
November	No Operation	
December	No Operation	

Example B illustrates the full regular season of the employer's operation as seven months from April to October. In the majority of those months - the four-month period from June to September - there are 20 or more workers employed. Therefore, this employer is obligated to re-employ (applies to workers who are injured and have been employed for one year prior to the injury). The employer is considered to have a re-employment obligation where there are 20 or more workers employed for at least 50% of the regular season.

A seasonal employer is considered in operation during the months (full or partial) that the product is produced or the service is delivered. There may be months where there is no production or operation (shutdown), but the employer maintains a limited number of workers for facility maintenance or security reasons. These months are not considered as months of operation.

39.03 Who has a Right to Re-employment following a Work Injury?

Workers in an employment relationship with an employer for a continuous period of one year immediately prior to the date of their injury have a right to be re-employed. This means the worker was working for the employer for 12 months prior to the injury, not merely the majority of months in the last 12-month period (except where employment is seasonal, casual, etc.). The majority formula is only used to establish the number of workers regularly employed as outlined in Example A.

Continuous Employment

Policy RE-05 Re-employment Obligation provides guidelines to determine continuous employment and whether a work cessation has occurred that breaks the employment relationship.

Seasonal, casual and contractual workers may be eligible for re-employment where the continuous employment guidelines have been met.

Example C - Continuous Employment for a Seasonal Worker

A worker works eight months from April to November each year for the last three years at the local plant. In the third season, the worker is injured on the job and loses time from work. The employer disputes the re-employment obligation claiming that the worker was not employed for 12 consecutive months prior to the injury. However, the decision maker finds that the worker and employer did not intend to break or terminate the employment relationship during the four-month break in the employment period. The worker is considered employed for 12 consecutive months and therefore entitled to re-employment.

The fact that the seasonal worker received Employment Insurance Benefits during a seasonal layoff does not break the employment relationship. All factors of the case must be examined. (See Policy RE-05 Re-employment Obligation, specifically Work Cessation.)

The policy states a seasonal worker must have been continuously employed for more than one season in order to meet the continuous employment requirement. This means having worked one full continuous season with that employer. In the case example above, a worker must have worked one full continuous season from April to November before a re-employment obligation exists.

39.04 Determining the Date of Injury for Re-employment Purposes

The date of injury must be clearly established because the re-employment obligation and penalties for noncompliance are tied to prescribed time frames in the the Act. The policy clarifies that - for re-employment purposes - the date of injury is the date the worker experiences loss of earnings capacity from the injury. Therefore, where a worker suffers an injury but loss of earning capacity from the injury occurs at a later point in time, the re-employment obligation takes effect from the latter date.

39.05 Determining the Re-employment Obligation for Recurrences and Reinstatements

Re-employment obligations exist following a recurrence provided the worker is still employed with the same employer as the original injury. If, at the time of a recurrence, the worker is employed with a different employer and the obligation related to the original injury has ended, the employer would not be subject to a penalty under Policy RE- 09 Re-employment Penalties and Payments, and Procedure 42.00 Re-employment Penalties and Payments.

If a recurrence occurs during a seasonal break but the employment relationship was not broken, then there is a re-employment obligation.

In some cases, the recurrence may occur while the obligation period from the original injury is still ongoing. For example, a worker who is injured and disabled from earning on February 1, 2020, returns to the pre-injury job March 15, 2020. The re-employment period is ongoing until March 14, 2021 (i.e., one year after the worker is fit for essential duties of pre-injury employment). That worker suffers a recurrence of symptoms fourteen months later and is unable to continue working as of May 15, 2021. Now the re-employment obligation period is ongoing from May 15, 2021, provided that the worker is employed with the same employer at the time of the recurrence. However, if at the time of the recurrence the employer is not obligated because it no longer regularly employs 20 or more workers, then the re-employment obligation would stem from the initial injury which, in this example, would end on March 14, 2021.

If a worker subsequently experiences a return of symptoms, resulting in a loss of earnings within 12 months from the initial date of disability, it is considered a reinstatement and the date of disability is considered a continuation of the previous injury with the same re-employment obligation period. For example, that same worker who is injured and disabled on February 1, 2020, returns to the pre-injury job March 15, 2020. The re-employment obligation is in effect until March 14, 2021 (one year from the date worker returns to pre-injury). If the worker subsequently experiences a return of symptoms and is disabled from earning on June 1,

2020, the re-employment obligation period does not change and remains in effect until March 14, 2021 (1 year from the date the worker returned to pre-injury duties).

39.06 Determining Essential Duties under the Re-employment Obligation

The essential duties of the pre-injury job are the duties necessary to achieve the actual job outcome. Job outcome refers to the overall objective of the job in terms of the production of the final product or provision of service. (Policy RE-05 under Determining Essential Duties lists specific factors to be considered). For example, if a worker's only restriction is lifting over 50 pounds and this task is an occasional requirement in the pre-injury job, then the worker is considered fit for essential duties. Determining essential duties must occur on a case-by-case basis considering the worker's individual circumstances. The employer must explore any modifications to accommodate work restrictions. Determining that a worker is fit for essential duties is a critical decision because it engages the highest standard of re-employment that an employer must fulfill (i.e., must provide the pre-injury or a comparable job). This also impacts whether the worker will be eligible for LMR services if the employer does not meet the re-employment obligation.

Health care providers identify the worker's functional abilities. The workplace parties identify the essential duties of the pre-injury job.

The Case Manager may request the opinion of a qualified professional where the essential duties are not apparent or there is disagreement over the duties. WorkplaceNL will pay for any evaluations it considers necessary to determine the essential duties. Mediation may be offered to the workplace parties.

The workplace parties (the employer and the worker) are responsible for determining essential duties and suitable employment, and for resolving the workplace issues in general. The decision maker will offer advice and facilitate the process, if necessary.

The worker and the employer will refer the matter to a case manager for a final decision if they cannot agree on the essential duties after considering all available information.

The employer is required to re-employ the worker in the pre-injury job for the lesser of two years after the date of disability, one year after the date the worker is fit for the essential duties of the pre-injury job, or the date the worker reaches age 65 (see Policy RE-08 Compliance with the Re-employment Obligation).

39.07 Determining Suitable Work under the Re-employment Obligation

The employer (who has a re-employment obligation) is required to offer the worker the first opportunity to accept suitable employment that is available, as defined in Policy RE-05 Re-employment Obligation, when a worker is medically able to perform suitable work but is unable to perform the essential duties of the pre-injury job.

Suitable employment that becomes available means the work exists with the employer and is available to the worker. This does not mean the worker can displace another worker to obtain a suitable job (unless collective agreement provisions allow bumping and the worker has seniority to do so).

The employer is not required to create suitable work but is required to offer it every time it becomes available. For more information on suitable employment, see Policy RE-08 Compliance with the Re-employment Obligation, and Procedure 41.00 Compliance with the Re-employment Obligation.

39.08 Voluntary Severance

The employer must make an offer of re-employment in accordance with the existing obligations before voluntary severance occurs. The worker must be fully advised of their rights to re-employment that they are giving up if the worker and the employer agree to a voluntary severance during the obligation period. The decision must be documented, signed by both parties and submitted in writing to WorkplaceNL within one week from the date of the agreement.

Where the employer has not made an offer to re-employ, refer to Policy RE-09 Re-employment Penalties and Payments.

Merits and Justice

Where the individual circumstances of a case are such that the provisions of this procedure cannot be applied or to do so would result in an unfair or unintended result, WorkplaceNL will decide the case based on its individual merits and justice as outlined by Policy EN-22 Merits and Justice. Such a decision will be considered for that specific case only and will not be precedent setting.

Reference: Workplace Health, Safety and Compensation Act, 2022, Section 101
Policies:
RE-01 through RE-03
RE-05 Re-employment Obligations
RE-08 Compliance with the Re-employment Obligation
RE-09 Re-employment Penalties and Payments
EN-22 Merits and Justice

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