Client Services Procedure Manual

Procedure: 41.00
Subject: Compliance with the Re-employment Obligation

41.01 Introduction

The fundamental principle of the re-employment obligation is that an employer of a worker who is medically cleared for the essential duties of the pre-injury employment must re-employ the worker in the position held prior to the injury, or in an alternative position which is comparable in nature and earnings to the pre-injury employment (see Policy RE-06 Alternative Work Comparable to the Pre-injury Job). This means the worker will be restored to the same or a comparable status as existed at the time of the injury.

Compliance with the re-employment obligation means that an employer is obligated to re-employ until the earliest of:

- Two years after the date of disability;
- One year after the date that the worker is medically able to perform the essential duties of the pre-injury job; or
- The date on which the worker reaches age 65.

Workers are required to provide notice to the employer and WorkplaceNL of their fitness for work. WorkplaceNL may become involved in determining fitness level where there is a disagreement between the workplace parties. The return to work model is one of self-reliance for the workplace parties (workers and employers). Therefore, it is the responsibility of the worker to initiate the re-employment process by providing notice of fitness to work to the employer and WorkplaceNL.

Workers who are terminated within six months of re-employment are required to notify WorkplaceNL in writing within three months of termination so that an investigation can occur. Refer to Policy RE-08 Compliance with the Re-employment Obligation.

41.02 The Re-employment Obligation Period

The date of disability for re-employment purposes is the date the worker experiences loss of earnings capacity from the injury.

The employer's obligation to re-employ begins on the date that the worker is able to perform the essential duties of the pre-injury job or suitable employment.

Examples of Establishing the Re-employment Obligation Period

- **Example A - Two-year Obligation:**
  A 30-year-old worker is injured and loses time from work starting February 1, 2002. The employer is obligated to re-employ that worker until January 31, 2004. If the worker is cleared for suitable work on March 15, 2002, the employer is required to offer suitable work that becomes available anytime up to January 31, 2004 which is the

period of the re-employment obligation. If suitable work becomes available and that worker commences suitable work on April 1, 2002, the employer is obligated to keep the worker until January 31, 2004, because the obligation is an ongoing process.

If in the same example, the worker is cleared for suitable work and commences it on January 1, 2004, then the employer is obligated to keep the worker until January 31, 2004, because the obligation period runs out at that time.

- **Example B - One-year Obligation**
  If the same worker is cleared for essential duties on March 15, 2002, the employer is required to re-employ the worker in the pre-injury job (or a comparable job) until March 14, 2003.

  Note: In either example, the provision under section 101(9) of the Workplace Health, Safety and Compensation Act, 2022 (the Act) regarding termination within six months of re-employment does not extend the re-employment period whatsoever. In other words, where the worker is cleared in month 23 of the two-year obligation period, the obligation runs out in one month not withstanding of section 101(9).

Re-employment Obligations for Contract Workers
In certain industries, particularly the construction sector, employers operate on a contract basis. The employment relationship at the time of hiring a worker is usually tied to the duration of the contract or the duration of the portion of the contract that requires the worker's skill or trade specification. Section 101(5) requires an employer of a worker who is medically cleared for the essential duties of the pre-injury employment to re-employ the worker in the position held prior to the injury, or in an alternative position which is comparable in nature and earnings to the pre-injury employment. The nature of contractual employment is that the employment period was determined prior to the injury for a specific time frame. Therefore, the employer will only be required to re-employ the worker for the duration of the contract that was interrupted by the work injury. To guarantee employment beyond that time frame would be enhancing the worker's pre-injury status by reason of the re-employment obligation. This is not the intention. Therefore, when determining compliance, WorkplaceNL must take into consideration the contract of service established at the time of hire. This should be indicated to WorkplaceNL at the time the claim is filed for a contract worker. If it is not reported at the time of the claim filing, then the employer must confirm, in writing, the contract duration and any other information required by WorkplaceNL.

41.03 Initiating the Re-employment Process

When a worker is cleared for the essential duties of the pre-injury job, they will notify the employer and the case manager, and return to work. Re-employment must occur within one week. If the pre-injury job is not available, the employer must offer alternate comparable employment (Refer to policy RE-06 Alternative Work Comparable to the Pre-injury Job and Procedure 40.00 Alternate Work Comparable to the Pre-injury Job).

If the workplace parties disagree on the essential duties and cannot resolve the dispute either with or without mediation, the case manager will decide in accordance with Procedure 39.00 Re-employment Obligation and provide verbal notice, if possible, and written notice of the worker's fitness for essential duties. The employer's re-employment obligation begins from the date of the case manager's written notice. Re-employment must occur within two weeks. Wage loss benefits may continue for the two-week period between WorkplaceNL's written notice and commencement of re-employment.

When a worker is medically fit for suitable employment, as defined in Policy RE-05 Re-employment Obligation, they will notify the employer and the case manager. The workplace parties must explore re-employment arrangements for the worker. The employer is required to offer the worker the first opportunity to accept suitable employment that becomes available. Available means the work exists with the injury employer. The employer must notify the case manager, in writing, of the suitable work being offered within one week of the worker's notice of fitness for suitable work. The case manager's role is one of monitoring and providing support where necessary.

If the workplace parties disagree on suitable work, the case manager will offer mediation services. Where mediation does not resolve the disagreement, the case manager will decide and provide verbal notice, if possible, and written notice of the worker's fitness. The employer's re-employment obligation begins from the date of the case manager's written notice.

In cases where the case manager obtains medical information indicating the worker is fit for suitable employment and no return to work plan has been filed by the employer, the case manager must inquire into the status of the return to work plan and facilitate the process. Where re-employment efforts are hampered by non-compliance of workplace parties, refer to the Policy RE-08 Compliance with the Re-employment Obligation.

Where the worker has returned to suitable work and subsequently becomes fit for essential duties within the re-employment obligation period, the employer must re-employ the worker in the pre-injury or comparable job. Where the employer fails to do so, the case manager will determine non-compliance.

Where the employer is unable or refuses to provide suitable work that is consistent with the worker's functional abilities, the worker will be referred for a labour market re-entry (LMR) assessment in accordance with Policy RE-14 Labour Market Re-entry Assessments. The case manager must evaluate what suitable employment the worker is capable of performing, whether there is a wage loss, and whether LMR services are required to address the wage loss. Further entitlement is then determined based on LMR Policies RE-14 Labour Market Re-entry Assessments, RE-16 through RE-18 and RE-15 Suitable Employment and Earnings.

If at any time the worker's fitness level changes during the re-employment obligation period, they must notify the employer and WorkplaceNL. Failure to do so may result in a decision of

non-compliance in accordance with Policy RE-08 Compliance with the Re-employment Obligation.

41.04 Employer's Responsibility to Offer "More Suitable" Employment

When a worker is able to perform suitable employment, the employer is required to offer the worker the first opportunity to accept suitable employment that becomes available. Because the obligation to offer suitable employment is ongoing, the employer must offer the worker the job that is most comparable in nature and earnings to the worker's pre-injury job. Although a specific earnings level is not required to be provided by the employer as part of offering a suitable job, the goal is to continuously work toward the pre-injury job status in terms of the nature of the employment and the earnings provided. This obligation is ongoing throughout the re-employment period. Therefore, as work becomes available that is "more suitable" to the worker (in terms of the nature of the job and the earnings level), it must be offered to the worker. The worker must notify the case manager when more suitable work becomes available. Failure by the employer to offer more suitable work that becomes available, or failure by the worker to accept more suitable work, will be considered for non-compliance in accordance with Policy RE-08 Compliance with the Re-employment Obligation.

41.05 Report of Re-employment

A report of re-employment will be used by the workplace parties whenever the worker returns to alternative comparable employment. It must indicate the following:

- How the job is comparable in nature to the pre-injury job;
- How the job is comparable in earnings to the pre-injury job; and
- The date the worker commences the job.

A return to work plan will be used by the workplace parties whenever the worker returns to suitable employment. It must indicate the following:

- How the job will accommodate the worker's functional restrictions (this information is not required if the worker has been cleared for essential duties and the pre-injury job or a comparable job is not available);
- The salary of the suitable job; and
- The date the worker commences the suitable job.

Earnings information is necessary so that the case manager can accurately determine penalties and re-employment payments, if necessary.

Employers are required to provide the case manager with written notification of any changes in the report of re-employment within one-week of their occurrence.

41.06 Reporting Non-compliance

Where the employer has re-employed the worker and subsequently terminates the worker's employment within six (6) months (within the original re-employment obligation period), the

worker must report the termination to the case manager within three (3) months of the occurrence in order for WorkplaceNL to review the situation. This allows the case manager to make prompt inquiries to address the situation and where appropriate, make decisions on non-compliance.

When a termination is reported, the case manager must contact the employer to determine that it is in fact a termination of employment (i.e., the employment relationship has been severed), and not a temporary work cessation where the employment relationship is not broken.

Generally, the following types of work cessation do not break the employment relationship:

- Strikes and lockouts;
- Sabbaticals, sick leaves, parental leaves, leaves of absence, and vacations;
- Work-related injuries resulting in time off work;
- Layoffs of less than three months if the worker returns to work for the employer through an employer's offer of re-employment at the time of layoff, or a union hall's hiring process; or
- Layoffs of more than three months if the worker returns to the employer through an offer of re-employment or a union hall hiring process, and
    - A date of recall was stipulated, and the recall occurs;
    - The employer continued to pay the worker;
    - The employer continued to make benefit payments for the worker pursuant to the provisions of a retirement, pension, or employee insurance plan; or
    - The employee received, or was entitled to, supplementary employment insurance benefits.

If it is a termination, the employer is presumed to be in breach of the obligation and the appropriate penalty will be levied in accordance with Policy RE-08 Compliance with the Re-employment Obligation.

The employer has the right to rebut this presumption by submitting evidence that a breach has not occurred and that the termination was not caused by the injury or the claim for compensation. Where the employer submits evidence to rebut, the case manager will review the evidence, investigate if necessary, and submit the findings to the case manager. Where the evidence supports the employer is not in breach, the case manager will rescind the penalty.

The provision under section 101(9) of the Act regarding termination within six months of re-employment does not extend the re-employment period in any way whatsoever. Therefore, for example, where a worker is cleared in month 23 of the two-year obligation period, the obligation runs out in one month notwithstanding of section 101(9) of the Act.

Where a worker is terminated after six months of the re-employment, a breach is not presumed. In this case, a determination must be made as to whether the employer is in breach by reviewing the circumstances of the termination.

Notice of Non-compliance
Where the case manager determines that an employer or a worker is not in compliance with the re-employment obligation, the case manager will inform the party verbally, if possible, and in writing, of the consequence of non-compliance. For employers, the notice must state the penalty amount to be levied in accordance with Policy RE-08 Compliance with the re-employment Obligation.

A one-week notice period will be provided, beginning from the date of written notification. Where the employer fails to comply within one-week, the penalty will be levied. Where the worker fails to comply within one-week, benefits are terminated, reduced or suspended, depending on the situation.

Where the case manager has evidence that the employer or worker received written notification for non-compliance in the past then subsequent notice will not be provided and the penalty will be levied from the date of non-compliance.

41.07 Re-employment Penalties and Payments

Amount of Penalty
The employer penalty will be the amount of the worker's actual net average earnings for the 12 months immediately preceding the loss (not subject to the maximum compensable assessable earnings). The net average earnings must be in relation to the worker's salary for the pre-injury job with the injury employer, and not include other income (e.g., Employment Insurance benefits or income from concurrent employment) in the employer's penalty amount.

Example:
WorkplaceNL determines that an employer has failed to re-employ a worker whose net average earnings are $92,000. Although these earnings are greater than the maximum compensable assessable earnings, the penalty levied on the employer is $92,000.

Employer Provides Suitable Work at a Wage Loss
If an employer does not meet the re-employment obligation but offers the worker suitable work at a wage loss, the penalty will be reduced by 50 per cent.

Employer Provides Suitable Work at no Wage Loss
If an employer does not meet the re-employment obligation but offers the worker suitable work at no wage loss, the penalty will be reduced by 75 per cent.

Depending on the circumstances, different penalties may be levied throughout the duration of the re-employment obligation.

If an employer fails to meet the re-employment obligation on more than one occasion for the same claim, the total of all penalties levied cannot exceed the maximum penalty (the worker's

actual net average earnings with the pre-injury employer for the 12 months immediately preceding the loss of earnings resulting from the injury).

Waiving the Penalty
WorkplaceNL may waive the penalty in its entirety if the employer offers to re-employ the worker, but the worker and the employer agree to a voluntary cessation of employment. However, if an employer fails to offer to re-employ a worker, and the worker agrees to sever the employment relationship (with or without a severance package), a penalty will be levied.

Reducing the Penalty
WorkplaceNL may reduce the amount of the penalty if the employer:

- Subsequently meets the re-employment obligation; or
- Does not meet the re-employment obligation, but offers the worker suitable work at a wage loss.

When the employer subsequently meets the re-employment obligation, the reduced penalty is calculated according to the number of weeks (or part weeks) that the employer does not meet the re-employment obligation.

Example:
WorkplaceNL notifies the employer that the worker is fit to perform the pre-injury job. Subsequently, WorkplaceNL determines that the employer has failed to offer to re-employ the worker in the pre-injury or comparable job. A penalty is levied equal to the worker's net average earnings with the pre-injury employer for the 12 months preceding the earnings loss, $52,000 ($1000/week).

52 weeks x $1,000 = $52,000 penalty

The employer re-employs the worker ten weeks after receiving the initial notice from WorkplaceNL. WorkplaceNL reduces the penalty to the number of weeks that the employer failed to re-employ the worker, and adjusts the employer's penalty.

Adjusted Penalty: 10 weeks x $1,000 = $10,000

Re-employment Payments to the Worker
A re-employment payment is not a benefit resulting from wage loss entitlement but rather paid solely for the reason that the employer is non-compliant with the re-employment obligation. Re-employment payments are not included in the calculation of assessment rates.

Employer Fails to Re-employ
If the employer fails to re-employ the worker in the pre-injury job or comparable employment, full re-employment payments are paid to the worker for up to the balance of the year during which the breach initially occurred. Full re-employment payments to the worker are based on 85 per cent of the worker’s net pre-injury earnings (subject to the maximum compensable assessable earnings limit).

Suitable Work at a Wage Loss
If the employer fails to re-employ the worker in the pre-injury job or comparable employment, but provides the worker with suitable work at a wage loss, partial re-employment payments are issued based on the difference between the worker's full re-employment payments and the net average earnings of the suitable job.

Suitable Work at no age Loss
If the employer fails to re-employ the worker in the pre-injury job or comparable employment, but provides the worker with suitable work at no wage loss, no re-employment payments are issued.

When a re-employment penalty has been levied against the employer, the case manager may approve re-employment payments to the worker for up to a period of one year or to the end of the obligation period whichever is the shorter period.

Re-employment payments for seasonal workers are based on the net average earnings for the period of the employer’s season of operation. Concurrent earnings or earnings from other sources recognized for the 13-week rate review may be included in the calculation of re-employment payments.

To issue a re-employment payment to the worker, the case manager will complete a cheque requisition form for the Finance Department and payments will be issued through a direct deposit system to the worker’s account. The Finance Department will set up the direct deposit for one year or less as indicated by the case manager on the cheque requisition. The case manager must advise Finance of any adjustment of the re-employment payment.

Effect of Penalty on Payments
Workers are entitled to re-employment payments regardless of whether a re-employment penalty is levied against the employer.

Levying the Penalty to the Employer
When the case manager makes the decision to levy the re-employment penalty, the client service assistant will calculate the amount of the penalty and notify the Assessment Services Department. The penalty will be collected from the employer in accordance with current assessment procedures on outstanding accounts.

For self-insured employers the client service assistant will calculate the amount of the penalty and notify the Finance Department. The Finance Department will charge the penalty amount against the self-insured employer account plus administration fee.

Collection of Penalty

WorkplaceNL collects re-employment penalties according to the established provisions governing the collection of assessments.

The Role of the Entitlement Division
Re-employment penalty and payment decisions will be made within the Entitlement Division where a claim is paid and closed with no referral required to case management. They will be responsible for all aspects of the process, including setting up the re-employment payment and penalty. Any subsequent follow up on re-employment issues will be referred to the case manager (e.g., the employer subsequently re-employs and a change is needed to the re-employment payment to the worker).

41.08 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 cause 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:
EN-22 Merits and Justice
RE-05 Re-employment Obligation
RE-06 Alternative Work Comparable to the Pre-injury Job
RE-08 Compliance with the Re-employment Obligation
RE-14 Labour Market Re-entry Assessments
RE-15 Determining Suitable Employment and Earnings
RE-16 Labour Market Re-entry Plans
Procedures:
40.00 Alternate Work Comparable to the Pre-injury Job
39.00 Re-employment Obligation

Amendment History

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