Client Services Policy Manual

Policy Number:	**RE-05**
Subject:	**Re-employment Obligation**
Chapter:	**Return to Work and Rehabilitation**

Policy Statement

Employers have a legal re-employment obligation (section 89.1) if:

- 20 or more workers are regularly employed;
- The employer and the worker are in an employment relationship for a continuous period of one year immediately prior to the date of the worker's injury; and
- The worker is medically able to perform the essential duties of the pre-injury employment (see "Determining Essential Duties" in this policy), or to perform suitable work.

The Workplace Health, Safety and Compensation Act (the Act) specifically addresses the duty to accommodate for an employer who has a re-employment obligation in section 89.1 of the Act. The employer must accommodate the work or the workplace for the worker who has been unable to work as a result of an injury to the extent that the accommodation does not cause the employer undue hardship.

The Act also requires all employers to co-operate in the early and safe return to work of a worker, injured in their employment, by providing suitable employment (section 89). This is defined as employment that is available and consistent with the worker's functional abilities and that, where possible, restores the worker's pre-injury earnings.

All employers have a duty under human rights legislation to accommodate a worker who is unable to work as a result of an injury. In addition to the duty to accommodate in section 89.1 of the Act, WorkplaceNL interprets its legislation and policies in compliance with human rights legislation and applies the duty to accommodate to all employers.

The fundamental principles of the re-employment obligation under section 89.1 of the Act, require employers 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. This would be if the worker is medically cleared for the essential duties of the pre-injury employment (see Policy RE-06 Alternative Work Comparable to the Pre-injury Job).
- Offer the worker the first opportunity to accept suitable employment that may become available. This would apply if the worker is medically cleared for suitable work, but is unable to perform the essential duties of the pre-injury employment.
- Accommodate the work or workplace, for the worker, to the extent that the accommodation does not cause the employer undue hardship.

Return to work planning should follow a hierarchy of priorities that restores the worker to the pre-injury job. This includes any required accommodation or suitable work, while restoring the pre-injury earnings, where possible. Refer to Policy RE-18 Hierarchy of Return to Work and Accommodation for guidance.

Construction Industry

The re-employment obligation for this industry is determined by Policy RE-19 Construction Industry.

Roles

Role of WorkplaceNL

WorkplaceNL is responsible for communicating the requirements of the re-employment obligation to the workplace parties.

WorkplaceNL ensures compliance in accordance with legislation by:

- Confirming return to work plans are achieving the hierarchy of priorities as outlined in Policy RE-18 Hierarchy of Return to Work Priorities and Accommodation.
- Ensuring return to work plans are consistent with the worker's functional abilities as outlined in Policy RE-03 Functional Abilities Information for Return to Work.
- Facilitating the shared responsibilities of workplace parties.
- Giving advice and direction as required.
- Communicating regularly and effectively with the workplace parties and health care providers.
- Offering dispute resolution if required.

WorkplaceNL may determine whether the worker is able to perform the essential duties of the pre-injury employment.

Where there is disagreement between the workplace parties regarding the fitness level of the worker, WorkplaceNL may determine if the worker is able to perform suitable work.

Applicable penalties will be enforced where WorkplaceNL determines non-compliance.

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When referencing any of the return to work policies (RE-01 to RE-11 and RE-18), it is important to recognize the responsibilities of the workplace parties within the context of the complete return to work process. Therefore, the whole return to work model must be considered in its entirety, not based upon an individual policy.

General

Who is an employer?

An employer is defined by the Act.

An employer is treated as one employer when determining a re-employment obligation, even if the employer:

- Has numerous geographically distinct plants or branches within the province; or
- Has numerous firm or account numbers with WorkplaceNL for assessment purposes.

Employers who are self-insured, and employers covered under the Government of Canada's Government Employees' Compensation Act (GECA), are bound by the re-employment obligation of the Act.

A principal, contractor, or subcontractor referred to in section 120 of the Act, who is not the injury employer, will not be responsible to re-employ an injured worker injured with another employer referred to in section 120.

Who is a worker?

A worker is defined by the Act. This definition applies when determining the number of workers regularly employed by an employer, and includes employment that is:

- Full-time;
- Part-time;
- Temporary;
- Casual or contractual but that serves the purpose of employer's industry; or
- Seasonal.

Determining when a worker is unable to work

Workers are considered unable to work if, because of the injury, they:

- Are unable to perform the essential duties of their pre-injury employment; or
- Require workplace modifications or assistive devices to perform the essential duties of their pre-injury job (see Policy RE-18 Hierarchy of Return to Work and Accommodation).

Determining the date of disability

For the purpose of section 89.1 of the Act, the date of disability for re-employment purposes and determining compliance with the employer's obligation is the date that the worker experiences loss of earning capacity, either full or partial loss, as a result of an injury.

Re-employment Obligation for Recurrences

The date of disability for re-employment purposes and determining compliance where a worker experiences a recurrence (as defined in Policy EN-03 Recurrences), is the date that the worker experiences loss of earning capacity, either full or partial loss, as a result of the recurrence.

There is an obligation to re-employ the worker where the employer at the time of the recurrence is the injury employer. Section 89.1 of the Act does not apply where the employer at the time of the recurrence is not the injury employer.

The injury employer may have an ongoing re-employment obligation related to the original injury, even though the worker has returned to suitable employment with another employer at the time of the recurrence. This may occur in situations where the pre-injury employer did not have suitable work available for the worker, but continues to have an obligation to offer suitable work that becomes available during the re-employment obligation period.

Determining the number of workers regularly employed

The number of workers that the injury employer has employed on the day of injury is generally considered the number of workers regularly employed. If the worker or employer disagrees with this number, WorkplaceNL:

- Determines the average number of workers employed in each of the 12 months before the worker's injury;
- Determines the seven months that have the highest average number of workers; and
- Calculates the average number of workers in this seven-month period.

The resulting figure represents the number of workers regularly employed.

Seasonal Employment
WorkplaceNL will review the past hiring practices of the employer if the employer's operations are seasonal, and the worker, employer, or WorkplaceNL questions whether the number of workers employed on the date of the worker's injury, fairly represents the number regularly employed. WorkplaceNL will determine the average number of workers employed in each of the 12 or fewer months that make up the full regular season of the employer's operation before the date of the worker's injury. The full regular season of operation means the months (partial months being considered as full months) that the employer is producing the product or delivering the service for which coverage under the Act is provided.

The employer is bound by the re-employment obligations if there are 20 or more workers in the majority of the months of the full regular season.

In the fishing industry, an employer may operate at various times throughout the year depending on the species in season at any given time (i.e., crab versus shrimp season). An injured worker shall be considered regularly employed with that employer for at least one year at the time of the injury, regardless of the varying species that were in season throughout the year.

Determining Essential Duties
The workplace parties usually determine the essential duties. WorkplaceNL will determine the essential duties if there is a disagreement by considering the duties necessary to achieve the actual job outcome including:

- How often each duty is undertaken;
- The proportion of time spent at each specific duty;
- The effect on the job outcome if a duty is removed;
- The effect on the process before or after a duty, if a duty is removed;
- The current and relevant job description, and
- The normal productivity expected in the job.

WorkplaceNL will rely on the advice and support from qualified experts where necessary.

Job outcome
The job outcome is the overall objective of the job in terms of the production of the final product or provision of service.

Normal productivity
Normal productivity refers to the range or level of productivity expected for the job.

Determining Suitable Employment
The workplace parties (worker and employer) are responsible for determining whether a particular job that becomes available, is suitable for the worker. WorkplaceNL will make the final determination if the workplace parties cannot agree.

Suitable employment is any work that:
i. The worker has the necessary skills to perform, or the worker is reasonably able to acquire the necessary skills to perform; and
- Does not pose a health or safety risk to the worker or co-workers (see Policy RE-02 The Goal of Early and Safe Return to Work and the Roles of the Parties).

The workplace parties or WorkplaceNL evaluates the suitability of the job by considering the above, and the worker's:
- Functional abilities that their health care providers recommend (refer to Policy RE-03 Functional Abilities Information for Return to Work);
- Cognitive abilities;
- Degree of impairment and medical prognosis of the injury; and
- Aptitude for the job's tasks and duties.

The employer will offer the worker suitable employment that becomes available where the worker:
- Has achieved maximum medical plateau in the recovery for the injury, and
- Is medically able to perform suitable work, but is unable to perform the essential duties of the pre-injury job.

Consideration must also be given to any potential accommodations to the work or workplace when determining if a worker can perform the job (see Policy RE-06 Alternative Work Comparable to the Pre-injury Job).

The employer is obligated to offer the worker suitable employment that becomes available throughout the period of workplace re-integration.

The employer must offer the worker the job that is most comparable in nature and earnings to the worker's pre-injury job because the obligation to offer suitable employment is ongoing.

For example, the employer must offer the more comparable job to the worker if suitable employment has been offered to the worker and another suitable job more comparable in nature and earnings to the pre-injury job becomes available throughout the period of the re-employment obligation.

Continuous Employment
Workers hired one year or more before the injury are considered to be continuously employed. This does not apply when the worker or employer interrupts the year with a work cessation that is intended to sever the employment relationship.

Seasonal workers
A seasonal worker is considered to be continuously employed where:

- There is a demonstrated pattern of rehiring the worker for more than one season; and
- There is no evidence that the employment relationship was officially terminated with no intention to rehire the worker at the next season.

Example:
A worker is employed for eight months (April to November) each year, for three consecutive years, for the same employer without a formal contract. In the third season, the worker is injured on the job and loses time from work. The employer disputes the application of section 89.1 of the Act, claiming that the worker was not employed for 12 consecutive months prior to the injury. WorkplaceNL finds that the worker's employment pattern and the informal understanding between the worker and the employer establishes that the 4-month work cessation was not intended by the worker or the employer to break the employment relationship. Therefore, section 89.1 of the Act applies because the worker is considered employed for 12 consecutive months.

Work Cessation

Employment relationship broken
The following factors are considered to determine whether there was an intention by either party to sever the employment relationship when there is a work cessation:

- The length of time the employer has employed the worker;
- The length of, and reason for, any work cessation;
- Any contractual arrangements between the parties;
- The worker's pattern of employment and the employment patterns of co-workers;
- The expressed views and behaviour of the parties; and
- The extent to which aspects of the employment relationship are maintained (i.e., maintenance of employee benefits by the employer).

Employment relationship not broken
The following types of work cessation generally 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.

Casual Workers
Casual workers must be on the casual placement roster (i.e., call-in list) continuously for at least one year at the time of injury in order to determine that there is one-year continuous employment under section 89.1 of the Act. It is not necessary that the worker be continuously on work assignments during that time. A worker at a temporary employment agency may be considered a casual worker under this policy.

Essential duties
The essential duties of a casual worker include the duties of:

- The pre-injury job; and
- Any other jobs that the worker normally is assigned to or is eligible to be assigned.

Fit for pre-injury job
The employer of a casual worker is considered to meet the re-employment obligation by offering comparable employment when the worker is:

- Able to perform the pre-injury work; and
- Is returned to the casual placement roster for normal rotation of job assignments.

Fit for suitable employment
The employer of a casual worker is considered to meet the re-employment obligation by:

- Placing workers on the casual placement roster; and
- Offering the first opportunity of suitable employment that becomes available, considering the normal rotation of job assignments.

Additional factors
Placing the worker on the casual placement roster in and of itself does not meet the intent of the re-employment obligation. The worker must also receive assignments in a pattern similar to that of the pre-injury employment pattern.

Date of re-employment
The date of re-employment is the date the worker's name is placed on the casual placement roster.

Entitlement to benefits
Reinstating workers to their former position on placement rosters does not rule out entitlement to loss of earnings benefits.

Entitlement to benefits is determined by whether or not the worker continues to have a loss of earnings as a result of the injury.

Where the worker's employment is of a casual nature, (i.e., performing short term employment for partial day(s) throughout the month), that worker will be included in the average number of workers for the month when determining the number regularly

employed. The same worker will be counted only once, even if the worker performs casual work on more than one occasion during the month for the same employer.

Section 89.1(5) of the Act requires the employer to offer to re-employ a worker when they are medically cleared for the essential duties of the pre-injury job in:

- The position that the worker held on the date of injury; or
- An alternative position comparable in nature and earnings to the pre-injury position (see Policy RE-06 Alternative Work Comparable to the Pre-injury Job).

Contract Workers
For contract workers, the specified time frame (i.e., period) of the employment contract established at the time of hire must be considered when determining the status of the position held on the date of injury. The re-employment obligation is not intended to extend the specified time frame of employment agreed to at the time of hire.

Essential duties or alternative employment
The employer is only required to re-employ a contract worker with an employment agreement for a specified time frame in the pre-injury job or alternative work of a comparable nature, for the remaining period of the employment contract that was interrupted by the injury.

Suitable employment
Employers of contract workers are expected to offer the first suitable job that becomes available.

Date of re-employment
The date of re-employment is used to determine whether an employer has fulfilled the obligation for the remaining period of the contract. The date the worker returns to the pre-injury job, or to a comparable contract position, is the date of re-employment.

Entitlement to benefits
Entitlement to benefits for contract workers is determined by whether the worker continues to have a loss of earnings as a result of the injury.

Voluntary Severance
An employer must offer to re-employ a worker in compliance with the re-employment obligation under section 89.1 of the Act even if the worker and employer agree to a voluntary severance (see Policy RE-09 Re-employment Penalties and Payments). In these cases, the re-employment obligation will be met and no penalty will be levied.

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Penalties
Penalties for non-compliance with the re-employment obligation under section 89.1 of the Act are addressed in policy RE-09 Re-employment Penalties and Payments. In addition, a finding of a breach of the duty to accommodate resulting in non-compliance under section 89 of the Act may also result in penalties for non-co-operation, as outlined in policy RE-02 The Goal of Early and Safe Return to Work and the Roles of the Parties. The cost to WorkplaceNL of providing return to work and labour market re-entry may also be charged to the employer.

Merits and Justice
Where the individual circumstances of a case are such that the provisions of this policy 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, Sections 89, 89.1 and 89.4.

Policies:
EN-22 Merits and Justice
EN-03 Recurrences
RE-01 through RE-09
RE-18 Hierarchy of Return to Work and Accommodation

Amendment History

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