Client Services Policy Manual

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

Policy Statement

The fundamental principles of the re-employment obligation are:

1. where the worker is medically cleared for the essential duties of the pre-injury employment, the employer 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").

2. Where the worker is medically cleared for suitable work but is unable to perform the essential duties of the pre-injury employment, the employer must offer the worker the first opportunity to accept suitable employment that may become available with the employer.

3. The employer must 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, with accommodation if required, or suitable work and restores the pre-injury earnings, where possible. (refer to Policy RE-18 Hierarchy of Return to Work and Accommodation).

An employer of a worker who has been unable to work in their pre-injury job as a result of an injury is required to offer to re-employ the worker if:

i. the employer regularly employs 20 or more workers;
ii. the employer and the worker had been in an employment relationship for a continuous period of one year immediately prior to the date of the worker's injury, and
iii. 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.
iv. Employers also have an obligation to accommodate and re-employ injured and disabled workers under human rights legislation.

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Role of WorkplaceNL

WorkplaceNL is responsible for communicating the requirements of the re-employment obligation to the workplace parties and ensuring compliance in accordance with the legislation. This is achieved by ensuring the return to work plans are achieving the hierarchy of priorities (refer to Policy RE-18 Hierarchy of Return to Work Priorities and Accommodation) and are consistent with the worker's functional abilities (refer to Policy RE-03 Functional Abilities Information for Return to Work), facilitating the shared responsibilities of the workplace parties, giving advice and direction as required, communicating regularly and effectively with the workplace parties and health care providers, and offering dispute resolution, where required. Where there is disagreement between the workplace parties regarding the fitness level of the worker, WorkplaceNL may determine whether the worker is able to perform the essential duties of the pre-injury employment or to perform suitable work. Where WorkplaceNL determines non-compliance, applicable penalties will be enforced.

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 and not only the specific guidelines under an individual policy.

Construction Industry

Effective January 1, 2002, section 89 and 89.1 of the Act applies to non-construction workers of construction employers. Effective January 1, 2003, section 89.1 of the Act shall also apply to a worker who performs construction work and to an employer who is engaged primarily in construction work as defined by Policy RE-19 "Construction Industry".

General

Who is an employer?

An "employer" means an employer as defined by the Act. When determining a re-employment obligation, an employer is treated as one employer even if it:

i. has numerous geographically distinct plants or branches within the province, and/or
ii. has numerous firm/account numbers with WorkplaceNL for assessment purposes.

Employers who are self-insured, and employers covered under the 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 who was injured with another employer referred to in section 120.

Who is a worker?

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

i. full-time
ii. part-time
iii. temporary,
iv. casual or contractual but that serves the purpose of employer's industry, or
v. seasonal.

Determining when a worker is unable to work

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

i. are unable to perform the essential duties of their pre-injury employment, or
ii. 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.

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

Re-employment Obligation for Recurrences

Where the employer at the time of the recurrence is the injury employer, there is an obligation to re-employ the worker related to the recurrence. Where the employer at the time of the recurrence is not the injury employer, there is no obligation to re-employ the worker related to the recurrence by the employer at the time of the recurrence.

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
Generally, the number of workers employed by the injury employer on the day of injury is considered the number of workers "regularly employed." If the worker or employer disagrees with this number, WorkplaceNL:

i. determines the average number of workers employed in each of the 12 months before the worker's injury,
ii. determines the seven months that have the highest average number of workers, and
iii. calculates the average number of workers in this seven-month period.

The resulting figure represents the number of workers regularly employed.

Seasonal Employment

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 review the past hiring practices of the employer. 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.

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

In the fishing industry an employer may operate at various times throughout the year depending on the species in season at any given time (e.g. 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

Usually, the workplace parties determine the essential duties. Where there is disagreement, WorkplaceNL will make this determination by considering the duties necessary to achieve the actual job outcome including:

i. how often each duty is undertaken;
ii. the proportion of time spent at each specific duty;
iii. the effect on the job outcome if a duty is removed;
iv. the effect on the process before or after a duty, if a duty is removed;
v. the current and relevant job description, and
vi. the normal productivity expected in the job.

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

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. If the workplace parties cannot agree, WorkplaceNL will make the final determination.

Suitable employment is any work that:

i. the worker has the necessary skills to perform, or
ii. the worker is reasonably able to acquire the necessary skills to perform, and
iii. 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”).

To evaluate the suitability of the job, the workplace parties and/or WorkplaceNL consider the above, and the:

i. worker's functional abilities as defined on the Form 8/10 Physician’s Report of Injury (refer to Policy RE-03 Functional Abilities Information for Return to Work);
ii. worker’s cognitive abilities;
iii. degree of the worker's impairment and medical prognosis of the injury, and
iv. worker's aptitude for the job's tasks and duties.

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, the employer will offer the worker suitable employment that becomes available. 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 the re-employment obligation.

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.

For example, 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, the employer must offer the more comparable job to the worker. This obligation applies every time a more comparable job becomes available throughout the period of the re-employment obligation.

Continuous Employment

Workers who are hired one year or more before the injury are considered to be continuously employed unless the year was interrupted by a work cessation intended by the worker or the employer to sever the employment relationship.

Seasonal workers
A seasonal worker is considered to be continuously employed where it is shown there has been a 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 works eight months (April to November) each year for three consecutive years for the same employer. They do not have a formal contract. In the third season, the worker has an injury on the job and loses time from work. The employer disputes the re-employment rights 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 establish that the 4-month work cessation was not intended by the worker or the employer to break the employment relationship. The worker is considered employed for “12 consecutive months" and therefore is entitled to re-employment.

Work Cessation

Employment relationship broken
If there is a work cessation, the following factors will be considered to determine whether there was an intention by either party to sever the employment relationship:

i. the length of time the worker was employed by the

employer;
ii. the length of, and reason for, any work cessation;
iii. any contractual arrangements between the parties;
iv. the worker's pattern of employment and the employment patterns of co-workers;
v. the expressed views and behaviour of the parties, and
vi. the extent to which aspects of the employment relationship are maintained (e.g., maintenance of employee benefits by the employer).

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

i. strikes and lockouts;
ii. sabbaticals, sick leaves, parental leaves, leaves of absence, and vacations;
iii. work-related injuries resulting in time off work;
iv. 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
v. 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,
    a. and a date of recall was stipulated, and the recall occurs,
    b. the employer continued to pay the worker,
    c. the employer continued to make benefit payments for the worker pursuant to the provisions of a retirement, pension, or employee insurance plan, or,
    d. the employee received, or was entitled to, supplementary employment insurance benefits.

Casual Workers

To be eligible for re-employment, 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. 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

i. the duties of the pre-injury job, and
ii. the duties of 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 taking into account 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 necessarily 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 very casual nature, such as only performing very 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 he/she performs casual work on more than one occasion

during the month for the same employer.

Contract Workers

Section 89.1 (5) of the Act requires the employer to offer to re-employ a worker, who is cleared for the essential duties of the pre-injury job, in the position that the worker held on the date of injury, or offer 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").

For contract workers hired by an employer for a specified time frame which is established at the time of hire, the duration of the employment contract must be considered when determining the status of the position held on the date of injury. The re-employment obligation under the Act is not intended to extend the duration of employment agreed to at the time of hire.

Essential duties/alternative employment
If a contract worker enters into an employment agreement for a specific period of time, the employer is only required to re-employ the worker in the pre-injury job or alternative work of a comparable nature, for the remainder of the 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 remainder of the contract period. 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 even if the worker and employer agree to a voluntary severance (see policy RE-09 “Re-employment

Penalties and Payments"). In such cases, the re-employment obligation will be met and no penalty will be levied.

Penalties

Penalties for non-compliance with the re-employment obligation are addressed in policy RE-09 "Re-employment Penalties and Payments". In addition, a finding of non-compliance under re-employment 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" and the cost to WorkplaceNL of providing return to work and labour market re-entry may be charged to the employer.

Exceptional Circumstances

In cases where the individual circumstances of a case are such that the provisions of this policy 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. Such a decision will be considered for that specific case only and will not be precedent setting.

Effective Date

This policy applies to injuries occurring on or after January 1, 2002, other than injuries to construction workers defined by Policy RE-19 "Construction Industry". For a worker who performs construction work and an employer who is engaged primarily in construction work as defined by Policy RE-19 "Construction Industry", the re-employment obligation under this policy applies to injuries occurring on or after January 1, 2003.

Reference: *Workplace Health, Safety and Compensation Act (the Act), Sections 89.1 and 89.4.*
Policies: RE-01 through RE-11
RE-18 Hierarchy of Return to Work and Accommodation

Amendment History

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