Client Services Policy Manual

Policy Number:	**RE-08**
Subject:	**Compliance with the Re-employment Obligation**
Chapter:	**Return to Work and Rehabilitation**

Policy Statement
When a worker is able to perform the essential duties of the pre-injury job, the employer is required to:

- Offer to re-employ the worker in the position held on the date of injury;
- Accommodate the work or the workplace for the worker to the extent that the accommodation does not cause the employer undue hardship (see Policy RE-07 Undue Hardship); or
- Provide alternative employment comparable to the employment on the date of injury (see Policy RE-06 Alternative Work Comparable to the Pre-injury Job).

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, as a result of an injury (section 101 of the Workplace Health, Safety and Compensation Act, 2022 (the Act)).

When a worker is able to perform suitable employment (see Policy RE-05 Re-employment Obligation), the employer is required to offer the worker the first opportunity to accept suitable employment that becomes available.

Employers are required to re-employ workers as part of the early and safe return-to-work process.

The return-to-work policies (RE-01 to RE-07, and RE-18) represent the return-to-work model. Therefore, all policies must be considered, not only the specific guidelines under an individual policy.

Collective Agreements
When a worker is covered by the re-employment provisions of both a collective agreement and the Act, the provisions of the Act shall be applied. The exception would be where the workplace parties, in consultation with local union representatives, determine that the provisions of the collective agreement afford the worker greater rights.

The worker's return to work under the re-employment provisions of the Act does not displace seniority provisions of the collective agreement. The application of the re-employment obligation is subject to the level of accumulated seniority in relation to co-workers, and the specific seniority provisions of the collective agreement.

General

Duration of Obligation
An employer is obligated to re-employ the worker until the earliest of:

- Two years after the date of the worker's disability (see Policy RE-05 Re-employment Obligation Determining 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 the worker reaches age 65.

Change in Fitness Level
If a worker is able to perform suitable work and is later able to perform the essential duties of the pre-injury job, the worker must inform WorkplaceNL and the employer of the improvement. The employer is then required to offer to re-employ the worker in the pre-injury job or an alternative job of a comparable nature.

Determining Compliance
At the worker's request, or on its own initiative, WorkplaceNL will determine whether employers have met their re-employment obligation to workers. WorkplaceNL will consider these facts to determine whether the employer:

- Offered to re-employ the worker;
- Offered employment consistent with the worker's ability to return to the pre-injury job or a comparable job, or suitable employment (see Policy RE-05 Re-employment Obligation, section: Determining Suitable Employment);
- Offered to accommodate the work or workplace for the worker (see Policy RE-18 Hierarchy of Return to Work and Accommodation); and
- Re-employed the worker for the duration of the re-employment obligation.

Identifying Non-compliance
WorkplaceNL on its own initiative may investigate where it identifies potential non-compliance.

Before a penalty is levied against an employer for not complying with the re-employment obligation, the employer will be given an opportunity to respond to WorkplaceNL regarding the reason for non-compliance. If WorkplaceNL finds that an employer has failed to meet the re-employment obligation and does not have a legitimate reason, WorkplaceNL will inform the employer verbally, if possible, and in writing of the amount of the re-employment penalty.

If the employer fails to comply within one week of notification, the penalty will be levied. Where there is evidence that an employer has been formally notified in writing of the co-operation obligation in the past (either on the same claim or other claims), WorkplaceNL will not provide a subsequent one-week penalty notification. However, the employer will be given an opportunity to comply before any penalty is levied on the same or subsequent claim. The penalty will only be levied where the employer fails to demonstrate compliance to the satisfaction of WorkplaceNL.

Termination Within six Months of Re-employment
WorkplaceNL will presume that the employer has not fulfilled the re-employment obligation where a worker is terminated within six months of re-employment. WorkplaceNL must ensure that the work cessation is, in fact, a termination (i.e., severing the employment relationship) and not a temporary work cessation which is not intended to be a termination where the employment relationship is not broken.

The employer must show that the termination of the worker's employment was not related to the injury in order to rebut this presumption.

WorkplaceNL will examine the following to determine if the employer is in breach of the re-employment obligation:

- The terms of the collective agreement (if any) in conjunction with the employer and local union officials;
- Pre-existing written company policy;
- Established company practices; and
- Other relevant evidence.

Workers who are terminated within six months of re-employment will have three months to request in writing that WorkplaceNL investigate the non-compliance with the re-employment obligation. If the request is made after three months, WorkplaceNL is not required to investigate.

Termination After six Months of Re-employment
The presumption does not apply where a worker is terminated more than six months after re-employment. In this case, a determination must be made as to whether the employer is in breach by reviewing the circumstances of the termination.

Consequences of a Breach
If WorkplaceNL determines that the employer has not fulfilled the re-employment obligation, it:

- Will levy on the employer a penalty not exceeding the amount of the worker's net average earnings with the pre-injury employer for the 12 months immediately preceding the beginning of the loss of earnings as a result of the injury (i.e., actual net average earnings and not subject to the maximum compensable earnings amount); and
- May make payments to the worker for up to a maximum of one year as if the worker was entitled to payments under section 83 of the Act.

Re-employment Penalty and Payments
The re-employment penalty is an amount owing to WorkplaceNL at the time that it is levied, and shall be added to the employer's assessment. Payment shall be enforced under section 140 of the Act. A principal, contractor, or subcontractor referred to in section 144 of the Act who is not the injury employer, will not be held liable for a non-compliance penalty charged against the injury employer.

See Procedure 41.00 Compliance with the Re-Employment Obligation for information on:

- Amount of the penalty
- Waiving the penalty
- Reducing the penalty
- Collection of the penalty

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).

Penalty for Employer Non-cooperation
In deciding whether to levy a re-employment penalty, WorkplaceNL may also determine whether a finding of non-cooperation is appropriate (see Policy RE-02 The Goal of Early and Safe Return to Work & the Roles of the Parties). If determined appropriate, WorkplaceNL shall levy a financial penalty on the employer not exceeding the cost to WorkplaceNL of providing the worker's benefits.

Labour Market Re-entry (LMR) for Employer Non-Cooperation
Where there is a finding of employer non-cooperation, the cost of any LMR assessment or plan provided to a worker, may be charged to the employer. See policies RE-14 Labour Market Re-entry Assessments and RE-16 Labour Market Re-entry Plans for entitlement to these services.

Objection to Penalty
A re-employment penalty is not suspended if an employer launches an objection. In these cases, the penalty is still levied. However, the employer's objection is considered before the penalty is enforced.

Re-employment Payments (Worker fit for essential duties without accommodation)
If the worker is fit for the essential duties of the pre-injury job without accommodation, but the employer fails to meet the re-employment obligation, re-employment payments are issued to the worker effective from the date of the re-employment obligation. The amount of the re-employment payment is calculated in accordance with section 83 of the Act.

Re-employment payments are issued for a maximum of one year, or the end of the obligation period. Re-employment payments end if the employer meets the obligation.

Temporary Earnings Loss (Worker fit for essential duties with accommodation or fit for suitable work)
If the worker is fit to perform only the essential duties of the pre-injury job with accommodation; or suitable work, and the employer fails to meet the re-employment obligation, the worker is offered an LMR assessment. In addition, temporary earnings loss benefits are paid to the worker as long as the worker is available for, and co-operates in:

- Medical rehabilitation programs;
- Early and safe return to work programs; or
- LMR assessments and plans.

If the employer subsequently meets the re-employment obligation, WorkplaceNL re-examines the need for an LMR plan, if applicable (refer to Labour Market Re-entry policies RE-12 to RE-18).

Worker Accepts Less Suitable Work
If the worker accepts work which is not the most suitable job available, partial temporary earnings loss benefits are paid based on the salary for the most suitable job. An LMR assessment will be conducted to determine whether the worker requires an LMR plan.

If an LMR plan is required, full temporary earnings loss benefits are paid while the worker participates in the plan.

Change in Fitness Level
If the worker's fitness improves such that the worker is able to perform the essential duties of the pre-injury job without accommodation during the first year the re-employment breach occurred, temporary earnings loss benefits are converted to re-employment payments.

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 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, sections 63, 83, 101, 140, 144
Policies: RE-01 Overview – Return to Work
RE-02 The Goal of Early and Safe Return to Work and the Roles of the Parties
RE-03 Functional Abilities Information for Return to Work
RE-05 Re-employment Obligation
RE-06 Alternative Work Comparable to the Pre-Injury Job
RE-07 Undue Hardship
RE-12 Labour Market Re-entry Overview
RE-13 Labour Market Re-entry Co-operation
RE-14 Labour Market Re-entry Assessments
RE-15 Determining Suitable Employment and Earnings
RE-16 Labour Market Re-entry Plans
RE-18 Hierarchy of Return to Work and Accommodation
EN-22 Merits and Justice

Amendment History

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