 Yukon Workers' Compensation Health and Safety Board	<b>Part:</b>	<b>Return to Work and Rehabilitation</b>		
	<b>Board Approval:</b>	<b>Original signed by chair</b>	<b>Effective Date:</b>	<b>January 1, 2011</b>
	<b>Number:</b>	<b>RE-04</b>	<b>Last Revised:</b>	
	<b>Board Order:</b>		<b>Review Date:</b>	

## **EMPLOYER'S OBLIGATION TO RE-EMPLOY – OVERVIEW**

*When referencing any of the return to work policies (RE-01 to RE-13), it is important to recognize the responsibilities of the employer and the worker 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.*

**This policy applies to employers who regularly employ 20 or more workers.**

### **GENERAL INFORMATION**

Return to work is a proactive approach to helping injured workers return to safe and productive work activities as soon as it is physically possible. It is a partnership involving employers, workers, health care providers, unions (where applicable) and the Yukon Workers' Compensation Health and Safety Board (YWCHSB). Section 41 of the *Workers' Compensation Act*, S.Y. 2008 (the "Act") sets out a new re-employment obligation that applies to certain employers. An employer who regularly employs 20 or more workers is obligated to re-employ an injured worker if that injured worker has been employed continuously with that employer for at least one year prior to the work-related injury, in accordance with the various provisions set out in section 41. These provisions apply to injuries occurring on or after January 1, 2011.

### **PURPOSE**

This policy provides direction to employers and assists workers in understanding their obligations and role in the re-employment process.

This policy sets out what the fundamental principles of the re-employment obligation are under section 41 of the *Act*, clarifying when section 41 applies to an employer, how the number of workers regularly employed will be calculated, what the re-employment obligation is, when a worker is medically unable to work, and what is suitable employment.

## DEFINITIONS

1. **Case Management Team:** a team that assists the injured worker with their recovery, early and safe return to work plan and, if needed, vocational rehabilitation. The team always includes the injured worker and YWCHSB. Employers have a duty to co-operate in their injured worker's early and safe return to work and will be encouraged to use participation on the Case Management Team to facilitate that duty. The team can also include up to two representatives of the injured worker<sup>1</sup> (as desired by the injured worker), disability manager and the health care community. Other members may be added depending on their specific roles and responsibilities.
  
2. **Employer:** means an employer as defined by the *Act*. When determining whether a re-employment obligation applies to an employer, an employer is treated as one employer even if it:
  - a) has numerous geographically distinct work sites, plants or branches within the Yukon; or
  - b) has numerous industry/assessment account numbers with YWCHSB for assessment purposes.

A principal, contractor, or subcontractor referred to in section 74 of the *Act* who is not the injury employer will not be responsible to re-employ an injured worker who was injured while working for another employer.

3. **Suitable Employment:** is work that meets all of the following criteria:
  - a) the work is within the worker's functional abilities;
  - b) the worker has, or is reasonably able to acquire, the necessary skills to perform the work;
  - c) the work does not pose a health or safety risk to the worker or co-workers; and
  - d) the work restores the worker's pre-injury earnings, if possible.
  
4. **Medically Able to Perform:** a worker is medically able to perform work duties when the worker has the functional abilities to perform those duties.

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<sup>1</sup> Note that the only type of representative who may make decisions on behalf of the worker is a lawyer retained by the worker, or a worker's representative with a power of attorney and/or a power of personal attorney.

- 5. Worker:** means a worker as defined by the *Act*. When determining whether a re-employment obligation applies to an employer, the number of workers regularly employed by an employer includes workers that are employed:
- a) full time;
  - b) part time;
  - c) temporary;
  - d) casual or contractual but that serves the purpose of the employer's industry; or
  - e) seasonal.

## PREVENTION

Preventing work-related injuries is the responsibility of everyone in the workplace. When injuries do occur, it is important for workers and employers to minimize the impacts by (1) when possible, keeping the worker at work in safe and productive work or (2) returning the worker to safe and productive work as soon as it is functionally appropriate for the worker to do so. Prevention of recurrences and further injuries once workers have returned to work is of utmost importance.

## POLICY STATEMENT

An employer of a worker who has been unable to work as a result of a work-related injury is required to offer to re-employ the worker in accordance with section 41 of the *Act* if:

- a) the employer regularly employs 20 or more workers;
- b) the employer and the worker had been in an employment relationship for a continuous period of at least one year immediately prior to the date of the work-related injury; and
- c) the worker is medically able to perform the essential duties of the pre-injury employment (see the "Determining Essential Duties" section in this policy), or to perform suitable employment.

Sections 41(1) to 41(18) of the *Act* set out an employer's obligations to re-employ a worker who has sustained a work-related injury.

Employers also have an obligation to accommodate and re-employ injured and disabled workers under human rights legislation.

Where the re-employment obligation applies to an employer, the fundamental principles of the re-employment obligation are:

- a) Where the worker is medically able to perform the essential duties of the pre-injury employment, the employer must offer to re-employ the worker in the position held on the date of the work-related injury, or in an alternative position which is comparable in nature and earnings to the pre-injury employment (see YWCHSB policy RE-05, "Alternative Employment Comparable to Pre-injury Employment");
- b) Where the worker is medically able to perform suitable employment, 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; and
- c) The employer must accommodate the work or workplace for the worker to the extent determined by YWCHSB (see section 41(6) of the *Act* and Policy RE-06, "Accommodating Work or a Workplace").

Return to work planning should follow a hierarchy of objectives that restores the worker to the pre-injury employment, with accommodation if required, or suitable employment that restores the pre-injury earnings, where possible (see the Return to Work Hierarchy of Objectives section in YWCHSB policy RE-02-1, "Duty to Co-operate, Part 1 of 4: Early and Safe Return to Work Plans").

## 1. Determining When a Worker is Unable to Work

A worker must have been unable to work as a result of a work-related injury in order for the obligation to re-employ to apply.

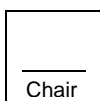
Workers are considered unable to work if, because of the work-related injury, they:

- a) are unable to perform the essential duties of their pre-injury employment; or
- b) require workplace modifications or assistive devices to perform the essential duties of their pre-injury employment (see the Adaptive Technologies section in YWCHSB policy RE-02-1, "Duty to Co-Operate, Part 1 of 4: Early and Safe Return to Work Plans").

## 2. Determining the Number of Workers Regularly Employed

The number of workers regularly employed must be 20 or more for the obligation to re-employ to apply. In general, the number of workers employed by the injury employer on the date of the work-related injury is considered the number of workers regularly employed.

If the worker, employer or YWCHSB questions whether this number fairly represents the number of workers regularly employed, YWCHSB will:



- a) determine the average number of workers employed in each of the 12 months before the work-related injury;
- b) determine the seven months that have the highest average number of workers; and
- c) calculate 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 YWCHSB questions whether the number of workers employed on the date of the work-related injury fairly represents the number regularly employed, YWCHSB will review the past hiring practices of the employer.

YWCHSB 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 work-related 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 obligation.

### Contract/Term Workers

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 the worker performs casual work on more than one occasion during the month for the same employer.

## **3. Determining Essential Duties**

The workplace parties determine the essential duties of the worker's pre-injury employment. Where there is disagreement, YWCHSB will make this determination by considering the duties necessary to achieve the actual job outcome including:

- a) how often each duty is undertaken;
- b) the proportion of time spent at each specific duty;
- c) the impact if a duty is removed;

- d) the effect on the process before or after a duty, if a duty is removed;
- e) the current and relevant job description; and
- f) the normal productivity expected in the job.

Where necessary, YWCHSB will rely on 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.

### **4. Determining Suitable Employment**

An employer of a worker who has been unable to perform the essential duties of their pre-injury employment as a result of a work-related injury but is medically able to perform suitable employment, is required to offer the worker the first opportunity to accept suitable employment that may come available with the employer, in accordance with section 41(4) of the *Act*.

When evaluating the suitability of the job, the workplace parties and YWCHSB consider the definition of suitable employment and the:

- a) worker's functional abilities (see YWCHSB policy RE-02-3, "Duty to Cooperate, Part 3 of 4: Functional Abilities");
- b) worker's cognitive abilities;
- c) degree of the worker's impairment and medical prognosis of the work-related injury; and
- d) worker's aptitude for the job tasks and duties.

Where the worker has achieved maximum medical improvement in the recovery from the work-related injury and is medically able to perform suitable employment 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 be given to any possible accommodations to the work or workplace when determining if the worker can perform the job.

The employer is obligated to offer the worker the first opportunity to accept suitable employment that becomes available throughout the period of the re-employment obligation in accordance with the review schedule agreed upon by

the workplace parties and YWCHSB in the return to work plan (see YWCHSB policy RE-02-1, "Duty to Co-operate, Part 1 of 4: Early and Safe Return to Work Plans").

Because the obligation to offer suitable employment is ongoing, the employer must offer the worker employment that is most suitable.

#### *Example*

*Suitable employment has been offered to and accepted by the worker. The return to work plan contains a schedule in which the plan is reviewed every four weeks. If at the time of the return to work plan review, more suitable employment has become available, the employer must offer the more suitable job to the worker. This obligation is ongoing throughout the period of the re-employment obligation.*

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

## **5. Determining What is a Continuous Employment Relationship**

Workers who are hired one year or more before the work-related 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 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. Between the periods of seasonal employment, the worker receives Employment Insurance (EI) benefits. In the third season, the worker has an injury 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 work-related injury. YWCHSB finds that the worker's pattern of employment and receipt of EI benefits, 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 the employer is obligated under the provisions of section 41 of the Act.*

### 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:

- a) the length of time the worker was employed by the employer;
- b) the length of, and reason for, any work cessation;
- c) any contractual arrangements between the parties;
- d) the worker's pattern of employment and the employment patterns of co-workers;
- e) the expressed views and behaviour of the parties; and
- f) 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:

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

## **6. Casual/On-Call Employment**

To be eligible for re-employment, casual/on-call workers must be on the casual placement roster (e.g. call-in list) continuously for at least one year at the time of the work-related injury. It is not necessary that the worker be continuously on work assignments during that time. Under this policy, a worker at a temporary employment agency may be considered a casual/on-call worker.

### Essential Duties

The essential duties of a casual worker include:

- a) the duties of the pre-injury employment; and
- b) the duties of any other work that the worker normally is assigned or is eligible to be assigned.

### Able to Perform Pre-injury Job

The employer of a casual worker is considered to meet the re-employment obligation by offering the pre-injury job or comparable employment when the worker is able to perform the pre-injury work, and by returning the worker to the casual placement roster for normal rotation of job assignments.

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.

### Able to Perform Suitable Employment

The employer of a casual worker who is able to perform suitable employment is considered to meet the re-employment obligation by placing the worker on the casual placement roster, and offering opportunities of suitable employment that become available taking into account the normal rotation of job assignments.

### 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 work-related injury.

## 7. Contract/Term Employment

Section 41(3) of the *Act* requires the employer to offer to re-employ a worker who is medically able to perform the essential duties of the pre-injury job in the position that the worker held on the date of injury, or offer an alternate position comparable in nature and earnings to the pre-injury position.

For contract/term workers hired by an employer (see the Contract for Service section in YWCHSB policy EA-02, "Determining the Status of a Person: Employer, Worker, Sole Proprietor or Non-Working Director") for a specified time frame which is established at the time of hire, the duration of the employment contract/term must be considered when determining the status of the position held on the date of work-related injury. The re-employment obligation under the *Act* is not intended to extend the duration of employment agreed to at the time of hire.

In cases where there are multiple terms established through contract/term employment, YWCHSB will examine the pattern of the work relationship in determining whether or not there is a continuous relationship established with the employer.

### Essential Duties/Alternative Employment

If a contract/term 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 and earnings, for the remainder of the contract/term that was interrupted by the work-related injury.

### Suitable Employment

Employers of contract/term workers are required to offer the first suitable employment that becomes available when the contract/term worker is medically unable to perform the essential duties of the pre-injury job.

### 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/term period. The date the worker returns to the pre-injury employment, or to a comparable contract/term position or to suitable employment, is the date of re-employment.

### Entitlement to Benefits

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

### **8. Employer's Re-employment Obligation for Temporary Assignments**

Section 41(3) of the *Act* requires the employer to offer to re-employ a worker who is medically able to perform the essential duties of the pre-injury employment in the position that the worker held on the date of injury, or offer an alternate position comparable in nature and earnings to the pre-injury position.

For workers who are injured while on temporary assignment for a specified time frame, the duration of the temporary assignment must be considered when determining the status of the position held on the date of the work-related injury. The re-employment obligation under the *Act* is not intended to extend the duration of the temporary assignment agreed to by the parties at the start of the temporary assignment period.

The re-employment obligations under section 41 of the *Act* relate to temporary assignment positions held on the date of the work-related injury for the remainder of the temporary assignment period that was interrupted by the work-related injury. For the remainder of the re-employment obligation period, the obligation relates to the substantive position the worker had prior to the work-related injury.

### **9. Employer's Re-Employment Obligation for Recurrences**

The employer may have an obligation to re-employ a worker during the re-employment obligation period where the worker experiences a recurrence of the work-related injury.

A recurrence is a situation in which:

- a) a worker has had a work-related injury, has received treatment, has reached maximum medical improvement, and has returned to work; or
- b) where entitlement has ended, and subsequently the worker requires treatment directly related to or caused by the work-related injury.

Where the employer at the time of the recurrence is the injury employer, there is an obligation to re-employ the worker in relation to the recurrence (see the Duration of Re-employment Obligation section in YWCHSB policy RE-07-1, "Compliance with the Re-employment Obligation").

The injury employer may have an ongoing re-employment obligation related to the original work-related injury even though the worker has returned to employment with another employer at the time of the recurrence. This may occur

in situations where the injury employer did not have suitable employment available for the worker but continues to have an obligation to offer suitable employment that becomes available during the re-employment obligation period.

Where the employer at the time of the recurrence is not the injury employer, there is no obligation on that employer to re-employ the worker in relation to the recurrence.

## **10. Voluntary Severance**

An employer must offer to re-employ a worker to be in compliance with the re-employment obligation. If the worker and the employer agree to a voluntary severance, the re-employment obligation will be met once an offer has been made and refused; no penalty will be levied (see YWCHSB policy RE-07-2, "Re-employment Penalties and Payments").

## **11. Penalties**

Penalties for non-compliance with the re-employment obligation are addressed in Policy RE-07-2, "Re-employment Penalties and Payments". In addition, a finding of non-compliance with the re-employment obligation may result in penalties for non-co-operation as outlined in YWCHSB policy RE-02-4, "Duty to Co-operate, Part 4 of 4": Penalties for Non Co-operation", and the cost of providing return to work and vocational rehabilitation services may be directly charged to the employer.

## **ROLES AND RESPONSIBILITIES**

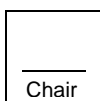
### **YWCHSB**

Yukon Workers' Compensation Health and Safety Board (YWCHSB) is responsible for communicating the requirements of the re-employment obligation to the worker and employer and for ensuring compliance in accordance with the legislation and YWCHSB policies. This is achieved by ensuring the return to work plans reflect the hierarchy of objectives and are consistent with the worker's functional abilities (see YWCHSB policy RE-02-3, "Duty to Co-operate, Part 3 of 4: Functional Abilities").

The relevant provisions of a collective agreement, if applicable in the circumstances, should be taken into consideration.

The role of YWCHSB includes:

- establishing the Case Management Team;
- managing the medical recovery of the injured worker;
- ensuring early and safe return to work plans are progressing; and



- monitoring the activities, progress and co-operation with the duty to co-operate, including determining compliance with the duty to co-operate (see YWCHSB policy Re-02-2, "Duty to Co-operate, Part 2 of 4: Roles and Responsibilities").

YWCHSB is also responsible for 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 YWCHSB decision-maker considers appropriate, mediation services may be offered. Where there is disagreement between the workplace parties regarding the fitness level of the worker, YWCHSB may determine whether the worker is able to perform the essential duties of the pre-injury employment or to perform suitable employment.

Where YWCHSB determines non-compliance, applicable penalties will be levied (see YWCHSB policy RE-07-2, "Re-employment Penalties and Payments").

### **The Employer**

The employer is responsible for offering to re-employ workers in accordance with the relevant provisions of the *Act* and YWCHSB policies.

The employer is also responsible for accommodating the work or the workplace to the extent determined by YWCHSB, (see YWCHSB policy RE-06, "Accommodating Work or a Workplace").

The relevant provisions of a collective agreement, if applicable in the circumstances, should be taken into consideration.

### **The Worker**

The worker is responsible for mitigating the loss caused by a work-related injury by taking all reasonable steps to reduce or eliminate any impairment and loss of earnings resulting from a work-related injury. This includes accepting offers of re-employment made by employers in accordance with the relevant provisions of the *Act* and YWCHSB policies and cooperating with efforts taken to accommodate the work or the workplace in order to facilitate re-employment.

The relevant provisions of a collective agreement, if applicable in the circumstances, should be taken into consideration.

## **Bargaining Agent**

The bargaining agent, as a party to a collective agreement, facilitates and encourages re-employment efforts of the workplace parties, including accommodation of the work or the workplace, in order to facilitate re-employment of the worker in accordance with the relevant provisions of the *Act* and YWCHSB policies.

The relevant provisions of a collective agreement, if applicable in the circumstances, should be taken into consideration.

## **APPLICATION**

This policy applies to the Board of Directors, President/CEO and staff of YWCHSB and to the Workers' Compensation Appeal Tribunal; employers who have a re-employment obligation under section 41 of the *Act*, and workers of these employers.

## **EXCEPTIONAL CIRCUMSTANCES**

In situations 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 an unintended result, YWCHSB will decide the case based on its individual merits and justice in accordance with YWCHSB policy EN-02, "Merits and Justice of the Case". Such a decision will be considered for that specific case only and will not be precedent-setting.

## **APPEALS**

Decisions made by YWCHSB under this policy, can be appealed in writing to the YWCHSB Hearing Officer in accordance with section 53(1) of the *Act*, or any decision made under section 14(2) of the *Act* may be appealed directly to the Workers' Compensation Appeal Tribunal.

A notice of appeal must be filed within 24 months of the date of the decision by YWCHSB, in accordance with section 52 of the *Act*.

## **EFFECTIVE DATE**

This policy applies to injuries occurring on or after January 1, 2011.

## **ACT REFERENCES**

Preamble and sections 14, 40, 41, 52, 74, 85

## **POLICY REFERENCES**

EA-02, "Determining the Status of a Person: Employer, Worker, Sole Proprietor or Non-Working Director"

EL-01, "Loss of Earnings Benefits"

EN-02, "Merits and Justice of the Case"

RE-01 to RE-13, Return to Work and Rehabilitation Policies

## **HISTORY**

New