Policy Amendment Proposal
RE-04 Employer's Obligation to Re-Employ

This policy amendment proposal relating to an employer's obligation to re-employ will reflect the issues consulted on during the engagement for the *Workers' Safety and Compensation Act* (the 'Act') and will align the amendments made in the new legislation.

The new Act comes into force July 1, 2022. The intended effective date of the proposed policy amendments will be July 1, 2022.

The proposed amended Employer's Obligation to Re-Employ policy will reflect minor changes to ensure consistency with the provisions of the Act.

A five-year policy review plan will be developed later in 2022. After July 1, 2022, all amended policies to align with the new Act will be prioritized for a more detailed review.

The purpose of this policy is to provide information on the re-employment process.

Relevant sections of the Act

The following sections of the Act are relevant:

- 118 employer's obligation to re-employ

Proposed minor changes to this policy are highlighted in yellow

- changes to section references, language and definitions
- addition of new exceptions to applicability provisions of the Act

Board Orders/Regulations

N/A

Current policy

RE-04 Employer's Obligation to Re-Employ – Overview

Policy Amendment Proposal
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The Board of Directors is providing this policy amendment proposal to stakeholders seeking their input, comments, questions and suggestions.

Some questions for consideration:

1. Are there any general comments about this policy proposal?
2. Are there any gaps in this policy proposal?
3. Additional comments?

The views of our stakeholders are important to us. All feedback will be considered prior to the Board of Directors approving any amendments.

Engagement on this policy proposal closes on **May 31, 2022**. Please provide your feedback by:

1. Downloading a fillable form our website and sending it as an attachment to Policy.Feedback@wcb.yk.ca

2. Emailing comments directly to Policy.Feedback@wcb.yk.ca

3. Receipt in our building by May 31, 2022, by mail or drop off at
   Yukon Workers' Compensation Health and Safety Board
   401 Strickland Street
   Whitehorse, Yukon Y1A 5N8

By the end of June a summary of all feedback on this policy amendment proposal will be published on our website at www.wcb.yk.ca

Policy Amendment Proposal
RE-04 Employer's Obligation to Re-Employ

Preventing work-related injuries is the most important job in any workplace. The *Workers' Safety and Compensation Act* establishes the responsibilities of all workplace parties to work together to ensure the physical and psychological health and safety of workers. When injuries do occur, workers and employers must continue to work together to facilitate an injured worker's early and safe return to health and work.

Purpose

This policy provides information on the re-employment process.

Definitions

board means the Workers' Safety and Compensation Board

case management team means a team that assists the worker with their recovery, early and safe return to work plan and, if needed, vocational rehabilitation. The team always includes the worker and the board. Employers have a duty to co-operate in their 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 worker (chosen by the worker), case manager and the health care providers. Other members may be added depending on their specific roles and responsibilities.

employer means every association, corporation, individual, partnership, person, society or unincorporated organization or other body having in their service one or more workers in an industry and as further defined in section 77 of the Act

medically able to perform means a worker is able to perform work duties when the worker has the functional abilities to perform those duties

suitable employment means work that meets 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 earnings, if possible.

worker means a person who performs work or services for an employer under a contract of service or apprenticeship, written or oral, express or implied and as further defined in section 77 of the Act

Policy Statement

1. General

An employer of a worker who has been unable to work as a result of a work-related injury and who, on the date of the work-related injury, had been employed by that employer in a continuous employment relationship for at least one year, must offer to re-employ the worker in accordance with section 118 of the Act and this policy.

This is only applicable to employers who employ 20 or more workers. There are certain employers and workers that the re-employment obligation does not apply to.

An employer is required to comply with the above provisions until the earliest of the following dates:

a. two years after the date of the work-related injury;

b. one year after the worker is medically able to perform the essential duties of the employment they held at the time of the work-related injury;

c. the date on which the worker reaches the age when they are eligible to apply for benefits under Part I of the *Old Age Security Act* (Canada).

Employers also have an obligation under the *Human Rights Act* to accommodate workers to the point of undue hardship.

When the worker is medically able to perform the essential duties of the employment they held at the time of the work-related injury, an employer to whom the re-employment obligation applies, must do one of the following:

d. offer to re-employ the worker in the position that they held on the date of the work-related injury; or

e. offer to provide the worker with alternative employment of a nature and at earnings comparable to the employment they held on the date of the work-related injury (see policy RE-05 Alternative Employment Comparable to Employment at the Time of the Work-Related Injury).

When the worker is medically able to perform suitable employment, but is unable to perform the essential duties of the employment they held at the time of the work-related injury, an employer to whom the re-employment obligation applies must offer the worker the first opportunity to accept suitable employment that may become available with the employer.

The employer must accommodate the work or workplace for the worker to the extent determined by the board (see policy RE-06 Accommodating Work or a Workplace).

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

2. Exceptions to applicability of re-employment provisions

The re-employment provisions of section 118 of the Act do not apply to the following persons and bodies:

a. an employer who regularly employs fewer than 20 workers;

b. a person or body who is deemed in section 79(2), (3) or (4) of the Act to be an employer;

c. any of the following workers:

   i. a learner,

   ii. a person who is designated under section 82 of the Act to be a worker employer by the Government of Yukon,

   iii. a member of the Legislative Assembly,

   iv. the mayor or a councilor of a municipality,

   v. a person who is deemed under subsection 79(1), (3) or (4) of the Act to be a worker,

   vi. a director of a corporation

d. any other employer or worker that the board determines.

3. 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 the employment they held at the time of the work-related injury; or

b. require workplace modifications or assistive devices to perform the essential duties of the employment they held at the time of the work-related injury (see the Adaptive Technologies section in policy RE-02-1 Duty to Co-operate Part 1 of 4: Early and Safe Return to Work Plans).

4. 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 employer on the date of the work-related injury is considered the number of workers regularly employed.

If the worker, employer or the board questions whether this number fairly represents the number of workers regularly employed, the board 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 the board questions whether the number of workers employed on the date of the work-related injury fairly represents the number regularly employed, the board will review the past hiring practices of the employer.

The board 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.

5. Determining essential duties

The workplace parties determine the essential duties of the employment the worker held at the time of the work-related injury. Where there is disagreement, the board 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, the board 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.

6. Determining suitable employment

An employer of a worker who has been unable to perform the essential duties of the employment they held at the time of the work-related injury 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.

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

a. worker's functional abilities (see policy RE-02-3 Duty to Co-operate, 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.

When 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 employment they held at the date of the work-related injury, 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 the board in the return to work plan (see 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.

> *For 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, the board will make the final determination.

7. 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.

> *For 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. The board 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 118 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:

g. strikes and lockouts;

h. sabbaticals, sick leaves, parental leaves, leaves of absence, disability insurance and vacations;

i. work-related injuries resulting in time off work;

j. 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

k. 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.

8. 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 employment they held at the time of the work-related injury; and

b. the duties of any other work that the worker normally is assigned or is eligible to be assigned.

Able to perform essential duties

The employer of a casual worker is considered to meet the re-employment obligation by offering the worker the job they held at the time of the work-related injury or comparable employment when the worker is able to perform the essential duties of the employment they held at the time of the work-related 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 employment pattern at the time of the work-related injury.

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 capacity as a result of the work-related injury.

9. Contract/term employment

Subsection 118 (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 position that the worker held on the date of work-related injury, or offer the worker an alternate position of a nature and at earnings comparable to the position held on the date of the work-related injury.

For contract/term workers hired by an employer 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, the board 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 position they held at the date of the work-related injury or alternative employment of a nature and at earnings comparable, 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 position they held at the date of the work-related injury.

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

employment they held at the date of the work-related injury, or to a comparable contract/term position or to suitable employment, is the date of re-employment.

Entitlement to benefits

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

10. Employer's re-employment obligation for temporary assignments

Subsection 118 (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 employment the position that the worker held on the date of injury, or offer an alternate position of a nature and at earnings comparable .

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 118 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.

11. 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 (see policy EN-16 Recurrence of Injury).

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

The 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 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 employer, there is no obligation on that employer to re-employ the worker in relation to the recurrence.

12. 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 (see policy RE-07-2 Re-Employment Penalties and Payments).

13. Administrative penalties

Penalties for a contravention of the re-employment provisions are addressed in policy RE-07-2 Re-Employment Penalties and Payments. In addition, a contravention of section 117-return to work may be found which may result in an administrative penalty as outlined in policy RE-02-4 Duty to Co-operate Part 4 of 4: Penalties for Non co-operation.

Related Policies

EN-16 Recurrence of Injury

RE-02-1 Duty to Co-operate Part 1 of 4: Early and Safe Return to Work Plans

RE-02-3 Duty to Co-operate Part 3 of 4: Functional Abilities

RE-02-4 Duty to Co-operate Part 4 of 4: Penalties for Non co-operation

RE-05 Alternative Employment Comparable to Employment at the Time of the Work-Related Injury

RE-06 Accommodating Work or a Workplace

RE-07-1 Compliance with the Re- employment Obligation

RE-07-2 Re-Employment Penalties and Payments