

 Yukon Workers' Compensation Health and Safety Board	<b>Part:</b>	<b>Return to Work and Rehabilitation</b>		
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## **RE-EMPLOYMENT PENALTIES AND PAYMENTS**

***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 explains the penalty provisions set out in sections 41(14) and (15) of the *Act* for employer non-compliance with their re-employment obligations under section 41 as well as the applicable penalty provisions under section 40 for employer non-cooperation in the duty to co-operate in return to work (see YWCHSB policy RE-02-2, "Duty to Co-operate, Part 4 of 4: Penalties for Non Co-operation").

## DEFINITIONS

1. **Employer:** means an employer as defined by the *Act* and for purposes of this policy, who is also subject to the re-employment provisions of section 41 of the *Act* because the employer:
  - a) regularly employs 20 or more workers; and
  - b) is an employer of a worker who has been employed continuously with that employer for at least one year prior to the work-related injury.

See YWCHSB policy RE-04, “Employer’s Obligation to Re-employ - Overview” in determining when an employer and a worker are subject to the re-employment provisions of section 41 of the *Act*.

2. **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.

3. **Net Earnings:** means a worker’s gross earnings less Income Tax, Employment Insurance and Quebec/Canada Pension Plan deductions.

4. **Worker:** means a worker as defined by the *Act* who has been unable to work as a result of a work-related injury and who is also subject to the re-employment provisions of section 41 of the *Act*, because the worker had been employed in a continuous employment relationship for at least one year with the employer, on the date of the work-related injury.

See YWCHSB policy RE-04, “Employer’s Obligation to Re-employ - Overview” in determining when an employer and a worker are subject to the re-employment provisions of section 41 of the *Act*.

## PREVENTION

Preventing workplace 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 injured workers have returned to work is of utmost importance.

## **POLICY STATEMENT**

Employers may be subject to various penalty provisions of the *Act*, for non-co-operation in the return to work process and non-compliance with the re-employment obligation.

Penalties can be levied under section 40(4) on an employer for non-cooperation (see YWCHSB policy RE-02-04, Duty to Cooperate, Part 4 or 4: Penalties for Non-Cooperation”).

Penalties can also be levied under section 41(14) of the *Act* for non-compliance with an employer’s re-employment obligations under section 41.

### **1. Penalties for Employer Non-Co-operation Under Section 40(4) of the Act-Duty to Co-Operate**

YWCHSB may levy a penalty on an employer where there is a finding of employer non-co-operation under section 40(4) of the *Act* (see YWCHSB policy RE-02-04, “Duty to Cooperate, Part 4 of 4: Penalties for Non-Cooperation”).

#### Amount of Penalty for Non-Co-operation Under Section 40 - Duty to Co-operate

If YWCHSB makes such a finding, it shall levy a financial penalty on the employer in accordance with section 40(4) of the *Act* as determined by Order of the Board of Directors.

#### Vocational Rehabilitation in Cases of Employer Non-Cooperation

Where there is a finding of employer non-cooperation, the cost of any vocational assessment or vocational rehabilitation plan provided to a worker may be charged to the employer (see YWCHSB policy RE-10, “Vocational Rehabilitation” for entitlement to these services).

### **2. Penalties for Employer Non-Compliance Under Section 41 of the Act- Re-Employment Obligations**

Penalties under section 41 for non-compliance with an employer’s re-employment obligation may be levied by YWCHSB if YWCHSB determines that the employer has not fulfilled its re-employment obligations, YWCHSB may:

- a) *in all but exceptional cases*, 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 work-related injury; and
- b) make payments to the worker for up to a maximum of one year as if the worker was entitled to payments, as calculated under section 22 of the *Act* ‘Compensation for Loss of Earnings’ and related YWCHSB policies.

Amount of Penalty for Employer Non-Compliance with Re-Employment Obligations Under Section 41

A penalty is based on the worker's net average earnings with the pre-injury employer.

The maximum wage rate amount is not applicable to the amount of this penalty because the maximum penalty under section 41 is set out specifically in section 41(14) of the Act, which states that the board may:

*levy a penalty on the employer not exceeding the amount of the worker's net average earnings for the 12 months immediately preceding the beginning of the loss of earnings as a result of the work-related injury.*

The penalty is applied from the start date of the re-employment obligation (see YWCHSB policy RE-07-1, "Compliance with the Re-employment Obligation").

The formula for calculating the penalty is as follows:

*number of weeks of non-compliance (up to 52) x worker's net average earnings with pre-injury employer = penalty amount.*

*Example*

*YWCHSB determines that an employer has failed to re-employ a worker whose net average earnings are \$85,000 per year. Although these earnings are greater than the maximum wage rate, the penalty levied on the employer will be \$85,000.*

Waiving Penalty

YWCHSB may waive the penalty in its entirety if the employer offers, in writing, to re-employ the worker, but the worker and the employer agree to a voluntary severance of employment.

Even if a worker agrees to sever the employment relationship, (with or without a severance package), if an employer fails to offer, in writing, to re-employ the worker, a penalty will be levied.

Reducing Penalty

YWCHSB may reduce the amount of the penalty if the employer:

- a) subsequently meets the re-employment obligation; or
- b) does not meet the re-employment obligation, but offers the worker suitable employment at a wage loss, with the agreement of the worker.

*Employer Subsequently Meets the Re-employment Obligation*

The reduced penalty is calculated according to the number of weeks (or part weeks) that the employer does not meet the re-employment obligation.

*Example*

*YWCHSB notifies the employer that the worker is fit to perform the pre-injury employment. Subsequently, YWCHSB determines that the employer has failed to offer to re-employ the worker in the pre-injury or comparable employment. Accordingly, a penalty is levied equal to the worker's net average earnings with the pre-injury employer for the 12 months preceding the earnings loss (\$52,000 per year, \$1,000 per week).*

$$52 \text{ weeks} \times \$1,000 = \$52,000 \text{ penalty}$$

*The employer re-employs the worker ten weeks after receiving the initial notice from YWCHSB, with the agreement of the worker. YWCHSB reduces the penalty to the number of weeks that the employer failed to re-employ the worker, and adjusts the employer's penalty:*

$$\text{Adjusted Penalty: } 10 \text{ weeks} \times \$1,000 = \$10,000.$$

*Employer Provides Suitable Employment at a Wage Loss*

Where a worker is medically able to perform the essential duties of the worker's pre-injury employment, and the employer does not meet the re-employment obligation, but offers the worker suitable employment at a wage loss, the penalty may be reduced up to 50% of the remaining balance.

*Employer Provides Suitable Employment at No Wage Loss*

Where a worker is medically able to perform the essential duties of the worker's pre-injury employment, and the employer does not meet the re-employment obligation, but offers the worker suitable employment at no wage loss, the penalty may be reduced up to 75% of the remaining balance.

*More Than One Penalty*

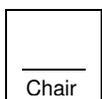
Depending on the circumstances, more than one penalty may be levied throughout the duration of the re-employment obligation.

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 beginning of the loss of earnings resulting from the work-related injury).

**3. Re-employment Payments Made to Worker Under Section 41 of the Act**

Worker Medically Able to Perform Essential Duties Without Accommodation

If the worker is medically able to perform the essential duties of the pre-injury employment without accommodation, but the employer fails to meet the re-employment obligation, re-employment payments will be made to the worker, by YWCHSB, effective from the start date of the re-employment obligation.



The amount of the re-employment payment is calculated in accordance with section 22 of the Act 'Compensation for Loss of Earnings' (see YWCHSB policy EL-01, "Loss of Earnings Benefits").

*Employer Fails to Offer to Re-employ*

If the employer fails to offer to re-employ the worker in the pre-injury employment or comparable employment, full re-employment payments are paid to the worker.

*Employer Provides Suitable Employment at a Wage Loss*

If the employer fails to offer to re-employ the worker in the pre-injury employment or comparable employment, but offers the worker suitable employment at a wage loss with the agreement of the worker, partial re-employment payments are paid to the worker, based on the difference between the worker's pre-injury net average earnings and the net average earnings of the suitable employment.

*Employer Provides Suitable Employment at No Wage Loss*

If the employer fails to re-employ the worker in the pre-injury employment or comparable employment, but provides the worker with suitable employment at no wage loss and the worker is in agreement, no re-employment payments are made to the worker.

*Effect of Re-Employment Penalty on Employer on Payments Made to Worker*

Workers are entitled to re-employment payments regardless of whether a re-employment penalty is levied or collected from the employer.

Worker Medically Able to Perform Essential Duties with Accommodation or Medically Able to Perform Suitable Employment (Temporary Loss of Earnings)

If the worker is medically able to perform only:

- a) the essential duties of the pre-injury employment with accommodation; or
- b) suitable employment.

and the employer fails to meet the re-employment obligation, the worker may be offered a vocational assessment (see YWCHSB policy RE-10, "Vocational Rehabilitation") and temporary loss of earnings benefits are paid to the worker as long as the worker is available for and co-operates in:

- a) a medical rehabilitation program;
- b) an early and safe return to work plan; or
- c) a vocational assessment and vocational rehabilitation plan.

If the employer subsequently meets the re-employment obligation, YWCHSB re-examines the need for the vocational rehabilitation plan (if applicable).

### *Worker Accepts Less Suitable Employment*

If the worker accepts work that is not the most suitable employment available, temporary partial loss of earnings benefits will be paid based on the salary for the most suitable employment. A vocational assessment will be conducted to determine whether the worker requires a vocational rehabilitation (VR) plan.

### *Change in Fitness Level*

If, in the first year during which the non-compliance with the re-employment obligation occurred, the worker's fitness level for employment improves such that the worker is able to perform the essential duties of the pre-injury employment without accommodation, temporary loss of earnings benefits are converted to re-employment payments.

### Duration of Re-Employment Payments

Re-employment payments are issued for a period of:

- a) one year; or
- b) to the end of the re-employment obligation period, whichever occurs sooner.

Re-employment payments end if the employer subsequently meets its re-employment obligation.

## **4. Collection of Penalties**

YWCHSB collects non-cooperation penalties (under section 40) and re-employment penalties (under section 41) according to the established provisions governing the collection of assessments (see YWHCSB policy EA-01, "Payment of Assessments"). The re-employment penalty and non-cooperation penalties are amounts owing to YWCHSB at the time that it is levied and it will be added to the employer's assessment and payment enforced under Part 12 of the *Act* 'Enforcement and Priorities'.

Section 74 of the *Act* deals with liability for assessment premiums of contractors and subcontractors. A principal, contractor, or subcontractor referred to in section 74 of the *Act* who is not the injury employer will not be held liable for a non-cooperation penalty (section 40) or a non-compliance penalty (section 41) charged against the injury employer.

### Objection to Penalty

A penalty is not suspended if an employer objects and appeals the penalty. In these cases, the penalty is still levied; however, the employer's objection is considered before the penalty is enforced.

## **ROLES AND RESPONSIBILITIES**

### **YWCHSB**

Yukon Workers' Compensation Health and Safety Board is responsible for communicating the requirements of the duty to co-operate, the duty to accommodate and the re-employment obligations to the worker and the employer and for ensuring compliance in accordance with the legislation and YWCHSB policies.

Where the worker and the employer are unable to agree on the worker's fitness to work or a change in the worker's level of fitness to work, YWCHSB is responsible for determining the matter and providing the worker and the employer with a determination (see YWCHSB policy RE-07-1, "Compliance with the Re-employment Obligation").

YWCHSB is also responsible for determining whether there has been compliance with the employer's duty to co-operate under section 40 and the employer's re-employment obligation under section 41, and for levying the appropriate penalties.

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

### **The Employer**

The employer is responsible for offering to re-employ workers, including accommodating the work or the workplace, 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.

### **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, as applicable, in accordance with the relevant provisions of the *Act* and YWCHSB policies, as well as cooperating with efforts taken to accommodate the work or the workplace in order to facilitate re-employment.

Workers are responsible for notifying the employer and YWCHSB of their fitness to work and any changes to the level of their fitness to work (see YWCHSB policy RE-03, "Mitigation of Loss").

It is the worker's responsibility, in relation to section 41 re-employment provisions, as applicable, to report to YWCHSB that the worker has been terminated by the employer within six months after re-employment, within 30 days of its occurrence, so YWCHSB can readily obtain the facts.

Workers are also responsible to report all other instances of employer non-compliance with section 40 (duty to co-operate) and non-compliance with the re-employment obligations of section 41, in a timely manner to enable YWCHSB to properly investigate the matter (see YWCHSB policy RE-07-1, “Compliance with the Re-employment Obligation”).

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 terms and conditions 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, and to employers subject to the re-employment provisions of section 41 and workers of these employers. It applies to work-related injuries that occurred on or after January 1, 2011.

### **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*.

**ACT REFERENCES**

Preamble and sections 14, 22, 40, 41, 85

**POLICY REFERENCES**

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

Policy EL-01, "Loss of Earnings Benefits"

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

**HISTORY**

RE-07-2, "Re-employment Penalties and Payments" effective January 1, 2011;  
Revoked July 1, 2012