

 Yukon Workers' Compensation Health and Safety Board	Part:	Return to Work and Rehabilitation		
	Board Approval:		Effective Date:	July 1, 2012
	Number:	RE-05	Last Revised:	
	Board Order:		Review Date:	

**ALTERNATIVE EMPLOYMENT COMPARABLE TO
PRE-INJURY EMPLOYMENT**

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 addresses the obligation of an employer who has a re-employment obligation to provide a worker with alternative work/employment of a nature and at earnings comparable to the worker's pre-injury employment.

DEFINITIONS

1. **Available Work:** is work that exists with the pre-injury employer at the pre-injury work site or at a proposed work site arranged by the employer that is comparable to the pre-injury work site. In determining if a proposed work site is comparable to the pre-injury work site, the considerations include (but are not limited to) whether:
 - a) assignment to a work site other than the injury work site forms part of the employment contract;
 - b) traveling to the proposed job is within the normal parameters of travel expected of a worker; or
 - c) the worker and the employer agree on appropriateness of the conditions of work for the worker.
2. **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 worker¹ (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.
3. **Earnings:** means earnings as defined under section 3(1) of the *Act* and YWCHSB policy EL-01, "Loss of Earnings Benefits".
4. **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*.

5. **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.

¹ 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 power of attorney and/or power of personal attorney.

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 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

Where an employer has a re-employment obligation under section 41 of the *Act* to offer to re-employ the injured worker in their pre-injury employment and the pre-injury employment is not available, the employer has the obligation to offer to provide the worker with alternative employment of a comparable nature and at earnings comparable to the worker’s pre-injury employment.

The workplace parties (employer and worker) are responsible for determining whether the alternative employment is comparable in nature and in earnings to the pre-injury employment. If the workplace parties cannot agree, YWCHSB will make the final determination.

1. Determining Alternative Employment Comparable To Pre-injury Employment

Determining Comparable Nature

When comparing pre-injury employment to comparable alternative employment the workplace parties and/or YWCHSB shall consider all of the following factors:

- a) duties to be performed;
- b) skills, qualifications and experience required;
- c) degree of physical and cognitive effort;
- d) level of responsibility and supervision of other employees;
- e) rights and privileges associated with the position;
- f) wages and employee benefits;
- g) working conditions, hours of work, and right to work overtime;
- h) geographic location of the worksite;

- i) opportunities for advancement and promotion;
- j) whether the employment is covered by a collective agreement; and
- k) other relevant factors.

Geographic Location

The following factors will be considered in determining whether the geographic location of the alternative employment is comparable:

- a) travel or assignment to different job sites is the normal practice of the industry;
- b) travel or assignment to a job site other than the injury work site forms part of the employment contract;
- c) the worker normally accepts employment assignments in various geographic areas;
- d) travelling to the alternative employment falls within the normal parameters of travel expected of the worker; and
- e) the reasonableness of the offer.

Determining Comparable Earnings

Gross earnings in the alternative employment must be at least 90% of the pre-injury gross earnings in order to be considered comparable (see YWCHSB policy EL-01, “Loss of Earnings Benefits” in determining gross earnings. Also see YWCHSB policy RE-07-1, “Compliance with the Re-employment Obligation”).

For the purposes of this provision, a worker’s earnings in the pre-injury employment and the earnings in the comparable alternative employment are not subject to the maximum wage rate.

ROLES AND RESPONSIBILITIES

YWCHSB

Yukon Workers’ Compensation Health and Safety Board is responsible for communicating the requirements of the re-employment obligation to the worker and the employer and for ensuring compliance in accordance with the legislation and YWCHSB policies.

When the worker and the employer cannot agree whether an offer of alternative employment is comparable in nature and in earnings to the worker’s pre-injury job, YWCHSB is responsible for making the final determination.

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 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 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; 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, 85

POLICY REFERENCES

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

RE-05, "Alternative Employment Comparable to Pre-Injury Employment" effective January 1, 2011; revoked July 1, 2012