

## Client Services Procedure Manual

**Procedure: 39.00**  
**Subject: Re-Employment Obligation**

### 39.01 The Re-employment Process

The re-employment obligation is one of three components in the return to work model. Early and safe return to work and labour market re-entry are the other two components. Prior to engaging the re-employment obligation, the workplace parties would have already been active in the early and safe return to work process. As such, communication regarding the worker's recovery and functional abilities will have already occurred, and any early and safe return to work programming will be underway. (For details on early and safe return to work refer to policies RE-01 through RE-03 and the associated procedures.)

However, the early and safe return to work aspect is intended to occur during the physical recovery from the work injury. When work injury recovery has plateaued medically and the worker is fit for either the essential duties of the pre-injury job or for suitable employment, then the re-employment process will be initiated.

Policy RE-05 "Re-employment Obligation" outlines the process for determining essential duties and suitable employment. The determination of suitable employment for re-employment purposes is the same as for early and safe return to work discussed in detail in Procedure #34.00 - Suitable and Available Employment.

The following sections provide guidelines which are to be followed when determining the re-employment obligation.

### 39.02 Who has a Re-employment Obligation?

An employer who regularly employs 20 or more workers is obligated to re-employ if the injured worker has been employed continuously with that employer for at least one year prior to the injury.

Where an employer has groups of companies or firms which are assessed as a single employer or are grouped for experience rating, or where an incorporated employer operates several different businesses in different rate codes, it will be considered as one employer for determining the re-employment obligation. For example, where an employer operates several sites or locations across the province and a worker is injured at a site that employs less than 20 workers, that employer is obligated to re-employ if the total number of workers regularly employed for all sites combined is 20 or more (and the injured worker has been employed continuously for at least one year prior to the injury).

The decision maker may consult with Assessment Services where there is doubt, disagreement, or insufficient information to establish whether numerous firm or account numbers relate to one employer, whether an employer has multiple sites or branches, and whether the employer regularly employs 20 or more workers.

### Workers Who Are Regularly Employed

Policy RE-05 “Re-employment Obligation” provides the formula(s) to be used to determine the number of workers regularly employed (including a distinct formula for seasonal employment). Generally, the number of workers employed on the day of injury, as reported on the Form 7, is considered to be the number of workers regularly employed. For many employers, this is a fairly constant number throughout the year. However, where the decision maker has doubt about the number of regularly employed workers, or where the workplace parties raise concerns with the decision maker, further inquiry may be necessary.

Where the decision maker determines that information is required from an employer on the average numbers of workers employed in the 12 months prior to the injury, a referral will be made to the Audit Team Lead in the Assessment Services Department. Once obtained, the information is submitted to the decision maker who makes the determination.

The following provides an example of the formula used to determine the number of regularly employed workers:

#### **Example A: Number of Workers Regularly Employed**

Months of employer operation	Average number of workers employed in each of the 12 months before worker’s injury	7 months with the highest number of average workers
January	12	
February	25	✓
March	18	
April	22	✓
May	25	✓
June	12	
July	27	✓
August	27	✓
September	25	✓
October	19	
November	18	
December	25	✓
Number Regularly Employed		Average: 25.1

In example A, the employer has seven months where 20 or more workers are regularly employed and therefore is obligated to re-employ.

### Workers Who Are Casually Employed

In some cases, the employer may hire a worker on a very casual basis, for example, a tile setter who may be called in to perform 2 hours of work for specific duties on a contract. For the purpose of calculating the number regularly employed, that worker will be included in the average number for the month. However, where the casual worker was called in on more than one occasion within the same calendar month, he/she is only counted once for that month.

### Workers who are Seasonally Employed

The following provides an example of the formula used to determine the number of workers employed for seasonal employment:

#### **Example B: Seasonal Employment**

Months of employer operation	Average number of workers employed in each of the 12 or fewer months of regular season of operations	Months of employer's operation where 20 or more workers are employed
January	No Operation	
February	No Operation	
March	No Operation	
April	6	
May	16	
June	20	✓
July	27	✓
August	27	✓
September	27	✓
October	16	
November	No Operation	
December	No Operation	

In example B, the full regular season of the employer's operation is seven months from April to October. In the majority of those months - the four month period from June to September - there are 20 or more workers employed. Therefore, this employer is obligated to re-employ (workers who are injured and have been employed for one year prior to the injury). Should the number of months greater than and less than 20 be equal for the full regular season, then the employer will be considered to have a re-employment obligation.

A seasonal employer is considered to be in operation during the months (full or partial) that the product is being produced or the service is being delivered. There may be cases where there is no production or operation (shutdown) but the employer maintains a very limited number of workers for facility maintenance or security reasons. These months will not be considered as months of operation.

### **39.03 Who has a Right to Re-employment following a Work Injury?**

Workers who have been in an employment relationship with an employer for a continuous period of one year immediately prior to the date of their injury have a right to be re-employed. This means the worker has been working for the employer for 12 months prior to the injury, not merely the majority of months in the last 12 month period (except where employment is seasonal, casual, etc.). The majority formula is only used to establish the number of workers regularly employed as in Example A.

#### **Continuous Employment**

Policy RE-05 "Re-employment Obligation" provides guidelines to determine continuous employment and whether a work cessation has occurred that breaks the employment relationship.

Seasonal, casual and contractual workers may be eligible for re-employment where the continuous employment guidelines have been met.

***Example C - Continuous Employment for a Seasonal Worker***

A worker works 8 months from April to November each year for the last three years in the local plant. 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 injury. However, the decision maker finds that the four month break in the employment period is not intended by the worker or the employer to break or terminate the employment relationship. The worker is considered employed for 12 consecutive months and therefore entitled to re-employment.

The fact that the seasonal worker received Employment Insurance Benefits during a seasonal layoff does not break the employment relationship. All factors of the case must be examined. (See Policy RE-05 "Re-employment Obligation", specifically Work Cessation.)

To meet the continuous employment requirement, the policy states a seasonal worker must have been continuously employed for more than one season. This means having worked one full continuous season with that employer. In the case example above, a worker must have worked one full continuous season from April to November before a re-employment obligation exists.

**39.04 Determining the Date of Injury for Re-employment Purposes**

Because the re-employment obligation and penalties for noncompliance are tied to prescribed time frames in *the Workplace Health, Safety and Compensation Act*, the date of injury must be clearly established. The policy clarifies that - for re-employment purposes - the date of injury is the date the worker experiences loss of earnings capacity from the injury. Therefore, where a worker suffers an injury but loss of earning capacity from the injury occurs at a later point in time, the re-employment obligation takes effect from the latter date.

**39.05 Determining the Re-employment Obligation for Recurrences and Reinstatements**

Re-employment obligations exist following a recurrence providing the worker is still employed with the same employer as the original injury. If, at the time of a recurrence, the worker is employed with a different employer and the obligation related to the original injury has ended, there is no obligation to re-employ by the original employer or the recurrence employer.

If a recurrence occurs during a seasonal break but the employment relationship was not broken then there is a re-employment obligation.

In some cases, the recurrence may occur while the obligation period from the original injury is still ongoing. For example, a worker who is injured and disabled from earning on February 1, 2002 returns to the pre-injury job March 15, 2002. The re-employment period is ongoing until March 14, 2003 (i.e., one year after he/she is fit for essential duties of pre-injury employment). That worker suffers a recurrence of symptoms six months later and is unable to continue working as of September 15, 2002. Now the re-employment obligation period is ongoing from September 15, 2002, providing that the

worker is employed with the same employer at the time of the recurrence. However, if at the time of the recurrence the employer is not obligated because it no longer regularly employs 20 or more workers, then the re-employment obligation would stem from the initial injury which, in this example, would be ongoing until March 14, 2003.

### **39.06 Determining Essential Duties under the Re-employment Obligation**

The essential duties of the pre-injury job are the duties necessary to achieve the actual job outcome. Job outcome refers to the overall objective of the job in terms of the production of the final product or provision of service. (Policy RE-05 under “Determining Essential Duties” lists specific factors to be considered). Therefore, for example, if a worker’s only restriction is lifting over 50 pounds and this task is a requirement only occasionally in the pre-injury job, then the worker is considered fit for essential duties. Determining essential duties must occur on a case by case basis with consideration of the worker’s individual circumstances. The employer must explore any modifications to accommodate work restrictions. Determining that a worker is fit for essential duties is a critical decision since it engages the highest standard of re-employment that an employer must fulfill (i.e., must provide the pre-injury or a comparable job). This also impacts whether the worker will be eligible for labour market re-entry services should the employer not meet the re-employment obligation.

Health care providers identify the worker’s functional abilities. The workplace parties identify the essential duties of the pre-injury job.

Where the essential duties are not readily apparent or there is disagreement over what they are, the Case Manager may request the opinion of a qualified professional. WorkplaceNL will pay for any evaluations it considers necessary to make this determination. Mediation may be offered to the workplace parties.

The workplace parties (the employer and the worker) are responsible for making determinations on essential duties and suitable employment, and for resolving the workplace issues in general. The decision maker will offer advice and facilitate the process, if necessary.

Where, after considering all the available information, the worker and the employer cannot agree on the essential duties, the matter will be referred to the Case Manager for a final decision.

The employer is required to re-employ the worker in the pre-injury job for one year after the date the worker is fit for the essential duties of the pre-injury job (see Policy RE-08 “Compliance with the Re-employment Obligation”).

### **39.07 Determining Suitable Work under the Re-employment Obligation**

When a worker is medically able to perform suitable work but is unable to perform the essential duties of the pre-injury job, the employer (who has a re-employment obligation) is required to offer the worker the first opportunity to accept suitable employment that is available, as defined in Policy RE-05 “Re-employment Obligation”.

Suitable employment that becomes available means the work exists with the employer and is available to the worker. This does not mean the worker can displace another worker to obtain a suitable job (unless collective agreement provisions allow bumping and the worker has seniority to do so).

The employer is not required to create suitable work but is required to offer it every time it becomes available throughout the re-employment obligation period. For more discussion on suitable employment, see Policy RE-08 “Compliance with the Re-employment Obligation” and Procedure 41.00 “Compliance with the Re-employment Obligation”.

### **39.08 Voluntary Severance**

The employer must make an offer of re-employment in accordance with the existing obligations before voluntary severance occurs. If the worker and the employer agree to a voluntary severance during the obligation period then the worker must be fully advised of the re-employment obligations he/she is giving up, the decision must be documented, signed by both parties and submitted in writing to WorkplaceNL within one week from the date of the agreement.

Where the employer has not made an offer to re-employ, refer to Policy RE-09 “Re-employment Penalties and Payments”.

**Reference:** *The Workplace Health, Safety and Compensation Act, Sections 89.1  
Policy RE-05 Re-employment Obligations*

#### **Amendment History**

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