

## Client Services Procedure Manual

**Procedure: 41.00**

**Subject: Compliance with the Re-Employment Obligation**

### 41.01 Introduction

The fundamental principle of the re-employment obligation is that an employer of a worker who is medically cleared for the essential duties of the pre-injury employment must re-employ the worker in the position held prior to the injury, or in an alternative position which is comparable in nature and earnings to the pre-injury employment (see Policy RE-06 "Alternative Work Comparable to the Pre-injury Job"). This means the worker will be restored to the same or a comparable status as existed at the time of the injury.

Compliance with the re-employment obligation means that an employer is obligated to re-employ until the earliest of two years after the date of injury, one year after the date the employer is notified that the worker is medically able to perform the essential duties of the pre-injury job, or until the worker reaches age 65.

Workers are required to provide notice to the employer and WorkplaceNL of their fitness for work. WorkplaceNL may become involved in determining fitness level where there is a disagreement between the workplace parties. The return to work model is one of "self-reliance" for the workplace parties (workers and employers). Therefore, it is the responsibility of the worker to initiate the re-employment process by providing notice of fitness to work to the employer and WorkplaceNL.

Workers who are terminated within six months of re-employment are required to notify WorkplaceNL in writing within three months of termination so that an investigation can occur. Refer to Policy RE-10 (Termination after Re-employment) and procedure #43.00.

### 41.02 The Re-Employment Obligation Period

An employer is obligated to re-employ until the earliest of two years after the date of injury, one year after the worker is fit for the essential duties of the pre-injury job, or until the worker reaches age 65. The date of injury for re-employment purposes is the date the worker experiences loss of earnings capacity from the injury.

The employer's obligation to re-employ begins on the date that the worker is able to perform the essential duties of the pre-injury job or suitable employment.

#### **Example A: Establishing the Re-employment Obligation Period**

##### **Scenario A (i) Two year obligation:**

A 30 year old worker is injured and loses time from work starting February 1, 2002. The employer is obligated to re-employ that worker until January 31, 2004. If the worker is cleared for suitable work on March 15, 2002, the employer is required to offer suitable work that becomes available anytime up to January 31, 2004 which is the period of the re-employment obligation. If suitable work becomes available and that worker commences suitable work on April 1, 2002, the employer is obligated to keep the worker until January 31, 2004 because the obligation is an ongoing process.

If in the same example, the worker is cleared for suitable work and commences it on January 1, 2004, then the employer is obligated to keep the worker until January 31, 2004 because the obligation period runs out at that time.

### **Scenario A (ii) One Year Obligation**

If the worker is cleared for essential duties on March 15, 2002, the employer is required to re-employ the worker in the pre-injury job (or a comparable job) until March 14, 2003.

Note: In either scenario, the provision under section 89.1(9) regarding termination within six months of re-employment does not extend the re-employment period whatsoever. In other words, where the worker is cleared in month 23 of the two year obligation period, the obligation runs out in one month notwithstanding of section 89.1(9).

### **41.02(A) Re-Employment Obligations for Contract Workers**

In certain industries, particularly the construction sector, employers operate on a contract basis. The employment relationship at the time of hiring a worker is usually tied to the duration of the contract or the duration of the portion of the contract that requires the worker's skill or trade specification. Section 89.1(5) requires an employer of a worker who is medically cleared for the essential duties of the pre-injury employment to re-employ the worker in the position held prior to the injury, or in an alternative position which is comparable in nature and earnings to the pre-injury employment. The nature of contractual employment is that the employment period was determined prior to the injury for a specific time frame. Therefore, the employer will only be required to re-employ the worker for the duration of the contract that was interrupted by the work injury. To guarantee employment beyond that time frame would be enhancing the worker's pre-injury status by reason of the re-employment obligation. This is not the intention. Therefore, when determining compliance, WorkplaceNL must take into consideration the contract of service established at the time of hire. This should be indicated to WorkplaceNL at the time the claim is filed for a contract worker. If it is not reported at the time of the claim filing, then the employer will be expected to confirm, in writing, the contract duration and any other information required by WorkplaceNL.

### **41.03 Initiating the Re-Employment Process**

When a worker is cleared for the essential duties of the pre-injury job, he/she will notify the employer and the Case Manager, and return to work. Re-employment must occur within one week. If the pre-injury job is not available, the employer must offer alternate comparable employment; refer to policy RE-06 (Alternative Work Comparable to the Pre-injury Job) and procedure #40.00 (Alternate Work Comparable to the Pre-injury Job).

If the workplace parties disagree on the essential duties and cannot resolve the dispute either with or without mediation, the Case Manager will decide in accordance with procedure #39.00 (Re-employment Obligation) and provide verbal notice, if possible, and written notice of the worker's fitness for essential duties. The employer's re-employment obligation begins from the date of the Case Manager's written notice. Re-employment must occur within two weeks. Wage loss benefits may continue for the two-week period between WorkplaceNL's written notice and commencement of re-employment.

When a worker is medically fit for suitable employment (as defined in Policy RE-05 "Re-employment Obligation), he/she will notify the employer and the Case Manager. The workplace parties must explore

re-employment arrangements for the worker. The employer is required to offer the worker the first opportunity to accept suitable employment that becomes available. Available means the work exists with the injury employer. The employer must notify the Case Manager, in writing, of the suitable work being offered within one week of the worker's notice of fitness for suitable work. The Case Manager's role is one of monitoring and providing support where necessary.

If the workplace parties disagree on suitable work, the Case Manager will offer mediation services. Where mediation does not resolve the disagreement, the Case Manager will decide and provide verbal notice, if possible, and written notice of the worker's fitness. The employer's re-employment obligation begins from the date of the Case Manager's written notice.

In cases where the Case Manager obtains medical information indicating the worker is fit for suitable employment and no return to work plan has been filed by the employer, the Case Manager must inquire into the status of the return to work plan and facilitate the process. Where re-employment efforts are hampered by non-compliance of workplace parties, refer to the Policy RE-08 (Compliance with the Re-employment Obligation) and Procedure #41.00.

Where the worker has returned to suitable work and subsequently becomes fit for essential duties within the re-employment obligation period, the employer must re-employ the worker in the pre-injury or comparable job. Where the employer fails to do so, the Case Manager will determine non-compliance.

Where the employer is unable or refuses to provide suitable work that is consistent with the worker's functional abilities, the worker will be referred for a labour market re-entry assessment in accordance with Policy RE-14 (Labour Market Re-entry Assessments). The Case Manager must evaluate what suitable employment the worker is capable of performing, whether there is a wage loss, and whether labour market re-entry services are required to address the wage loss. Further entitlement is then determined based on Labour Market Re-entry Policies RE-14 and RE-16 through RE-18 and Suitable Employment and Earnings Policy RE-15.

If at any time the worker's fitness level changes during the re-employment obligation period, he/she must notify the employer and WorkplaceNL. Failure to do so may result in a decision of non-compliance in accordance with Policy RE-09 (Re-employment Penalties and Payments).

#### **41.04 Employer's Responsibility to Offer "More Suitable" Employment**

When a worker is able to perform suitable employment, the employer is required to offer the worker the first opportunity to accept suitable employment that becomes available. Because the obligation to offer suitable employment is ongoing, the employer must offer the worker the job that is most comparable in nature and earnings to the worker's pre-injury job. Although a specific earnings level is not required to be provided by the employer as part of offering a suitable job, the goal is to continuously work toward the pre-injury job status in terms of the nature of the employment and the earnings provided. This obligation is ongoing throughout the re-employment period. Therefore, as work becomes available that is "more suitable" to the worker (in terms of the nature of the job and the earnings level), it must be offered to the worker. The worker must notify the Case Manager when more suitable work becomes available. Failure by the employer to offer more suitable work that becomes available, or failure by the worker to accept more suitable work, will be viewed as non-compliance in accordance with Policy RE-09 (Re-employment Penalties and Payments).

### **41.05 Report of Re-Employment**

A report of re-employment will be used by the workplace parties whenever the worker returns to alternative comparable employment. It must indicate the following:

1. how the job is comparable in nature to the pre-injury job;
2. how the job is comparable in earnings to the pre-injury job, and
3. the date the worker commences the job.

A return to work plan will be used by the workplace parties whenever the worker returns to suitable employment. It must indicate the following:

1. how the job will accommodate the worker's functional restrictions (this information is not required if the worker has been cleared for essential duties and the pre-injury job or a comparable job is not available);
2. the salary of the suitable job, and
3. the date the worker commences the suitable job.

Earnings information is necessary so that the Case Manager can accurately determine penalties and re-employment payments, if necessary.

Employers are required to provide the Case Manager with written notification of any changes in the report of re-employment within one week of their occurrence.

### **41.06 The Case Manager's Role in Facilitating Early and Safe Return to Work**

WorkplaceNL is committed to providing guidance and support to workplace parties who require assistance in establishing their early and safe return to work or re-employment programs/plans. Depending on the individual needs and resources of the employer, the Case Manager's role may range from advising the employer where to access useful information on setting up effective disability management programs to actually becoming involved in the process (e.g., assisting to determine essential duties or suitable employment). However, where possible, return to work solutions should be resolved by the workplace parties. It is WorkplaceNL's decision to determine the level of assistance it will provide workplace parties in facilitating early and safe return to work.

### **41.07 Reporting Non-Compliance**

Where the employer has re-employed the worker and subsequently terminates the worker's employment within six (6) months (within the original re-employment obligation period), the worker to must report the termination to the Case Manager within three (3) months of the occurrence in order for WorkplaceNL to review the situation. This allows the Case Manager to make prompt inquiries to address the situation and where appropriate, make decisions on non-compliance. For more details, refer to Policy RE-10 (Termination after Re-employment).

### **Notice of Non-compliance**

Where the Case Manager determines that an employer or a worker is not in compliance with the re-employment obligation, the Case Manager will inform the party verbally, if possible, and in writing, of the consequence of non-compliance. For employers, the notice must state the penalty amount to be levied in accordance with Policy RE-09 (Re-employment Penalties and Payments).

A one week notice period will be provided, beginning from the date of written notification. Where the employer fails to comply within one week, the penalty will be levied. Where the worker fails to comply, benefits are terminated, reduced or suspended, depending on the situation.

Where the Case Manager has evidence that the employer or worker received written notification for non-compliance in the past then subsequent notice will not be provided and the penalty will be levied from the date of non-compliance.

**Reference:** *The Workplace Health, Safety and Compensation Act, Section 89.1*  
*RE-08 Compliance with the Re-employment Obligation*

**Amendment History**

<i>Original Effective Date</i>	2002 01 01
<i>Revision #1</i>	2002 06 01