

 Yukon Workers' Compensation Health and Safety Board	<b>Part:</b>	<b>Return to Work and Rehabilitation</b>		
	<b>Board Approval:</b>		<b>Effective Date:</b>	<b>July 1, 2012</b>
	<b>Number:</b>	<b>RE-07-1</b>	<b>Last Revised:</b>	
	<b>Board Order:</b>		<b>Review Date:</b>	

## **COMPLIANCE WITH THE RE-EMPLOYMENT OBLIGATION**

***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 issues concerning when an employer, who has a re-employment obligation, is in compliance with the re-employment provisions of section 41 as well as addressing how to determine the duration of the re-employment obligation.

## DEFINITIONS

**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. 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*.

**3. Medically Able to Perform:** a worker is medically able to perform work duties when the worker has the functional abilities to perform those duties.

**4. 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.

**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.

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

Sections 41 of the *Act* set out an employer's re-employment obligations. If YWCHSB determines that an employer has not complied with the employer's obligations under this section, YWCHSB may levy penalties on the employer (section 41(14) and (15)).

When a worker is medically able to perform the essential duties of the pre-injury employment, an employer who is subject to a re-employment obligation must:

- a) offer to re-employ the worker in the position that the worker held prior to the work-related injury; or
- b) offer an alternative position which is comparable in nature and earnings to the worker's pre-injury employment (see YWCHSB policy RE-05, "Alternative Employment Comparable to Pre-injury Employment").

However, when a worker is medically unable to perform the essential duties of the worker's pre-injury employment but is able to perform suitable employment, the employer must offer the worker the first opportunity to accept suitable employment that may become available with the employer (see the Determining Suitable Employment section of YWCHSB policy RE-04, "Employer's Obligation to Re-employ - Overview").

The employer must accommodate the work or workplace for the worker to the extent determined by YWCHSB (see section 41(6) of the *Act* and YWCHSB policy RE-06, "Accommodating Work or a Workplace").

### 1. Duration of Re-Employment Obligation

An employer, who has a re-employment obligation under section 41 of the *Act*, is obligated to re-employ the worker until the earliest of three dates:

- a) two years after the date of the work-related injury;
- b) one year after the date the worker is medically able to perform the essential duties of the worker's pre-injury employment; (see the Determining When A

Worker Is Unable To Work section in YWCHSB policy RE-04, “Employer’s Obligation to Re-employ - Overview”); or

- c) the date on which the worker reaches the age that a worker becomes entitled to apply for benefits under Part 1 of the *Old Age Security Act*.

#### Worker’s Notice of Fitness to Work

Under the *Act* and YWCHSB policies, a worker is required to take all reasonable steps to provide full and accurate information on any matter relevant to their claim, notify YWCHSB immediately of any change in circumstance that may affect their claim, and maintain contact with their employer throughout the return to work process (see YWCHSB policy RE-03, “Mitigation of Loss”).

As a result of these requirements, the worker must immediately notify YWCHSB and the employer when they are able to perform:

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

In turn, YWCHSB expects employers to offer to re-employ workers as part of the early and safe return to work process. 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.

#### YWCHSB’s Notice of Fitness to Work

In the event the workplace parties cannot initially agree on the worker's level of fitness to work or subsequently disagree as to the worker's level of fitness to work, YWCHSB will provide notice (verbally, if possible, and in writing) of the worker's fitness to return to work.

In these cases, the employer's re-employment obligation begins from the date that YWCHSB provides notice to the employer that the worker is medically able to perform either the essential duties of the pre-injury employment or suitable employment.

#### Change in Level of Fitness to Work

If a worker is able to perform suitable employment and is later able to perform the essential duties of the pre-injury job, the worker must immediately inform YWCHSB and the employer of the improvement. The employer is then required to offer to re-employ the worker in the pre-injury job or alternative employment which is comparable in nature and earnings with the pre-injury employment.

YWCHSB will provide notice (verbally, if possible, and in writing) of the change in the level of the worker’s fitness to work only if the worker and the employer do not agree on the level of the worker’s fitness to work.

A notice of fitness to work or change in level of fitness to work provided by YWCHSB will include the following:

- a) The employer will be notified of its obligation to re-employ the worker, and to immediately notify YWCHSB if the worker's employment is terminated within six months of the worker being re-employed by the employer; and
- b) The worker will be notified of his/her responsibility to accept an offer of re-employment that is in accordance with the relevant provisions of the *Act* and YWCHSB policies, and to immediately notify YWCHSB if his/her employment is terminated within six months of being re-employed by the employer.

## **2. Determining Compliance**

At the worker's request, or on its own initiative, YWCHSB will determine whether the employer has met its re-employment obligation to a worker.

In making this determination, YWCHSB will contact and review relevant information with the workplace parties to obtain the facts relevant to the issue(s), and will consider these facts to determine whether the employer:

- a) offered to re-employ the worker;
- b) offered employment consistent with the worker's ability to return to pre-injury job or comparable employment, or suitable employment;
- c) was willing to accommodate the work or workplace to the needs of the worker; and
- d) offered to re-employ the worker for the duration of the re-employment obligation.

### Request by Worker to Investigate Non-Compliance

Workers who are terminated within six months of re-employment have 30 days from the date of termination to request that YWCHSB investigate any alleged non-compliance with the re-employment obligation. If the request is made beyond 30 days from the date of termination, YWCHSB is not required to investigate.

### Penalties for Non-Compliance

Before a penalty is levied against an employer for non-compliance with the re-employment obligation, the employer will be given an opportunity to respond to YWCHSB regarding the reason for non-compliance.

If YWCHSB finds that the employer has failed to meet the re-employment obligation and does not have a legitimate reason for doing so, YWCHSB will inform the employer (verbally, if possible, and in writing) of the amount of the re-employment penalty (see YWCHSB policy RE-07-2, "Re-employment Penalties and Payments").

If the employer fails to comply within one week of notification that the employer is in non-compliance with the re-employment obligation, the penalty will be levied. Where there is evidence that an employer has been formally notified in writing of the co-operation obligation in the past (either on the same claim or other claims) YWCHSB will not provide an additional notification.

Where the employer requires time to comply for a reason beyond the employer's control, a reasonable time will be allowed before any penalty is levied on the same or subsequent claim.

## **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. YWCHSB is also responsible for levying the applicable penalties where appropriate.

The employer and worker are responsible for working in co-operation towards agreement on the worker's fitness to work or a change in the worker's level of fitness to work. In the event of a disagreement, YWCHSB is responsible for determining the matter and providing the worker and the employer with notice of the worker's fitness to work.

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*, YWCHSB policies and 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 regarding their fitness to work and any changes to the level of their fitness to work (see YWCHSB policy RE-03, “Mitigation of Loss”).

Workers are also responsible to report instances of employer non-compliance with the re-employment obligations, in a timely manner to enable YWCHSB to properly investigate the matter.

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 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. 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*.

\_\_\_\_\_  
Chair

## **LEGISLATIVE REFERENCES**

*Old Age Security Act*

*Workers' Compensation Act* - preamble and sections 14, 22, 40, 41, 85

## **POLICY REFERENCES**

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

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

## **HISTORY**

RE-07-1, "Compliance with the Re-employment Obligation" effective January 1, 2011;  
revoked July 1, 2012