

 Yukon Workers' Compensation Health and Safety Board	Part:	Return to Work and Rehabilitation	
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ACCOMMODATING WORK OR A WORKPLACE

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 clarifies the accommodation requirements for employers and workers under the *Act*. This policy outlines the basic accommodation requirements for all employers and focuses on the specific accommodation requirements applicable to employers who have a re-employment obligation under section 41 of the *Act*.

DEFINITIONS

1. **Accommodation:** is the use of modified work and/or adaptive technologies to enable a worker to return to work following a work-related injury. In any specific case, accommodation can include, but is not limited to, any of the options outlined in this policy or in any of YWCHSB policies RE-01 to 13, Return to Work and Rehabilitation, designed to return an injured worker to work.
2. **Adaptive Technologies:**
 - a) **Assistive Devices:** includes aids/attachments specifically designed for the worker and/or required by the worker to perform job-related activities.
 - b) **Modifications:** changes to job schedule, equipment, aids/attachments, organization of work, and/or facilities.
3. **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*.
4. **Modified Duties:** is changing the job duties of the pre-injury position required to accommodate the worker’s functional restrictions as a result of the work-related injury. Modified work includes altering or removing some duties.
5. **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.
6. **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

The intent of the duty to accommodate is to provide equal opportunity and access to employment for workers with work-related injuries, who might otherwise face barriers to employment because of those injuries. It may also help to prevent work-related injuries or recurrences.

To facilitate return to work, YWCHSB uses a hierarchy of objectives, the goal of which is to safely return the worker to pre-injury employment through early and safe return to work and/or re-employment obligation, or to offer vocational rehabilitation services to ensure workers have the skills, knowledge and abilities to re-enter the workforce and reduce or eliminate their loss of earnings (see YWCHSB policy RE-01, “Return to Work-Overview”). While the hierarchy is intended as a guideline for most cases, there may be situations where the priorities of a specific case may differ as the most effective method of returning the worker to the pre-injury, comparable, or suitable employment.

1. Duty to Accommodate for Employers with a Re-employment Obligation (Under Section 41- Employer’s Obligation to Re-Employ)

Employers who have a re-employment obligation under section 41 of the *Act* must accommodate the work or the workplace for an injured worker to the extent determined by YWCHSB.

Examples of accommodation of a work-related injury in the workplace include (but are not limited to) the following:

- a) helping to meet the needs of a worker with a work-related injury by giving them special equipment, or rearranging the work space; and
- b) assigning a worker to different work, taking away or substituting work duties, or sharing duties among employees.

Costs of Accommodation under section 41 Employer's Obligation to Re-Employ

Section 41(7) of the *Act*, states that an employer who has a re-employment obligation is liable for the payment of up to a maximum of \$1,000 in expenses related to the accommodation of the work or workplace, and YWCHSB will be responsible for expenses in excess of \$1,000 related to accommodation as YWCHSB considers appropriate in the circumstances.

2. Duty to Accommodate Under Human Rights Legislation

Under the *Human Rights Act*, all employers have a duty to accommodate disabled workers. The legislation prohibits discrimination on the basis of a person's physical or mental disability. It states that every person has a responsibility to make reasonable provisions in connection with employment, accommodations and services for the special needs of others, if those needs arise from physical disability. This duty does not exist if making the provisions would result in undue hardship.

3. Determining Undue Hardship

In most cases accommodation is simple and affordable. However, there may be some cases where a particular type of accommodation will cause undue hardship to an employer. The employer responsible for making an accommodation must demonstrate that providing the accommodation would create undue hardship. Generalized conclusions or speculation will not suffice to support a claim of undue hardship.

Instead, undue hardship must be based on an individualized assessment of current circumstances with respect to a specific accommodation. In order to claim the undue hardship defence, the employer who is responsible for making the accommodation has the onus of proof. It is not up to the injured worker or YWCHSB to prove that the accommodation can be accomplished without undue hardship. YWCHSB recognizes that different businesses have different financial and operational circumstances. What may be an undue hardship for one business may not be undue for another one.

Where a claim of undue hardship is made YWCHSB will conduct an investigation and will take the following factors into account in making a determination of undue hardship.

Health and Safety

The extent to which the accommodation would compromise the health and safety of the worker, co-workers, or members of the public.

Disruption to the Public

The extent to which the accommodation would impact the legitimate operational requirements of the employer and result in disruption to the public.

Contractual Obligations

The effect on contractual obligations will be considered. However, collective agreements or other contractual arrangements cannot act as a barrier to providing accommodation (see YWCHSB policy RE-08, “Re-employment Provisions of Collective Agreements”).

Financial Cost

The extent to which demonstrated costs of the accommodation would impact on the financial viability of the employer’s business.

Business Efficiency

The extent to which the accommodation would impact on the way in which the employer is able to operate and carry on its business. Larger employers will have more flexibility than smaller employers to rearrange work duties and otherwise handle other changes to the usual way of working.

Excluded Factors

Matters such as business inconvenience, employee morale and customer preferences will not be considered relevant in an undue hardship defence. Business inconvenience in and of itself is not a defence to the accommodation obligation. If there are demonstrable costs attributable to decreased productivity, efficiency or effectiveness, they can be taken into account in assessing undue hardship under the cost standard, providing they are quantifiable and demonstrably related to the proposed accommodation.

An employer cannot claim undue hardship based on customer (or employee) preferences, fears or prejudices toward an individual’s work-related injury or disability.

ROLES AND RESPONSIBILITIES

YWCHSB

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

YWCHSB is responsible for assisting the workplace parties, giving advice and direction as required, and where necessary determining whether a proposed accommodation would result in undue hardship.

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

The Employer

The employer is responsible for complying with the provisions of the *Act* relating to the return to work plan for the worker, including accommodating the work or the workplace if required, 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 as well as 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.

The 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 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.

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. 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*.

LEGISLATIVE REFERENCES

Workers' Compensation Act S.Y. 2008 – preamble and sections 14, 40, 41, 52, 85

Human Rights Act R. S.Y. 2002 c 116

POLICY REFERENCES

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

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

HISTORY

RE-06, "Accommodating Work or a Workplace" effective January 1, 2011; revoked July 1, 2012