

# Workplace Safety and Insurance Act, 1997

## ONTARIO REGULATION 35/08

### RETURN TO WORK AND RE-EMPLOYMENT — CONSTRUCTION INDUSTRY

**Consolidation Period:** From September 1, 2008 to the e-Laws currency date.

No amendments.

*This is the English version of a bilingual regulation.*

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## **PART I GENERAL**

### **Application**

**1.** (1) This Regulation,

- (a) applies to employers engaged primarily in construction and to workers who perform construction work, as mentioned in subsections 40 (3) and 41 (8) of the Act; and
- (b) prescribes the requirements mentioned in subsections 40 (3) and 41 (8) of the Act. O. Reg. 35/08, s. 1 (1).

(2) For greater certainty, this Regulation applies to all employers engaged primarily in construction, whatever the number of workers they employ. O. Reg. 35/08, s. 1 (2).

### **Definition**

**2.** In this Regulation,

“suitable work” means work that,

- (a) is safe, productive and consistent with a worker’s functional abilities, and
- (b) when possible, restores a worker’s pre-injury earnings. O. Reg. 35/08, s. 2.

## **PART II RETURN TO WORK**

### **Requirements — employer**

**3.** The employer of an injured worker shall co-operate in the early and safe return to work of the worker in accordance with the following requirements:

- 1. The employer shall contact the worker as soon as possible after the injury occurs and shall maintain appropriate communication throughout the period of the worker’s recovery and impairment.
- 2. The employer shall attempt to provide suitable work that is available.
- 3. The employer shall give the Board such information as the Board may request concerning the worker’s return to work. O. Reg. 35/08, s. 3.

### **Requirements — worker**

**4.** The worker shall co-operate in his or her early and safe return to work in accordance with the following requirements:

- 1. The worker shall contact the employer as soon as possible after the injury occurs and shall maintain appropriate communication throughout the period of the worker’s recovery and impairment.
- 2. The worker shall assist the employer, as may be required or requested, to identify suitable work that is available.
- 3. The worker shall give the Board such information as the Board may request concerning the worker’s return to work. O. Reg. 35/08, s. 4.

## **PART III RE-EMPLOYMENT — ALL WORKERS**

### **Duration of obligation**

**5.** The employer is obligated under this Part and under Part IV or V, as the case may be, until the earliest of the following:

1. The second anniversary of the date of injury.
2. One year after the worker is medically able to perform the essential duties of his or her pre-injury employment.
3. The date on which the worker declines an offer from the employer to re-employ the worker in accordance with this Regulation.
4. The date on which the worker reaches 65 years of age. O. Reg. 35/08, s. 5.

### **Additional basis for determination by Board**

**6. (1)** The Board may determine the matters set out in paragraphs 1 and 2 of subsection 41 (3) of the Act at the request of the worker or employer. O. Reg. 35/08, s. 6 (1).

**(2)** Subsection (1) applies in addition to subsection 41 (3) of the Act. O. Reg. 35/08, s. 6 (2).

**(3)** When the Board makes a determination under subsection (1) or under subsection 41 (3) of the Act, it shall promptly give the worker and employer written notice of the determination. O. Reg. 35/08, s. 6 (3).

### **Employer, requirements concerning re-employment**

**7. (1)** The employer shall comply with the following requirements concerning the re-employment of a worker:

1. The employer shall comply with the requirements of Part IV or Part V, as the case may be.
2. The employer shall accommodate the work or the workplace to the needs of the worker, to the extent that the accommodation does not cause the employer undue hardship.
3. At the request of the worker or the Board, the employer shall give written notice to the worker and to the Board of the particulars of the way in which the employer intends to accommodate the work or the workplace to the needs of the worker under paragraph 2. O. Reg. 35/08, s. 7 (1).

**(2)** Paragraph 2 of subsection (1) does not require the employer to accommodate the workplace to the needs of the worker if the employer does not control the workplace. O. Reg. 35/08, s. 7 (2).

### **Presumption, non-fulfillment of employer's obligations**

**8. (1)** Subject to subsection (2), the employer is presumed not to have fulfilled the employer's obligations under this Regulation if the employer re-employs the worker in accordance with this Regulation and then terminates the worker's employment within six months after the date on which the worker was re-employed. O. Reg. 35/08, s. 8 (1).

(2) In the case of re-employment at a construction project in accordance with this Regulation, the employer is presumed not to have fulfilled the employer's obligations under this Regulation in each of the following circumstances:

1. The employer re-employs the worker at a construction project and then terminates the worker's employment,
  - i. before his or her work on the construction project is completed, and
  - ii. within six months after the date on which the worker was re-employed.
2. The employer re-employs the worker at a construction project and then terminates the worker's employment when his or her work on the construction project is completed. The employer does not re-employ the worker at the construction project or at another construction project within six months after the date on which the worker was re-employed although,
  - i. the worker is able to perform the essential duties of his or her pre-injury employment, and the pre-injury employment, or employment that is comparable to it, is or becomes available at the construction project or at another construction project, or
  - ii. suitable work is or becomes available at the construction project or at another construction project. O. Reg. 35/08, s. 8 (2).

(3) The employer may rebut a presumption established by subsection (1) or by paragraph 1 of subsection (2) by showing that the termination was not related to the injury. O. Reg. 35/08, s. 8 (3).

(4) The employer may rebut a presumption established by paragraph 2 of subsection (2) by showing that the failure to re-employ was not related to the injury. O. Reg. 35/08, s. 8 (4).

## **PART IV RE-EMPLOYMENT — UNION WORKERS**

### **Application of Part IV**

9. This Part applies if, at the time the worker was injured, the employer was bound by a collective agreement with a union representing the worker. O. Reg. 35/08, s. 9.

### **Definition**

10. In this Part,

“collective agreement workplace” means,

- (a) a construction project or shop of the worker's employer that is within the trade, sector and geographic jurisdiction covered by the collective agreement that applies to the worker, or
- (b) the workplace where the worker was injured. O. Reg. 35/08, s. 10.

### **Worker medically able to perform essential duties**

11. (1) This section applies if the employer receives information indicating that the worker is medically able to perform the essential duties of his or her pre-injury employment. O. Reg. 35/08, s. 11 (1).

(2) The employer shall offer to re-employ the worker in a position in the worker's trade and classification at a collective agreement workplace, if such a position,

(a) is available; or

(b) is occupied by another worker who was hired, assigned or transferred on or after the date on which the worker was injured. O. Reg. 35/08, s. 11 (2).

### **Worker medically able to perform suitable work in construction**

12. (1) This section applies if the employer receives information indicating that the worker, although unable to perform the essential duties of his or her pre-injury employment, is medically able to perform suitable work in construction. O. Reg. 35/08, s. 12 (1).

(2) The employer shall offer to re-employ the worker,

(a) in a position whose duties consist of suitable work in the worker's trade and classification at a collective agreement workplace, if such a position is available;

(b) if there is no position described in clause (a), in a position whose duties consist of suitable work in the worker's trade at a collective agreement workplace, if such a position is available;

(c) if there is no position described in clause (a) or (b), in a position whose duties consist of suitable work in construction at another workplace of the employer, if such a position is available. O. Reg. 35/08, s. 12 (2).

### **Multiple positions**

13. (1) If more than one position described in subsection 11 (2) or in clause 12 (2) (a), (b) or (c) is available, the employer shall offer to re-employ the worker in the position that is most similar in nature and earnings to the one the worker had at the date of the injury. O. Reg. 35/08, s. 13 (1).

(2) If two or more positions are found when subsection (1) is applied, the employer shall have regard to the following factors in deciding in which position to offer to re-employ the worker:

1. The duration of each position.

2. In the case of a position at a construction project, the duration of the construction project.

3. The proximity of each position to the worker's home. O. Reg. 35/08, s. 13 (2).

### **Worker medically able to perform suitable work other than in construction**

14. (1) This section applies if the employer receives information indicating that the worker, although it is unlikely that he or she will be medically able to perform construction work again, is medically able to perform suitable work other than in construction. O. Reg. 35/08, s. 14 (1).

(2) The employer shall offer to re-employ the worker in a position whose duties consist of suitable work other than in construction, if such a position is available. O. Reg. 35/08, s. 14 (2).

(3) At the request of the worker or the employer, the Board shall provide the worker with a labour market re-entry assessment and, if the Board determines that it is required, a labour

market re-entry plan to facilitate the worker's return to work with the employer. O. Reg. 35/08, s. 14 (3).

## **PART V RE-EMPLOYMENT — NON-UNION WORKERS**

### **Application of Part V**

**15.** This Part applies if,

- (a) at the time the worker was injured, the employer was not bound by a collective agreement with a union representing the worker; and
- (b) during the period in which the employer is obligated under Part III and this Part, the employer is still employing workers at the workplace where the worker was injured or at a comparable workplace. O. Reg. 35/08, s. 15.

### **Worker medically able to perform essential duties**

**16. (1)** This section applies if the employer receives information indicating that the worker is medically able to perform the essential duties of his or her pre-injury employment. O. Reg. 35/08, s. 16 (1).

**(2)** The employer shall offer to re-employ the worker in a position in the worker's trade,

(a) at the workplace where the worker was injured, if such a position,

(i) is available, or

(ii) is occupied by another worker who was hired, assigned or transferred on or after the date on which the worker was injured; or

(b) at a comparable workplace of the employer, if such a position is available. O. Reg. 35/08, s. 16 (2).

### **Worker medically able to perform suitable work in construction**

**17. (1)** This section applies if the employer receives information indicating that the worker, although unable to perform the essential duties of his or her pre-injury employment, is medically able to perform suitable work in construction. O. Reg. 35/08, s. 17 (1).

**(2)** The employer shall offer to re-employ the worker,

(a) in a position whose duties consist of suitable work in the worker's trade at the workplace where the worker was injured, if such a position is available;

(b) if there is no position described in clause (a), in a position whose duties consist of suitable work in the worker's trade at a comparable workplace, if such a position is available. O. Reg. 35/08, s. 17 (2).

**(3)** If the employer has no suitable work in the worker's trade available at any workplace but does have suitable work in construction available, the employer shall offer to re-employ the worker,

(a) in a position whose duties consist of suitable work in construction at the workplace where the worker was injured, if such a position is available;

- (b) if there is no position described in clause (a), in a position whose duties consist of suitable work in construction at a comparable workplace, if such a position is available. O. Reg. 35/08, s. 17 (3).

### **Multiple positions**

**18.** (1) If more than one position described in subsection 16 (2), 17 (2) or 17 (3) is available, the employer shall offer to re-employ the worker in the position that is most similar in nature and earnings to the one the worker had at the date of the injury. O. Reg. 35/08, s. 18 (1).

(2) If two or more positions are found when subsection (1) is applied, the employer shall have regard to the following factors in deciding in which position to offer to re-employ the worker:

1. The duration of each position.
2. In the case of a position at a construction project, the duration of the construction project.
3. The proximity of each position to the worker's home. O. Reg. 35/08, s. 18 (2).

### **Worker medically able to perform suitable work other than in construction**

**19.** (1) This section applies if the employer receives information indicating that the worker, although it is unlikely that he or she will be medically able to perform construction work again, is medically able to perform suitable work other than in construction. O. Reg. 35/08, s. 19 (1).

(2) The employer shall offer to re-employ the worker in a position whose duties consist of suitable work other than in construction, if such a position is available. O. Reg. 35/08, s. 19 (2).

(3) At the request of the worker or the employer, the Board shall provide the worker with a labour market re-entry assessment and, if the Board determines that it is required, a labour market re-entry plan to facilitate the worker's return to work with the employer. O. Reg. 35/08, s. 19 (3).

## **PART VI TRANSITION**

### **Transition**

**20.** Despite its revocation by section 21 of this Regulation, Ontario Regulation 259/92 (Reinstatement in the Construction Industry) under the Act continues to apply to employers and workers in respect of any injury that occurs before September 1, 2008. O. Reg. 35/08, s. 20.

**21.** Omitted (revokes other Regulations). O. Reg. 35/08, s. 21.

**22.** Omitted (provides for coming into force of provisions of this Regulation). O. Reg. 35/08, s. 22.