

## **Working with Workers' Compensation Ten Costly Return-to-Work Mistakes**

Coupled with the impact of the recession, the sweeping changes in the newly enacted ADA Amendments Act (ADAAA) and the Family and Medical Leave Act (FMLA), have severely altered the economic and legal landscape for employers. These are two major reasons why, even in difficult economic times, a strong Return-to-Work (RTW) focus improves an employer's bottom line.

Because employers often find it difficult recognizing the benefits of RTW, here are ten common mistakes they make:

**Mistake #1. Failure to recognize the increase in the number of employees covered by the ADAAA.** For employers covered by the ADAAA (those with 15 or more employees), more employees will satisfy the definition of disability and be entitled to reasonable accommodations, including those employees who have suffered on-the-job injuries. Employers covered by the ADAAA must make disability determinations without consideration of mitigating measures such as medication, hearing aids and assistive technology.

The ADAAA's stated goal is to shift the focus from whether an employee is disabled to whether employers are complying with their obligations under the law.

When faced with litigation, employers, in many cases, will no longer be able to argue over whether the worker is covered by the ADA. Employers will need to have an interactive process with disabled workers, wherein the employer discusses with the workers the reasonable accommodations that will allow them to perform their essential job duties. They will need to make sure managers know their obligations to provide reasonable accommodations and do not reject requests without appropriate analysis.

As a federal law, the ADA supersedes state Workers' Compensation laws, and therefore, its directives provide the floor level protection for disabled individuals. State Workers' Compensation laws can provide more protection, but not less.

Properly structured, RTW programs can decrease the ADA exposure.

**Mistake #2. Insist that employees be released to “full duty” before returning to work.** Considerable evidence exists about the value of RTW programs that provide a means for employees to transition back into their full duty jobs with responsibilities and tasks modified for short periods of time.

Insisting on a return to “full duty” increases Workers’ Comp costs and heightens the possibility that the injured employee will fall prey to a “disability syndrome” – the failure to return to work when it is medically possible.

For employers covered by the ADAAA, the criterion is the “essential functions of the job.” Not all job functions are essential. Courts consider job descriptions and performance evaluations in determining what functions are essential to a job.

Employers should review and update these documents to ensure that the essential functions for each position are accurately described.

**Mistake #3. Cut the budget for RTW.** Employers seeking to cut expenses may target RTW programs. Yet, cutting or delaying such programs can result in higher costs both now and in the future.

The longer an employee is out on injury leave, the higher the cost, adversely affecting claim reserves and ultimately the Experience Modification Factor as well as increasing the likelihood of litigation.

Furthermore with today’s sharply reduced workforces, employees are often working beyond full capacity and cannot absorb the excess work of an absent co-worker. A troubling message is sent to valued employees, both injured and healthy, damaging an already vulnerable morale.

**Mistake #4. Believe that RTW cannot address musculoskeletal injuries such as back pain.** Low back pain is the most prevalent and most costly work-related condition, yet only a small fraction of workers with acute back pain progress to chronic disability.

A recent study concluded that workers who were not offered an accommodation such as light duty or reduced hours to facilitate the return to work in the first three weeks were almost twice as likely to develop a chronic disability. “These findings suggest that an employer offer of accommodations to facilitate working in the first few weeks after injury may play an important role in chronic disability prevention.”

**Mistake #5. Be deterred from setting up transitional assignments because the employee “may get hurt again.”** Employer and employee fear of re-injury often hampers RTW efforts. While this is of course a risk, an even greater risk is having the employee stay at home and develop a “disability attitude” that extends the absence and drives up costs.

Explain why it is important to return to work and the steps that are being taken to ensure the employees’ safety. Be sure job assignments meet the medical restrictions set by the treating physician and stay in touch with the employees as to their comfort level with the assignment.

**Mistake #6. Don’t distinguish “light duty” from “transitional work” from “reasonable accommodation.”** RTW assignments are best described as transitional tasks. Limited in duration, such tasks help the injured worker return to full productivity by being progressively adjusted in line with medically documented changes in the employee’s ability.

Under the ADAAA, it is permissible for an employer to reserve “light-duty” jobs for those with work-related disabilities and these jobs should be distinct from transitional tasks. The ADAAA also stipulates that “reasonable accommodations” include, but are not limited to making existing facilities used by employees readily accessible, job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

**Mistake #7. Rely on the physician to guide the RTW process.** While physicians are medical experts they do not have essential information about workplace policies, job demands and the availability of transitional work.

Moreover, if a physician’s training is not specifically in the treatment of occupational injuries they may not adhere to evidence-based guidelines. The employer must be proactive and take the lead role with both the physician and the injured worker.

**Mistake #8. Don’t take time to understand the laws governing mandatory comprehensive medical exams before returning to work.** This is one of the most confusing aspects of RTW with the ADAAA, the FMLA and state Workers’ Compensation

laws having different and sometimes conflicting requirements. Understanding the laws and how they apply to your specific circumstance is critical.

**Mistake #9. Don't establish consequences for failure to comply with RTW requirements.** What's important here is to understand the difference between disciplining and cutting off benefits. If an employee is covered by the FMLA and cannot perform one or more of the essential functions of his or her job, that employee may refuse transitional assignments and take FMLA leave.

However, the FMLA only creates an entitlement to unpaid leave, and therefore, in most cases, the Workers' Compensation indemnity payments may discontinue with the refusal to return to work. The employee retains the right to reinstatement to the position held when FMLA leave was taken.

**Mistake #10. Believe Workers' Compensation settlements resolve ADA liabilities.** Under the ADAA, more injured employees will qualify as "Qualified Individual with a Disability" and as such can assert their right under the ADA to a reasonable accommodation, irrespective of any Workers' Compensation settlement.

During settlement negotiations, close coordination is necessary between the company's legal, risk management, and HR departments to ensure that each office is able to accomplish its mandate without compromising the employee's rights.

Return-to-Work is a proven business strategy in both prosperous and difficult times. Properly implemented, RTW programs can reduce costs and improve the bottom line.