



ACCORDING TO new federal guidelines, employers are expected to accommodate employees with non-work-related injuries or disabilities through return-to-work programs.

# The Next Chapter for Return to Work

**Modified duty and return-to-work programs are making a comeback, due to improvement in the economy and amended federal workplace accommodation requirements.**

**BY KATIE KUEHNER-HEBERT**

During the last recession, many employers opted to fold their return-to-work programs when business slowed and employees were laid off.

Now, the tide is turning, according to Theresa Everett, vice president, director, lead consultant at Aon Risk Solutions in New York.

As employers revitalize their return-to-work programs or launch them for the first time, some companies are adapting RTW initiatives to meet their obligations under the Americans with Disabilities Act Amendments Act (ADAAA).

Not all experts agree with that approach as a way to reasonably accommodate employees, even though the federal government has offered guidance on the use of transitional — and even permanent light duty — programs to accommodate disabled workers.

Nonetheless, the trend may expand even more

now that obesity has been included as a qualifying disability under the ADAAA.

Using RTW programs is one way employers may attempt to deal with the country's "obesity epidemic," Everett said.

"If an employee gains a great deal of weight after getting a job and they get injured and can no longer do that job, their employer must engage them in the interactive process to see if they can give them a reasonable accommodation through their RTW program — provided they have a position and can do the essential functions of the position," she said.

But there is an inherent conflict, said J. Bradley Young, a partner at Harris, Dowell, Fisher & Harris LC in Chesterfield, Mo., between workers' comp and the ADAAA when it comes to return-to-work programs.

Workers' comp gives a financial incentive to

employers to get their employees back to work on light duty. It saves them money. It also enables the worker to recover more quickly by giving them meaningful activities rather than being home alone.

RTW programs under the ADAAA, on the other hand, may be costly for employers, he said.

If a company has already demonstrated that it can accommodate an injured worker in a return-to-work program, then a permanently disabled worker (who was not injured in a work-related incident) may demand light duty as a reasonable accommodation, Young said.

That type of situation could result in a permanent light duty job, as opposed to a temporary situation for employees with workers' comp injuries.

"Now that courts around the country are starting to recognize obesity as a disability under the ADA, employers in the not-too-distant future may have to start creating permanent light duty jobs for obese employees," he said.

## GETTING SPECIFIC

To mitigate the impact of this, Young advises employers to limit light duty within their return-to-work programs to a specified amount of time, such as no longer than six months.

Then — on a case-by-case basis — the employer can create other ways to accommodate individuals who are permanently disabled due to factors outside of work, leaving RTW light duty to those who were injured on the job.

This could be an opportune time to limit the types of work permitted in RTW programs, he said.

Some employers mistakenly try to accommodate every injured employee through their return-to-work programs, which typically results in some duties that don't meet the "straight-face" test.

An example would be having someone who is on work restriction sorting paper clips or cleaning desks because the company isn't able to provide substantial work for them.

Still, for those employers that utilize RTW programs to comply with the ADAAA, formalizing them so that they consistently provide workers with transitional duty can make them more sustainable, said Randi Urkov, a managing director at Marsh Risk Consulting in Chicago.

Many employers have recognized that it is difficult to effectively sustain a program when there is an insufficient structure to offer guidance to managers, she said.

More formalized programs can also help employers to better comply with the ADAAA's requirements to treat occupational and nonoccupational disabilities similarly, by offering temporary transitional duty regardless of the nature of the disability.

Part of this entails identifying tasks that workers can do within transitional programs that can be deemed as a reasonable accommodation.

Employers also need to establish an escalation process if supervisors can't or won't make temporary accommodations, by identifying which manager has the ultimate authority to send the

## Summary

- Employers have begun using return-to-work programs to reasonably accommodate workers under the ADAAA.
- The designation of obesity as a disability may force employers to create permanent light duty jobs for obese employees.
- Inconsistencies in the accommodation of work-related and non-work-related injuries may lead to increased litigation.

worker home, Urkov said.

Christina Bergman, a consultant with Aon Global Risk Consulting's risk control, claims and engineering group in Minneapolis, said more coordination is needed.

There are various internal departments, she said, that might be separately managing return-to-work and workers' comp, as well as compliance requirements under the ADA, the Family and Medical Leave Act and the Equal Employment Opportunity Commission.

"Most employers have various siloes within their organizations that separately manage their primary responsibilities and they don't always speak to each other," she said.

"Defined triggers, improved integration and coordination of the overlapping obligations are needed by employers in order to improve outcomes and be successful."

### NEXT WAVE OF SCRUTINY

Employers also need to determine whether their policies and procedures consistently treat occupational-related return-to-work efforts and nonoccupational accommodations in a similar manner, Bergman said.

"I believe this area will be the next wave of scrutiny and litigation," she said.

Employers would also be better off if they did not leave all the responsibilities of communication to their third-party workers' compensation administrators, said Charlie Cartwright, claims control consultant at Lockton Cos. in Kansas City, Mo.

The sooner employers reach out

would be if they were on the job, she said.

The firm charges a flat fee for the placement, which is paid by the carrier or the third-party administrator servicing the claim.

ReEmployAbility's program has found traction with those employers that do not have an on-site return-to-work initiative or those that need additional options to supplement their on-site programs, she said.

"Transitional employment options are a great solution for employers who have a lot of workers in remote locations such as over-the-road drivers or field technicians," she said.

Ford mentioned Safelite Auto Glass, which sends workers to client locations to replace windshields, as an example of a company that benefits from the program.

ReEmployAbility's focus on volunteerism is a popular aspect of the program, said Debra Livingston, the company's other co-founder.

Especially during the recession, she said, volunteerism gave unemployed workers a way to network to get a new job, learn new skills, and to maintain a regular work routine, she said.

"That trend has not changed, as volunteerism is just getting bigger," Livingston said.

A volunteerism program "also fits in well with employers' corporate social responsibility initiatives in addition to their workers' comp responsibilities," she said.

VocWorks, a part of York Risk Services Group Inc., also works with nonprofits to provide volunteer placements for employees



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to injured workers, the more likely they can convince workers to come back to work on modified duty, by communicating that return-to-work programs often expedite the healing process.

And when an employer is unable to accommodate a light duty transitional job, there are firms like ReEmployAbility Inc. in Tampa, Fla., which provides specialty return-to-work and transitional duty programs that focus on volunteerism, said Frances Ford, co-founder.

The firm sets up alternative work at nonprofit organizations within the injured workers' communities, where workers can perform volunteer duties while recovering from their injuries, Ford said.

Workers are paid by their employers at the same rate as they

with temporary job restrictions, said Kimberly Wickert, director of rehabilitation and business development.

Marsh's Urkov said that employers are becoming more open to using nonprofits for RTW programs.

"Several years ago, many employers didn't want to do that because they were afraid it would expose them to liability they could not control," she said.

"But now they realize it can be a very viable option when there is no transitional duty available at the worksite."

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