

GOODBYE – COME BACK SOON!

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The U.S. Supreme Court is currently considering the issue of whether under the Pregnancy Discrimination Act, an employer who provides light-duty work to some employees, (such as those injured on the job) but not to all employees with physical limitations, must provide it to pregnant employees on the same basis. As women make up approximately 50% of the retail workforce, and there are few valuable light-duty jobs in most retail stores, the prospect of being required to provide light-duty work to pregnant employees is a daunting one.

In light of this prospect, now would be a good time to evaluate your company's return-to-work program and consider its effectiveness. Even if the Supreme Court says retailers do not have to accommodate pregnant employees, a review of the program can reveal many flaws and opportunities for improvement that will assist in maintaining control over your workforce and particularly your decisions regarding when, and to whom, to provide light-duty work.

Putting The Program To Work

Return-to-work programs are an important part of a retailer's effort to reduce workers' compensation costs and to improve performance by reducing the time experienced employees spend away from jobs due to workplace injuries. Some studies have shown that following an on-the-job injury, the faster employees return to work in some capacity, the more likely it is that they will be able to recover fully. These studies also suggest that return to work programs reduce the overall amount of lost workdays by 50%.

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Return-to-work programs can consist of a variety of components including light-duty assignments, modified duty, vocational rehabilitation, and other educational efforts for the injured employee. These practices often intersect with the Americans with Disabilities Act (ADA) because courts and the Equal Employment Opportunity Commission (EEOC) have concluded the ADA's reasonable-accommodation obligation includes assignment to a vacant light-duty position as well as modification of the manner in which an employee does a job, reassignment of marginal job functions, and restructuring of facilities or equipment to allow disabled employees to perform the job. While return-to-work programs can be a valuable tool, take care in implementing such a program to avoid establishing undesired precedent for treatment of disabled employees under the ADA.

Providing light-duty work to employees injured on the job creates a host of issues. Failing to have clearly defined parameters for light-duty work establishes a precedent for the treatment of all similarly situated employees with physical limitations regardless of the genesis of those limitations.

For example, one court held that an employee's evidence that the retailer had, in the past, allowed other employees to remain on light-duty status far longer than its policy called for, created an issue of fact as to whether the retailer failed to reasonably accommodate the employee when it refused to allow him to remain on light-duty status. Likewise, another court held because a retailer assigned a disabled employee to a light-duty position permanently, it had to consider this option as a reasonable accommodation.

You can develop a return-to-work program that includes light duty to assist in lowering workers' compensation costs without resulting in the program turning into a reasonable accommodation under the ADA. As one court explained, while the ADA requires transfer to a vacant position for which the employee is qualified, it does not require the retailer to waive a legitimate nondiscriminatory policy regarding transfers, *e.g.*, a no-transfers-that-result-in-a-demotion policy.

Thus, retailers can create nondiscriminatory parameters for participation in a light-duty program, such as parameters based on criteria designed to help the program achieve its goals, without running afoul of the ADA. These parameters

should include: 1) creating the positions only upon the occurrence of an on-the-job injury; 2) limiting the number of employees who can be on light duty at any given time; 3) ensuring that the positions have a limited duration; and 4) requiring that the physical impairment be temporary.

If you want to limit light-duty assignments to workers injured on the job, it's important that the limited number of positions under the program not exist in the absence of a work-related injury. Rather, the policy should result in the creation of light-duty positions when an employee with a workplace injury is capable of performing light-duty work. The EEOC has taken the position that all disabled employees, without regard to the genesis of the injury, must be considered for vacant light-duty positions. But the EEOC's position does allow you to limit the creation of light-duty positions for employees with work-related injuries.

Retailers should also consider a maximum number of employees who can be on light duty at any given time. Particularly, where you have a limited amount of light-duty tasks to be performed, you may find yourself unable to provide meaningful light duty as the number of injured workers increases. Limiting the duration of the positions should alleviate this problem somewhat as the ability to create a new position will recur when employees move off of light duty.

Since the primary focus of the light-duty component of return-to-work programs is ordinarily to provide a bridge to help employees return to their former jobs, light duty should be limited to employees with temporary impairments. Employees whose injuries will never allow them to return to their former position may be better served through vocational rehabilitation and educational efforts designed to provide them with the skills to perform jobs within their physical limitations.

A Checklist That Works

If these parameters are consistently adhered to, they will withstand claims that permanently disabled employees should be transferred into a light-duty position permanently. Where you have, and consistently enforce, these parameters, you are not required to create a light-duty assignment as an accommodation, nor do you have to convert a temporary light-duty position into a permanent one. Nor can the employee insist on having a light-duty position created by eliminating "essential" duties of a job.

Before deciding to adopt a return-to-work program with a “light duty” component, consider a variety of questions related to their particular circumstance.

CONSIDERATIONS FOR DEVELOPING A LIGHT-DUTY PROGRAM

- are there light-duty tasks that exist within the company that can easily be assigned to an employee with physical restrictions;
- do current jobs have light-duty tasks that an employee restricted to light duty could continue to perform;
- are available tasks to be performed valuable to the company;
- how easy is it for employees with no training in performing those tasks to come in and perform them efficiently and well;
- in what circumstances is having employees return to work on light-duty status better than having employees convalesce to the point where they are fully recovered and can come back and perform their regular job; and
- how will having employees performing light duty work affect the morale of other employees within the organization?

Once a light-duty program is implemented, be aware of the limitation under the Family Medical Leave Act (FMLA) on your right to force an employee to come back to work in a light-duty position while the employee has FMLA leave remaining. Employees on FMLA leave are entitled to have their jobs restored and their benefits continued. You cannot force an employee on FMLA leave to come back to work who is less than fully capable of performing the duties of the former position.

Thus, an employee cleared for light duty after six weeks of leave cannot be forced to report for work or forfeit the job. Rather, the employee is entitled to take the full 12 weeks of leave assuming that he or she does not become fit enough to return to the old job during that period. This does not impact your right to cut off workers' compensation payments based on the employee's failure to report, but the employee cannot be fired.

The Bottom Line

Finally, remember that even if employees can no longer perform their own jobs due to a disability, and are ineligible for a light-duty program, you still have a duty under the ADA to consider whether the employee could perform other jobs with or without a reasonable accommodation.

So, either at the end of the light-duty assignment or at the time it is determined an employee is not eligible for a light-duty assignment, you should review any regular available positions (or positions likely to become available in the near future) with the disabled employee as part of the ADA's interactive process.

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