Successful Return to Work Strategies

Returning to Work: Fit for Duty?

- Safety and HR managers have the delicate task of reintroducing injured workers back into their company’s daily operations. They must consider the company’s production needs, the employee’s health, and the concerns of medical professionals, as well as legal responsibilities under the American’s with Disability and American’s with Disability Amendment and Family Medical Leave Act. Identify strategies to help you fully understand the employee’s capabilities upon returning to work or the need for accommodation are critical to the success of all parties. Learn how to effectively work with the medical community and within the laws to reduce the chances of injury aggravation and better protect your company.

- David Hoyle, National Director, Select Physical Therapy
Continuum of Services

Objectives

- Participants will become familiar with:
  - The impact of work-related musculoskeletal disorders on employers in the US.
  - How to communicate effectively with healthcare workers regarding injured worker functional work abilities.
  - The process for developing a functionally based job description.
  - Employer responsibilities under ADA and ADAA surrounding return to work.
  - Differences between a Functional Capacity Evaluation and a Fit for Duty Test.
Disclaimer

- Physical Therapist by background.
  - Not an attorney.
- Information provided is generally available on the internet mostly from government websites and is not intended to be legal advice but for awareness only.
- Talk is based on National Statutes and there may be State Statutes that influence or supersede federal policy.
- Key Laws Enforce by the Equal Employment Opportunity Commission
  - Title VII of the Civil Rights Act of 1964
  - Uniform Guidelines on Employee Selection Procedures or “UGESP” under Title VII. See 29 C.F.R. Part 1607 (1978)
  - Title I of the Americans with Disabilities Act (ADA)
  - The Age Discrimination in Employment Act (ADEA)
  - American Disability Act Amendment Act (ADAAA)
  - Family Medical Leave Act (FMLA)

https://www.eeoc.gov/policy/docs/fact/employment_procedures.html

Work-Related Musculoskeletal Disorder
Work-Related Musculoskeletal Disorders (WRMSD)

- Musculoskeletal disorders (MSD) are injuries or disorders of the muscles, nerves, tendons, joints, cartilage, and spinal discs. Work-related musculoskeletal disorders (WRMSD) are conditions in which:
  - The work environment and performance of work contribute significantly to the condition; and/or
  - The condition is made worse or persists longer due to work conditions

- Examples of MSDs include:
  - Sprains, strains, and tears
  - Back pain
  - Carpal tunnel syndrome
  - Hernia

https://www.cdc.gov/workplacehealthpromotion/health-strategies/musculoskeletal-disorders/

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Work-Related Musculoskeletal Disorders (WRMSD)

- In 2015 there were nearly 1M injuries resulting in lost work time.
- Nearly half of those were due to sprains and strains and injuries to the back.
- Direct and Indirect Costs of WRMSD and CTS are over $1.5B and $1B annually.

https://www.bls.gov/iif/
https://www.cdc.gov/niosh/nioshtic-2/20044181.html
How is Return to Work from Medical Leave Managed?

Who Determines Safe Work Abilities in Workers Compensation

- Historically, return-to-work decisions have been based upon diagnoses and prognoses of physicians.
  - Generally this has not included objective measurements of an individual's functional abilities.
  - Most physicians are not trained to assess the full array of human functional abilities required for comprehensive disability determinations or return to work recommendations.
  - In an evidence-based medical model, measurements are preferable to estimates.
  - The physician or treating provider determines diagnosis and medical prognosis, but should rely on functional testing to more objectively identify a person's functional abilities than their use of estimates, commonly called restrictions.

What about FMLA

- Upon return from FMLA leave, an employee must be restored to his or her original job or to an equivalent job with equivalent pay, benefits, and other terms and conditions of employment.¹
  - A personal physician may make recommendations in readiness to return to work.

¹. US Dept of Labor. Fact Sheet #28: The Family and Medical Leave Act

What are Employee’s rights with regards to return to work

- Employees returning from leave under WC and Personal Leave due to an injury or illness resulting in a disability are entitled to reasonable accommodation under the American's with Disability Act and American's with Disability Amendment Act.
  - The ADA defines a person with a disability as a person who has a physical or mental impairment that substantially limits one or more major life activity.¹
  - This includes people who have a record of such an impairment, even if they do not currently have a disability. It also includes individuals who do not have a disability but are regarded as having a disability.¹

¹. ADA National Network. What is the definition of disability under the ADA?
   https://adata.org/faq/what-definition-disability-under-ada
What are Employee’s rights with regards to return to work

- Reasonable Accommodation
  - In general, an accommodation is any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities.\(^1\)
  - The only statutory limitation on an employer's obligation to provide "reasonable accommodation" is that no such change or modification is required if it would cause "undue hardship" to the employer.\(^1\)


What are Employee’s rights with regards to return to work

- Does the Employee have to request an Accommodation?
  - Yes, BUT a family member, friend, health professional, or other representative may request a reasonable accommodation on behalf of an individual with a disability.\(^1\)
  - EEOC guidance specifically says: “An employee has been out of work for six months with a workers' compensation injury. The employee's doctor sends the employer a letter, stating that the employee is released to return to work, but with certain work restrictions. (Alternatively, the letter may state that the employee is released to return to a light duty position.) The letter constitutes a request for reasonable accommodation.”\(^1\)

What are Employee’s rights with regards to return to work

- Interactive Process
  - This means that the individual requesting the accommodation and the Employer Representative (Disability Program Manager) must communicate with each other about the request.
    - the precise nature of the problem that is generating the request
    - how a disability is prompting a need for an accommodation
    - alternative accommodations that may be effective in meeting an individual’s needs.
  - When a third party (e.g., an individual’s doctor) requests accommodation on behalf of an applicant or employee, the DPM should, if possible, confirm with the applicant or employee that he wants a reasonable accommodation before proceeding.

1. EEOC. Procedures For Providing Reasonable Accommodation For Individuals With Disabilities
   https://www.eeoc.gov/eeoc/internal/reasonable_accommodation.cfm

Understanding and Communicating Work Demands

A Key Component of Effectively Managing Return to Work
Understanding Job Functions

- In addition to return to work used to communicate
  - To prospective employees via posting of available jobs
  - During interviewing of new employees to enable to indicate they are covered under ADA.
  - To develop post offer and return to work testing programs.
  - To communicate with medical professionals regarding physical abilities required to complete job assignments for rehabilitation.

**Analyse Jobs:**

- It is prudent for employers to develop and maintain a detailed description for each job that lists its essential functions and duties. Such descriptions should focus on a job, not a person. For example, a warehouse position may require that boxes be stacked on shelves. The essential function of this job is that boxes be stacked, not that a person lift boxes.

- When developing job descriptions, all aspects of a job must be taken into consideration. In addition to specific tasks, descriptions should include details such as scheduling and location, equipment necessary to complete the job, any health and safety requirements, and conduct requirements.

[https://www.dol.gov/odep/jobs/misc/job.htm](https://www.dol.gov/odep/jobs/misc/job.htm)
Understanding Job Functions

Essential Job Function

- The basic job duties that an employee must be able to perform, with or without reasonable accommodation.
- Factors to consider in determining if a function is essential include:
  - whether the reason the position exists is to perform that function,
  - the number of other employees available to perform the function or among whom the performance of the function can be distributed, and
  - the degree of expertise or skill required to perform the function.
- Employer judgment as to which functions are essential, and a written job description prepared before advertising or interviewing for a job will be considered by EEOC as evidence of essential functions.
- Job Functions which are not essential are known as marginal or non-essential functions.

https://www.eeoc.gov/facts/ada17.html

Understanding Job Functions

- Developed through a Job Site Analysis
  - Should involve:
    - Human Resources/Safety
    - Department Supervisor
    - Field Level Employee(s)
  - Interviewing to Determine:
    - Range of Job Functions Tasks
    - Essential vs. Marginal Job Function
Understanding Job Functions

- Developed through a Job Site Analysis
  - Job Functions Analyzed for
    - Strength requirements
      - Lift, lower, push, pull
    - Positional requirements
      - Sit, Stand, Walk, Run, Climb, Crouch, Kneel, Crawl, Reach, Bend
    - Handling requirements
      - Fingering, Gripping (firm/simple)

Example- Job Site Analysis

This full Job Site Analysis for all tasks was 10 pages.
Communicating Job Functions

- With Prospective and Current Employees
  - Including for Return to Work and During the Interactive Process
- Physical Abilities Job Description
  - A list of the physical requirements for the most physically demanding tasks
    - Essential Functions
    - Non-Essential (Marginal) Functions

Example: Physical Job Description
Communicating Job Functions

- With Medical Personnel
  - List Physical Abilities Associated with
    - Essential Job Functions
    - Marginal Job Functions
  - Include areas to indicate if the worker has the ability to complete the job functions.
    - If they currently don’t have the ability to complete the job function what is their current limitation.

Example Return to Work Note
Employers Rights with Regards to Agility Testing

Disability Inquiries and Medical Testing Under ADA

- The ADA limits an employer’s ability to make disability-related inquiries or require medical examinations at three stages
  - pre-offer
    - an employer may not ask any disability-related questions or require any medical examinations, even if they are related to the job.
  - post-offer
    - an employer may ask disability-related questions and conduct medical examinations, regardless of whether they are related to the job, as long as it does so for all entering employees in the same job category
  - during employment
    - an employer may make disability-related inquiries and require medical examinations only if they are job-related and consistent with business necessity.

https://www.eeoc.gov/policy/docs/qanda-inquiries.html
Return to Work Under FMLA

- An employer may require employees who take leave for their own serious health condition to provide a fitness for duty certification: a signed statement from a health care provider indicating that the employee is able to return to work.
  - The employer may require that the certification specifically address the employee's ability to perform the essential functions of the job
    - but only if the employer tells the employee that this will be required and gives the employee a list of the essential job functions when the employer first designates the employee's time off as FMLA leave.

Return to Work Under Workers Comp and NonFMLA

- The Americans with Disabilities Act (ADA), the federal law that prohibits disability discrimination, also regulates fitness for duty exams.
  - A fitness for duty exam could reveal information about an employee's disability, they are allowed only in limited circumstances under the ADA.
    - A fitness for duty exam must be job related and consistent with business necessity under the ADA. Generally, this standard will be met if:
      - the employer reasonably believes that the employee's condition may prevent him or her from preventing the essential functions of the job, or
      - the employee poses a direct threat to his or her own safety or the safety of others.

What does this mean for Employers

Kris Indergard vs. Georgia-Pacific Corp., 9th U.S. Circuit Court of Appeals, No. 08-35278, Sept. 28, 2009

- Georgia-Pacific contracted with an independent occupational therapy company to conduct the PCE once an orthopedic surgeon authorized Ms. Indergard to return to work in 2005.
- Then an occupational therapist conducted the PCE, recording information such as Ms. Indergard's pain level, use of alcohol and tobacco, blood pressure, heart rate and breathing after a treadmill test. Range of motion and muscle strength tests also were administered.
- As a result of the exam, the therapist recommended that Ms. Indergard not return to work and GPC terminated the employee.
- The employee filed a complaint.
- EEOC guidance determined that several components of the PCE administered to Ms. Indergard are considered medical exams under the EEOC guidance.
- The EE was awarded damages and GPC was ordered to reinstate the EE.

http://www.businessinsurance.com/article/20091004/ISSUE01/310049972
Medical Inquiry/Employment testing of Active Employees

- It is permissible to perform testing on current employees engaged in active employment if a trigger for testing can be documented:
  - Change in or unable to meet productivity standards
  - Change in work methods that may be unsafe.
  - Frequent loss of work time due to injury or illness.
  - Frequent requests for assistance or avoidance of essential job functions.
  - Indication that employee may pose a direct threat to themselves or others.

Fitness for Duty VS Functional Capacity Evaluation

- **Fitness for Duty**
  - Employment Test
  - Ordered by the employer
  - Paid for by Employer dollars
  - Agility/Functional Components to determine ability to perform essential job functions
  - Provided to Employer to begin the interactive process

- **Functional Capacity Evaluation**
  - Medical Test
  - Ordered by a medical provider
  - Paid for by WC dollars
  - Most often designed to test general work functions.
  - Interpreted by a treating provider to provide return to work recommendations
  - Recommendations trigger the interactive process
    - Could trigger a Fitness for Duty
What’s an Employer to Do?

- Every employer should have a written protocol for return-to-work exams that states “the only thing that exam is to explore is whether the injury or illness that caused the person to be out of work has healed to the point that they are now capable of performing the essential job functions.
- Every employer should have a written protocol for testing of active employees who may demonstrate difficulty performing essential job functions or pose a direct threat to themselves or others.
- In addition to showing a business necessity, employers can avoid running afoul of the courts by giving an employee a physical agility exam limited to specific injured body parts.
- Employers also should provide a written directive to health care providers that conduct the tests and any insurer that requests them to assure compliance with the employer’s policy.

http://www.businessinsurance.com/article/20091004/ISSUE01/310049972

Thank you