

Don't Forget the ADA! How to Build a Premier Return to Work Program

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LANDSCAPE OF RETURN TO WORK PROGRAMS



AGENDA

- Return to work (RTW) program
- RTW in action – a look at Kohl's program
- Americans with Disabilities Act
- *Frazier vs. Gee* case
- Best practice takeaways

WHAT IS A RETURN TO WORK PROGRAM?

Return to work (RTW) program:

A RTW program is part of a business strategy to retain valued employees and to enhance the productivity of the workforce. The anticipated result of a RTW program is the progressive return of the injured employee to full duty. (JAN)

Assist employees to return to work at the earliest possible date following an injury or illness

Always comply with medical work restrictions

Include a temporary assignment that is physically or mentally less demanding than normal job duties

LIGHT
DUTY

MODIFIED
DUTY

TRANSITIONAL
DUTY

COMPONENTS OF A RETURN TO WORK PROGRAM



COMPANY COMMITMENT

- Roles and responsibilities
- Timeframes

COMMUNICATION

- Training
- Assign a RTW coordinator

JOB DESCRIPTIONS

- Updated written physical demands
- RTW options

SOMETHING TO CONSIDER

YES



NO

Does your company have light duty/modified duty/transitional duty assignments that only apply to employees who have sustained a work-related injury or illness?

KOHL'S TAKES A LOOK AT RETURN TO WORK



BENEFITS OF A RETURN TO WORK PROGRAM



**Cost
Reduction**



**Employee
Engagement**



**Increased
Productivity**

BENEFITS OF A RTW PROGRAM: KOHL'S EXPERIENCE



COST REDUCTION

- Reduces costs to disability leave programs as well as claims (including loss of productivity, retraining costs, etc.)
- Reduces the need to replace employees, lowers turnover and associated costs (recruitment, hiring, onboarding, etc.)



EMPLOYEE ENGAGEMENT

- Facilitates better employer and employee communication
- Integrated disability management approach makes employees feel valued
- Helps retain a more experienced workforce



INCREASED PRODUCTIVITY

- With daily productivity, employees heal faster and require less medical care

AMERICANS WITH DISABILITIES ACT

Purpose:

- The Americans with Disabilities Act is a law that was enacted in 1990 and amended in 2008 (ADAAA) by Congress that prohibits discrimination based on disability. Under the ADA, employers are required to provide reasonable accommodations to qualified individuals with disabilities, unless doing so would pose an undue hardship. (42 USC § 12101)
 - It prohibits discrimination, retaliation and harassment of disabled persons
-

DEFINITION OF A DISABILITY



Disability – defined by the ADA with a three-pronged definition:

1. Physical or mental impairment that substantially limits one or more major life activities
2. A record of such an impairment, or
3. Regarded as having such an impairment

See USC 12102 (2)

The determination of whether any particular condition is considered a disability is made on a case by case basis.

CAUTION: MUST BE ABLE TO RETURN FULL DUTY OR 100% HEALED



Policies requiring employees to be completely restriction-free violate the ADA

- One of the ways an employee can meet the definition of disability is to show that the employer "regarded" him as having a disability. In some cases, employees have proved that their employers regarded them as having a disability by showing that the employer would not let them return to work until 100% healed
- In the EEOC vs. UPS, the court held that:
 - "100% healed" policy is *per se* impermissible because it "prevents individualized assessments" and "necessarily operates to exclude disabled people that are qualified to work"
 - Thus, a "100% healed" acts as a prohibited "qualification standard" because it removes the opportunity for the employee to pursue reasonable accommodation, in violation of the ADA

EEOC v. UPS, Inc., 2014 BL 35887, N.D. Ill., No. 1:09-cv-05291, 2/11/14

DISABILITY UNDER WORKERS' COMPENSATION



Disability – differences under workers' compensation standards as compared to ADA standards

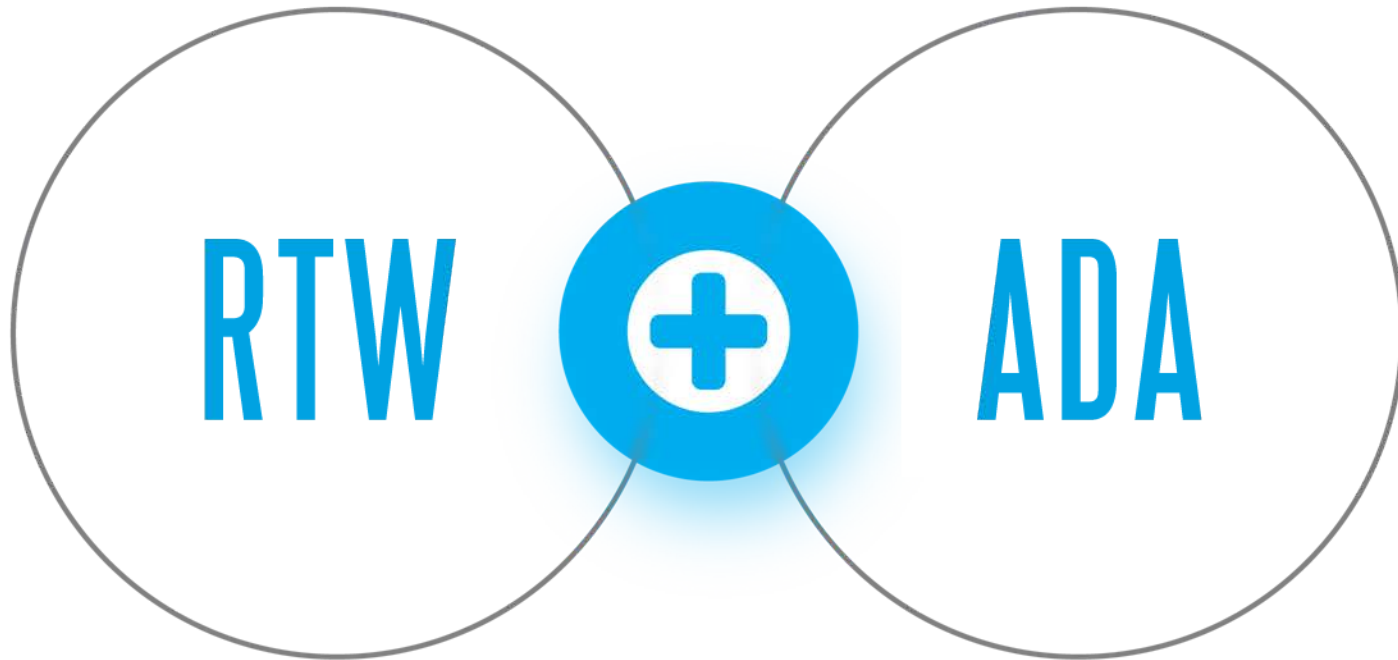


Compliance – considerations are unique across the states

DO NOT MAINTAIN A NARROW FOCUS



COMPLIANCE EQUATION



= COMPLIANCE

FRAZIER VS. GEE

Background:

- This case arises from the termination of Delores Frazier's (Plaintiff) employment from the Hillsborough County Sheriff's Office (HCSO) (Defendant) in June 2011
- Ms. Frazier was hired by the HCSO in 1990, and she held various positions there until her termination. During her last few years at the HCSO, Ms. Frazier was a community service officer (CSO), responsible for security-related duties at the sheriff's detention center
- As a result of her termination, Ms. Frazier sued for discrimination and retaliation claims arising under the Americans with Disabilities Act (ADA) and the Florida Civil Rights Act (FCRA)

CAUSES OF ACTION

1

INDEFINITE EXTENSION OF LIGHT-DUTY STATUS

2

REASSIGNMENT

3

FAILURE TO INITIATE THE INTERACTIVE PROCESS

BEST PRACTICE TAKEAWAYS



- Draft a written RTW policy inclusive of roles and responsibilities, timeframes, training, updated job descriptions, etc.
- Send frequent, consistent communication to the employee indicating how long they have been on light duty, policy timeframes, repercussions as well as incorporate in your light duty letters ADA accommodation language
- Review any request for light duty with the ADA and start the interactive process
- Do not maintain or enforce 100% healed policies or philosophies

BEST PRACTICE TAKEAWAYS



- Don't be the last to know! Maintain communication with the injured or ill employee
- Be aware of changes occurring in the life of the injured employee
- Know your available resources

BEST PRACTICE TAKEAWAYS



- Think outside the box – is an outside vendor or different location the right option?
- Treat all your employees the same – whether workers' comp or personal health, ADA matters
- Employee advocacy is key – there is a reason the ADA is interactive

QUESTIONS



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