

Introduction

Workers' compensation is an employer-financed, no-fault insurance program that compensates employees who have been disabled because of a work-related injury or accident. Every state has enacted some form of workers' compensation law to protect employees against loss of income and burdensome medical payments resulting from a work-related injury, illness, or disease. Compliance with these state laws may increase in complexity if a case requires coordination with other state laws, or even federal laws. Examples of protected leaves requiring coordination may include the Family and Medical Leave Act (FMLA), or the Americans with Disabilities Act (ADA).

Employers Affected

Most states have made workers' compensation coverage mandatory, although in Texas it is voluntary. Moreover, most states require employers with at least one employee to carry workers' compensation coverage; however, some states exempt small employers — although there is not total agreement about what constitutes a small employer. Some states exempt employers with fewer than five employees, some with fewer than four, some with fewer than three. Exempt employers may participate in the state workers' compensation program if they wish. Employers are cautioned to check with their attorneys before setting up a workers' compensation program.

Employees Affected

State workers' compensation laws **do not** provide coverage to every type of employee. Business owners, independent contractors, real estate salespersons working solely on commission, professional athletes, domestic employees in private homes, farm workers, maritime workers, railroad employees, unpaid volunteers, operators of leased taxicabs, and some others are frequently excluded. Employers should be careful to monitor the status of such persons, especially independent contractors, to make sure they are properly classifying personnel to maintain adequate coverage.

Workers' Compensation Coverage

Employer-Financed Aspect

Workers' compensation coverage is **employer financed**, meaning that workers cannot be required to pay for any of the workers' compensation premium. Employers also cannot require employees to sign statements that they will not seek workers' compensation benefits if they are injured or become ill on the job. Any such agreements are invalid and unenforceable. Most states will mandate how much coverage an employer must purchase and what percentage of an employee's salary the employer must pay if the employee is hurt or becomes ill during the course of employment.

Purchasing Coverage

Most employers purchase an insurance policy to obtain protection from paying workers' compensation benefits. They may pay one lump sum annually or make regular payments throughout the year to obtain this coverage either from an insurance company or through a voluntary association of insurance companies formed to handle high-risk companies. In most states, workers' compensation coverage is purchased from a workers' compensation insurance company. However, North Dakota, Ohio, Washington, West Virginia, and Wyoming require employers to exclusively buy the coverage

through a state-operated fund.

In many states, large insurance companies handle most workers' compensation coverage. Employers who purchase their workers' compensation coverage from a commercial insurance company should be careful to select a commercial insurance agent capable of representing the company in dealings with the insurer. Even with careful selection of the agent, however, the employer should maintain involvement in the decision of which workers' compensation coverage to purchase since this decision can ultimately affect the employer's liability. Ideally, the workers' compensation agent should be familiar with the employer's specific industry and thus be able to determine the most appropriate insurer. The agent must also know what discounts are available and how to negotiate the best discounts from the insurer. Employers with a multistate workforce should make certain the agent they select can write out-of-state policies.

Companies in high-risk categories — companies with a poor safety record and above-average number of complaints — may be required to purchase their workers' compensation insurance through state insurance pools, similar to high-risk health or automobile insurance pools. Generally, state insurance pool coverage is more expensive coverage through a commercial insurance company.

Providing Self Insurance

Self-insuring companies pay many workers' compensation premiums. Self-insuring companies incur the actual costs of paying benefits to injured employees, rather than paying an up-front fee to an insurer for the insurer to take over the risk of providing benefits to injured employees. Except for North Dakota and Wyoming, self-insurance by the individual employer is a viable alternative in all states for companies of a certain size. Smaller companies — which are not allowed to self-insure in many states — have the option of joining a pool of other small employers, usually as part of a trade association, to form a unit large enough to provide self-insurance under state requirements.

Views of the viability of self-insuring differ. Since the employer pays all costs for employee benefits and for administering the insurance program, a major accident or a large number of claims could result in serious financial problems. However, employers can purchase excess insurance, which provides insurance for claims over a specified amount. Companies that insure themselves have more control over their own workers' compensation program in such things as being able to determine when an injury qualifies for workers' compensation. Self-insurance may be considerably less expensive than insurance purchased from a commercial insurer. Additionally, self-insurance may be particularly beneficial for trucking, manufacturing, construction, and similar industries where premiums per employee are usually very high.

No-Fault Aspect

There is no liability in workers' compensation. Benefits are paid regardless of who is to blame for the injury or job-related illness — with certain restrictions. When benefits are paid the employer is not admitting liability for the injury or illness, and the employee is paid without resorting to a lawsuit.

For purposes of workers' compensation payment, ***injury*** is any harmful change in the body as a result of work activities. This could be a direct trauma or a gradual wearing down of a body part through repetitive movement or minor traumas.

Work-related illness can be caused by exposure to toxic substances, to unhealthful working conditions, or by the elements. Whether the injury or illness was the result of the employee's own negligence is of no consequence, liability hinges on the mere fact that the injury or illness was work-related.

Covered Injuries and Illnesses

The legal language concerning workers' compensation is that the injury or illness must arise out of and be in the course and scope of employment.

By law, the injury or illness must occur within both of the following:

- During the time and at the place of employment, as applicable.
- Out of an activity that is an inherent part of the employment and directly or indirectly furthers the employer's interests.

Injuries occurring while employees are at lunch in a company-sponsored cafeteria may be covered and injuries sustained by telecommuting employees in the course of their duties are also covered. Injuries sustained by an employee while merely entering an employer's premises would be covered, as would injuries sustained by an employee while changing clothes or washing up before or after work in an employer's locker room or similar facility.

Occupational diseases — that is, any ailment or disease caused by the nature or circumstances of the employment — are covered if they are presumed to arise out of the employment or if the nature of the employment is such that a hazard of contracting a disease is inherent in the employment.

The following are injuries and job-related illnesses that are **not** covered under workers' compensation:

- Accidents resulting from an employee's willful misconduct.
- Injuries occurring while traveling to or from work unless the employee was on an errand for the employer, with the following exceptions:
 - Employees who are required to travel in the performance of their work (such as salespeople) are covered while traveling.
 - Injuries that occur in the company parking lot or while using company-provided transportation are also covered by workers' compensation.
- Injuries resulting from the influence of drugs or alcohol.
- Injuries or illnesses resulting from a violation of known safety rules.
- Injuries resulting from voluntary participation or attendance, for example, voluntarily attending an athletic event during work time. However, injuries sustained during required recreational or social activities or during acknowledged or permitted physical activities on company premises may be covered.
- Injuries occurring at parties, picnics, and similar functions.
- Intentional self-injury. In some circumstances, intentional injuries by third parties may not be covered, for example, an estranged spouse that went to the employment site of a wife or husband to hurt that person. While the employee was injured at work, the reasons for the injury were personal to the employee. On the other hand, if a store clerk were injured by the actions of a thief, there likely would be coverage because the work of the employee resulted in the injury.
- Psychological injuries arising out of any personnel action (including demotion or termination) are not considered personal injuries and are thus not covered — unless the personnel action was intended to inflict emotional harm. If it can be proved that the predominant contributing cause of the mental or emotional disability was an event or events occurring as part of the employment, the disability may be covered. In some states, purely psychological injuries are not covered, unless they are tied to a physical ailment.

Note: Employees who unjustifiably refuse to accept recommended medical treatment may be denied compensation or have their compensation suspended.

Coverage Provided

Workers' compensation insurance packages tend to be standardized.

Basic coverage provides for all necessary medical treatment including, but not limited to, the following:

- Diagnostic procedures.
- Medical supplies and equipment.
- Rehabilitation costs.
- Replacement of lost wages, usually up to two-thirds of the employee's salary, for personal injuries caused by accidents arising out of and in the course of employment.

If an employee's disability is classified as permanent, additional benefits are provided, as are death benefits if the accident results in death.

Most policies also provide liability insurance in case a worker's family sues for damages resulting from a workers' compensation claim. Benefits are sometimes available for retraining the employee. Coverage is usually provided for certain occupational diseases as specified in the state laws.

Injured workers are typically referred to a doctor or health plan of the employer's choosing. Employees who indicate they do not like the doctor provided by the employer or the insurance company may have the right to see another doctor. If the injury is serious, the employee usually has the right to a second opinion.

In some states, after an injured employee has been treated by the insurance company's doctor for a certain period, usually 90 days, the employee may have the right to transfer treatment to the employee's own doctor or health plan, with the cost paid for by the workers' compensation insurance company.

Note: All employers have an obligation under the Occupational Safety and Health Act's (OSH Act) General Duty Clause, § 5(a)(1) to keep their workplaces free from recognized serious hazards, including ergonomic hazards. This requirement exists whether or not there are voluntary guidelines. The Occupational Safety and Health Administration (OSHA) will cite employers for ergonomic hazards under the General Duty Clause or issue ergonomic hazard letters as part of its overall enforcement program. OSHA encourages employers to implement effective programs or other measures to reduce ergonomic hazards and associated musculoskeletal disorders. Employers should contact OSHA or another industry and labor organization for information regarding how to establish an effective ergonomics program.

Advantages and Disadvantages of Workers' Compensation

The workers' compensation system is designed to protect both employers and employees. Some of the advantages for employers who participate in the system are as follows:

- Employer liabilities under the workers' compensation system are limited. In exchange for the benefits guaranteed by the workers' compensation laws, employees lose the right to sue employers for covered injuries. However, employees still may be able to sue if the injury was caused by someone other than the employer, such as an independent contractor or a defective product. In addition, some states permit an employer to be sued by a wrongdoer for contribution if an employer's negligence contributed to an employee's injury, although the recovery may be limited.
- The laws specify the types of benefits employers must pay employees.

- Planning for liability coverage is easier because costs are predictable.

Some disadvantages for employers who participate in the system are as follows:

- Employers with frequent accident records may incur high premiums.
- Filing requirements may increase administrative burdens.
- False workers' compensation claims are time consuming.
- An employee may be permitted to file a lawsuit against the employer (outside the realm of workers' compensation) depending on the employer's conduct, for example, if an employer intentionally injured an employee.

Americans with Disabilities Act Claims

The exclusive-remedy provisions in workers' compensation that protect employers from liability in case of occupational illness or accidents do not bar employees from pursuing Americans with Disabilities Act (ADA) claims. Applying the exclusivity provision to a state workers' compensation law with the intent of barring an individual's ADA claim would violate the Supremacy Clause of the U.S. Constitution and seriously diminish the civil rights protection Congress granted to persons with disabilities. However, in some states, the workers' compensation exclusive remedy provision may bar disability discrimination claims under state antidiscrimination law. In addition, the statements made by a claimant or claimant's physician regarding an inability to work may be used against the claimant in an ADA lawsuit where the claimant maintains to be qualified and able to perform all essential job functions notwithstanding conflicting assertions made during workers' compensation proceedings.

Benefit Claim Procedures

Employees' Responsibilities

When a worker is injured or contracts a work-related illness, the worker must first report the event to the employer.

Most states require the employee to report the work-related sickness or injury as follows:

- Within two to 20 days after occurrence.
- As soon as the injury or illness is discovered in situations where the illness or injury occurs over time (as with breathing problems or carpal tunnel syndrome).

After reporting the illness, employees should seek necessary medical treatment. Then, while using employer provided forms, the worker must file a claim with the employer's insurance company or with the self-insuring employer.

The required written report of the accident should contain all of the following information:

- Employee's name and address.
- Time, place, nature, and cause of the injury.
- Signature of the employee or a representative.

Employees also have certain rights under some state laws, including the right to a workers' compensation lawyer if medical claims are rejected. Some states require an employer to formally post these rights.

Employers' Responsibilities

Employers are responsible for obtaining the best type of workers' compensation coverage available. Additionally, upon receipt of an employee-provided notice of a work-related accident or illness, an employer must:

- **Regard Every Accident Report as a Serious Incident.** If an employer suspects that an illness or injury report is false, the employer must continue to consider the report to be a serious incident. Importantly, employers may be sued upon the failure to properly respond to a legitimate report.
- **Respond to the Employee's Needs.** Employers should ensure that the ill or injured employee receives all necessary medical help. If necessary, an employer should accompany the injured employee to the medical provider.
- **Provide Information on Available Insurance.** Employers must inform the injured or ill employee that insurance is available to provide coverage for the situation.
- **Document the Incident.** Within 24 hours of the incident, employers must provide written details documenting exactly what happened.
- **File an Accident Report.** Employers are ultimately responsible for filing the accident report with the insurance company providing workers' compensation coverage. The employer must follow up with the employee to ensure the report is filed within the time limit. Whenever possible, the report should be completed in the employee's own handwriting and should include the statement, "This is a true, correct, and complete statement," above the employee's signature. The supervisor should also sign and date the completed form. If an employee will not cooperate with the employer's procedures for filing the accident report, the lack of cooperation should be noted on the report: "Employee was requested to complete and sign this report as a true and complete statement of this alleged incident, but refused to do so on this date." Accident reports must contain the following:
 - The accident date and time.
 - The specific place of accident.
 - Details of how the accident happened.
 - Job activity, machines, and products involved.
 - Precise description of the injury.
 - The names of any witnesses.
 - The supervisor's name.
 - The date and time incident was reported and to whom (such as name and title).

Note: Reports should be careful not to state as a "fact" any information that is not actually known to be valid.

For example, if no one witnessed the asserted accident, the report should document, "Employee states . . . but there were no witnesses." If the employee claims to be injured or ill without providing any medical documentation of that fact, the nature of the injury should be stated as "unknown — employee asserts to having . . . but no medical documentation of that diagnosis was received." Alternatively, the employer might assert, "employee reports pain." If the employer fails to take these steps, the employer may be held liable for issues that would not be considered valid, factual issues but for the employer's concede.

- **Designate an Employee Contact Person.** A specific individual must be designated to communicate with the injured or ill employee and this individual should be identified on the report. An employee contact person should be able to explain the benefits available to the employee and should follow up with the employee's medical provider to monitor the employee's status.

- **Investigate the Accident.** Employers must investigate the accident or illness to determine how it happened and to ensure there is no recurrence. An efficient investigation would include, but not be limited to, the gathering of material evidence, taking pictures, and talking to witnesses. Employers must determine whether the accident was work related and gather all possible information to convince an insurer that the incident was indeed work related. Employers are also responsible for gathering any information relevant to a possible claim that a negligent third party or piece of defective equipment contributed to the accident.
- **Monitor the Accuracy of Claims Reporting to the National Council on Compensation Insurance.** Employers should ensure that they monitor claims reporting. Inaccurate claims affect an employer's premium. Employers should also monitor any insurers' audits of company payroll to ensure that workers are properly classified, thus further controlling premium costs.

Developing a Workers' Compensation Policy

When developing a workers' compensation policy, employers must consider the workers' compensation laws of the state in which they operate. However, there is much that is standard in all workers' compensation laws — the no-fault aspect, the fact that workers' compensation is the only remedy for workers injured on the job, and the fact that the cost is borne entirely by the employer.

Employers should formalize the procedures previously listed along the lines of the two types of policies outlined in this section.

Standard Policy

A standard policy will explain the responsibilities of employees and supervisors in cases of on-the-job injuries or work-related illnesses.

Additionally, a standard workers' compensation policy will provide other guidelines for employees and employers as follows:

- Employees will be informed that they are not permitted to use group health plans for injuries or illnesses covered under the workers' compensation.
- Employees are not allowed to use personal accrued leave time at the same time as they are receiving workers' compensation benefits.
- Employees filing fraudulent workers' compensation claims will be subject to prosecution.
- Employers must investigate all workers' compensation claims.
- Employees with questions about their coverage or seeking information about the workers' compensation program must contact the human resources department.

Detailed Policy

A more detailed workers' compensation policy would explain the responsibilities of employees and supervisors in further detail, indicating the time limits for reporting injuries and illnesses.

A detailed policy would also provide the following information:

- Specify a workers' compensation manager and the responsibilities of the manager.
- Indicate the exact sorts of medical coverage available to the employee, the waiting period mandated by the state for wage replacement, and the relation between workers' compensation leave and payments and such things as the Family and Medical Leave Act (FMLA), sick leave, and paid leave.
- Explain the penalty for fraudulent claims, including the possibility of disciplinary action such as

termination, as well as imprisonment and fines.

Reducing Workers' Compensation Costs

Employers may take several approaches to help keep their workers' compensation premiums reasonable.

Provide Education and Safety Programs

Fewer injuries and illnesses occur in a safe workplace. Well-trained employees who are aware of the safety precautions necessary for their position tend to have fewer injuries and illnesses. Employers' premiums for workers' compensation are much lower where there are fewer injuries and illnesses.

Extensive safety programs — characterized by top-down management commitment — and the development of a safety culture in the workplace foster the creation of an accident- and injury-free environment. Indeed, the existence of a strong safety program may be essential in persuading an insurer to provide coverage.

When injuries do happen, however, supervisors should know how to help employees complete the necessary workers' compensation forms. Employers should also be prepared to follow the employees through the steps leading up to returning to work.

Additional help and information may provide employees with peace of mind and increase their sense of job security, and help them in returning to work. At the very least, supervisors must be properly trained to accurately and efficiently report accidents and injuries. Supervisors must be cautioned not to authorize medical care without management's approval.

Investigate Claims Thoroughly

Employers must ensure that all claims are thoroughly investigated. Additionally, employers should follow up on all submitted claims.

To guard against fraudulent claims for workers' compensation, employers need to pay attention to signs of possible fraud, such as the following:

- Monday-morning accidents.
- Unwitnessed accidents.
- Injuries following discipline, demotion, or transfer.
- Claims from employees with private disability insurance.
- Claims from employees with histories of on-the-job injuries.
- Claims from employees with high-risk hobbies (such as skiing or snowmobiling).
- Delays in reporting accidents.
- Several versions of an accident.
- Claims from employees with financial or domestic problems.
- Claims for injuries not received on the job.
- Discrepancies between reported injuries and medical evaluations.

Monitor Each Case

A fundamental way to control costs is to maintain communication with the injured or ill employee after the claim is filed and benefits have begun. Often the injured or ill employee is ignored with the only reminder of their job being the weekly compensation check. The lack of regular communication

with representatives of the company may weaken an employee's resolve to return to work. Hospital visits, calls to employees' homes, and handwritten notes are all good examples of useful follow-up communication. These follow-ups provide a personal touch and reassure the employee that the company cares and is concerned with their well-being. Such contact also gives employers the chance to ensure the worker is at home recuperating and not working elsewhere or participating in activities that might inhibit recovery.

Employers should ensure that their injured or ill employees have the best medical care available. An employer should know which medical facilities and doctors are available in the area and should choose the best available. The medical facilities and doctors should be told the nature of the company's work, the job descriptions of the employees, and whether light duty is an option. Selecting the best medical care and properly communicating with the medical care providers may get the employee back to work sooner, reduce the degree of permanent disability, and save money on extended, improper, or unnecessary care.

Before an employer approves paying medical bills or for lost time, the injured or ill employee should be required to have their physician provide reports regarding the diagnosis, prognosis, and course of care. Where an employee has been treated by their own doctor, employees should be required to see an employer-selected doctor as soon as possible. Payment for ongoing medical care and lost time should be based on the opinions of physicians.

Develop a Return-to-Work Program

The employer's most important involvement in the workers' compensation system may begin when the treating physician releases the injured employee to return to work in some type of modified form.

The employer can make a difference in the system by developing an aggressive rehiring program, especially in the areas of light work. Such a program can result in significant savings.

A job offered to an employee recovering from an occupational illness or injury need not be the same job the employee was performing at the time they left work. The returning employee may be assigned lighter work or at different hours. However, the employment position for the returning employee must fit the physical limitations imposed by the doctor and be within the worker's abilities. If the employee initially refuses the new employment position then the position should be reoffered regularly. Unless a judge rules that the refusal is justified, an employee who continuously refuses employment cannot collect benefits. An injured worker should be placed concurrently on FMLA leave, as applicable, and is entitled to turn down offers of light duty and remain on FMLA leave.

Light duty should be time-limited and only provided to workers whose injuries or illnesses are likely to be sufficiently resolved within the light-duty time period. Light duty should not be implemented for workers who will never be able to perform in an existing position. In some states, it is unlawful to limit light duty to only employees injured on the job.

Once an employee returns to work, employers must document the return and subsequent duty status. Throughout the entire series of events — from the initial incident and the reporting of the incident through the medical care and regular reporting by physicians, up to the return to work and after — employers should strive to maintain the best possible relationship with their employees. Employers should treat all claims alike, legitimate or not, and follow them through to their conclusion. Employees who know that their company cares about them, their families, and their return to productive employment will respond with a sense of loyalty and responsibility. See the section **Model: Return-to-Work Program** at the end of this article.

Coordinate Workers' Compensation Benefits and Other Benefits

In some instances, it may be possible to reduce workers' compensation premiums by offsetting workers' compensation benefits with benefits from other sources.

Some possibilities are as follows:

- **Medicare.** If an employee's workers' compensation claim is settled in a lump sum or structured settlement, the interests of Medicare must be considered if the employee is currently eligible for Medicare or the amount of the settlement exceeds \$25,000 and the employee is expected to be eligible for Medicare within 30 months due to age or disability. Additionally, Medicare must be informed of any proposed workers' compensation settlements. Payment under Medicare may not be made for any item or service when payment has been made or can reasonably be expected to be made for such item or service under a workers' compensation law or plan. If it is determined that Medicare has paid for items or services that can be or could have been paid for under workers' compensation, the Medicare payment constitutes an overpayment.
- **Medical Plans.** If an employer's medical plan pays benefits for some of the same workplace-related medical expenses as workers' compensation, the two insurance carriers should work out a coordination of benefits that would preclude overlapping coverage.
- **Retirement Plans.** If an employee is receiving workers' compensation benefits and retires, it may be possible for an employer to offset the workers' compensation benefits with the retirement benefits rather than paying both — as long as the offset is not prohibited by the retirement plan.
- **Social Security.** Employees who are entitled to workers' compensation benefits should be instructed to see what Social Security benefits they are entitled to, as sometimes Social Security will pay for disability benefits and many states do not allow double payment to an employee.

Workers' Compensation and the ADA

General Interactions

An employee injured or made ill on the job may become subject to the Americans with Disabilities Act (ADA) if the accident or illness creates a physical or mental impairment that substantially limits one or more major life activity of the individual. In this case, the employer must make reasonable accommodation in finding the employee a suitable job, including a light-duty job. The employee cannot be fired. Additionally, reasonable accommodation may include extending the leave period.

Some questions that may arise out of the simultaneous application of the ADA and the Workers' Compensation Act include the following:

Q Does everyone with an occupational injury have a disability within the meaning of the ADA?

A No. The ADA defines **disability** as a physical or mental impairment that substantially limits one or more major life activity, or a record of such impairment, or being regarded as having such an impairment. Impairments resulting from occupational injury may not be severe enough to substantially limit a major life activity or they may be only temporary — with little or no long-term effect. However, an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. Additionally, an impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.

Q Does every person who has filed a workers' compensation claim have a disability under the "record of" portion of the ADA definition?

A No. A person has a disability under the "record of" portion of the ADA definition only if the person has a history of having an impairment that substantially limited the individual in a major life activity in the past from which the employee has recovered in whole or in part. In addition, the employee must have knowledge of the impairment and take some adverse action.

Q Could a person with an occupational injury have a disability under the "regarded as" portion of the ADA definition of disability?

A Maybe. An individual meets the requirement of "being regarded as having such an impairment" if the individual establishes that they have been subjected to an action prohibited under the ADA because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity. However, the "regarded as" protection does not apply to impairments that are transitory and minor. A **transitory impairment** is an impairment with an actual or expected duration of 6 months or less.

The ADA interacts with workers' compensation in other ways, specifically in such employment decisions as hiring, allowing injured employees to return to work, and providing reasonable accommodation.

Interviewing and Hiring

Several questions can illustrate the relationship between the ADA and workers' compensation in the interviewing and hiring process:

Q May an employer ask questions about an applicant's prior occupational injuries or workers' compensation claims?

A Yes, although such questions may be asked only after the employer has made a conditional offer of employment and only if these questions are asked of all applicants in the job category.

Q May an employer require a medical examination of an applicant to obtain information about the existence or nature of prior occupational injuries?

A Yes. Such an examination could be required, but only after a conditional offer of employment has been made and only if all entering employees in the same job category are required to undergo a medical examination. Follow-up examinations based exclusively on findings from initial medical information may be required of specific employees.

Q May an employer obtain information about an applicant's prior occupational injuries or workers' compensation claims from a third party?

A No. At no time may an employer request information about an applicant from a third party (for example, a previous employer) that it could not lawfully get from the applicant.

Q May an employer refuse to hire a person with a disability simply because of the assumption that the applicant poses some increased risk of occupational injury and subsequently of increased workers' compensation costs?

A Unless the employer can show that such an individual poses a direct threat, the refusal would violate the intent of the ADA to eliminate stereotyping because of disability. A potential health or safety risk is not enough to justify failure to hire. There must actually be a direct-threat level of risk involved, that is, a significant risk to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. Even if state laws might permit or require exclusion of an individual, the ADA supersedes such laws.

Q May an employer refuse to hire a person with a disability simply because the person sustained a prior occupational injury?

A The mere fact that a disabled individual has sustained a previous occupational injury does not, by itself, establish that current employment in the position in question poses a direct threat.

In some cases, however, evidence of a previous occupational injury may be relevant to the direct-threat question in the following ways:

- The relationship between the previous occupational injury and the disability.

If employees without disabilities had similar injuries, the injury may not be related to the disability.

- The circumstances surrounding the previous occupational injury. The injury may have been caused by the actions of others or by the lack of appropriate safety devices or procedures.

For example, a person with insulin-dependent diabetes suffered serious injury while operating a saw for a lumber mill. The injury was caused by the failure of a safety device and was unrelated to the individual's diabetes. The individual applies for a similar position with another lumber mill but, after making a conditional job offer, the employer learns of the previous injury and, assuming it was related to the diabetes, refuses to hire the individual. The employer in this case violates the ADA since the previous injury does not constitute evidence that the applicant poses a direct threat in the saw operator's position.

- The similarity between the position in question and the position in which the injury occurred. The previous position may have involved hazards not present in the position under consideration.

- The relationship between the person's present condition and condition at the time of the previous injury. If the person's condition has improved, the prior injury may have little significance. For example, if a person with a previous back injury suffered on the job is now completely recovered, an employer could not refuse to hire the person because of fear that the individual would re-injure the back doing heavy labor and thus increase workers' compensation premiums.

- The number and frequency of previous occupational injuries.

If, for example, an employer discovers that an applicant for a position requiring heavy lifting has had several previous shoulder injuries in similar positions over the past few years, and that further such employment could render the shoulder useless, refusal to hire would not violate the ADA since the position poses a direct threat to the individual. The employer would also have to consider whether some reasonable accommodation could be made that would allow the employee to perform the job without causing possible self-injury.

- The nature and severity of the prior injury. A minor injury may have little significance.

- The amount of time the person has worked in the same or similar position since the previous injury without subsequent injury.

- Whether the risk can be lowered or eliminated by a reasonable accommodation.

Continuing Employment/Return to Work

The ADA and workers' compensation considerations also interact in some decisions relating to continuing employment as the questions in this section illustrate.

Q May an employer ask disability related questions or require medical examinations of an employee when the employee experiences an occupational injury or when the employee seeks to return to work after such an injury?

A Yes. The questions and the exam must grow out of an employer's legitimate belief that the occupational injury will impair the employee's ability to perform essential job functions or that the injury could pose a direct threat to the employee or the employee's co-workers. The questions and the examination must not exceed the scope of the specific injury and its impact on the employee's ability to safely and satisfactorily perform the job.

Q May an employer ask disability-related questions or require a medical examination of an employee with an injury to ascertain the extent of the workers' compensation liability?

A The ADA does not prohibit this, however the questions and the examination must be consistent with the state law's intended purpose of determining an employee's eligibility for workers' compensation payments. The questions and examination must be limited to the specific occupational injury and may not be required more often than is necessary to determine the employee's initial or continued need for workers' compensation benefits. Excessive questioning or requiring of medical examinations may constitute disability-based harassment, prohibited by the ADA if the employee has an ADA-covered disability.

Q If an employee with an occupational injury caused disability requests a reasonable accommodation, may the employer ask for documentation of the disability?

A The employer may require documentation of the existence of an impairment and the nature of any limitations flowing from it as well as the employee's medical need for accommodation. This does not, however, allow an employer access to unrelated medical records.

Q May an employer require that an employee with an occupational injury caused disability be able to return to work "without restrictions"?

A No. An employer cannot enforce a "no-restrictions" policy. Such a policy ignores that an employee with a disability may be able to perform all essential but not marginal functions or may be able to perform the job with reasonable accommodation.

Q May an employer refuse to allow an employee with an occupational injury caused disability to return to work because the employer fears that the employee poses some increased risk of re-injury and may increase workers' compensation costs?

A A refusal such as this would constitute discrimination on the basis of disability unless the employer can show that the return of the employee to the position would pose a direct threat. The existence of the occupational injury caused disability does not in itself constitute proof that the employee is unable to perform the job or that returning to work constitutes a direct threat. For example, a clerk typist, who has broken her wrist moving office furniture, has been certified by her physician as completely healed and ready to return to work. Because of fear that the employee will re-injure her wrist by performing her duties, the employer refuses to allow her to return to work.

The employer is in violation of the ADA for the following reasons:

- The injury was not caused by normal office duties.
- The wrist has completely healed.
- There is little risk the employee will injure her wrist through repetitive motion.

On the other hand, if an employee returns to work after an occupational injury and is unable to carry out duties as before — as in the case of a supervisor whose fractured ankles have only partially healed and who no longer can do the extensive walking the position requires — an employer is justified in refusing to allow the employee to return to work if there is evidence that doing so would likely cause the employee serious harm. In such a situation, however, the employer would be expected to try to reassign the employee.

Q May an employer refuse to let an employee return to work simply because of a workers' compensation determination that the worker has a "permanent disability" or is "totally disabled"?

A Since workers' compensation laws are different from the ADA and may use different standards for evaluating whether an individual has a disability or is capable of working, employers cannot make their re-employment decisions on workers' compensation determinations.

For example, under a workers' compensation statute a person who loses vision in both eyes or who loses the use of either arm or of both legs may have a "permanent total disability" although they may be able to work. The workers' compensation determination may be helpful in deciding whether an employee can perform the essential functions of a certain job or whether the employee may pose a threat upon returning to work — but it is not relevant regarding the individual's ability to return to work in general.

- Under the ADA, is a rehabilitation counselor, physician, or other specialist responsible for deciding whether an employee with a disability-related occupational injury is ready to return to work?
- It is the employer's responsibility to decide if an employee can satisfactorily perform the essential functions of the job, with or without accommodation, and can perform them without posing a direct threat. Employers may find it helpful to get information from specialists regarding the specific functional limitations and abilities of disabled employees and appropriate reasonable accommodations. If, for example, an employer provides a rehabilitation counselor with details of the employee's position and the nature of the work to be performed, plus the nature of the work environment including possible hazards and obstacles, the counselor could contribute information helpful to the employer in making the return-to-work decision.

Reasonable Accommodation and Workers' Compensation

The ADA requires employers to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual with a disability.

The questions explain some problems associated with providing ADA-mandated reasonable accommodation in the context of workers' compensation.

Q Does the ADA require an employer to make reasonable accommodation for an employee with an occupational injury who does not have a disability as defined by the ADA?

A In cases where an employee has received workers' compensation for an occupational injury not considered a disability under the ADA, employers are under no obligation to make reasonable accommodation. Of course, an employer should be careful to determine whether applicable state law may define "disability" more broadly so as to provide disability status under state law even when the ADA does not. States that do have broader definitions than the ADA include, but are not limited to, California, New Jersey, New York, and Washington.

Q May an employer discharge an employee who is temporarily unable to work because of a disability-related occupational injury?

A In a situation such as this, if leave is a reasonable accommodation and would not impose an undue hardship on the employer, the employee may not be discharged and the employee's job left vacant, unless to do so would impose undue hardship. The employer also should consider whether the FMLA might also provide entitlement to 12 weeks of leave plus job restoration.

Q What are the reinstatement rights of an employee with an occupational injury caused disability?

A Unless an employer can demonstrate that holding the position open would impose an undue hardship, the employee is entitled to return to the same position. If the employee needs more leave than can be given without imposing an undue hardship on the employer, the employer must look for a vacant equivalent position to which the employee can be assigned for continuing leave. If no vacant equivalent position is available, the employer must try to find a vacant position at a lower level. If this is impossible, continued leave is not required as a reasonable accommodation.

Note: Employers may provide reasonable accommodation other than leave, even when an injured employee has requested leave as a reasonable accommodation, unless the employee requests leave that is available to all employees, such as accrued paid leave or leave without pay.

Q Must employers reallocate job duties of an employee with an occupational injury caused disability as part of reasonable accommodation?

A If the duties to be reallocated are marginal ones that the employee cannot perform because of the disability, they must be reallocated. Employers do not, however, need to reallocate essential functions of the position.

Q May employers reassign an employee with occupational-injury-caused disability to different positions instead of trying to accommodate the employees in the original positions?

A Employers must first determine if the employee could perform essential functions of the original job position with or without reasonable accommodation, such as a part-time schedule, job restructuring, or modification of equipment. If reasonable accommodation is impossible, reassignment may be considered.

Note: The ADA does not require employers to create a new position or to bump current employees from their positions to create vacancies for disabled workers. However, certain states, Minnesota for example, have state laws as part of their workers' compensation laws that may require an employer to return an employee to work in any job, if reasonably possible, or face a retaliation lawsuit.

Q May employers substitute vocational rehabilitation services for a reasonable accommodation for employees with occupational-injury-caused disability injuries?

A Since an employee's rights under the ADA are separate from workers' compensation entitlements, employers cannot substitute vocational rehabilitation for reasonable accommodation. Employers must accommodate employees in their current positions, unless this imposes an undue hardship on the employer.

Q May employers make workplace modifications that are not required forms of reasonable accommodation under the ADA to offset workers' compensation costs?

A Nothing in the ADA prohibits employers from making workplace modifications to accommodate employees with occupational injuries beyond what is required by the ADA or state law. An employer may, for example, lower production standards for an occupationally injured employee as a way of returning the employee to work more quickly.

Q Does the ADA prohibit employers from creating "light-duty" positions for employees injured on the job?

A Employers may recognize a special obligation to create a light-duty position for an employee injured on the job, as long as this is done on a nondiscriminatory basis. Employers need not create light-duty positions for nonoccupationally injured disabled individuals, since the ADA does not require employers to create positions as a form of reasonable accommodation; however, employers may make other reasonable accommodations for the disabled.

The term **light duty** can mean a variety of things. Generally, light duty refers to temporary or permanent work that is physically or mentally less demanding than normal job duties. Some employers use the term to mean simply excusing an employee from performing the job functions they are unable to perform because of impairment. Light duty may also identify certain positions with less-demanding duties created specifically to provide alternative work for employees unable to perform some or all of their normal duties. Employers may also refer to any positions that are sedentary or less demanding as light duty.

It may be that in some cases the only reasonable accommodation for an individual with a disability not the result of an on-the-job injury may be similar to — or indeed equivalent to — a light-duty position. This would be the case where the job is considered “light duty” simply because it is sedentary, as opposed to being created solely for a particular injured worker on a temporary basis. Employers may not refuse to provide this sort of accommodation because such positions are reserved for employees injured on the job. The ADA would require reassigning a disabled individual to a light-duty position unless this could be proven to impose an undue hardship on the employer. If, for example, an assembly-line worker with multiple sclerosis requests reassignment to a vacant sedentary “light-duty” position and is refused the reassignment because the position is reserved for employees injured on the job even though the reassignment would impose no hardship on the employer, the employer has violated the ADA.

Q If an employer has only temporary light-duty positions, must it still provide a permanent light-duty position for an employee with an occupational-injury-caused disability?

A The ADA does not require employers to change the content, nature, or functions of their positions. Employers are free to determine if light-duty positions are temporary or permanent.

If an employer decides that light-duty positions are only temporary, the employer is under no obligation of offer permanent light-duty positions for employees with disability-related occupational injuries.

Additional Information

Model: Return-to-Work Program

As previously mentioned, an employer’s key involvement in any state’s workers’ compensation system should begin when a treating physician releases an injured employee to return to work in some type of modified form or light duty. By developing and implementing aggressive rehiring programs, employers can make a difference in the system, which can result in significant savings for employers and taxpayers.

The Georgia State Board of Workers’ Compensation has developed a [Model Return-to-Work Program](#). The state agency created this model in its ongoing commitment to making its state workers’ compensation system fair and responsive to employers and employees. The model contains information for employers to assist their employees in staying at work, resources, occupational and nonoccupational return-to-work plans, a sample Job Activity Analysis, and transitional employment plan.

Other Federal Laws

Employers must also be aware of employees' FMLA rights and COBRA rights when employees are on extended disability leave under workers' compensation laws. If, for example, an employee with an occupational injury requests leave as a reasonable accommodation and qualifies for leave under the FMLA, an employer may not require the employee to remain on the job with modification of duties or some other accommodation in lieu of taking the leave of absence.

Contact Information

National Institute for Occupational Safety and Health

www.cdc.gov/niosh

Occupational Safety and Health Administration

www.osha.gov