

Practical Steps for Addressing the Injured, Sick and Disabled Workers

Presenters:
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Leave Laws

- **ADA**
 - Essential Job Functions
 - Interactive Process
 - Reinstating an Employee
- **FMLA/OFLA**
 - Serious health condition
 - Overlap with ADA (undue hardship)
 - Reinstating an Employee
- **Workers Compensation**
 - Overlap with ADA & FMLA/OFLA
 - Reinstating an Employee
- **How to avoid Common Pitfalls**

Americans with Disability Act (ADA)

Disability Laws

- Americans with Disabilities Act (ADA)
- ORS 659A.112
- Protects otherwise qualified individuals with a disability who are able to perform the essential functions of the job with or without reasonable accommodations
- Disability = substantially limited in one or more major life activities

Essential Job Functions

- Are the reason the job exists
- Are the key primary tasks that must be performed and cannot be delegated to others
- Well written job description may be prima facie evidence of essential functions
- If worker not able to perform essential functions of job even with accommodation, no duty to accommodate

Employer Obligations Under Disability Laws

- Engage in interactive process
 - A discussion with the employee about possible accommodations
- Provide reasonable accommodations

What Is A Reasonable Accommodation?

- Any modification or adjustment to the job or worksite that allows the employee with a disability to perform the job and enjoy the same benefits and privileges of employment as all other employees
- Common examples of workplace accommodations:
 - Equipment or assistive technology /changes to worksite or work station
 - Shift changes
 - Extra training
 - Removal of non-essential functions
 - Reassignment to open positions

Practical Considerations for Reasonable Accommodations

- **Reasonable Accommodation**
 - Must provide an effective accommodation to enable an employee to perform the essential functions of their job with or without workplace accommodations in place.
- **Essential Job Functions Analysis**
 - Need to understand the fundamental/ core job duties of the employees position
 - Job description should accurately reflects the job duties of the employees position.
 - What is the amount of time spent on job functions- Analyze if functions are essential or not as part of the ADA process.
 - What are the consequences/impact of not requiring a specific function- Important

Limitations on Accommodations

- Eliminating primary job duty
- Lowering production or performance standards
- Excusing violation of work rule
- Creating an undue hardship

What is the Interactive Process?

- Talking with and finding out from the employee the difficulties preventing the employee from performing an essential job function within their job and causing the need for accommodation
- Working with the employee to identify solutions that would allow the employee to be successful in performing the job
- Meant to be informal

Interactive Process

- Who performs it may be different in each company based on where the case is managed (i.e., risk management, human resources, employee health)
- Intended to be a "process"
- Duty is ongoing

Interactive Process At A Glance

Step 1. Recognize
an
Accommodation
Request

Step 2. Gather
Information

Step 3. Explore
Accommodation
Options

Step 4. Choose an
Accommodation

Step 5. Implement
the
Accommodation

Monitor/ Evaluate
the Effectiveness
of the
Accommodation

The Interactive Process

Step 1: Recognize an Accommodation Request

- The interactive process starts with an accommodation request from an employee with a disability. The employee does not need to use key words works like "ADA or "reasonable accommodation" when requesting an accommodation. Therefore, any time an employee indicates that he/she is having difficulty performing their job duties related to a medical condition/ impairment, the employer should recognize and consider whether the employee is making a request for accommodation under the ADA.

The Interactive Process

Step 1: Recognize an Accommodation Request

- Example A: An employee tells her supervisor, "I'm having trouble getting to work at my scheduled starting time because of medical treatments I'm undergoing."
- Example B: An employee tells his supervisor, "I need six weeks off to get treatment for a foot problem."
- Example C: A new employee, who uses a wheelchair, informs the employer that her wheelchair cannot fit under the desk in her office.
- Example D: An employee tells his supervisor that he would like a new chair because his present one is uncomfortable.

Step 1: Practical Considerations for Recognizing Accommodation Requests

- **Err on the side of caution:**
 - If an employer is not sure whether an employee has requested an accommodation, the employer should ask the employee to clarify what is being requested and why.
- **Act quickly:**
 - Once an accommodation request is identified, the employer should respond **immediately** – unnecessary delays in processing an accommodation request can be a violation to the ADA process. I recommend making contact with the employee within 24 hours of notice.
- **Assign responsibility:**
 - There should be at least one Point of Contact (POC) who is responsible for making sure an accommodation request is processed to closure so the request is not lost.
- **Conduct training:**
 - Employers should train all managers and supervisors to recognize accommodation requests and what to do with a request once it is received.

Step 2: Gather Information

- Once an accommodation request has been received, the employer should gather whatever information is necessary to process the request.
- In some cases, the employee's disability and need for accommodation are obvious and no additional information is needed.

Step 2: Gather Information

- Example: if an employee who recently started using a wheelchair indicates that he/ she needs a ramp to get into the workplace, the disability and need for accommodation are obvious.
 - However, in other cases the individual may know that he/she is having difficulty, but may be uncertain about the exact cause or possible solution.
- Example: if an employee with a non-visible disability indicates she is having trouble completing her/ his work tasks because of their disability, the employer does not have enough information to provide effective accommodations. The employer needs to know what limitations/ impairments are interfering with job performance and what specific work tasks are problematic for the employee.

Step 2: Practical Considerations for Gathering Information

- Find out the functional limitation and impairment.
 - In most cases, to find effective accommodations employers need to know what impairment is causing the limitation impacting the employees ability to perform their core job duties.
- Get information from the employee when possible.
 - Employees with disabilities are familiar with their limitations and often know what accommodations will work best for them.
- Remember ADA rules for medical inquiries.
 - A good policy is to only ask for what is absolutely necessary surrounding the employees impairment and functional limitations that may be impacting employees ability to perform his/her essential job duties.

Step 3: Explore Accommodation Options

- Once the employer has identified the employee's impairment and limitation that is impacting the employee's ability to perform his/her job duties, then the employer is ready to explore accommodation options.
- Encourage the employee to suggest accommodations. If more accommodation ideas are needed, the employer can request that the employee to work with his/her Healthcare Provider (HCP) for ideas – in some cases HCPs are able to suggest effective accommodations.

Step 3: Explore Accommodation Options

- In other cases, the Provider may not be able to suggest ideas, but may be able to say whether ideas under consideration will help the employee so he/she is able to perform the essential functions of their position.
- Sometimes you may need to consult with external resources such as an Ergonomist, Industrial Hygiene, Third Party Administrators, the Job Accommodation Network (JAN), etc.

Step 3: Practical Considerations for Exploring Accommodation Options

- Invite the employee to suggest accommodations.
 - The employee who requested the accommodation may have some good accommodation ideas, but may be hesitant to bring them up without being asked to do so.
- Recommend that the employee works with his/her medical provider for accommodation options or recommendations.
- Use JAN or other resources when needed and share the resource information with the employee.
 - JAN is a free, national resource for employers who are seeking help coming up with accommodation ideas.

Step 4: Choosing An Accommodation

- Once accommodation options have been explored, the employer must choose what accommodation to implement.
- If there is more than one option, the employer should consider the preference of the employee. However, the employer has the right to choose among effective options and can choose, for example, the lowest cost accommodation.
- Employers are free to try accommodations and stop them if they are not effective.
- During the “trial” period or if accommodations are temporary, employers should clearly communicate this to the employee and management for alignment purposes.

Step 4: Practical Considerations for Choosing an Accommodation

- Consider the employee’s preference. Although not required by the ADA, when possible employers should choose the accommodation the employee prefers.
- Consider a trial period. When it is not clear whether an accommodation be effective, it might be possible to try out the accommodation.

Step 5: Implement the Accommodation

- Once an accommodation has been chosen, it is time to implement the accommodation.
- This step is very important to the success of an accommodation.
- If equipment is involved, then it needs to be properly installed and the employee needs to be trained in its proper use.
- If the accommodation involves a schedule change or policy modification, then the employee’s manager/supervisor needs to be made aware of the accommodation to effectively implement it.

Step 5: Implement the Accommodation

- If the accommodation involves an outside service, the employers POC needs to make sure the service is provided promptly and effectively.
- If the accommodation is a reassignment, then the employee may need time to acclimate to the new job.
- Communication to ensure alignment is key as well as follow-up to determine if implemented accommodation is effective.

Step 5: Practical Considerations for Implementing the Accommodation

- Make sure all necessary steps are taken to implement the accommodation. A good way to do this is to check to see if the accommodation is actually working.
- Communicate with essential personnel about the accommodation. Remember confidentiality rules and keep managers/ supervisors updated about the accommodation on a need to know basis.

Step 6: Monitor/ Evaluate the Effectiveness of the Accommodation

- It is important to monitor the accommodations after they are in place.
- Because changes occur, employers may need to periodically check on the ongoing effectiveness of accommodations.
- The most important way to monitor accommodations is to encourage ongoing communication.
- Employees who are receiving accommodations need to understand that they should let their employers know if there are changes with the accommodation or the employees accommodation needs and who to contact.

Step 6: Practical Considerations for Monitoring the Effectiveness of the Accommodation

- **Check on effectiveness.**
 - As things change in the workplace, accommodations may need to also change so employers should periodically check the effectiveness of accommodations.
- **Maintain the accommodation.**
 - Equipment will not function forever without maintenance so when equipment is part of an accommodation, employers need to make sure the equipment is properly maintained.
- **Encourage ongoing communication.**
 - Ongoing communication is the key to success accommodation implementation – employers should encourage employees to communicate any concerns that they have with their accommodations.

Undue Hardship (UH) – Analysis Considerations

- The nature and cost of the accommodation needed.
- The overall financial resources of the facility making the reasonable accommodation
- The number of persons employed at this facility.
- The effect on expenses and resources of the facility.

Undue Hardship (UH) – Analysis Considerations

- The overall financial resources
 - size, number of employees, and type and location of facilities of the employer (if the facility involved in the reasonable accommodation is part of a larger entity).
- The type of operation of the employer
 - including the structure and functions of the workforce, the geographic separateness, and the administrative or fiscal relationship of the facility involved in making the accommodation to the employer.
- The impact of the accommodation on the operation of the facility.

Slide 29

JRA22 Corrected notes under slide.

Jackson, Regina A, 9/8/2015

Slide 30

JRA23 Corrected notes under slide.

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Practical Considerations for Undue Hardship (UH)

Other options to consider instead of filing for UH while the EE remains on leave:

- Are there temporary coverage opportunities available to fill in the position?
- Are there development opportunity for another employee to cover the position?
- Are there ways to shift work priorities?
- What about workload rebalancing?

Fitness for Duty (FFD)

- Under ADA, an exam must be job related and consistent with a business necessity
- An employer can require an employee to undergo a FFD exam if they have a "reasonable belief, based on objective evidence" that:
 - An employee is unable to perform the essential functions due to a medical condition; OR
 - An employee will pose a direct threat due to a medical condition
- Reasonable Belief
 - Direct knowledge of condition, report by reliable 3rd party, observation of symptoms impacting performance of essential job functions

FFD – Who Picks the Doctor

- Usually the employee does
- However, an employer may have its own medical provider ask the employee's medical provider for clarification on the employee's ability to work, but cannot delay the return to work for this purpose
- Last word of caution
 - when you request medical information in connection with those examinations, ensure that the information sought is narrowly tailored, and specific to the job

Family Medical Leave Act (FMLA)

Oregon Family Leave Act (OFLA)

FMLA/OFLA

- Family Medical Leave Act (FMLA)
 - 29 U.S.C. 2601, et. seq.
- Oregon Family Leave Act (OFLA)
 - ORS 659A.150 to 659A.186
- Family leave acts generally require employers to provide 12 weeks of leave in any 12-month period for a qualifying reason, provide for some reinstatement rights, and prohibit retaliation or discrimination

Qualifying Reasons

- Both OFLA and FMLA
 - Employee's own serious health condition, including pregnancy-related conditions
 - Family member's serious health condition
 - Both: Spouse, parent, child
 - OFLA: parent-in-law, same sex domestic partner, grandparent, grandchild
 - Parental leave – newborn, newly adopted or newly placed child
- OFLA only – “sick child leave” and bereavement

JRA9 You cannot read the title at the top "Qualifying Reasons."

Jackson, Regina A, 9/8/2015

RA10

Serious Health Condition

- “An illness, injury, impairment, or physical or mental condition that involves either: (1) in-patient care in a hospital, hospice, or residential care facility, or (2) continuing treatment by a health care provider.” 29 CFR 825.114(a)(2)
- Chronic conditions
- Multiple treatments for conditions that, if not treated, would likely result in incapacity of more than three days

Practical Considerations when ADA Overlaps with FMLA/ OFLA

- When an employee's FMLA entitlement runs out and the employee requests extended leave as an accommodation consider:
 - Unpaid leave extension may be a form of reasonable accommodation - Employees may be eligible for Short Term Disability benefits depending on company's benefit program and if the EE meets the criteria.
 - Understand when the facts of the case suggest that providing additional leave will not enable the employee to return to work and perform the essential functions of his or her job.
 - How much leave is reasonable depends on the individual circumstances- Case-by-case evaluation.

Practical Considerations when ADA Overlaps with FMLA/ OFLA

- When an employee's FMLA entitlement runs out and the employee requests extended leave as an accommodation consider:
 - No obligation to provide indefinite leave- Leave that continues beyond a point at which the employee no longer likely to become able to return to work or perform the essential functions of their job with additional leave .
 - It is important that you know when the employee's FMLA entitlement runs out.

Slide 37

JRA10 Same comment as in slide 29, you cannot see the title at the top of the slide (30), "Serious Health Condition"

Jackson, Regina A, 9/8/2015

RA11
RA12

Medical Certification

- FMLA –
 - Employer may require a medical certification; must use DOL form; may obtain fitness for duty for employee on leave for own medical condition (not for parental leave and only after 4th occurrence in Oregon for sick child leave)
- OFLA -
 - Same as FMLA, but no specific form required

FMLA Fitness for Duty

- Under the FMLA, an employer must return a worker to his or her position once he or she provides documentation of his or her ability to perform essential job duties. (29 C.F.R. § 825.312.)
- Any return to work exam must be pursuant to a uniformly applied policy or practices that requires all similarly situated employees (i.e. same job, same illness) to present certificate from employee's health provider that they can return to work.
- ADA and FMLA operate concurrently in determining when an employer can require an exam for an employee returning to work

Workers' Compensation

Slide 40

JRA11 In my practice, the FFD exam is separate from the ADA Certification form. I think the FFD exam should be a stand alone item and use the same language that is in slide 23 regarding FFD.
Jackson, Regina A, 9/8/2015

JRA12 I took a first pass of the ADA medical certification information- please edit as needed.
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Worker's Compensation

Reinstatement Rights (ORS 659A.043)

- Employers must reinstate the injured worker to the former position if the worker is able to perform the required duties and has made a timely demand for the job
- Applies to all Oregon employers with at least 21 employees
- Right to reinstatement lasts **three years**
- Job must exist
 - Job exists even if being worked by another
 - Bona fide elimination
- Subject to provisions of valid collective bargaining agreement

Reemployment Rights (ORS 659A.046)

- When worker is disabled from at-injury job, but still able to work, employer must consider other "available" and "suitable" positions
- Same Limitations as Reinstatement:
 - AP says worker cannot perform any available job
 - Worker accepts other suitable employment
 - Worker refuses bona fide offer of modified work
 - Worker enters vocational assistance
 - Termination for cause
 - Three years has lapsed from date of injury

Medical Certification

- At end of disabling claim insurer will obtain a closing exam indicating whether employee can return to work and extent of impairment
- No Reinstatement when
 - AP says injured worker cannot perform job
 - Worker accepts other "suitable employment"
 - Worker enters vocational assistance
 - No demand within seven days
 - Termination for cause
 - Lapse of 3 years from date of injury
 - Job abandonment

Practical Considerations when Reinstating an Employee into the Workplace

- **Reinstatement Rights/ Considerations:**

- The employee should be returned to their same position unless it presents an undue hardship or their job was eliminated.
- Employee who cannot perform the same job due to a disability/ impairment or if they cannot be accommodated, the employee should be moved to a job the employee is able to perform, or consider the Reassignment Program.
- No obligation to "create" a position for the EE

Practical Considerations when Reinstating an Employee into the Workplace

- **Reassignment Obligations:**

- Employee need not be the best qualified individual for the position.
- Not required to promote an employee- Employee must compete for vacant positions constituting a promotion.
- Not required to "bump" other employees from a job in order to create a vacancy.
- "Vacant" means position is available or employer knows it will become available within a reasonable amount of time.

Practical Considerations when the ADA Process Overlaps with WC

- Employees who are able to return to work after a work related injury/illness and are able to perform the essential job duties of their positions and their position has not been eliminated;
 - Reinstatement considerations after a leave are applicable (the employee should be reinstated into their current position).
- **Temporary work restrictions should be accommodated.**
 - If management indicates that they cannot accommodate the work restrictions, the employer now has an obligation to ensure that they have met their legal obligations under ADA.
- If an employee has *permanent* work restrictions and is unable to perform the core job duties of their position with or without accommodations due to their disability/ impairment,
 - it is critical that the interactive process is initiated and a representative from the employer works through the ADA process (also prior to considering the reassignment program).

RA17

FMLA/OFLA overlapping with Workers' Compensation

- Medical Certification
 - FMLA specifically allows reliance on workers' compensation medical information to stand in as FMLA medical certification
- If you will require separate fitness for duty, make this clear up front

RA18

When does the clock start?

- Any work-related injury requiring more than three days off work will likely meet the definition of a "serious health condition"
- Under FMLA, absences for a work-related injury count against FMLA entitlement
- Under OFLA, absences for a work-related injury (almost) never count against OFLA entitlement
 - ORS 659A.162(6)

Modified Jobs

- FMLA time may still be counted on a reduced hours basis if employee is released to less-than-regular hours of work
- OFLA still not counted except if employee refuses a bona fide modified duty job offer

Slide 49

JRA16 Need different shade for the Title on the few slides I called out,
Can't see the title.

Jackson, Regina A, 9/8/2015

JRA17 Title shading

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Slide 50

JRA18 title shading

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Checklist for Overlapping Leave Laws

1. Review eligibility requirements to determine whether employer is "covered"
2. Review employee's eligibility for benefits & protections
3. Analyze whether reason for absence qualifies employee under various laws (e.g. compensable claim for WC or disability for ADA or serious health condition for FMLA/OFLA)
 - For ADA, analysis involves whether employee is entitled to reasonable accommodation
4. If overlapping laws apply, determine which law grants the more generous leave entitlement

Checklist for Overlapping Leave Laws

5. Ensure that notice obligations and medical certification requirements are followed
 - ADA
 - FMLA/OFLA
6. Determine benefits and seniority issues
 - ADA
 - FMLA/OFLA
7. Determine reinstatement or reemployment rights/ accommodation issues
8. Don't take any adverse employment action without considering all of the above...

Questions?

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