

# Injury Management UPDATE

  
**WORKSTRATEGIES**

BROUGHT TO YOU BY THE  
SELECT MEDICAL OUTPATIENT DIVISION

## YOU'RE NOT AT 100 PERCENT? WE DON'T WANT YOU BACK.

In keeping with their 2018-2022 strategic plan, the Equal Employment Opportunity Commission (EEOC) has actively been pursuing cases of employment discrimination in relation to disability.<sup>1</sup> Recently, these EEOC activities have resulted in several judgements and relatively large settlements related to failure to provide reasonable accommodations to employees with disabilities.<sup>2,5</sup> These cases have been in a wide range of industries, including bottling and distribution,<sup>3</sup> health care,<sup>5</sup> banking<sup>2</sup> and manufacturing.<sup>4</sup> The cost of these cases to employers has been in the hundreds of thousands<sup>2,5</sup> to millions of dollars.<sup>3</sup>

At one time, it was common for employers to indicate that an employee needed to be fully recovered from an injury or illness to return to work. Medical professionals would often be told by employees “my company won’t take me back until I am 100 percent.” Since the enactment of the Americans’ with Disability Act (ADA) and its subsequent amendment by the ADA Amendment Act (ADAAA), employers are required to provide an informal interactive process and reasonable accommodations to any individual with a disability, enabling them to enjoy equal employment opportunities to those without a disability.<sup>6</sup> A recent settlement between the EEOC and Wilmington Trust for \$700,000 was based on findings that Hudson City Savings Bank (a Wilmington Trust subsidiary) had a long-standing inflexible policy and practice of placing employees with impairment or disabilities on involuntary leave until a medical provider’s clearance to return to work with no restrictions was received.<sup>2</sup> The EEOC indicated that this resulted in qualified individuals with disabilities being denied access to an interactive process and reasonable accommodations.<sup>2</sup>

The EEOC has taken a broad stance on what may constitute a request for an accommodation on behalf of an employee. They have indicated that there is no need to mention the ADA or use the phrase “reasonable accommodation” and the employees themselves do not need to make the request. It is enough for the individual or his/her representative to inform the employer that an adjustment or change at work is needed due to a medical condition.<sup>7</sup> The EEOC provides an example where “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.)”<sup>6</sup> The EEOC guidance indicates that the letter constitutes a request for reasonable accommodation on behalf of the employee<sup>6</sup> and, thus, should result in an interactive process with the employee to identify what accommodations may result in the injured worker’s ability to return to work.

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The EEOC provides guidance on what may constitute reasonable accommodations related to job performance, including job restructuring, leave, modified or part-time schedule, modified workplace policies and reassignment.<sup>6</sup> Job restructuring may include redistributing marginal job functions that an employee is unable to perform or altering when or how an essential or marginal function is performed. An employer is not required to reallocate essential functions as a reasonable accommodation, although they can if they wish.<sup>6</sup> Leave may include both paid and unpaid leave and may extend beyond the Family and Medical Leave Act (FMLA). Modified or part-time schedule may include a change in shift or work hours or extended breaks.<sup>6</sup> Modified workplace policies may include allowing eating by a diabetic, storing and consumption of medications or modifications to attendance policies.<sup>6</sup>

The ADA specifically lists reassignment to a vacant position if the individual is qualified for that position and can perform the essential job functions.<sup>6</sup> No matter what the reasonable accommodation, guidance indicates the accommodation only needs to be extended to the individual with the disability and that it is only reasonable if it does not impose an undue hardship to the employer.<sup>6</sup>

Select Medical assists employers, physicians and injured workers in return to work efforts through work-related, functionally-based rehabilitation of injuries and documentation of current functional abilities compared to essential job functions throughout the rehabilitation process. We also offer job site analysis to determine essential job functions, the functional abilities required to complete those functions and assistance in determining possible accommodations. In addition, Select Medical tests individuals who may be considered as having a disability to provide information about physical work abilities to be used in the interactive process.

To learn more about our programs and services, please contact us at [workstrategies@selectmedical.com](mailto:workstrategies@selectmedical.com).

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