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## COSTLY RETURN-TO-WORK MISTAKES EMPLOYERS MAKE

The recession coupled with sweeping changes in the newly enacted ADA Amendments Act (ADAAA) and the Family and Medical Leave Act (FMLA) changed the economic and legal landscape. A properly structured Return-to-Work (RTW) program reduces exposure and improves the bottom line.

Here are ten mistakes in RTW that could cost you:

### 1. Failure to recognize the increase in number of employees covered by the ADAAA

For employers covered by the ADAAA (those who have 15 or more employees), more employees satisfy the definition of disability and are entitled to reasonable accommodations, including those employees who have suffered on-the-job injuries.

The ADAAA's stated goal is to shift the focus from whether an employee is disabled to whether employers are complying with their obligations under the law. Employers need to have an interactive process with disabled workers, wherein they discuss the reasonable accommodations necessary to perform essential job duties. Managers must understand the obligation to provide reasonable accommodations and not reject requests without appropriate analysis.

### 2. Insist employees be released to "full duty" before returning to work

Considerable evidence exists about the value of RTW programs that provide a means for employees to transition back into their full duty jobs with responsibilities modified for short periods of time. Insisting on a return to "full duty" increases Workers' Comp costs and heightens the possibility that the injured employee will fall prey to a "disability syndrome" – the failure to return to work when it is medically possible.

### 3. Cut the budget for RTW

Employers seeking to cut expenses may target RTW programs. Yet, cutting or delaying such programs can result in higher costs both now and in the future. The longer an employee is out on injury leave, the higher the cost, adversely affecting claim reserves and ultimately the Experience Modification Factor as well as increasing the likelihood of litigation.

### 4. Believe that RTW cannot address musculoskeletal injuries such as back pain

Low back pain is the most prevalent and most costly work-related condition, yet only a small fraction of workers with acute back pain progress to chronic disability. A study found workers who were not offered light duty or reduced hours to facilitate the return to work in the first three weeks were almost twice as likely to develop a chronic disability.



## 5. Be deterred from setting up transitional assignments because the employee “may get hurt again”

Employer and employee fear of re-injury often hampers RTW efforts. This of course is a risk, but an even greater risk is having the employee stay at home and develop a “disability attitude” that extends the absence and drives up costs. Take steps to ensure the employees’ safety by verifying job assignments meet the medical restrictions set by the treating physician and stay in touch with the employees as to their comfort level with the assignment.

## 6. Don’t distinguish “light duty” from “transitional work”

RTW assignments are best described as transitional tasks. Limited in duration, such tasks help the injured worker return to full productivity by being progressively adjusted in line with medically documented changes in the employee’s ability. Under the ADA, it is permissible for an employer to reserve “light-duty” jobs for those with work-related disabilities and these jobs should be distinct from transitional tasks.

## 7. Rely on the physician to guide the RTW process

While physicians are medical experts they do not have essential information about workplace policies, job demands and the availability of transitional work. Moreover, if a physician’s training is not specifically in the treatment of occupational injuries they may not adhere to evidence-based guidelines. The employer must be proactive and take the lead role with both the physician and the injured worker.

## 8. Don’t understand the laws governing mandatory comprehensive medical exams before returning to work

This is one of the most confusing aspects of RTW with the ADA, the FMLA and state Workers’ Compensation laws having different and sometimes conflicting requirements. Understanding the laws and how they apply to your specific circumstance is critical.

## 9. Don’t establish consequences for failure to comply with RTW

What’s important here is to understand the difference between disciplining and cutting off benefits. If an employee is covered by the FMLA and cannot perform one or more of the essential functions of his or her job, that employee may refuse transitional assignments and take FMLA leave. However, the FMLA only creates an entitlement to unpaid leave, and therefore, in most cases, the Workers’ Compensation indemnity payments may discontinue with the refusal to return to work. The employee retains the right to reinstatement to the position held when FMLA leave was taken.

## 10. Believe Workers’ Compensation settlements resolve ADA liabilities

Under the ADA, more injured employees qualify as “Qualified Individual with a Disability” and as such can assert their right under the ADA to a reasonable accommodation, irrespective of any Workers’ Compensation settlement.

During settlement negotiations, close coordination is necessary between the company’s legal, risk management, and HR departments to ensure that each office is able to accomplish its mandate without compromising the employee’s rights.



This article is adapted from an article by Kevin Ring, the Director of Community Growth for the Institute of WorkComp Professionals that has appeared in 16 major trade and insurance publications. The material is provided as general information and is not a substitute for legal or other professional advice.



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