

**THE BILL BLACKWOOD  
LAW ENFORCEMENT MANAGEMENT INSTITUTE OF TEXAS**

**ISSUES IN THE COMPENSATION OF INJURED WORKERS**

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by  
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## **ABSTRACT**

The Americans with Disability Act of 1990, the Civil Rights Act of 1991, the Family Medical Leave Act, and Worker's Compensation reform extend comprehensive protection to individuals with disabilities, specifically in the area of employment. This paper examines the implications of establishing an early return to work program for public employees with temporary injuries or medical conditions. A review of literature and practice demonstrate that transitional duty policies increase productivity, increase employee morale, and reduces worker's compensation costs. After examining several municipal policies, a model policy establishing a transitional duty program has been developed and presented.

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## **Introduction**

A federal jury found, within the scope of the Americans with Disability Act of 1990 (ADA), the Denver, Colorado Police Department failed to reassign an injured officer to a vacant civilian job that he could perform. Assistant Attorney General Deval Patrick stated,

"Our nation's police officers risk their lives every day to enforce our laws. When an officer injured in the line of duty can no longer walk the beat but still perform other duties, a city should not turn its back on the officer."(19)

The ADA is landmark legislation. This Act along with the Civil Rights Act of 1991, The Family Medical Leave Act (FMLA), and Workers' Compensation reform extend comprehensive protection to individuals with disabilities, specifically in the area of employment. Organizational practices, employee concerns, compliance initiatives, and organizational costs require employers to have documented viable solutions to managing disability in the workplace.

Promptly returning an employee to work, who has been injured on the job, offers advantages to both the employee and the employer. Transitional duty reduces workers' compensation costs while increasing employee morale (Drozdowski, 1). The purpose of this research is to illustrate the need for a transitional duty policy affecting disabled public employees by examining the relationships and interactions of the Americans with Disabilities Act and Workers' Compensation.

The intended audience for this research will be municipal governments, law enforcement administrators, and other professionals operating in the public affairs arena. The sources examined include current journal articles, federal laws, and organizational policies. The presentation of this material is divided into three major groups. First is the Historical and Legal Context. Second is the Review of Literature and Practice. A discussion of Relevant Issues follows.

This research will develop a base of information supporting the implementation of a

transitional duty policy for municipalities affecting long-term or short-term disabled individuals.

### **Historical and Legal Context**

Traditionally, the injured employee system has not had a good record of bringing industrially injured employees back to work unless the injury was such that 100 percent recovery was expected (Walker, 153). Most agencies do not have a policy for injured employees, they generally handle each incident separately based upon individual circumstances. As agencies adopt transitional duty policies, it is important to remember that all absences and disability programs must be integrated with the requirements of the FMLA Workers' Compensation and the ADA (Shafer, 46).

The ADA is a federal civil rights statute which bans employment discrimination on the basis of disability against a qualified individual with a disability. To be protected under ADA one must meet the ADA requirements of a "qualified individual with a disability, who can, without reasonable accommodations, perform the "essential functions" of a job." There are three different groups of individuals who are protected under the Act: (1) a "qualified individual" with a physical or mental impairment that "substantially limits a major life activity; (2) a person who has a record of disability; or (3) a person who is regarded as having a disability.

Some examples of what constitutes a "major life activity" are: seeing, hearing, talking, walking, reading, learning, breathing, taking care of oneself, lifting, sitting, and standing. Usually, a temporary or short-term injury or illness does not qualify as a disability. In order to be covered, the impairment must substantially limit one or more major life activities (ADA 1990).

The ADA rests on the premise that disability does not necessarily mean inability to work; it focuses upon how reasonable accommodation can remove barriers to employment caused by the interaction between functional limitations and the workplace. The ADA does give an exemption to

businesses for undue hardships. An employer does not have to provide a reasonable accommodation that would impose significant difficulty or expense on the employer in relation to its business and the resources available to provide the accommodation. Along the same lines, "in *Monette v. Electronic Data Systems Corp.*(7-30-1996), the 6th Circuit Court of Appeals ruled that the ADA does not require an employer to keep an employee's job open indefinitely while the employee recovers from a workplace injury (Barlow, 92)."

The Equal Employment Opportunity Commission's (EEOC) guidance on disability under ADA indicates clearly that an employer may not require that an injured employee be released to full unlimited duty before allowing him or her to return to work. An employer must attempt to make accommodations if an employee is willing to return to limited duty. Early return to work policies saves money under workers' compensation laws.

The EEOC takes the position that an employer must first attempt to accommodate the employee on his or her original job. If that fails and there are vacant positions to which an employee can be reassigned that will accommodate his or her disability, then the employer must offer a reassignment. An employer is not required to create a new position or bump another employee.

The first twelve weeks that an employee takes off can be counted toward the Family Medical Leave Act. You cannot fire an injured employee that has been offered light duty until after the leave has expired. However, the EEOC does not recommend termination under these conditions (EEOC, 1-3).

"According to Maria Echaveste of the Labor Department in an advisory opinion letter, the federal Family and Medical Leave Act prevents employers from requiring temporarily disabled workers to return to work at light-duty jobs if the workers would rather take unpaid medical leave

(Shalowitz, 2)."

Whereas the ADA is designed to obtain the fullest productivity of disabled individuals despite their disability, Workers' Compensation is a no-fault compensation system that provides medical care and benefits to individuals who are disabled as the result of work-related injuries or accidents. Work related disabilities are typically classified as either partial or total and either permanent or temporary. The amount and type of benefits that an injured employee receives depends on the percentage of the disability assessed and the nature (permanent or temporary) of the disability. The benefits are not designed to fully restore the employee's losses, but are to supplement the employee's remaining earning ability such that the employee is able to maintain some proportion typically one-half to two thirds of his or her previous earning level. The focus of the workers' compensation system is on the extent to which an employee is unable to perform the duties of his or her job as the result of a work related injury (Martucci, 462). In most states, however, an employer has no obligation under workers' compensation to make any modification or reasonable accommodation to enable the employee to have productive employment.

Employees must understand the full ramifications of a transitional duty policy and it is the duty of the agency to ensure the understanding. Benefits can be affected under this type of policy. For example, Workers' Compensation wage loss benefits can be suspended if the employee refuses the job offer. The employer needs to extend a genuine offer of work in a job that the employee is physically capable of performing. Documentation is very important (Drozdowski, 2).

### **Review of Literature and Practice**

According to Neville Tompkins, early return to work or transitional duty programs are likely to get a boost under ADA (35). Transitional duty programs only apply to employees, not applicants,

and there is no requirement to create a job or "bump" an employee out of a job to place a disabled person or to promote a disabled individual. Disabled employees may be placed in vacant positions as an accommodation or placed in lower-paid jobs.

Rebecca Bruce in "Comp Camp" said that you know you need a transitional duty program when disability absences are disproportionately long, indicating that the company may be compensating employees who are no longer disabled. "If the majority of workers are out more than ten days, a return-to-work program is most likely needed (Bruce, 45)."

Transitional work programs have the advantage of allowing injured employees to regard themselves as "actively employed" and thus productive and valuable members of the workforce. Returning to work after an on-the-job injury requires the good faith of both the employer and the employee. If the employee turns down an offer for a job that had been analyzed for essential functions and documented in the form of a job description, the employer has in fact fulfilled its responsibilities under the ADA (Walker, 153).

"To manage their worker's compensation costs, companies also have to manage the return-to-work process and reduce their indemnity exposure (says Robert Breslin) (Reese, 25)." Transitional work programs typically apply to all people out of disability, whether short-term, long-term, or workers' compensation. Gemignani recommends six steps for a successful implementation of a transitional work program. First, start with a policy that defines the company rules, the responsibilities of the disabled employee, his manager, and the human resource department. Second, designate one person to coordinate the process and to check compliance with ADA. Third, communicate the transitional duty program policy to all employees. Fourth, consider a contractual requirement for cooperation with a transitional work program as a condition of eligibility for benefits.



Fifth, early intervention after an incident is crucial. A manager should explain the benefits, policies, goals, and the employee's role. Sixth, regular follow-up calls will help review which essential job functions an employee can or cannot perform and what potential accommodations might be necessary.

Meike Olin in Supervision outlined nine steps to implementing a transitional work program. They include gaining support of top management, appointing a coordinator, meeting with management of all departments and explain program, managers develop detailed job descriptions in every department, making a list of tasks that injured employees could perform, prepare a manual, informing medical providers of program, informing all employees of the program, and keeping top management informed of every step of the way (12).

When creating a new transitional work program a number of human resource management tools and strategies can be utilized. The preparation and scrutiny of detailed job descriptions for each position. "A clear specific job description will allow a clearer determination of the individual's ability to perform the job in question (Mello, 82)." The human resources department asks supervisors from every area of the company to submit job requests for tasks that qualify as temporary and alternative duty. These are jobs that normally pile up on the back burner, waiting for someone to find time to do them. Since the alternative duty jobs change according to the company's needs rather than just the employee's limitations, work that doesn't already have a permanent workforce gets done. As a result, managers are relieved of the need to find or create light-duty jobs. Another benefit is that departmental production numbers are structured so that they aren't affected by the loss of a full-time employee to injury or illness.

Working with the front-line supervisor, the disability manager ensures the transitional work

program is executed on the front line. With job descriptions in hand, they develop a program for getting the injured employee back to work. Instead of having separate rules for occupational and non-occupational disabilities, front-line supervisors use only one set of procedures (Patterson, 26). Also, this program allows the employer to better monitor the individual's medical progress and compliance. Assessments can be made on a daily basis with accommodations decreased or job assignments altered as medical progress permits (Drozdowski, 1). Carla Walworth, et al., reminds businesses that the ADA requires employers to make reasonable accommodations, if requested by the employee (222). An employer cannot refuse to allow an employee with a disability to return to work because the employee is not fully recovered from an injury if the employee can perform the essential job functions of the job, with or without an accommodation.

Olin describes four types of transitional work programs. First, the employee receives first aid or medical treatment and returns to regular job without restrictions. Second, the employee returns with restrictions that reduce some part of the regular job in order to achieve "work hardening". Third, the employee receives medical treatment and returns to a modified duty version of the regular job. This would include restrictions eliminating some tasks such as lifting or typing. Fourth, the employee returns to the workplace in another department, performing some alternative or light duty which fits within the restrictions prescribed by the medical provider. The light duty could include tasks from the regular jobs available or from the "wish list".

Several respondents offered examples of how to make returning to work more attractive than staying away. "Many of the workers' compensation experts surveyed recognized that the higher the percentage of the original wages paid out to disabled employees, the more difficult it is to get them to return to work (Smith, 57)."

One company gives disabled employees benefits 60 percent of pre-disability earnings. If the injured employees return to work, their earnings are supplemented by an incentive benefit amount so that their total earnings are considerably higher than their disability benefits.

Another company allows disabled employees to come back for a trial period, usually six months, during which time long-term disability benefits can be reinstated without reapplying if they cannot continue working.

A request for copies of policies concerning transitional duty was made from six neighboring cities. They include Carrollton, Dallas, McKinney, Mesquite, Plano, and Richardson. A comparison of the policies was completed and its results follows in Appendix A.

### **Discussion of Relevant Issues**

According to Meg Fletcher, the first decision is what to call the program. Most prefer "transitional" duty. "Light" duty is seen as not real work (14). Secondly, employers need to create a positive atmosphere that supports a recuperating worker. Transitional work should be just that, transitional. It should be progressive involving a series of steps that restore an employee's original capabilities.

Post injury response is where many employers fall short. They assume someone else is handling the situation. Another mistake is to rely only on either rewards or punishments. You need both (Bruce, 44). Some employees respond to rewards (get-well cards, calls from the boss) and others need the threat of punishment when malingering. It is in the best interest of the employer to return injured employees to suitable employment as soon as possible. An employer may transfer an employee that is not capable of doing their previous job to a vacant, comparable job. If an employer typically permits transitional duty work on a temporary basis for injured employees, under ADA the

employer may limit the time that an injured employee spends on light duty to that period of time customarily permitted for workplace injuries.

Transitional work assignments should not be "make-work" jobs, except as a last resort. Creation of a new position to accommodate an injured employee is unappealing to managers and to citizens. When reassigning an employee to new duties, it is important that he or she be properly trained. "The more accommodating the company is, the fewer excuses an employee will have not to take part in the program (Donley, 89)."

Returning injured employees to work as soon as possible can help costs. Management must realize that employees do not have to be 100 percent on the job, but can tackle modified duties suited to their current abilities (Lowther, 54). Management must be involved in establishing the back to work guidelines. Most employees want to work. They may be bored and anxious or under financial stress due to reduced salaries. They miss interacting with co-workers and might have low self esteem. Supervisors should contact injured employees as soon as possible to let them know they are missed and wanted back.

Although most people with a work-related injury return to work within fifty days, there is a small proportion each year who do not return to work (Anonymous, 14). Some cannot return but there are many whose injuries have stabilized but for many reasons do not return. Having a transitional work program does not mean people are thrown back into their old jobs as soon as they are on their feet again. The operative word is still "safety" and for some people that may mean working part-time for a while or doing alternative duties.

Managers in the public sector will be called upon to confront perceptions and the resulting behaviors of their employees relative to the employment of employees with disabilities. Managers

can be role models in deterring their subordinates' unfounded myths and prejudices concerning potential co-workers with disabilities. The first step according to Jeffrey Mello is to become knowledgeable about the specific nature of disabilities of their employees and applicants (78). Case by case application is recommended. Not every injured employee meets the ADA definition of disability.

Rebecca Shafer in Risk Management said that a well-managed transitional work program can result in a return to work rate of up to ninety percent for injured employees returning to the job within four days after the injury. However, any limits on duration of light duty should be clearly specified prior to the job assignment (Walworth, 229). "Over the last four years, S1. John's River Power Park in Jacksonville has saved \$221, 000 in benefits it did not have to pay as a result of a return-to-work program (Olin, 10)." This is a typical benefit of what are known as transitional duty, back-to-work or return-to-work programs. They mark a break from the traditional approach of waiting until 100 percent full health. Some of the momentum for change comes from the ADA.

Employee disability, costly both in human and financial terms, has been on the rise. Janet Gemignani's research indicates that the number of workdays lost due to disabling conditions nearly doubled between 1972 and 1992, topping 85 days per 100 employees (75). Workers' compensation claims were about \$75 billion last year, according to an Alexander and Alexander U. S. risk management survey. Medical expenses accounted for 46 percent of that total, up from 33 percent a decade ago.

Olin states that employee benefits from transitional duty programs include greater financial stability, faster recuperation, positive social reintegration, continued work routine, and improved sense of self-worth. Employer benefits include reduced workers' compensation costs, increased

productivity, clear message, reduced overtime, and less temporary help (11).

Organizations are increasingly vulnerable to staff injury and disability, whether or not the injuries are job-related. When it comes to on-the-job injuries, most organizations use some form of managed care to return that employee to work. Why not off-the-job injuries? The direct cost of short-term and long-term disability and sick pay is estimated at \$80 billion annually. This does not include indirect costs such as temporary employees, late projects, or below standard work quality. Some estimates put these combined items, direct and indirect, at eight to ten percent of payroll. Because of this, companies that do not manage off-the-job injuries in the same manner (transitional duty) may be missing out on an important competitive advantage (Patterson, 23).

### **Conclusion and Recommendations**

The purpose of this research has been to illustrate the need for a transitional duty policy affecting disabled public employees by examining the relationships and interactions of the American with Disabilities Act and Worker's Compensation. The ADA has resulted in significant positive changes to the worker's compensation system and practices benefitting both employers and injured workers. A greater emphasis on return to work strategies and reasonable accommodation should enable injured workers to come back to work sooner. This approach reduces benefit costs, increases productivity, improves employee morale, and helps to avoid ADA charges.

A transitional duty policy has been formulated and is included in Appendix B. This policy is structured to be implemented at the municipal level. This policy attempts to return to work, at the earliest reasonable time, those persons who are temporarily unable to perform their regularly assigned duties due to an injury or medical condition. During this temporary period, transitional work assignments may be utilized. However, any accommodations to an employee's required work

conditions must be made without undue hardship and without adversely affecting Municipal operations. Transitional duty assignments must be productive and contribute to the achievement of the service goals and objectives of the City. Transitional duty assignments will not exceed 180 days without the prior review and approval of the City Manager. A physician's limited duty recommendation form is included as part of the policy. The employee's physician would complete the form indicating the length of leave necessary and what physical activities the employee can complete upon return to work.

The implementation of this policy will help satisfy the requirements of the ADA to have documented viable solutions to managing disability in the workplace. It will also reduce worker's compensation costs and increase employee morale. Each and every governmental agency should implement a transitional duty policy.

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APPENDIX

A

A COMPARISON OF MUNICIPAL POLICIES

### Comparison of Policies Concerning Transitional Duty

<b>Policy Issues</b>	<b>Carrollton</b>	<b>Dallas</b>	<b>McKinney</b>	<b>Mesquite</b>	<b>Piano</b>	<b>Richardson</b>
Municipal Policy	Yes, non-civil service only	Yes	Yes	Yes, Discretion of Department Head	Yes	No, Discretion of Department Head
Police Department Policy	No	Follows Municipal Policy	Follows Municipal Policy	Follows Municipal Policy	Yes	Yes
Name	Modified Duty	Limited Duty	Alternate Duty	Light Duty	Alternate Duty	Light Duty
On-duty injury/illness	Yes	Yes	Yes	Yes	Yes	Yes
Off-duty injury/illness	Yes	Yes	Yes	Discretionary	Yes	Discretionary
Physician's Release	Yes	Yes	Yes	Yes	Yes	Yes
Length of duty	90 days	16 weeks	90 days	90 days	180 days	Discretionary
Disability Coordinator	Yes	Yes	Yes	Yes	Yes	Yes
Identifies available tasks	No	Yes	No	Yes	Yes	No
Defines roles for each supervisor	Yes	Yes	No	No	Yes	No