

THE ROLE OF ADA & WLAD IN WORKERS' COMPENSATION

A presentation by Washington Hospitals Workers' Compensation Program and Elizabeth Reeve



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Please hold your questions until the end of the presentation.

Thank you!



Handout Materials

- The handouts for this Power Point Presentation: " The Role of ADA & WLAD in Workers' Compensation," & Comparison Chart page was sent to everyone who pre-registered for this webcast.
- If you don't have the presentation handouts, you may contact Julie Stowitschek at: JulieS@wsha.org to acquire this or related webcast information. Thank you.



Role of the ADA and WLAD in WORKERS' COMPENSATION

for Washington Hospitals Workers' Compensation Program



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Goals for the Presentation

- o Learn and/or review techniques and best practices in workers' compensation.
- o Update members on the interconnection between workers' compensation, Washington Law against Discrimination (WLAD) and the Americans with Disabilities Act (ADA).



Background

The Boards of Trustees of the Washington Hospitals Workers' Comp. Trust and the Public Hospital District Workers' Comp. Trust adopted Joint Vision, Mission & Values for the program in 2003:

VISION: *To lead our membership to create and maintain the safest work environment.*

MISSION: *We exist to promote the best practices by all members for optimal injury and illness prevention and workers' compensation outcomes.*

VALUES: *We value and expect the following attributes:*

- o Demonstrating leadership and innovation while being responsive to member needs and increasing member value.
- o Committing to continuous improvements in the quality of our results and processes.
- o Preventing work-related illnesses and injuries.
- o Creating a core culture of safety.
- o Demonstrating integrity and trustworthiness in our relationships and activities.



Background *(continued)*

- One best practice we have promoted heavily is a Return-to-Work or Transitional Duty Policy.
- **95.8%** of the members have adopted this best practice of a written Return-to-Work Policy.
- Our goal is to have **100%** of the membership adopt this type of policy.



Background *(continued)*

- Using and following the written Return-to-Work policy assists the member hospital, the supervisor and the injured employee to understand the obligations of each in transitional or modified work.
- Included in the policy we recommend is reference to other laws potentially affecting injured employees.



The Role of the ADA & WLAD in WORKERS' COMPENSATION

for the Washington Hospitals Workers' Compensation Program



By guest presenter:

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Reasons it is important to recognize ADA issues in a claim

Many workers' compensation claimants have temporary and/or permanent disabilities during the life of a claim.

Thus, the ADA or WLAD may come into play.

Reasons...

1. Violation of either of these laws may result in lawsuits for lost wages, back pay, future wages, reinstatement and retroactive benefits.

Types: *Disability Discrimination lawsuit & Retaliation for filing a Worker's Comp Claim.*
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2. Keeping people at work can reduce your workers' compensation expenses and is a Best Practice.

The Most Important Rule

- o An employee is entitled to the benefits and protection of the most favorable law
- o Thus, if two laws conflict, apply the law that provides the greatest benefit to the employee



ADA - Overview

Federal Law

- Establishes and protects the rights of disabled employees of employers with 15 or more employees.
- Mandates employers engage in an interactive process (*Employer/Employee Communication*) to determine whether disabled employees who are qualified for specific jobs require one or more “reasonable accommodations” to perform the essential functions of their job, or to apply for a job for which they are qualified.

WLAD - Overview

Washington State Law

- Prohibits discrimination against employees and others in a wide set of protected classes.
- Applies to employers in Washington State with eight or more employees.
- To a large extent, this statute mirrors and extends protections contained in the *Americans with Disabilities Act* and the federal *Rehabilitation Act*.

WORKERS' COMP -Overview



Workers' Comp provides monetary benefits for medical treatment and lost wages and a process for assisting people in returning to work who have been injured on the job.

COMPARISON

- Both ADA and WLAD require that a disabled employee be provided with reasonable accommodations to enable the person to work.



COMPARISON

- ADA and WLAD define “disability” differently.
- Both emphasize though that the existence of a disability depends on an individualized assessment of that person and not a stereotypical view of that medical condition.

ADA – “Disability”

Prior Act: Physical or mental impairment that substantially limits one or more major life activities

- 2009 Amendments (ADAAA): Broadens the definition of disability:
 - Impairment must be considered without regard to mitigating measures, except ordinary glasses.
 - Includes episodic impairments or those in remission.
 - Expands identification of major life activities, eating, sleeping, standing, lifting, bending, thinking, working and communicating.
 - “Substantially limits” easier to show.

ADAAA

The Outlook for Employers:

- Potential increase in the number of disability claims filed against employers.
- Expect these claims will be harder for employers to defend- harder for employers to challenge the employee's assertion he/she has a disability.
- Focus will be on employer's interactive process.
- Focus will be on whether reasonable accommodation provided.

WLAD - "Disability"

WLAD defines a disability as:

- Sensory, mental or physical impairment that is:
 - Medically cognizable or diagnosable
 - Exists as a record or history; or
 - Is perceived to exist whether or not it does.
- Can be temporary or permanent.
- Can be mitigated or unmitigated by treatment.
- Whether it limits ability to work generally or work at any particular job.

[RCW 49.60.040 (2007)]

WLAD - "Disability"

- Disability exists whether or not it limits the ability to work **but...**
- For purposes of qualifying for a reasonable accommodation:
 - It must exist in fact; **and...**
 - Disability must substantially limit ability to perform job or if job would aggravate impairment without an accommodation to extent that it would create a substantially limiting effect, employer must provide reasonable accommodations.

COMPARISON

- ADA applies to permanent disabilities (more than 6 months).
- WLAD applies to both temporary and permanent disabilities.



Worker's Comp – “Disability”

- No one definition - Depends on context.
- Disability different than impairment.
- Disability: *Industrial injury or occupational disease affects ability to work.*
- Different Concepts for purposes of:
 - Temporary Total Disability
 - Permanent Partial Disability
 - Disability needed to obtain vocational-services.

RETURN TO WORK PROCESS - OVERVIEW

Three Topics:

- Vocational Priorities under ADA & Workers' Comp
- ADA Considerations
 - Engage in Interactive Process
 - Provide Reasonable Accommodations
 - Modifications of Job Duties
 - Transitional Duty
 - Reassignment to Vacant Position
- Additional Workers' Comp Considerations
 - Job Offer – Transitional Duty

Vocational Priorities under ADA, WLAD & Workers' Comp

The ADA, WLAD and Workers' Comp dovetail nicely in describing the sequence of jobs to consider for a disabled employee.

Vocational Road Map in Workers' Compensation

In Workers' Compensation, return-to-work is governed by a list of vocational priorities designed to return claimant to work in the job-of-injury or alternate job with current employer. If that is not possible, consider work with another employer or retraining.

[RCW 51.32.095 (2)]

Vocational Priorities – Workers' Comp, ADA and WLAD

1. Return to the previous job with the same employer.
2. Modification of the previous job with the same employer including transitional return to work.
3. A new job with the same employer in keeping with any limitations or restrictions.
4. Modification of a new job with the same employer, including transitional job.

Vocational Priorities (continued)

5. Modification of the previous job with a new employer.
6. A new job with a new employer or self-employment based upon transferable skills.
7. Modification of a new job with a new employer.
8. A new job with a new employer or self-employment involving on-the-job training; and...
9. Short-term retraining and job placement.

[RCW 51.32.095(2), Workers' Comp.]

Interactive Process

- The **employer** must engage in the interactive process with the employee:
 - Employer should meet with the employee.
 - Once the disability is known, employer must determine the nature and extent of the disability with appropriate medical information.



Interactive Process

- Determine the employee's capabilities, education, work experience, and skills.
- Ask the employee what he or she wants.

[ADA/WLAD. 29 CFR sec. 1630.2(o)(3)]

TIP – Call-In Policies

Consider adopting a reasonable call-in policy for injured workers. Helps satisfy Interactive process obligations. Keeps track of medical recovery.



REASONABLE ACCOMMODATION

- o Goal – provide **reasonable** accommodation(s) to enable a disabled person to return to work that is:
 - 1) Not an undue hardship on the employer or:
 - 2) A direct threat to health or safety of worker or co-workers.

[ADA/WLAD]

Exceptions to providing Reasonable Accommodations

1. **UNDUE HARDSHIP**

Providing an accommodation would cause significant difficulty or expense.

Factors to consider: Financial resources, net cost, impact on operations of facility (i.e. patient safety, emergency responses). Cannot consider morale of other employees.

Exceptions to providing Reasonable Accommodations

2. DIRECT THREAT – TO HEALTH OR SAFETY OF WORKER OR OTHERS

Do not have to provide accommodation if employment would pose a direct threat. Means more than a potential health or safety risk. Not fear of re-injury.

Definition: a significant risk of substantial harm to the health or safety of the disabled employee or others that cannot be eliminated or reduced by reasonable accommodation.

Cannot rely on stereotypes. Use individualized assessment, e.g. violence, bad eyesight.

Examples of Legally Required Modifications:

- The provision of equipment, e.g. safe patient handling equipment, chairs, arm rests, stools, headsets;
- Restructuring a job to facilitate the employee's disability;
- Modifications of essential functions of the regular job;
- Reallocation of marginal job functions to other employees;
- Part time or modified work schedules;
- Reassignment to a vacant position.

Modification of Essential Functions

- Do **NOT** have to **remove** essential functions.
 - Can remove temporarily, if employer elects but not legally required to do so.
- Do have to **modify** essential functions.

So, can require ability to perform all essential functions of job (w/ modifications if needed).

[ADA -42 USC sec. 12111(9) – reasonable accommodations. 42 USC sec. 12112 (discrimination). WLAD.]

Marginal Job Functions

- In contrast, you do have to remove marginal job functions.
 - Temporarily and permanently.
 - Therefore, one cannot insist on “full duty” release. If person cannot perform marginal duties, they must be eliminated.

[EEOC Enforcement Guidance: Workers' Compensation & ADA (re: full duty release)]

What are Essential Functions?

1. The job exists to perform that function;
2. The employee holding the job was hired for his or her specialized expertise in performing that function; or
3. Only a limited number of employees are available to perform that function (e.g., a small staff has to process a large volume of work).

[EEOC Technical Assistance Manual sec. 2.3(a)]

Transitional Duty

“Light Duty” is used loosely in Workers' Comp. Used to refer to:

1. “Light Work” – DOT –Not lifting more than 20 pounds.
2. Light Duty that is **Legally Required**:
 - **Modification of essential functions of job; and...**
 - **Removal or modification of marginal functions of job.**

Types of Transitional Duty

3. Light Duty that is **Not Legally Required**

e.g. Make work jobs, jobs created by combining approved job tasks, wellness room jobs, jobs with essential functions temporarily removed.

Question: Can an employer reserve those jobs only for injured workers?

Answer: Maybe, leaning towards probably.

TIP - Transitional Duty

- **WARNING:** Beware of leaving a person in a temporary transitional duty job (one not legally required) for very long. ...Person may claim that it is not an undue hardship on employer to give the employee that job as a permanent position.
- **SOLUTION:** Offer job in writing explaining it is a temporary job, not regularly available, that will be available up to 90 or 120 days. Purpose is to transition person into regular employment with the employer.

End of Transitional Duty

What to do when temporary period expires:

- If employee will be able to return to regular work within a *short* period of time, consider extending the "temporary period" by that length of time and confirm in writing with worker. Additional period can be an accommodation. [ADA]
- For workers' compensation claimant, if unable to return to regular work, should take off work and resume TTD payments. [RCW 51.32.090(4)]

End of Transitional Duty

- For workers' compensation, if a job other than the claimant's job of injury [transitional duty] comes to an end for "any reason" (layoff, aggravation), reinstate time loss compensation.
 - **Exception: work ends due to claimant's voluntary actions** (theft, moves, etc.)
- For workers' compensation, transition to regular job only with worker's written consent or the treating doctor's approval. If a medical dispute exists, obtain a preponderance of medical opinion.

[RCW 51.32.090(4)]

Reassignment – Form of Accommodation

If can't perform job of injury with modifications, employer must consider reassignment to a **vacant** position.

Flash to prior slide

Overlap of ADA and WC – Vocational Priorities

1. Return to the previous job with the same employer.
2. Modification of the previous job with the same employer including transitional return to work.
3. A new job with the same employer in keeping with any limitations or restrictions.
4. Modification of a new job with the same employer.

Reassignment Process

- Provide notice of job openings; (even after termination).
- Engage in interactive process.
- Provide affirmative assistance in locating and identifying appropriate jobs.
- Follow this path even if also providing vocational services or even vocational retraining under workers' compensation claim.
- Not required to promote injured worker.

Reassignment: Job Preference Rights

- Employer must give preference to disabled employee in hiring process for a reassigned position:
 - Only if disabled employee is "qualified" for the position.
 - Cannot hire the "most qualified" candidate.



TIPS - Job Preference Rights

TIP 1: Define qualifications carefully.

TIP 2: Define qualifications before the job is posted.

- *The reason why Job Analysis for all jobs before injury is critical.*

Reassignment: Follow CBA

- Employer can follow its seniority provisions in CBA:
 - So long as it has followed that practice in past.
 - Implication: Disabled person does not automatically obtain suitable position if he/she does not have sufficient seniority.
 - Employer can ask union to waive seniority rights.



Continuing Obligation to Accommodate

1. Even after you have made one or more accommodations.
2. As health condition changes.
3. Even if claimant earlier rejected that form of accommodation, but the accommodation selected is not working now. Revisit all earlier options.
4. Even if providing vocational retraining.
5. After termination.

...some more tips

TIP: Voc counselor is not a substitute for employer in the interactive process.

TIP: Money is available for job modification costs, subject to approval.

TIP: Review VRC's reports to make sure that voc counselor is not conceding that claimant has a permanent disability, employer has no jobs, employer cannot modify jobs, etc.

TIP: If everyone agrees on retraining, document with careful stipulation.

Consider written stipulation with claimant if jumping to retraining option that acknowledges that employer can cease interactive process, cease sending job notices, that employer may have suitable job within reasonable time or can modify existing job(s) but claimant prefers retraining.

TIP – Telecommuting as accommodation



Recommendations:

- Have telecommuting policy in place because disabled employees may ask to work at home.
- Determine whether only certain types of positions will be allowed to telecommute.
- Decide whether those disciplined within a certain time frame will be allowed to telecommute.

Summary – Reasonable Accommodations



- Don't have to provide if:
 - Undue Hardship or
 - Direct threat to health or safety of others.
- Don't have to reassign if:
 - No suitable vacant position;
 - Would constitute promotion; or
 - Violates seniority clause in CBA.

Job Offers in WC Claims

Written job offers are recommended at three stages:

1. **Transitional Temporary Duty**
 - For temporary modifications or modifications not legally required under ADA or WLAD.
2. **Job with Permanent Modifications**
 - Removal of marginal job duties, permanent odd lot job, modifications of essential functions.
3. **Job Offer during Vocational Plan Development**

Job Offer During Plan Development
 Workers' Compensation

- Employer has opportunity to make bona fide job offer within 15 days of commencement of vocational plan development (The date claimant was found eligible for services). If offer made, TTD and voc services cease.

-If offer made after 15 days and claimant accepts, TTD ceases when job starts. Claimant can reject offer, remain in voc plan development and continue to receive time loss compensation.

- Bona fide offer if job.
- Has value to employer.
- Matches claimant's employment pattern.
- Considers pre-existing conditions.
- Is reasonably expected to continue in future.

TIP - Critical Role of Supervisors

- Success in return-to-work often dependent on supervisor's attitude & assistance given.
- Supervisor concerned about productivity.
- Employee often a poor performer even before disability.
- Must affirmatively assist in succeeding upon return to work.
- Supervisor/co-workers often the source of retaliation claims: (Robel = \$52,000 + atty fees).

TIP - Personnel

- Disability issues are separate from personnel concerns. Don't let emotional reactions to employees spill over into the workers' compensation claim or your response to a request for an accommodation. Follow the law. Every employee must be treated uniformly.

Questions and Comments...



We wish to thank our guest presenter:



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RESOURCES



- o RCW Title 51 (Workers' Compensation)
- o RCW Title 49 (WLAD – Discrimination Law)
- o Department of Labor & Industries website – lni.wa.gov
- o EEOC Guidelines & Technical Assistance Manual – *ADA & Workers' Comp*
- o Job Accommodation Network – Searchable On-Line Accommodation Resource: www.jan.wvu.edu
- o ADA Amendments

A recording of this web cast will be available to view on our website at:

www.whwcp.com/MemberAccess/index.aspx



If you have any access questions, please contact Julie Stowitschek at: JulieS@wsha.org

Thank you for joining us!


