Accommodating Employees When They Return to Work (or Don't Return)

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"When are you coming back to work?" This oft-asked question by employers oftentimes does not receive a simple or straightforward answer, particularly when the employee in question is off work because of illness or injury. In such cases, employers must navigate the challenges of determining if (and when) a return-to-work can be effectuated and what (if any) accommodations must be provided to the returning employee. This article will highlight some of these key challenges and some best practices for resolving the dilemmas that are faced in bringing employees back to work.

Americans with Disabilities Act

The Americans with Disabilities Act ("ADA") is a federal civil rights law that prohibits discrimination against individuals with disabilities in all areas of public life, including employment. A person has a "disability" if he or she has at least one of the following: (1) a physical or mental impairment that substantially limits one or more major life activities; (2) a record of such an impairment; or (3) is regarded as having such an impairment. In order to be able to assert a claim under the ADA, a disabled employee must be able to perform "the essential functions of the position with or without reasonable accommodation." An employer must provide reasonable accommodation to disabled individuals, unless doing so would cause undue hardship to the employer.

Types of "reasonable accommodations" include the following:

1) Modifications or adjustments to the work environment, or to the manner or circumstances under which the job is customarily performed, that enable the disabled individual to perform the essential functions of that position; and

2) Modifications or adjustments that enable a disabled employee to enjoy equal benefits and privileges of employment as are enjoyed by similarly-situated, non-disabled employees of the employer.

The employee bears responsibility for requesting accommodation. However, no "magic language" is required to put the employer on notice of the request. The employee must simply let the employer know that he or she needs an adjustment or change at work for a reason related to a medical condition; the employee need not mention the ADA, put the request in writing, or use the phrase "reasonable accommodation." Accordingly, district administrators and supervisors must be *very* perceptive when inquiring about an employee's return to work. If there is any suggestion that a medical condition is the cause for a less-than-full return to duty, then the district may be obliged to engage in the "interactive process" to explore potential reasonable accommodations.

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Workers' Compensation

Many times an employee's extended absence from work is due to an on-the-job injury. Under Missouri's workers' compensation law, employees injured at work are entitled to medical treatment and lost-wages compensation for resulting time missed from work. During the recovery period, employees may miss work entirely or be limited to light or modified duty. To avoid paying full wage-loss benefits, work-comp insurance carriers often endeavor to have recovering employees return to work on a light-/modified-duty basis. Under the ADA, districts are not obligated to bring back employees who are unable to perform their essential job functions even with reasonable accommodations. Nevertheless, in workers' compensation cases, districts usually work with their carriers in effecting returns-to-work in order to avoid a negative impact on insurance premiums.

Once an employee is done treating for a work injury, the treating physician will release the employee as having reached maximum medical improvement ("MMI"). The physician should also provide a "return to work" form to identify what work restrictions (if any) the employee is now under due to the on-the-job injury. If the new restrictions raise questions about the employee's ability to perform his or her essential job functions, then the district should regard the "return to work" form as a request for reasonable accommodation and thus, a trigger for the "interactive process." It is vital to have current and accurate job descriptions so that all administrators and supervisors can determine the essential functions for a particular job and can identify what reasonable accommodations would be necessary for performing that job.

The Interactive Process

Regardless of the type of illness or injury, once an accommodation request has been received, districts are obligated to engage in the "interactive process," which is an informal process to clarify what the individual needs and identify the appropriate reasonable accommodation. According to the Equal Employment Opportunity Commission ("EEOC"), there are a number of possible reasonable accommodations for disabled individuals, including:

- Making existing facilities accessible;
- Job restructuring;
- Part-time or modified work schedules;
- Acquiring or modifying equipment;
- Changing tests, training materials, or policies;
- Providing qualified readers or interpreters; and
- Reassignment to a vacant position.

Returning employees often have their own ideas as to what "reasonable accommodation" is necessary. This may or may not be the district's chosen accommodation. Districts are not required to provide the employee's preferred accommodation unless that accommodation is the only *reasonable* accommodation. Districts cannot summarily reject all accommodation requests as causing "an undue hardship." Districts must be prepared to defend, preferably with clear documentation, their selection and/or rejection of proposed accommodations that are discussed in the interactive process. If an employee's disability or need for reasonable accommodation is not obvious, districts are allowed to require reasonable medical documentation to verify the existence of the disability or need for accommodation.

When Employees Refuse to Return to Work

Employees can be very reluctant to return to work following a serious illness or injury. Some may even go so far as to refuse to return to work while citing a "medical necessity." In such cases, districts must be cautious and deliberate about their approach. Districts cannot force employees to return to their work sites, but they can take certain employment actions with insubordinate employees. However, districts will want to avoid potential wrongful-termination and/or constructive-discharge claims under the ADA by carefully examining these "requests" for additional leave. One accommodation that is often over-looked is the option of unpaid leave. This accommodation should be considered by districts as increasing numbers of wrongful termination claims

take certain employment actions with insubordinate employees. However, districts will want to avoid potential wrongful-termination and/or constructive-discharge claims under the ADA by carefully examining these "requests" for additional leave. One accommodation that is often over-looked is the option of unpaid leave. This accommodation should be considered by districts as increasing numbers of wrongful termination claims are based on the failure to offer unpaid leave.

Districts should have clearly established rules and policies on the amount of paid and unpaid leave that is available to employees, regardless of whether a disability is implicated. Additional unpaid leave, even beyond that allowed for by rule/policy, may be a form of reasonable accommodation that is required under the ADA. Moreover, employees with disabilities should be able to enjoy equal benefits and privileges of employment to those enjoyed by similarly-situated and non-disabled coworkers. Therefore, districts will want to ensure that they are not denying leave opportunities to disabled employees that would be available to non-disabled employees. If additional leave is not a *reasonable* accommodation for a particular employee (i.e., it causes an undue hardship), then the district must be able to articulate the nature of the undue hardship.

If an employee has received a full release to resume performance of his or her essential job functions, then the district should provide written notice to the employee of the release and identify the date on which the employee is expected to report to work. If the employee objects on the grounds of some medical condition that is not already known or obvious, then the district may ask the employee for reasonable documentation about his or her disability and functional limitations that would justify a further delay in the return to work. Documentation is insufficient if it does not specify the existence of an ADA disability and explain the need for reasonable accommodation. Without receipt of sufficient documentation, the district can reassert its expectation for the employee's return to work and should be prepared to address the employee's failure to return to work as abandonment and/or insubordination.

Conclusion

Districts must consider reasonable accommodations whenever handling the return of staff members with physical and/or mental disabilities. However, this consideration is complicated by the case-by-case nature of determining what accommodations are reasonable, as opposed to those that will create an undue hardship. If there are specific questions about employee accommodations and compliance with the ADA, then districts should seek legal guidance.