

The Injured Worker

Practical Approaches For Avoiding Lawsuits

By Ed Harold (New Orleans)

Retail jobs almost all require certain physical capabilities. These can include physical work such as moving heavy inventory, pushing a mop, bending to assist a customer in getting a product off the bottom shelf, or handling merchandise at the cash register. Employees with physical limitations that prevent them from performing all the functions of their job can be difficult to manage.

In the age of the new Americans with Disabilities Act, simply telling employees to go home until they recover is not as easy as it once was. While the largest retailers may have some ability to move employees with physical limitations into less strenuous jobs, this is not an option for most retailers where all employees are needed to perform all functions.

On-The-Job Injuries Can Mean In-The-Courtroom Headaches

The situation is further complicated when the limitations stem from a workplace injury. No matter how safety-conscious an employer is, accidents happen and employees get hurt. Yet the company's risk department handling the attendant workers' compensation claims often needs to reduce costs by getting injured workers back quickly even when they cannot perform their jobs. The more quickly employees return to work, the more likely it is they will recover fully. But during this period, the manager is given the difficult task of finding work for an employee that does not go beyond their physical limitations. Good employees sometimes try to do more and reinjure themselves. Marginal employees may use the limitations as a shield to avoid doing any work at all.

Overlying all these decisions is the specter of lawsuits under the ADA, the Family and Medical Leave Act, or state workers' compensation retaliation laws. Employees who are let go because they are no longer capable of performing the functions of their job, with or without a reasonable accommodation, often sue claiming that the employer was wrong. Most do not have their own disability insurance and a lawsuit is seen as a cure for their economic woes. Other employees, who were only temporarily restricted but were then later terminated for poor performance or intentional misconduct, also sue claiming that their injury, their disability, or their FMLA leave was the real reason for their termination.

The practical impact of these complications is that when faced with the problems, store managers often choose the path of least resistance; doing nothing. They have learned enough about the ADA to know they do not understand it. Many are of the mistaken impression that employees injured on the job have to be kept on forever even though they will never return to full duty. Filling out leave paperwork is a tedious task that will never be important enough to get done.

As a result, the company ends up paying the employee for doing less than a full job and the employees who pick up the injured employee's slack become resentful. At some point, the situation will likely come to a head and the manager will terminate the employee or simply quit putting them on the schedule. But by this time, the injured employee has built an inaccurate assumption about being entitled to an easy job and will complain vociferously about losing it. Avoiding claims in these situations takes a lot of advance planning.



Education – The Right Kind

One of the most common topics at human resources conferences for the last ten years has been the interplay of the ADA, the FMLA, and workers' compensation. Presentations refer to the topic as the "devil's triangle," or a "conundrum." The attendees have endless questions about more and more incredible scenarios. The subject matter is complex. In light of this, it is virtually impossible to train a store manager or even a district manager sufficiently to have confidence in their ability to navigate this minefield. While they do need to be trained in the basic substance of the laws, if no more than for establishing good-faith efforts to comply, substantive knowledge not put to regular use quickly evaporates.

In light of this, training of store managers and district managers should be directed toward being able to identify issues and knowing where in the company to go for solutions. To accomplish this first requires a rethinking of most companies' training on the subjects. In manager Equal Employment Opportunity training, the focus is typically on what the law says you cannot do and teaching the managers to avoid common mistakes. Since managers may not be faced with the need to use what they learned in training for months or years later, all that will be remembered is making the wrong choice can get the company sued. This can reinforce the managers' predisposition to avoid making a decision for fear of doing something wrong.

The focus of manager training related to injured or physically-limited employees needs to focus on the more basic requirements of what employees need to be able to do and the difficulty managers will have if they fail to address it. The training should emphasize both the injured or physically-limited employees' rights as well as the company's right to manage the situation and require an employee to be able to do the job. The company's process for managing these employees should be highlighted and managers need to be clearly instructed to seek assistance immediately upon learning of an employee's inability to do some part of their job.

Managers need to understand that reaching out for assistance is the key for both legal compliance and avoiding practical issues in the store. They must be instructed that anytime an employee claims a physical

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restriction – whether supported by a doctor’s note or not – they must seek help. Identify situations that might not normally trigger concern.

For example, an employee in the late stages of pregnancy may come to work with restrictions limiting her to “no heavy lifting” for the last few weeks before she gives birth. A typical manager response, particularly if the employee is valued, may well be that it is easy to have her do nothing but run the cash register for three weeks and not consider this a problem. But, he is unwittingly creating precedent for what the store is able to do for employees with restrictions. Managers may also fail to understand that an employee calling in sick several times with migraines may have rights under the FMLA and terminate the employee for attendance problems that should be disregarded.

Ultimately, managers seeking assistance earlier allows the company to exercise prudent oversight that not only avoids lawsuits, but allows the store to operate more smoothly.

Know The Jobs

Accurate job descriptions can be excellent evidence when defending claims by employees unable to perform their duties. Poorly written job descriptions, on the other hand, can be excellent evidence for a physically-limited plaintiff suing the company over his termination. For example, if the task the employee cannot perform is not on the job description, holding the inability to perform that task against the employee will look suspicious.

In defending claims by physically-limited employees, the process by which you identified the physical requirements of the job is a critical step. Eyeballing the job and coming up with educated guesses of lifting requirements will not stand when that perception is confronted with the reality of weights and measures. Using the requirements set out in the *Dictionary of Occupational Titles* will not be defensible where the actual job differs in its requirements. For example, some retail employees

might be required to carry heavy televisions, while others might never handle an item larger than a watch.

Investing in a professional assessment of the requirements of the job is well worth the time and money. First, it provides a baseline for accurately screening applicants’ ability to perform tasks. Employers are allowed to, and should, ask candidates if they are able to perform the functions of the job with or without reasonable accommodation. If the applicant would need an accommodation, determining if it is reasonable can be addressed before hiring the employee.

Second, the process of identifying the jobs’ physical requirements can at the same time identify opportunities for improvement in safety in how the jobs are done. Finally, the results will provide guidance when assessing what accommodations are reasonable when the question arises.

Coordinating With Workers’ Compensation

Perhaps the most critical component of managing physically-limited workers arises when the limitations come from a workplace injury. In these situations, the natural inclination is to have the risk management department or the workers’ compensation insurer run the situation. In some cases, this is a conscious decision due to the cost and burden of workers’ compensation claims. More often, it seems to be the default position because of the immediacy of the need to make decisions on medical care and income replacement benefits to the injured worker.

One of the common problems of this scenario is that once the workers’ compensation department takes over, no one considers the company’s ADA and FMLA obligations. Decisions that are beneficial to reducing workers’ compensation costs, fighting frivolous claims, and getting employees back to work, often are at odds with the company’s operational needs and its ADA and FMLA rights and obligations.

One of the driving precepts of managing workers’ compensation claims is that the sooner the employee returns to work, the greater the likelihood of a full recovery. But this means employees are likely to return before they are capable of doing their full job and before a final outcome of the injury can be predicted. The FMLA allows the employer to require employees to remain on leave for as long as they are incapable of performing all the essential functions, with or without a reasonable accommodation.

Under the ADA, you have the right to determine whether the injury-caused limitations can be reasonably accommodated. If not (and assuming the limitations are permanent) you may terminate an employee who cannot do the job. These rights are more often passed over in favor of limiting the workers’ compensation liability. The result is the store manager then has an employee on the payroll who cannot do a full job and who will require much more management time than before.

The key to managing these competing concerns is to assess them generally without regard to particular situations. Weigh the detrimental impact of limited employees returning versus the benefits to the workers’ compensation costs. Consider whether you can create a game plan that balances these competing concerns. Who will have responsibility for monitoring FMLA and ADA issues when an injury is reported? Should the workers’ compensation department be made responsible for issuing initial FMLA paperwork when notified of a claim? What will communications to the injured employee contain? Having a plan in advance for managing all aspects of an injured employee is much less likely to result in a claim than ad hoc decision making.

Unfortunately, managing the legal obligations is not the only issue. Once employees make workers’ compensation claims, they become protected against retaliation for making that claim under state laws. The prevalence of workers’-compensations-retaliation lawsuits is increasing and juries have been issuing sizable awards.

In our next issue, we’ll explore these claims, and suggest some steps that can be taken to reduce their risk.

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