I. Using Workers’ Compensation and the ADA to Your Advantage

A. Introduction

The Congress finds that some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older. The majority, if not all, of these persons have encountered, or will encounter, some form of discrimination in almost every aspect of their lives. In an effort to eradicate such discrimination, Congress enacted The Americans With Disabilities Act ("ADA" or "the Act"). Arguably the most significant piece of civil rights legislation since the Civil Rights Act of 1964, the ADA presents employers, as well as employees, with unparalleled challenges and opportunities in the work place.

The ADA represents Congress's intent to impose a comprehensive ban on discrimination against disabled persons, with the intention of bringing them into the mainstream of society. However, unlike previous civil rights legislation which prohibited discrimination based on physical characteristics such as age, race, sex or national origin, the ADA's prohibitions are premised on a sliding scale of disability.

The most significant feature of the ADA, however, is found in the "affirmative action" requirements of the Act. Whereas Title VII mandates that employers make employment decisions based on merit or ability to perform the job, the ADA mandates the "accommodation" of disabilities and requires employers, in some cases, to take into account the disability of an employee when determining whether a reasonable accommodation exists.

Since its enactment in 1990, the ADA has generated a tidal wave of Equal Employment Opportunity Commission (EEOC) charges and a torrent of litigation. On the whole, court decisions on ADA claims have interpreted the law narrowly, and more often than not, favored the employers' perspective. A recent survey by the American Bar Association (AABA) found that employers prevailed in ninety-two percent (92%) of the court rulings where a final decision was reached. This result may be explained in part by the restrictive definitions courts have imposed on the language in the statute, definitions which at times are at odds with the interpretations given by the enforcement agencies. Nevertheless, while these statistics superficially suggest a bias in favor of employers, it must be viewed in context: the ABA's statistics dealt only with court rulings and did not take into account the myriad cases in which employers settle claims or make accommodations for workers with disabilities without resorting to litigation, a widespread practice that some argue better carries out the legislative intent behind the ADA than any number of court victories. Yet, it is the latter two situations that often present employers with the most difficulties.
Title I of the ADA prohibits employers with fifteen or more employees from discriminating against a qualified applicant or employee with a disability because of the individual's disability, with regard to job applications, hiring, advancement or discharge, compensation, job training, and other terms, conditions and privileges of employment. The ADA defines "disability" as a physical or mental impairment that substantially limits one or more "major life activities." The ADA also prohibits discrimination against individuals who are simply "regarded as" having a disability, or who have a record of a disability.

The ADA defines a "physical impairment" as a physiological disorder, cosmetic disfigurement, or anatomical loss affecting a body system, such as the neurological, cardiovascular or reproductive systems. A "mental impairment" is a mental or psychological condition, such as emotional or mental illness. The ADA regulatory definition of mental impairment includes mental retardation, organic brain syndrome, and specific learning disabilities. Examples of emotional or mental illness include major depression, bipolar disorder, anxiety disorders (such as obsessive-compulsive disorder and post-traumatic stress disorder), schizophrenia, and personality disorders.

Not every impairment is a disability, and the ADA's protection may be invoked only for individuals with disabilities. To rise to the level of a disability, an impairment must "substantially limit" one or more "major life activities." Certain conditions that do not qualify as impairments are listed below:

1. Physical characteristics that are within normal ranges and are not the result of a physiological disorder, such as eye color, hair color, left-handedness, height, and muscle tone;

2. A characteristic predisposition to disease or illness;

3. Common personality traits such as irritability, chronic lateness, poor judgment, or a quick temper where these are not symptoms of a mental or psychological disorder;

4. Environmental, cultural, or economic disadvantages such as poverty, lack of education, or prison records;

5. Advanced age (although medical conditions often associated with advanced age, such as hearing loss and arthritis may be impairments);

6. Pregnancy (although certain high-risk pregnancies and complications of pregnancy may qualify as disabilities under the ADA); and

7. Temporary or transitory physical or psychological problems.
C. What Are "Major Life Activities" And How To Know Whether Impairments "Substantially Limit" Them

"Major life activities" are those basic activities that the average person in the general population can perform with little or no difficulty. These include caring for one's self, performing manual tasks, walking, sitting, standing, lifting, reaching, seeing, hearing, speaking, breathing, learning, working, thinking, concentrating, interacting with other people. More recently, the United States Supreme Court has determined that "the ability to procreate" is a major life activity.

An impairment does not constitute a disability unless it substantially limits a major life activity. When, due to an impairment, an individual is unable to perform a major life activity that the average person in the general population can perform, then the impairment may be regarded as a disability. For example, an individual whose legs are paralyzed is substantially limited in the major life activity of walking; a blind person is substantially limited in the major life activity of seeing. The inability need not be total: a person who can only walk for a very brief period, or one with limited vision but not total blindness, would be considered substantially limited in those major life activities.

In determining whether an individual is 'substantially limited' in a major life activity, the following factors should be considered:

1. The nature and severity of the impairment;

2. The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect the impairment has on the individual's life.

3. Some impairments may be disabling for particular individuals but not for others, depending on the stage of the disease or disorder, the presence of other impairments that combine to make the impairment disabling, or other factors.

4. According to the EEOC, some impairments, such as HIV infection, are inherently substantially limiting. However, unlike the EEOC, many Courts have been conservative in the application of any per se rules, finding that even such disorders as diabetes, cancer, and epilepsy are not necessarily disabling (particularly where the condition is controlled by medication).

5. Temporary, non-chronic impairments of short duration with little or no long-term or permanent impact (such as broken limbs or appendicitis) usually are not disabilities. However, complications, such as a broken leg that heals improperly or a head injury that results in impaired cognitive functions, would be impairments.
According to the EEOC, the determination of whether an individual is substantially limited in a major life activity must be made on a case-by-case basis, without regard to mitigating measures such as medicines or assistive or prosthetic devices. Recently, the Supreme Court rejected the EEOC's position on this matter, and held that ameliorative measures (both positive and negative) must be considered when deciding whether an individual has a physical or mental impairment that substantially limits a major life activity. For example, if a person can, with the aid of corrective lenses, have 20/20 vision, that person would not be considered to be substantially limited in the major life activity of seeing.

Whether or not an individual is disabled is determined based on the facts known at the time of the employment action. In other words, if an individual has a broken leg when she is terminated, and is reasonably expected to make a full recovery, she will not be considered disabled even if, after her termination, the leg fails to heal properly and she becomes restricted in the major life activity of walking.

An individual who is not substantially limited with respect to any other major life activity may be substantially limited with respect to the major life activity of working. According to the EEOC, the issue of whether an impairment substantially limits the major life activity of working need only be considered if the individual is not substantially limited in another major life activity (e.g., walking, breathing, seeing). Furthermore, an individual is only considered substantially limited in working if he or she is significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. Finally, the inability to perform a single, particular job does not constitute a substantial limitation on the major life activity or working. For example, a commercial airline pilot who is no longer qualified to command a passenger jet because of a minor vision impairment but who can still copilot a commercial passenger aircraft or pilot a cargo plane is not substantially limited in working because he is only unable to perform a particular specialized job or narrow range of jobs.

The ADA specifically excludes the current use of illegal drugs from the definition of “disability.” However, the ADA does protect individuals who have overcome drug addiction, including those who are in rehabilitation or have completed rehabilitation and are not currently drug users. With that said, employers are entitled to seek reasonable assurances that no illegal use of drugs is occurring or has occurred recently enough so that the continuing use is a real and ongoing problem. The reasonable assurances that employers may ask applicants or employees to provide include evidence that the individual is participating in a drug treatment program or evidence, such as drug test results, to show that the individual is not currently engaging in the illegal use of drugs.

Alcoholism is not expressly excluded as a disability under the ADA. However, an employer may prohibit employees from using or being under the influence of alcohol while at the work site or on duty. In addition, alcoholics are
not protected if they fail to meet their employer’s regular employment standards. Indeed, the ADA does not require an employer to tolerate conduct by a person with a disability that would not be tolerated in a person without a disability.

Also excluded from the definition of “disability” are transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders, compulsive gambling, kleptomania, pyromania, or psychoactive substance use disorders resulting from current illegal use of drugs. Homosexuality and bisexuality are not considered to be impairments, and thus cannot fall within the definition of “disabilities” under the ADA regulations.

An individual who has a physical or mental impairment that does not substantially limit a major life activity, but is treated as though the impairment does substantially limit a major life activity, also is protected from discrimination by the ADA.

D. Defining “Essential” Functions and the “Qualified” Individual

Under the ADA, a “qualified individual with a disability” is one “who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.” Therefore, an individual who cannot perform the essential functions of a position is not a “qualified individual with a disability” and cannot prevail on an ADA claim. In other words, if an individual cannot meet the minimum requirements for the position, he or she is not qualified for the job.

This highlights the importance of determining whether a certain duty or activity is a “function” of the job, and whether or not it is “essential.” Normally, an employer’s determination as to what is “essential” is given deference. The EEOC has stated that a function may be essential if:

1) the position exists to perform the function;

2) there are a limited number of employees who could perform the function; or

3) the function is highly specialized.

In addition to the employer’s judgment, other evidence relevant to the determination of whether a function is essential includes:

1) any written job description that exists for the position;

2) the amount of time spent performing the function;

3) the consequences of not requiring someone to perform the function;
4) the terms of a collective bargaining agreement, if any; and

5) the work experience of those who have performed, or are performing, the job.

E. “Direct Threat”

Nothing in the ADA prohibits an employer from taking steps to protect the safety of its employees in the workplace. Thus, an employer may exclude someone from a job if that person poses a “direct threat” to health or safety. In order to prove that an employee (or applicant) poses a direct threat, an employer must show that the individual with a disability would pose significant harm to the health or safety of the individual or others, and that this harm could not be eliminated through reasonable accommodation. As with any other qualification criterion under the ADA, the direct threat standard must be applied uniformly to all job applicants and employees. Many of the lawsuits in which the issue of direct threat is raised involve a “hidden disability,” such as back impairments, mental illness, AIDS or HIV, or epilepsy.

The EEOC has indicated that the employer must identify the specific risk presented by the individual with a disability. For those who have mental or emotional disabilities, the employer must identify the specific behavior of the individual that would lead to an increased risk of harm. This identification must be based on the behavior of the particular disabled person, not merely on generalizations about the disability.

In assessing whether someone poses a direct threat, the EEOC and courts have said that employers should consider:

a. the duration of the risk;

b. the nature and severity of the potential harm;

c. the likelihood that the potential harm will occur; and

d. the imminence of the potential harm.

If an employer determines that based on this analysis the person with a disability poses a significant risk of substantial harm, the employer should analyze whether a reasonable accommodation is available that would reduce the risk to the level at which there no longer exists a significant risk. The risk of harm need not be eliminated entirely by an accommodation. Only if a reasonable accommodation will not eliminate or reduce the direct threat may an employer
exclude individuals with contagious diseases or infections or other conditions that threaten the health or safety of other individuals in the workplace.

EEOC Guidance on psychiatric disabilities also suggests that relevant information for making this assessment may include the following:

a. input from the individual with a disability;

b. the experience of the individual with a disability in previous similar positions;

c. the opinions of medical doctors, rehabilitation counselors or physical therapists, who have expertise in dealing with the individual's particular disability; and

d. the opinions of medical experts who have direct knowledge of the individual with the disability.

F. Reasonable Accommodation

By far, the most perplexing concept under the ADA is what constitutes a "reasonable accommodation" and how far does an employer's obligation to provide a reasonable accommodation extend? Exactly what constitutes a "reasonable accommodation" is not clearly spelled out in the ADA. Under the EEOC's regulations, an accommodation consists of any change in the work environment or the manner in which a job is usually performed that "enables an individual with a disability to enjoy equal employment opportunities." The regulations specify a three-part definition of the term "reasonable accommodation" as meaning any modification or adjustment:

1. To the job application process that enables a qualified individual with a disability to be considered for an employment position;

2. To the work environment or the manner in which a job is performed, that enables a qualified individual with a disability to perform the essential functions of that position; or

3. That would enable an employee with a disability to enjoy equal benefits and privileges of employment as similarly situated employees without disabilities.

The obligation of employers to provide "reasonable accommodation" is meant to ensure only that individuals with disabilities receive equal access to the benefits and privileges of employment, not to ensure that the individuals receive the same results of those benefits and privileges or precisely the same benefits and privileges.
Under the EEOC's approach, whether an accommodation is “reasonable” turns upon whether the accommodation is effective in enabling an individual with a disability to enjoy equal employment opportunities. Under the EEOC's method, the cost of an accommodation is not controlling to a determination of whether it is “reasonable.” Some courts, however, have evaluated whether a proposed accommodation is “reasonable” by weighing the benefits of the accommodation in relationship to its costs. In fact, the cost/benefit analysis has garnered increasing use by courts because of concerns that the ADA could require employers to spend funds for reasonable accommodation far beyond any benefits that may be produced.

In assessing whether an accommodation is “reasonable,” courts also ask if the accommodation is effective; that is, whether it addresses the job-related difficulties presented by the employee's disability and whether it would enable the employee to attain an equal level of achievement, opportunity and participation that a non-disabled individual in the same position would be able to achieve. Courts applying this analysis have concluded that for an accommodation to be reasonable, it must be effective in permitting a disabled worker to perform the essential job functions.

A “reasonable” accommodation need not be the “best” accommodation possible so long as it provides a meaningful equal employment opportunity. As long as an accommodation satisfies this test, an employer need not provide an alternative, “better” accommodation, nor does the employer have to provide the employee with the accommodation of his or her choice. For example, an employer would not have to provide an employee disabled by a back injury with a “state-of-the-art” mechanical lifting device if the employer provided the employee with a less expensive or more readily available alternative device that still enables the employee to perform the essential functions of the job. Hence, given two effective accommodations, the employer may choose the less expensive accommodation or the accommodation that is easier to provide.

While there are no hard and fast rules as to what is and is not a reasonable accommodation, employers are frequently called upon to restructure jobs, provide modified work schedules, or reassign a disabled employee into a vacant position. Job restructuring means modifying a job so that a person with a disability can perform the essential functions of the position; it also entails removing barriers to performance by eliminating nonessential functions. Job restructuring may require such things as redelegating job assignments; exchanging assignments with another employee; and redesigning procedures for accomplishing certain job functions. It is important to note, however, that the ADA does not require an employer to reallocate or eliminate essential job functions as part of a restructuring because, by definition, essential functions are those the employee must be able to perform to be considered qualified for the position.

Modified work schedules may be used to accommodate individuals who experience mobility problems. For example, individuals with disabilities who depend on public transportation may have limited travel times; adjusting the
employee’s arrival or departure time may significantly lessen these commuting problems. Modified work schedules may also be required to accommodate persons so have certain types of medical disabilities or who need medical treatment during the week or at various times during the day. For example, a person with epilepsy may require a constant shift rather than being rotated from day to night shifts.

Courts have found, however, that open-ended and work-when-able schedules are not reasonable accommodation under the ADA. Furthermore, reasonable accommodation does not require an employer to do away with job attendance requirements. An employer may discipline a tardy disabled employee the same way it would discipline any other tardy employee. In fact, the EEOC has specifically stated that an employer does not have to tolerate chronic lateness. Nevertheless, if an employee requests, for example, an alternate work schedule or flexible hours so that she can satisfy the attendance rule, the employer must consider whether the accommodation can be provided without imposing an undue hardship.

Reassignment to a vacant position may arise where a current employee no longer can perform the essential functions of the job and that inability cannot be overcome by another reasonable accommodation. In such circumstances, the employer has an obligation to offer a transfer to a vacant position for which the employee is qualified. Nevertheless, most courts addressing the duty of an employer to consider reassignment as a potential reasonable accommodation have interpreted this obligation as requiring employers to reassign disabled individuals only if the employer has a regular practice or policy of reassigning non-disabled employees to other positions. Moreover, the employer needs to consider reassignment only into vacant positions; bumping another employee out of a position is not required. Courts also have consistently held that employers are entitled to assign personnel as their needs dictate and are not required to make transfers in order to avoid personality or insubordination problems on the part of the employees.

Finally, there is no requirement that an employer "create" a position to accommodate a disabled employee. This includes light duty positions. Furthermore, an employer may lawfully restrict light duty to those employees with work related injuries, and only on a temporary basis.

G. Undue Hardship

The ADA does not require an employer, in every instance, to make a requested or necessary accommodation to an individual with a disability. An accommodation need not be undertaken if that accommodation would impose an undue hardship. Undue hardship is defined under the Act as “an action requiring significant difficulty or expense.” Even though an accommodation may not be costly to implement, the accommodation could still create an undue hardship if implementing the accommodation would be unduly disruptive to other
employees, patrons or customers, or would fundamentally alter the employer's business.

In analyzing whether an accommodation would impose a fundamental alteration of the employer's business, the EEOC counsels that more than the functions of the particular job must be affected. In other words, even though an accommodation may fundamentally alter the nature of the job being sought by an individual with a disability, this type of alteration may not rise to the level of an undue hardship. As long as the employer's business operations are not fundamentally changed by the alteration of the nature of the particular job, the EEOC's undue hardship standard may not be satisfied.

The EEOC regulations provide that the impact of an accommodation on the ability of other employees to perform their duties is one of the factors to be considered when determining whether a particular accommodation would impose an undue hardship on an employer. Thus, in theory, the adverse impact on the morale of other employees caused by implementing an accommodation may be relevant to a determination of undue hardship. According to the Commission, however, the negative effect on morale, by itself, is not sufficient to meet the undue hardship standard. In addition to lowering morale, the employer must also show that the provision of the accommodation would have a negative impact on the ability of its employees to perform their jobs.

Additional factors are also considered in assessing whether a proposed accommodation imposes an undue hardship on an employer, including the number of employees or applicants potentially benefiting from the accommodation and the availability of outside funding to pay for the accommodation. The potential business and financial benefit stemming from making accommodations, therefore, may be included in the undue hardship equation.

Several court decisions suggest that an employer will be unable to rely on undue hardship as a defense unless it has specifically conducted an analysis to determine whether the accommodation presents an undue hardship. The employer will be required to present credible evidence in support of their undue hardship argument, and must present a strong factual basis that is free of speculation or generalization about the nature of the individual's disability or the demands of a particular job.

H. Leave As A Reasonable Accommodation - Complying With ADA and FMLA

It is clear that unpaid leave can be a reasonable accommodation under the ADA, depending on the circumstances. Prior to exploring the issue of when leave may be an appropriate accommodation under the ADA, a brief review of key distinctions between the FMLA and the ADA may be useful. The ADA applies to employers with more than fifteen employees while the FMLA applies to employers with more than fifty employees. Under the ADA, employees who are
“qualified individuals with disabilities” will be entitled to leave under certain circumstances. Additionally, the employer’s leave obligations conceivably may be open-ended. In contrast, the FMLA provides a maximum of twelve weeks leave per twelve months, and the employee must have worked a minimum of 1,250 hours during the previous twelve month period to be entitled to FMLA leave. Additionally, the triggering physical conditions of the respective Acts differ. A qualifying “disability” under the ADA may or may not be a qualifying “serious health condition” for purposes of the FMLA, and vice-versa. Moreover, whereas the ADA contains an undue hardship defense for employers, the FMLA does not.

According to the EEOC, an otherwise qualified individual with a disability may be entitled to more than twelve weeks of unpaid leave (i.e., FMLA plus additional leave) as a reasonable accommodation if the additional leave would not impose an undue hardship on the employer’s business. To evaluate whether additional leave would impose an undue hardship, the EEOC allows employers to consider the impact on its operations caused by the employee’s initial twelve-week absence, along with the undue hardship factors specified in the ADA.

Be that as it may, a majority of courts ruling on the issue have held that the ADA does not impose on employers a duty to provide indefinite leave as a reasonable accommodation. Thus, while in certain circumstances an employer may be obligated to continue unpaid leave beyond the twelve-week entitlement, the employer does not have to carry the employee on leave forever.

A somewhat troublesome issue that arises under the FMLA and ADA is reinstatement rights. Under the ADA the employee is entitled to return to the same job unless the employer demonstrates that holding the job open would impose an undue hardship on the employer’s business. In contrast, the FMLA requires the employer to return the employee into her previous position unless restoration to that position would cause the employer “substantial and grievous economic injury.” The FMLA’s “substantial and grievous economic injury” standard is much more stringent than the “undue hardship” test under the ADA. The employer’s best approach, therefore, whenever a qualified employee seeks extended leave for treatment of a chronic health problem, would be to consider the employee’s request as a dual request for FMLA leave as well as concurrent ADA accommodation by way of leave. If the employee is able to return after twelve weeks (or whatever FMLA leave time may be remaining in the twelve month period used), then under the FMLA he or she must be returned to the same or equivalent position.

II. INTERACTION BETWEEN ADA AND WORKERS’ COMPENSATION

Since the passage of the ADA, employers and insurers alike have been dealing with a myriad of issues under workers’ compensation law that also bring into the play the provisions of the ADA. Often, those who deal with the interplay of these two laws (not to mention the FMLA) feel as though they are "caught in the crossfire" of the mandates of each law. Too often, employers, in light of the
ADA, approach workers’ compensation issues from the standpoint of what they cannot do, rather than what they can. This is a mistake.

In fact, in many instances, ADA and workers’ compensation issues dovetail nicely; that is, an employer can use the provisions of both of these sets of laws to their advantage. Set forth below are some of the more prevalent issues that employers concern themselves with regarding the ADA/workers’ compensation overlap.

A. The Subsequent Injury Trust Fund, Rycroft and The Americans With Disabilities Act

Consistent with the public policy of the State of Georgia, the Subsequent Injury Trust Fund (SITF) is designed to encourage employers to hire injured workers or those with preexisting conditions by helping to defray the cost of those injuries if the preexisting condition either causes, or is made worse by, a subsequent injury. Implicit in any SITF inquiry is the open and legitimate exchange of information between the employee and his actual or potential employer so that the employer can make an informed decision to hire or retain an employee with knowledge of the preexisting condition(s). Without that informed decision, the employer does not have recourse to the SITF.

Partially for this reason, the Georgia Supreme Court decided in the Rycroft case that where the employer relied upon an employee’s wilful misrepresentation of his prior condition, then the employee’s claim may be denied. The Court emphasized that for a false statement to bar benefits, three factors must be present: 1) the employee must have made a knowingly and willfully false representation as to his physical condition; 2) the employer must have relied upon the misrepresentation as a substantial factor in the hiring decision; and 3) there must be a causal connection between the misrepresentation and the injury. Case law subsequent to Rycroft has made clear that the misrepresentation need not be written, and that a misrepresentation made after a decision to hire, but during the initial intake process before the employee commenced work was sufficient to deny the employee’s benefits.

With the advent of the ADA, public policy concerns in the protection of the employer’s interests with the SITF seemed to have given way to the concerns about possible discrimination as well as the privacy concerns of the employee. Furthermore, many assumed that the efficacy of Rycroft in the ADA world was either gone or severely, limited. That concern was put to rest by the Georgia Supreme Court, which held that a false representation defense adopted in Rycroft can be completely consistent with the ADA. The Court also held that the employer could rely upon the false representation defense even if the questions violated the ADA. The Court stated that the ADA does not authorize or countenance the use of knowing and willful misrepresentations by employees in response to improper questioning by the employer. There is not necessarily any inconsistency between the employer’s quest for information and the prohibitions against discrimination. Properly handled, the employer can still obtain the
necessary information without violations of the ADA. Those inquiries, made at the proper time and appropriately handled after the information has been obtained provide little chance for liability on the part of the employer.

Set forth below are the restrictions on medical inquires under the ADA, and how an employer can still use Rycroft and the SITF in connection with workers' compensation claims.

B. Medical Examinations And Inquiries Under The ADA

1. When Can We Ask and What Can We Ask?

There are three basic rules regarding inquiries and medical examinations under the ADA. At the pre-offer stage of employment (i.e., the interview process), an employer may not ask any disability-related questions nor require any medical examinations, even if the questions or examinations are job related. A disability-based question is one that is likely to elicit information about a disability. This includes direct questions regarding a disability (e.g., Do you suffer from a hearing impairment?) and questions closely related to a disability (e.g., Do you have trouble hearing?). Pre-offer questions regarding an applicant's previous work-related injuries or workers' compensation history are considered to be "disability-related" and thus prohibited by the ADA.

In short, an employer's inquiry at the pre-offer stage is limited to whether the applicant can perform the essential functions of the job. An employer may state the physical requirements of the job (e.g., lifting twenty-five pounds, ability to climb ladders) and ask the applicant if he/she can satisfy these requirements. In addition, the employer can identify the functions of the job at issue and ask the applicant whether he/she can perform those functions with or without a reasonable accommodation.

At the post-offer stage (after an applicant has been given a conditional offer of employment), the ADA allows disability-related questions and medical examinations, provided that all employees in the job category are asked these questions and/or given the examinations. At this stage, employers may ask about an individual's workers' compensation history, prior sick leave usage, illnesses, diseases, impairments and general health. Furthermore, these inquiries do not have to be job-related. Employers should be advised, however, that extensive questions in these areas could provide the basis for an argument that the employer "regarded" the employee as having a disability, or preclude the employer from arguing that it did not know of the employee's disability. These issues are crucial should the employee claim that he/she was discriminated against because of his/her disability. Thus, although these types of questions are permissible under the ADA, an employer should ask only those questions that are relevant to the employment of the individual.
During the employment of an individual, an employer can only ask disability-based questions or require medical examinations if they are job-related and consistent with business necessity. An inquiry or examination is "job-related and consistent with business necessity" if: 1) the employer has a reasonable belief that an employee’s ability to perform the essential functions of the job will be impaired by a medical condition; or 2) the employee will pose a direct threat due to a medical condition.

With respect to work-related injuries, the ADA does not prohibit an employer or its agent from asking disability-related questions or requiring medical examinations that are necessary to determine workers' compensation liability. These examinations and/or inquiries should be limited to the specific occupational injury and its impact on the individual. Unnecessary or excessive questioning and examinations may give rise to a claim that the employee has been "harassed" because of his/her disability.

Based on the above, it is clear that employers can obtain relevant information that would allow them to avail themselves of the Rycroft defense and/or take advantage of the Subsequent Injury Trust Fund if they ask pertinent medical questions after a conditional offer of employment has been made. The ADA prohibits obtaining this information prior to the conditional offer of employment.

2. Where Should Medical Information Be Kept?

As a general rule, an employee's medical information should be kept separate from the employee's personnel file. The EEOC has suggested that such information be kept in a separate, locked cabinet and that one person have access to the cabinet.

While it is not necessary for employers to go this far, it is crucial that employers keep the information separate from other personnel documents, and strictly limit access to the information to those who have a reason, or need, to know (e.g., supervisors and managers where there is a request for an accommodation or an issue about whether the employee can safely perform the essential functions of the position in light of physical restrictions placed on the employee by a physician; workers' compensation insurers; attorneys; etc.).

C. Return To Work Issues

1. Workers’ Compensation Considerations

While the prospect of returning an injured employee to work is somewhat frightening and very often perilous, it may also present the employer with a golden opportunity to gain control over its workers' compensation claims. If
handled correctly, it can, and most often does, lead to less expensive claims and an improved reputation at the State Board of Workers' Compensation.

A return to work in this context assumes that the employee had a valid injury which was accepted as compensable and that he/she has been released to perform less than full duty unrestricted work. It is also important to note that a return to the regular job is not the recognized equivalent of a return to normal duty or a release without restrictions. If the employee has been released to normal duty, the employer is under no obligation whatsoever to return that employee to work or to continue paying benefits.

If, however, your injured employee has restrictions, it is unquestionably to your advantage to offer a return to suitable work. In the context of the workers' compensation system, suitable work is that work which is suitable to the physical restrictions given to the employee by the authorized treating physician. The Georgia Supreme Court has made clear that the only relevant inquiry in this context is whether the job duties are suitable to the employee's restricted capacity. The only question is whether the employee is physically capable of performing that job. While it is the employer's burden to establish that the job is in fact suitable, the employee can attempt to establish that the job is not suitable by such evidence as contrary medical establishing that the job is not suitable, testimony from the claimant that the job is beyond his capacity or ability or evidence that the job description does not accurately reflect the job which he was asked to perform.

The State Board of Workers' Compensation does, however, have the authority in O.C.G.A. § 34-9-240(a) to find that although the job may be within the employee's restrictions, the employee's refusal to perform it was justified. The Georgia Supreme Court has decided that the refusal to perform must relate, in some manner, to his physical capacity or his ability to perform the job in order for that refusal to be justified within the meaning of § 34-9-240. The only reported examples of justifiable refusal to perform proffered employment predate the Supreme Court’s decision referenced above. Those examples are:

1. While the employee was physically capable of performing the job, she lacked the skills to adequately perform it;

2. The job offered no prospect for advancement.

Given the Supreme Court’s decision set forth above, the continuing vitality of example number 2 is in question.

Finally, since the Georgia Supreme Court’s decision, Georgia courts have consistently held that the employee is not justified in refusing suitable employment if the job offered conflicts with other part-time work that the claimant is already performing.
Your efforts at returning employees to work can either be greatly aided or frustrated by the treating physician in whom the responsibility for approving light duty employment lies. It is not sufficient that another doctor, even one who has examined the claimant for a second opinion or an independent medical examination, issues an opinion as to suitability of light duty. Furthermore, if the employee is under the care of two or more physicians, we strongly advise that you obtain approval for each job description from each of the treating physicians who are actively treating the claimant. It is, therefore, crucial for you to obtain and maintain control over which physicians treat your injured employees. The subject of control over medical is an issue unto itself, not amenable to a brief discussion. As an outline, however, you should assure strict adherence to the following:

1. You must have posted, in a conspicuous place accessible to your employees, a panel of physicians with at least four different doctors (a group counts only as one) with at least one orthopedist and no more than two industrial clinics. If available, a minority physician should be included. After December 31, 2001, the panel must consist of at least six physicians.

2. You must advise your employees of the panel and their rights to treatment and must post an employees bill of rights, also in a conspicuous location.

3. You must allow the employee to choose the doctor from the panel and assist them in scheduling or attending the appointment.

4. If in an emergency circumstance, the employee can seek treatment from a hospital but must return to a panel doctor when the emergency subsides.

5. If your employee wishes to change physicians, the employee can switch, once, from the first panel doctor to another. [Note: referral from one panel doctor to another does not eliminate the right to one free switch].

2. Pre-7/1/92 Injuries

For these claims, the employer has been and always will be at a distinct disadvantage. The injured employee has an unlimited number of weeks he/she can receive workers’ compensation benefits. Those benefits could only be suspended if the employee actually returned to work for the same or another employer or if the authorized treating physician released the employee to return to work at normal duty. If the employee did return to work, the focus then shifted to whether the employee was earning less than the pre-injury wage. If so, temporary partial disability (TPD) benefits were then owed. The employee is only eligible for TPD for 350 weeks from the date of the injury.
Without the authorization for unilateral suspension of benefits, it is easy to see how this employee could simply sit back and collect benefits indefinitely. In order to prevent this, or stop it once it has occurred, the employer must be willing to offer this employee a job and force the employee back to work under penalty of suspension of his benefits. If the employer will not tender such an offer, then the only remaining choice is to continue paying income benefits or to attempt a settlement with the injured employee. Settlement in this context can be a difficult and expensive process.

3. Claims Occurring Between 7/1/92 And 7/1/94

The Workers’ Compensation Act was amended, effective 7/1/92 changing the substantive rights and procedures for suspension of income benefits for employees with continuing restrictions. This applies only in non-catastrophic cases. It is important to note that THE EMPLOYER IS NOT PERMITTED TO UNILATERALLY SUSPEND THE EMPLOYEES BENEFITS FOR PRE-7/1/94 CASES UNLESS THE EMPLOYEE ACTUALLY RETURNED TO WORK. The State Board has issued a form (Form 104), which is to be used when the employee was given light duty restrictions. (This form is still applicable under the present Act but its utility is limited given other substantive changes effective 7/1/94). When the authorized treating physician gives the employee limited duty restrictions (in other words no longer completely disabled) the employer/insurer is obligated to complete Board Form 104 and to send a copy of the completed form to the employee notifying him/her of the restrictions. This form needs to be provided to the employee within sixty days of the date of the doctor's release.

If the employee was properly notified of the release, then the clock starts to tick on the employee’s entitlement to continued total disability. While the employee has light duty restrictions, he/she is entitled to receive only fifty-two consecutive weeks of TTD or seventy-eight weeks total if the doctor excuses the employee from work at any time during that period. If the employee reaches fifty-two weeks and has not returned to work, the employer is authorized to unilaterally convert these benefits to temporary partial disability. For these purposes, the average weekly wage should be deemed to be $0.00. The employee would most often be entitled to the maximum TPD rating. If the TTD was less than the maximum TPD rating, you should continue the same amount but classify it differently as TPD by filing a WC-2 Form. This will allow you to suspend TPD at 350 weeks after the date of the injury if the employee has still not returned to work.

For those cases occurring before 7/1/94, a motion may be filed with the State Board requesting a suspension of benefits for the employee's unreasonable refusal to return to employment which has been deemed suitable by the authorized treating physician. The employer must in this case give a written job description to the doctor who reviews and hopefully approves it. If approved, the job offer is given in writing to the employee. If the employee refused to return to that job, the employer then: 1) requests an evidentiary hearing to determine if the employee's benefits should be suspended; and 2) files
a motion for an interlocutory order requesting a suspension of benefits pending the hearing. Attached to that motion must be the employer's affidavit that the job description is accurate and that it continues to be available to the employee. Also attached must be a job description signed and approved by the doctor. THE JOB DESCRIPTION MUST BE TENDERED WITHIN SIXTY DAYS OF THE DOCTOR APPROVING THE JOB DESCRIPTION. There is no requirement that the treating physician actually examine the employee within that sixty day period however, stale medical evidence may not ultimately be convincing to the Administrative Law Judge. The employee then has the opportunity to object to the motion within fifteen days. Thereafter, the Board will issue its order, which must be followed pending the hearing.

While the WC-240 does not specifically apply to those injuries occurring before 7/1/94, the State Board had, prior to 7/1/98, encouraged employers to use the WC-240 and the procedures within Board Rule 240. With the changes to the Board’s Rules effective 7/1/98, however, the Board has made clear that even without resorting to a WC-240, the employer must follow the procedures for recommencement of benefits in the event of an unsuccessful return to work, or waive its defense/contention that the job offered was suitable. Therefore, the procedures within § 34-9-240 and Board Rule 240 must be followed scrupulously regardless of the date of accident.

4. Post-7/1/94 Injuries

Effective 7/1/94, O.C.G.A. § 34-9-240 was amended to allow for the unilateral suspension of benefits if an employee does not return to suitable approved employment. The job must be tendered to the employee on Board Form 240, which advises of the job duties and the date on which the employee is expected to return. If the employee refuses to attempt the job, the employer should then file a copy of that form along with a WC-2 suspending the TTD benefits. Under this procedure, there is no obligation to commence TPD benefits to the employee. After this suspension, the employee has the burden of showing the refusal was justified.

If the employee returns to the proffered job, then the benefits should automatically be suspended with the filing of a WC-2 indicating an actual return to work. If the employee cannot perform the job for more than fifteen days, then he/she shall be placed back on benefits. The burden of proof in this instance is on the employer to show that the claimant was indeed capable of performing the job.

D. Coordination With Treating Physicians

As noted above, your job in achieving a successful return to work and the concomitant suspension of benefits is made much easier if you have a good working relationship with the treating physician. That is not to say that your choice of a physician will always agree with a return to work or that the employee’s choice will inevitably disable the worker. Instead, the physician is just
the same as everyone else. The doctor has predispositions, "gut feelings," and very often makes a judgment call based upon his opinion of the parties. If the doctor believes that you are not interested in the welfare of your employees, he or she may not be willing to give you the benefit of the doubt. The same is true if the doctor believes that the employee is whining, overly sensitive or "in it for the money."

When you set up your panel of physicians, ask the doctors for permission to include their names on your list. Explain that you wish to work with, not against, their efforts. Invite the physician for a tour of your facility. This invitation would have the dual purpose and benefit of getting to know the doctor and allowing him to see the various jobs in your operation. In fact, if you have a light duty return to work program in place, you may be able to show the doctor the various positions that you will offer for restricted duty work. You may wish to include the doctors in the design of light duty employment so that when the job is presented for approval, your physician already knows more about the job than the employee and what the employer can do to accommodate the employee.

The steps necessary to coordinate a return to work for your employees will very likely depend upon the date of that employee's accident. What will not vary is the abject necessity for RECENT medical information from the doctor. The changes to the Board Rules effective 7/1/98 provide that the employer should send a copy of the job description to the employee and/or his attorney at the time that description is submitted to the treating physician for approval. See Board Rule 240(b)(1).

You must present the physician with a description of the essential duties to be performed. It is not necessary for a formal job analysis to be conducted by a rehabilitation specialist but, in some limited instances, you may wish to consider this option. You should not, however, have that rehabilitation supplier contact the employee or the treating physician without explicit permission to do so from the employee and his attorney.

E. Returning The Injured Employee To Work: General Considerations & Guidelines Under The ADA

Six years after the effective date of the ADA, employers are faced with ADA questions on a regular basis. Most of the time, these questions relate to returning an injured employee to work after they sustain an on-the-job injury.

As a preliminary note, not all employees with work-related injuries enjoy the protection afforded by the ADA. The ADA only covers those individuals who have a disability, individuals who are regarded as having a disability and individuals with a record of having a disability. Many employees who suffer work-related injuries are not, however, individuals with disabilities because their injuries are not of such severity that they have a long-term impact on a major life activity.
While employees with minor workers' compensation injuries will not usually enjoy the protection afforded by the ADA, prudent employers may nonetheless be able to minimize workers' compensation-related costs and, at the same time, minimize exposure under the ADA by considering whether a reasonable accommodation may be made to enable an injured employee to safely return to work. By taking the ADA into consideration, the injured worker is quickly returned to work, thereby lowering temporary disability costs. Also, when the employee is provided a reasonable accommodation to enable the injured employee to return to work, the employer provides itself with defenses to subsequent ADA claims brought by unhappy injured employees.

In sum, rather than facing work-related injuries that implicate the ADA with great fear and trembling, employers should recognize that, like certain workers' compensation provisions, the reasonable accommodation process of the ADA can be your "friend." There are a number of ways in which you can "embrace" the reasonable accommodation process and use it to your advantage.

As an initial matter, it is important to bear in mind that the concept of "reasonable accommodation" can involve altering a person's existing job or finding the person another job. Therefore, when an injured employee can return to work in some capacity, the first step an employer should take is to specifically identify a job to which the employee will be returned. In that regard, the first issue that must be dealt with is whether the employer can provide a reasonable accommodation to allow the employee to perform the essential functions of his or her current job. If the employer cannot provide a reasonable accommodation to the employee in his or her current position, the employer must explore whether the employee will be able to safely perform the essential functions of other jobs with or without a reasonable accommodation. Once again, the employer need not create a job, bump someone from a job or violate bona fide bidding or seniority rule to provide a disabled person with a position. Furthermore, an employer need not place a disabled employee in a vacant position for which he or she is not otherwise qualified. The obligation of an employer with respect to reassigning a disabled employee applies only to vacant positions for which they are eligible and/or qualified.

Nevertheless, the first step is to gather detailed information about the essential functions of the job(s) at issue. A detailed job description listing essential functions for the job will assist in this process. In this regard, input from employees who actually perform the job is of great assistance and should be utilized both in creating job descriptions and during the reasonable accommodation process.

Second, the employer should gather appropriate medical information regarding the employee’s injury or impairment, as well as, data reflecting the employee’s ability to safely perform the essential functions of the job(s) in light of his/her injury. This is a process which requires interaction with the employee, as well as, with the health care provider.
Doctors often mistakenly restrict employees from performing work based upon assumptions, rather than objective evidence, because the physicians were not supplied with sufficient information about the employee's job duties on which an objective medical opinion regarding the employee's abilities can be based. Accordingly, the more a physician knows about a position and those functions which the employer thinks may pose a direct threat, the more a physician is in a position to recommend that the employee perform a job or that the employee be restricted from performing that job. Likewise, if a doctor understands the employee's duties, the physician may be able to suggest reasonable and inexpensive accommodations to enable the employee to safely perform the essential functions of the job.

By taking these extra steps in communicating with an employee's doctor, the employer places itself in a more defensible position under the ADA because it made a job decision based upon objective medical evidence and recommendations, instead of basing the decision on subjective opinions or assumptions about what duties the employee would be expected to perform in light of the employee's injury.

Physicians are, however, busy people and they often do not quickly or adequately supply the information necessary for an employer to continue its analysis of whether the employee is able to return to his or her job. Thus, the employer may want to utilize a two-pronged approach to ascertain and extract medical information from the employee's physician. First, the employer should encourage the physician to observe the job to which the employee is seeking to return, and specifically observe those functions the employer believes pose a direct threat to the employee's or others' health and safety. While a doctor's on-site visit of the employer's facilities would be best, often this is impractical given most doctors' busy schedules.

Thus, the employer should bring the workplace to the doctor's office. This can be accomplished by videotaping an employee performing the proposed job duties that the injured employee would be performing if he/she returns to work. The videotape need not be a Hollywood-quality production, but should fairly portray all the job functions that the injured employee would be expected to perform should he/she return to work.

After a videotape is made, it should be sent to the injured employee's physician, together with a questionnaire which the doctor can complete after observing the video. The questionnaire's purpose is to determine whether the identified risks are "significant" in light of the employee's medical limitations. The questionnaire will ask the doctor to consider, for example, the duration of the risk, the nature and severity of the potential harm in light of the employee's injury and the likelihood that harm will occur given the prognosis for the employee's injury.

The third prong of the action plan involves communicating with the employee the company's efforts to determine whether a reasonable accommodation can be provided the employee. By keeping in contact with the
employee, the employer lets the injured employee know that it is in the process of identifying whether he/she is able to return to work and under what conditions said return to work would be possible. Further, by communicating with the injured employee, the employer enlists the employee’s assistance in motivating the physician to thoroughly respond to the employer’s questionnaire so that it will be provided with sufficient information to make an educated decision about whether the employee’s medical restrictions pose a direct threat to the employee’s ability to perform the essential functions of the job. Mind you, this communication is required by Board Rule 240, as the employer is required to send a copy of the job description to the employee (or his/her attorney) when it is submitted to the doctor for approval. Thus, in the workers’ compensation context, these communications document the employer’s good faith effort to place the employee in a suitable position in light of his injury.

Also, an employer should always engage the injured employee in a discussion to gather his/her ideas about what reasonable changes could be made to the proposed job that would enable him/her to safely perform that job. The EEOC requires the employer to consult with the individual employee to identify potential accommodations and assess how effective each would be in enabling him/her to perform the essential job functions. Given the sometimes-adversarial nature of the workers’ compensation system, this may be difficult. In this regard, some involvement with claimant’s counsel may be necessary. Thus, by discussing the situation with the employee, the employer minimizes its risk of liability under the ADA. Moreover, the injured employee is often in the best position to know what reasonable accommodation is needed to enable him/her to perform the job, and the employee’s suggested accommodation is often easier and less expensive than the accommodation proposed by the employer or the physician.

After the employer receives a response from the employee’s physician, the employer will then be in a favorable position to determine: 1) what possible reasonable accommodations can be made to the proposed job to allow the employee to safely return to work; and, 2) whether the employee’s injury poses a direct threat to his or her or others’ safety if the employee returns to work. Again, what constitutes a reasonable accommodation depends upon the information received from the employee’s physician. For example, depending on the injury, the company might need to consider what devices are readily available (and the expense of such devices) which might assist the employee in performing specific tasks that he/she cannot otherwise perform.

After making these inquiries, both the employer and the injured employee may, based upon the objective medical evidence, be unable to identify a reasonable accommodation that would enable the employee to safely perform the proposed job(s). If that is the case, other forms of accommodation (e.g. leave) should be considered.

In sum, the touchstone of the obligation of an employer in the reasonable accommodation area is to engage the employee in an “interactive process” to
assess the request and/or need for a reasonable accommodation. As you can see, engaging in a reasonable accommodation process under the ADA is similar to an employer's efforts to return an employee to provide suitable employment in the workers’ compensation arena.

Finally, while results are obviously important, what is crucial from the ADA standpoint is the good faith attempt. The employer must engage in the interactive process of attempting to provide a reasonable accommodation to an employee. It is important that the employer take good faith reasonable steps to provide assistance to the disabled individual. Along those lines, meeting with the employee and asking him or her, "How can we [the employer] help you [the employee] come back to work?" is an extremely effective strategy.

First, in the case of employees who really want to return to work and do not want to "lay out" of work and receive workers’ compensation benefits, the employer and employee are able to work together and will often find solutions with which both can be happy. In the case of an employee who does not want to work with the employer and appears to be more interested in being declared disabled, or for those employees who appear to be trying to take advantage of the protections they have been provided, the "how can I help you" strategy is totally disarming, is often the last thing these employees expect, and may eventually require the employee to make a decision to come back and work productively or potentially lose benefits. In any event, the employer will have complied with the ADA and will be considered "the good guy."

F. The Importance of Documentation

There is an old saying: "If you didn't write it down, it didn't happen!" Never has there been more an appropriate adage than in the context of the ADA. Proper documentation is crucial in the context of the ADA for several reasons. Proper documentation can facilitate the employer’s efforts to engage in the “interactive process” with an employee or applicant who has requested an accommodation, as well as serve as evidence of the employer’s compliance with this obligation.

Documentation is of greatest importance in demonstrating an employer’s good faith in its efforts to provide a reasonable accommodation. Where an employer can demonstrate such good faith efforts, it should be relieved of any liability for compensatory and punitive damages, and perhaps even be relieved of any ADA liability whatsoever.

The matter of proving this “good faith” defense is much easier when the employer’s consultation with the disabled individual and its efforts to assess and make reasonable accommodations have been well documented.

G. Settlement Issues in Workers’ Compensation: Waiver of ADA, FMLA Claims and Resignation
The exclusive power to consider and approve settlements relating to workers' compensation claims in Georgia rests with the State Board of Workers' Compensation. The State Board takes no position as to whether a case should be settled, but instead will review an agreement reached between the parties. If the settlement complies with Board Rule 15 and is reasonable in amount, the State Board will approve that settlement. However, only those issues within the purview of the Workers' Compensation Act will be considered as part of the stipulated settlement. Those issues outside of the Workers’ Compensation Act, are not subject to review or approval by the State Board. Such outside issues include employment considerations, resignation agreements as well as potential/alleged violations of the Americans with Disabilities Act. The State Board can refuse to approve any settlement that purports to address or waive those outside issues.

Any such outside concerns need to be addressed in separate documents, those not submitted to the State Board of Workers’ Compensation. For example, there are often legitimate employer concerns with an employee’s status or intentions after a workers’ compensation settlement has been reached. For this reason, many settlements are reached with the caveat that the employee resign as a condition of settlement. However, that resignation document itself has additional implications for the employer unless properly handled.

Very often, through the conduct of litigation or the handling of a claim, it becomes apparent that there is a potential violation of the ADA, FMLA or myriad other Federal statutes that, if not properly handled, can leave the employer exposed for additional liability even after a satisfactory settlement of the workers’ compensation issues. The stipulated settlement submitted to the State Board of Workers’ Compensation cannot address these issues and most certainly will not waive them. For this reason, some consideration needs to be given to a separate release that specifically addresses any potential violations. This is especially important if the employee has already made allegations that such violations have occurred. If a separate release is to be submitted to the employee in conjunction with the settlement documents, this release should contain separate consideration for the release of these other potential claims. Without separate consideration, the employer risks having the additional release (for issues other than the workers’ compensation claim) declared invalid for lack of consideration. The ADA release should be a document separate from the workers’ compensation stipulated settlement agreement.

A simple “voluntary resignation” which states that the resignation is offered by the employee to the employer as additional consideration for the workers’ compensation settlement and which contains a rudimentary release of “all ADA claims” may be sufficient to discourage the employee from later bringing a lawsuit under the ADA. But, such a release may not operate as an air-tight basis for a motion for summary judgment by the employer should the employee decide to sue anyway. Then again, a simple resignation and release may have a better chance of being signed by the employee. A foolproof release, however, should contain specific language in which the employee acknowledges that he is
releasing all claims under the ADA and the document should recite the specific consideration that is being paid for the release. The key issue in determining the validity of an ADA release is whether the employee “knowingly and voluntarily” waived the right to sue. In that regard, unambiguous specific language is crucial. However, as the release language becomes longer, more specific and more inclusive, it carries more legal force but it may cause the employee to think twice about signing it and it may result in a request for additional consideration for such a release.

III. COMMON QUESTIONS UNDER WORKERS’ COMPENSATION AND ADA

1. Does this injury qualify for ADA protection?

   · injury substantially limits the employee in a major life activity
   · injury not merely temporary in nature

2. What do I have to do to provide a reasonable accommodation to an injured employee?

   · determine the essential functions of the employee’s job
   · determine from treating physician and employee if the employee can perform the essential functions of the job without an accommodation
   · determine what accommodations, if any, will enable the employee to perform the essential functions of the job
   · determine if the accommodations are “reasonable” and whether they would result in an “undue hardship” to the employer
   · depends on size and resources of the employer
   · job restructuring, part-time, reassignment to vacant position and modification of equipment have all been found by the courts to be reasonable, depending on the circumstances
   · need to consider the cost of the accommodation and the disruption to the workplace
   · determine whether the employee’s return (either with or without accommodations) would result in a “direct threat” of harm to himself/herself or others
   · if not able to perform the essential functions of old job with reasonable accommodation, determine if a transfer to a vacant position is viable
consider creating a light duty job, although not required under ADA

3. Can I refuse to take an injured employee back to work until he/she is fully released by his physician?
   - if the injury and the employer are subject to the ADA, must go through the “essential function” and “reasonable accommodation” analysis. Cannot insist on “full duty release” because may not take into account what the essential functions of the job are and/or the accommodation process

4. What constitutes a “direct threat” of re-injury?
   - objective evidence of potential of re-injury;
   - evaluate type of injury and job duties; consult with physician;
   - must not be based on speculation or worry about re-injury

5. We have no “light duty” here. Do I have to create a job?
   - no, but if subject to the ADA, must make the “essential function” and “reasonable accommodation” analysis as to the employee’s regular job

6. Am I creating a bad precedent by taking an employee back to light duty?
   - not if you make the light duty position temporary and do not create a "pool" of light duty jobs for work-related injuries

7. Once on light duty, do I have to keep the light duty job available indefinitely?
   - no, it can be temporary

8. This light duty job just isn’t working out any more. What can I do?
   - if light duty is temporary, can remove employee from light duty position after temporary period has expired
   - evaluate other accommodations that would enable employee to come back to work (equipment modifications, vacant positions, flexible work schedules, etc.)

9. Can I have a policy of only making light duty jobs available for employees injured on the job?
can have policy of “creating” light duty jobs only for injured employees

cannot create a “pool” of such jobs and reserve only for injured employees

10. I'd like to go ahead and fill the position vacated by an injured employee. Can I be sued for terminating an employee who is drawing workers’ compensation benefits?

   - no cause of action under the Workers’ Compensation Act for terminating an employee because of filing a workers’ compensation claim

   - loss of possibility of employment with the original employer will make light duty return to work difficult or impossible

   - employee may have a cause of action under ADA and/or FMLA, depending on circumstances

11. Now that the workers’ compensation claim has settled, can I terminate the employee?

   - FMLA and ADA considerations

12. What should I put on the termination notice?

   - the reason for termination (i.e., misconduct, violation of work rules, inability to perform job duties, etc.)

13. Can we get a “voluntary resignation”/ADA release/FMLA release as part of the settlement?

   - yes

14. What should it say?

   - should mention ADA and FMLA

   - give employee the right to consult an attorney

   - give employee reasonable time to consider agreement

   - recite adequate consideration - something to which the employee is not already entitled

15. What do I do after the settlement if the employee tries to re-apply for his job?
consider along with other candidates; if employee agrees not to re-apply in settlement can use as a defense in any subsequent action

16. Is simply asking for an ADA release as part of a workers’ compensation settlement a violation of the ADA?

- no

17. What about the Rycroft defense? Is it still viable?

- at the post-offer stage, the employer may ask questions about physical condition and medical history; defense may be available

18. How can we find out about prior impairments for SITF purposes?

- at the post-offer stage, the employer may ask questions about physical condition and medical history.

Posted August 24, 1999

Disclaimer: The reader is cautioned to use extreme care in applying the legal principles discussed in these articles. Competent legal advice should always be obtained to properly apply the relevant law to the specific facts of any case.