

How to Design a Modified Duty Program

by John H. Geaney

Modified duty programs constitute a very effective method of reducing costs and maximizing human resources, particularly when the absent worker is receiving very expensive temporary disability benefits and the municipality may need to hire temporary help to perform the absent worker's job. With workers' compensation rates rising each year, a municipality without a modified duty program has a gaping hole in its workers' compensation program.

Municipalities have a greater incentive than private employers to institute modified duty policies, since some municipal workers receive full salary by contract for absences due to work-related injuries. By returning an injured worker to temporary modified duty (also known as light duty or alternative duty), the municipality saves the amount of the lost wages it was paying and obtains some productivity. These savings amount to no small matter given that a municipality might be paying \$539 per week (current max in 1999) to a worker who earns \$770 or more per week, or even full salary if required by a collective bargaining agreement or contract. A municipality which offers a highly paid worker modified duty for 26 weeks, for example, rather than rest at home, saves \$14,014 in temporary disability benefits.

Another compelling reason to institute modified duty is compliance with the Americans with Disabilities Act of 1990. The failure to make necessary reassignment to vacant positions or modify a job can constitute in itself a violation of the ADA according to the EEOC. Furthermore, courts have held that employers who

refuse to take workers back until they are 100 percent healed engage in per se violations of the ADA. (See *Bearshield v. John Morrell & Co.* 8 AD Cases 1841 (Iowa S.Ct. 1997).

Having reviewed the arguments for modified duty, this article will focus on the components of an appropriate policy.

Job Description

A modified duty assignment may involve changes to the regular job of the worker or an entirely different job in the worker's department or another department. Having an accurate job description to work with is essential because it avoids unnecessary argument over the correct job functions and avoids mistakes in assigning work which may prove too onerous for the injured worker.

Writing job descriptions should be a collaborative effort. It is wise to involve more than management alone in this process. Those who currently do the job should help prepare a list of essential functions. Marginal functions (those functions for which the job does not exist) should be excluded. Bringing management and labor together will reduce argument about what is or is not an essential job function.

Fitness for Duty Exams

The EEOC recognizes the right of employers to have employees examined for fitness for duty when there is a business necessity for such an exam. A period of absence from work generates such a need. When a worker has been absent from work with a serious injury, it is helpful to obtain a fitness for duty

examination to determine whether the worker can perform the essential functions of the job or whether modifications to the job may be necessary.

Choosing the right physician to perform these examinations is very important. Generally speaking, physicians who are board certified in occupational medicine are best suited to conduct fitness exams and engage in the complex skill of matching abilities with job requirements within the context of an injury which may still be healing. Having a familiarity with the ADA is also invaluable.

A good fitness for duty exam involves more than just a one-time examination in a physician's office. It requires that the physician know the job well, either from a description of the job, verbal information communicated by a supervisor, or a tape of the job. It also often requires sophisticated testing usually performed in work hardening centers or physical therapy centers. A test known as an FCE (functional capacity evaluation) can closely replicate the job duties on machines and produce accurate data which show the abilities of the worker and the restrictions. These tests break job tasks down into the required job functions, such as lifting, bending, sitting, reaching, and the like, as well as the frequency with which each function is performed. The physician must consider all this information, as well as possible job accommodations, and then prepare a report to the employer addressing the question of whether the worker can perform the essential functions of the job and/or poses a direct threat of harm to himself/herself or others.

Set an End Date to Modified Duty

The most challenging aspect of preparing a modified duty program is setting a date when the modified duty ends. It is important to make clear in writing that the modified duty job is temporary; otherwise, the injured worker may argue at some later date that the employer intended the modified duty job to be the permanent new job.

There are two ways of providing an end date. The most common and simple approach is to put a numerical limit on the modified duty. Depending on the needs of the municipality, the limit tends to be six months or a year, but there is no hard and fast rule on this. The problem with this approach is that it is not flexible to the individual injury involved and may be somewhat arbitrary in certain circumstances.

Another way of providing an end date is to focus on the concept of maximum medical improvement or the point at which medical restrictions become permanent. An example emerges in the case of *Hendricks-Robinson v. Excel Corp.*, 8 AD Cases 645 (C.D.Ill. 1998) where a federal court approved the

policy of an employer which terminated modified duty either when the injured worker was cleared to return to full duty or when the worker reached a point of permanent restriction (similar to maximum medical improvement). Once a worker reached a point of permanent restriction, the company evaluated whether the worker could return to the former job with or without reasonable accommodation or do another vacant job in the company. Those who could not perform a vacant job or their former jobs were placed on medical layoff status. During the period of medical layoff status the worker could bid on any vacant position which was posted, but after 12 months on medical layoff status, the worker was terminated.

The advantage of the policy described in the Excel case is that it is flexible to meet the individual medical problems of each case. Regardless of the approach, the

policy should make clear that when the modified duty job ends the municipality expects the worker to return to a full duty job, or if unable to do so, the worker may be subject to termination. Decisions to terminate or make accommodation should not be made without advice from legal counsel, and a fitness for duty examination may be necessary for those employees who request reasonable accommodation in returning to work full duty.

Occupational Injuries May Be Favored over Non-occupational

Most municipalities have a limited number of modified duty positions available. What if there is only one modified duty position available for two workers who apply for it, but only one of the workers has an occupational disability? The EEOC in its

Enforcement Guidance issued on September 3, 1996, states that employers may favor occupational injuries over those which are non-occupational in this particular instance. Thus, the municipality may take the position that it has a limited number of positions for modified duty and will prefer those workers whose need for such work stems from work injuries or work illnesses.

Consider Inter-departmental Assignments

For obvious reasons it can be hard to accommodate modified duty in certain departments in a municipality. The nature of jobs performed in a road department, for example, is such that there are few, if any, jobs not involving extensive physical activity. There is no reason a municipality cannot assign a worker modified duty in another department or even in the administrator's office, doing mail work, for example. Unless the municipality has bargained away the right to make inter-departmental assignments, it makes eminent sense to look to other departments for appropriate modified duty jobs. Studies have consistently shown that persons who return to work on modified duty return to full duty far more rapidly than those with similar injuries who are not offered modified duty.

Publicize the Policy and Adhere to it

In some municipalities the modified duty policy is handled administratively; in others, formal action is taken before the municipal body. Whatever the adoption process, the important point is to create an awareness of the policy throughout the entire workforce and a prevailing attitude that the municipality intends to pursue modified duty vigorously. Municipal officials should know that when an offer of modified duty is made and the worker rejects the offer, the workers' compensation carrier has the right to terminate lost-wage payments under the case of *Harbatuk v. S&S Furniture Systems Insulation*, 211 N.J. Super. 614 (App.Div. 1986).

Conclusion

It would be misleading to leave the impression that modified duty policies are a panacea for all ills. Sometimes the worker who is reassigned to modified duty gets reinjured, in spite of best efforts to place the worker in a safe environment within the restrictions imposed by the physician. Nevertheless, employers in New Jersey derive substantial benefit on balance from such programs. One little known dividend to modified duty programs is that they tend to reduce the number of claims for total and permanent disability. This is the single most expensive category of workers' compensation claims. When a worker is out for more than a year from a work injury or illness, the likelihood of a claim for total and permanent disability increases dramatically because the employee and his or her physician become more and more convinced that the employee cannot effectively function in the workplace.

Whatever the size of the municipality, a modified duty policy will save considerable sums of money each year by reducing lost wage payments, gaining productivity, and returning injured workers more rapidly to full duty work.

John H. Geaney is a Shareholder in Capehart & Scatchard's Mt. Laurel, NJ office, practicing in the ADA and workers' compensation statewide. He is certified as a trial attorney by the Supreme Court of New Jersey in workers' compensation.