VEDDER PRICE

Public Employer Bulletin

A review and analysis of emerging developments affecting public sector employees

In This Issue:

May 1997

EEOC PROVIDES GUIDANCE FOR COMPLYING WITH THE ADA AND WORKERS' COMPENSATION LAWS

In response to employer uncertainty about the interaction between the Americans With Disabilities Act (the "ADA") and state workers' compensation laws, the Equal Employment Opportunity Commission (the "EEOC") recently released an Enforcement Guidance entitled "Workers' Compensation and the ADA." EEOC pronouncements are not binding on the courts but are generally considered to provide useful guidance.

Cautioning employers that workers' compensation concerns do not supersede ADA mandates, the Guidance comments on the ADA with respect to the following workers' compensation-related issues:

- whether occupationally injured individuals are "disabled" for ADA purposes;
- hiring individuals with histories of occupational injury;
- return-to-work decisions;
- reasonable accommodation for individuals with disability-related occupational injuries;
- light duty issues;
- questions and medical examinations regarding occupational injury and workers' compensation claims; and
- exclusive remedy provisions in workers' compensation laws.

Topics of particular interest are discussed below.

Occupational Injury as a Disability

Individuals who qualify for workers' compensation benefits are not necessarily protected by the ADA. Instead, they are entitled to the ADA protection, including reasonable accommodation, only if they have ADA-defined disabilities. (The ADA defines "disability" as a physical or mental impairment that substantially limits a major life activity, a record of such an impairment, or being regarded as having such an impairment.) An occupational injury may not be permanent or severe enough to constitute an ADA-covered disability.

Refusal to Hire

An employer cannot refuse to hire ADA-covered applicants because they pose an increased risk of occupational injury and workers' compensation costs, with one exception: an employer can reject an individual whose employment poses a "direct threat." The employer must demonstrate that such an applicant poses a significant risk of substantial harm to the health or safety of himself or herself or others that cannot be controlled by reasonable accommodation. According to a federal district court in the Northern District of Illinois, however, the direct threat defense applies only where there is a risk of harm to

individuals other than the applicant. *Kohnke v. Delta Airlines* 932 F. Supp. 1110 (N.D. Ill. 1996).

In determining whether a direct threat of harm exists, many factors regarding a prior occupational injury should be considered, including whether the prior position involved hazards not present in the position under consideration and whether reasonable accommodation can reduce the risk of harm.

Return to Work

An employer cannot require an employee with a disability-related occupational injury to return only to "full duty." Rather, a return must be permitted when the employee can perform the essential functions of the job.

Similarly, an employer cannot refuse to return an employee with a disability-related occupational injury simply because of a workers' compensation determination of "permanent" or "total" disability. "Such a determination is never dispositive regarding an individual's ability to return to work although it may provide relevant evidence regarding an employee's ability to perform the essential functions of the position in question or to return to work without posing a direct threat," according to the EEOC.

Reasonable Accommodation

Employers must provide reasonable accommodation for individuals with ADA-covered occupational disabilities. A workers' compensation vocational rehabilitation program does not necessarily satisfy an employer's duty to provide reasonable accommodation. Instead, employers must accommodate an ADA-covered employee in his or her current position through job restructuring or some other modification. If this would impose an undue hardship or would be impossible, then the employer must consider reassigning the employee to a vacant, equivalent position (or lower-level position if an equivalent one is unavailable).

Light Duty

An employer is not required to *create* "light duty" positions for injured employees. But the EEOC warns that creating light duty jobs for occupationally injured employees (and not nonoccupationally injured employees)

is prohibited if it has an adverse impact on a class of individuals with disabilities, unless the distinction is justified by a job-related reason consistent with business necessity. Moreover, if the only effective reasonable accommodation is to restructure the employee's position by redistributing marginal functions so that the restructured position resembles the light duty position, the employer must provide this accommodation absent undue hardship.

Further discussion of the EEOC's position on this issue can be found in the article "Light Duty Can Create Not-So-Light Complications" included in this bulletin.

Confidentiality of Workers' Comp Information

The ADA confidentiality requirement applies to medical information regarding an applicant's or employee's workers' compensation claim. The information must be kept on separate forms maintained in a separate medical file along with other information required to be kept confidential under the ADA.

The ADA prohibits disclosure of such information except in limited circumstances, such as to state workers' compensation offices, state second injury funds and workers' compensation insurance carriers in accordance with state workers' compensation laws. Supervisors may be informed of necessary restrictions on an employee's work duties and about necessary accommodations.

Conclusion

While the EEOC's Guidance seeks to clarify an employer's obligations when the ADA and workers' compensation-related issues intersect, these issues are still being defined by the courts. It is up to employers and their counsel to determine what is "reasonable" accommodation in each case.

If you have questions about the EEOC Enforcement Guidance, or about the ADA in general, contact Vedder Price (312/609-7500).

Return to Top of Document

HIPAA ELECTION DEADLINE APPROACHING

Public employers have an important deadline approaching over the next few months. Interim final regulations issued recently by the Departments of Health and Human Services, Labor and Treasury set forth how, when and to what extent group health plans maintained by governmental entities may elect out of the substantive provisions of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") and the Newborns and Mothers Health Protection Act.

As the October 1996 *Public Employer Bulletin* reported, the new statutes represent the federal government's most comprehensive effort to date to regulate the provision of health care coverage in the United States. Among other things, the new laws regulate employer-provided group health care plans by restricting the reach of preexisting condition exclusions, prohibiting discrimination on the basis of health status, providing special enrollment periods for individuals whose coverage under another plan has been lost, mandating minimum maternity length of stay provisions and requiring parity in plan-provided mental health benefits. Moreover, to facilitate the portability provisions of the new law, group health plans are required to issue for each participant and beneficiary a certification of the period during which he or she was covered by the plan. Please refer to the October 1996 issue of the *Public Employer Bulletin* for more information on the substantive provisions of HIPAA. (To obtain a copy of the October issue, call Barbara Stawski at 312/609-7596.)

The new health plan requirements become effective for plan years that begin on or after July 1, 1997, but HIPAA permits state and local governments to opt out of compliance with the substantive provisions other than the certification requirements.

Scope of Election

The new regulations make it clear that the sponsor of a governmental plan can elect out of certain substantive requirements only as to a plan that is not provided through a health insurance policy, or as to the portion of a plan that is not provided through a health insurance policy. Restricting the election to self-insured plans appears to reflect the practical point that HIPAA requires insurers to offer its substantive minimums in the policies they sell.

That is, an insurance policy marketed to a plan, whether private or governmental, will contain the substantive HIPAA requirements.

A governmental plan may elect out of the following requirements:

- limitations on preexisting condition exclusion periods;
- special enrollment periods for individuals who have lost other coverage;
- prohibitions against discrimination on the basis of health status;
- maternity length of stay provisions; and
- mental health parity provisions.

Governmental plans cannot opt out of the certification requirements; they will still have to provide a former participant or beneficiary with the certification of creditable coverage, so the individual can shorten or eliminate the period of any preexisting condition limitation under his or her next employer's plan.

Content and Form of Election

A governmental plan sponsor that wishes to elect out of the above requirements must make the election in writing and file it with the Health Care Financing Administration ("HCFA"). The election must specify:

- the name of the plan;
- the name and address of the plan administrator;
- either that the plan does not include health insurance coverage or the portion of the plan that is not funded through insurance; and
- that the person signing the election document is legally authorized to do so (this fact must be certified).

The election must conform to all the plan sponsor's rules,

and if a public hearing is required to make the election, the hearing must be held.

As a condition of making the election, the plan sponsor must give an individual notice to each plan participant explaining that federal law imposes the HIPAA requirements on group health plans in general, but allows governmental plans to elect out of many of the requirements. The notice must describe the HIPAA requirements, which part of the plan the election applies to, which requirements the plan is electing out of and, if applicable, which requirements the plan will comply with voluntarily. The notice can be placed in the plan's summary plan description (or equivalent document) if it is "prominently printed" and provided at the times described below. The notice must be attached to the election the plan sponsor sends to HCFA.

Timing of Election

The election out of the HIPAA provisions applies only for the plan year as to which it is made. In the case of a collectively bargained plan, the election applies for the term of the collective bargaining agreement. To extend the period of the election, the plan sponsor must file a new election. A plan sponsor must make its election in time for it to be received by HCFA before the first day of the plan year to which it applies, or, if the plan is collectively bargained, before the date of the agreement or its ratification. Therefore, plan sponsors with July 1 — June 30 plan years must send their elections so that HCFA receives them before July 1, 1997.

The timing of the notice to participants is similar. It must be provided at the time the participants enroll in the plan, or, for existing participants, each year that the election is made.

Election Considerations

HCFA anticipates that between 3,500 and 5,000 state and local governmental plans will make the election to be exempted from HIPAA's requirements. The election may be the right move for your plan. But before you choose to make it, be sure to consider the potential human resources effects of the election. If your employees are collectively bargained, you may find the union demanding compliance with the HIPAA requirements at the bargaining table now,

or in future bargaining rounds. Employees who are not members of collective bargaining units may exert pressure for you to adopt the HIPAA provisions. Pressure from both groups may be exacerbated (or even created) by the notices you must provide to employees if you do elect out of HIPAA's requirements. Therefore, you may want to consider whether the cost of HIPAA compliance for your workforce is worth the administrative burden and possible cost in morale of electing out of the statute.

If you have questions regarding this article, please contact James A. Spizzo (312/609-7705) or any other Vedder Price attorney with whom you have worked.

Return to Top of Document

ABILITY TO PERFORM MULTIPLE DUTIES IS "ESSENTIAL FUNCTION" UNDER ADA FOR CORRECTIONS OFFICER

In a recent decision, the Seventh Circuit ruled that the Illinois Department of Corrections ("DOC") did not violate the Americans With Disabilities Act ("ADA") when it discharged a disabled corrections officer who was able to perform some, but not all, of the duties of the position. *Miller v. Illinois Department of Corrections*, 107 F.3d 483 (7th Cir. 1997).

Miller involved a corrections officer who suffered a precipitous vision loss, leaving her with vision substantially below the standard for legal blindness. As a result, Miller was unable to perform virtually all of the duties corrections officers were expected to rotate through, which included standing guard, counting inmates, checking for contraband, escorting inmates, searching inmates and visitors, acting as telephone and armory officers, searching for escaped prisoners and being on 24-hour call to respond to emergencies, such as riots and escapes. Miller admitted that she was able to perform only the duties of switchboard operator and armory officer, but argued that she should be permitted to rotate between those duties and be excused from the duties she was unable to perform.

The ADA protects only those employees who are able to perform the essential functions of their jobs, with or

without reasonable accommodation. The Seventh Circuit reasoned that where an employer has a legitimate reason for including, and expecting employees to rotate through, multiple functions in a particular job classification, "a disabled employee will not be qualified for the position unless he can perform enough of these duties to enable a judgment that he can perform its essential duties." *Id*. at 485. As an example, the Seventh Circuit posited a farmer who requires farmhands to be able to drive a tractor, clean out the stables, bale hay and watch the sheep because the farm is too small to justify hiring a specialist for each task. In such circumstances, a farmhand incapable of performing any but the lightest of these tasks (*i.e.*, watching sheep) is not able to perform the essential functions of the job.

Analogously, the Seventh Circuit ruled, the DOC legitimately requires its officers to be able to perform numerous duties because it must be able to call on its full staff of corrections officers to deal with emergency situations, such as prison riots. Each officer must have the ability and experience to perform the tasks necessary to quell a riot, such as searching prisoners and quarters or escorting prisoners back to their cells. The Seventh Circuit reasoned that, under such circumstances, it would not do to have a corrections officer whose experience and capability were limited to operating the switchboard and issuing weapons. Therefore, Miller's ability to perform the functions of the two lightest corrections officer duties did not constitute an ability to perform the essential functions of the corrections officer job. Rather, the essential function of the corrections officer job was the ability to rotate through and perform the many corrections officer duties. Because Miller admitted she was unable to perform most of these duties, many of which involved search and surveillance, she was unable to perform the essential functions of the job and, therefore, was not protected by the ADA.

Significantly, the Seventh Circuit's reasoning in holding that the ability to perform multiple duties may be an essential function of a job is not limited to corrections officer or similar positions. It applies to any situation where an employer has a legitimate reason for requiring employees to perform multiple duties.

Return to Top of Document

LIGHT DUTY CAN CREATE NOT-SO-LIGHT COMPLICATIONS

Employers face increasingly complex choices when confronted with employees experiencing work-related illnesses or injuries, or employees with permanent disabilities. The seemingly simple option of offering "light duty" to encourage a speedy recovery and reduce potential workers' compensation costs is no longer so simple. It has been complicated by state and federal anti-discrimination laws, including the Americans With Disabilities Act ("ADA"). Accordingly, the decision an employer makes in dealing with light duty can produce serious and complicated repercussions reaching far beyond the simple goal of saving on insurance premiums.

In order to properly address light duty issues, an employer should be aware of the breadth of its obligations under the ADA. The ADA mandates that an employer reasonably accommodate otherwise qualified disabled employees, *i.e.*, those able to perform the functions essential to their current jobs with or without such accommodation. 42 U.S.C. §12112(b)(5); *Miranda v. Wis. Power & Light Co.*, 91 F.3d 1011, 1016-17 (7th Cir. 1996). (The ADA defines "disability" as a physical or mental impairment that substantially limits a major life activity, a record of such an impairment, or being regarded as having such an impairment.) The duty to accommodate requires an employer to restructure a disabled employee's job or modify it in some other way, including eliminating "non-essential" or "marginal" job functions. 29 C.F.R. § 1630.2 (o). But if job modification would be an undue hardship or would be impossible, an employer may have to reassign a disabled employee to an entirely different job, *i.e.*, a "light duty" position. 42 U.S.C. § 12111.9(B)(5); 42 U.S.C. § 12112(b)(5)(A); *Hammer v. Bd. of Educ. Arlington Heights School Dist. No. 25*, __ F. Supp. __, 1997 WL 27075 (N.D. Ill. Jan. 21, 1997). *See also* 29 C.F.R. 1630, App. § 1630.2(o).

Human resource professionals generally consider a "light duty" position to encompass scaled-down assignments that are radically different from the original job and its essential job functions. For example, light duty positions can include desk or shop assignments with minimal physical or mental demands. Such a position may be

About Vedder Price

Vedder, Price, Kaufman & Kammholz, is a national, full-service law firm with approximately 180 attorneys in Chicago, New York City and Livingston, New Jersey.

The Vedder Price Public Sector Group

Vedder Price provides a broad range of services to its public sector clients, including:

- labor and employment law;
- general public sector law property transactions;
- public finance;
- contract law; and
- litigation.

Vedder Price represents a considerable number of public bodies, including counties, cities, villages, school districts and townships, with respect to the myriad day-to-day problems they face. Firm attorneys also work with elected officials and administrators in preparing and presenting in-house workshops tailored to the needs of the individual public body. The firm keeps its public sector clients abreast of breaking developments through frequent

permanent in nature, or it may only be a temporary solution intended to ease a recovering employee back into the flow of the workplace. Ultimately, the employer's treatment and characterization of light duty assignments may affect its obligations under the law.

An employer with "reserved" light duty positions must assign an ADA-covered employee to a vacancy if no other reasonable accommodation is available. *See Howell v. Michelin Tire Corp.*, 860 F. Supp. 1488 (M.D. Ala. 1994); 29 C.F.R. 1630, App. § 1630.2(o). (An employer designated or "reserved" certain clerical jobs as "light duty" for factory workers injured on the job.) Consequently, an employer cannot limit these light duty positions only to employees with on-the-job injuries, *i.e.*, those who could qualify for workers' compensation. Equal Employment Opportunity Commission (the "EEOC"), Enforcement Guidance on Workers' Compensation and the Americans With Disabilities Act (the "Guidance"). Instead, it must assign vacancies to otherwise qualified disabled employees regardless of whether they are injured at work.

In contrast, the EEOC has opined that if an employer does not have "reserved" light duty positions, it can deny light duty because the ADA does not require employers to "create" light duty positions for employees who may or may not be disabled. EEOC, Guidance. However, at least one court has noted that such policies may violate the ADA if, as a result, the employer impermissibly distinguishes between persons with similar disabilities in providing different levels of accommodation. *Hutchinson v. UPS, Inc.*, 883 F. Supp. 379 (N.D. Iowa 1995). For example, a federal district court ordered a trial to determine whether an employer failed to satisfy its duty to provide a reasonable accommodation when it denied a light duty request made by a disabled employee but had granted others. *Leslie v. St. Vincent New Hope, Inc.*, 916 F. Supp. 879 (S.D. Ind. 1996). In so ruling, the court stressed that the employer frequently rotated and reassigned employees, which undermined the employer's undue hardship defense.

An employer who does not "reserve" light duty positions accordingly may be required to assign light duty to an ADA-covered employee if it occasionally provides such assignments to other employees. At least one court has held that an employer's assignment of non-disabled

Vedder, Price, Kaufman & Kammholz
A Partnership including Vedder, Price, Kaufman & Kammholz, P.C.

Chicago
222 North LaSalle Street
Chicago, Illinois 60601
312/609-7500
Facsimile: 312/609-5005

New York
805 Third Avenue
New York, New York 10022
212/407-7700
Facsimile: 212/407-7799

New Jersey
354 Eisenhower Parkway
Plaza II
Livingston, New Jersey 07039
973/597-1100
Facsimile: 973/597-9607

employees to light duty is evidence of the company's ability to accommodate disabled employees by assigning light duty. *Howell, supra*.

Once an employer offers light duty, it also may have to assign a disabled employee indefinitely unless its policy limits the duration of such assignments. *See, e.g.*, *Nguyen v. IBP, Inc.*, 905 F. Supp. 1471 (D. Kan. 1995); *Howell, supra*; EEOC, Guidance. If the employer sets time limits for light duty, it may refuse to employ a disabled worker in that position beyond the established period. *See, e.g., Champ v. Baltimore County*, 5 A.D. Cases 1184 (4th Cir. 1996) (approving dismissal of disabled employee where employer allowed plaintiff to remain on light duty in excess of normal duration). Nevertheless, an employer must allow an otherwise qualified disabled employee to perform a light duty job for at least as long as other employees.

An employer may entirely avoid the duty to reassign an otherwise qualified disabled employee to a light duty position if it consistently refuses to offer light duty to other employees. *Evans v. GM Corp.*, 107 F.3d 2, 1997 WL 32936 (2d Cir. Jan. 23, 1997) (no duty to transfer to light duty position absent a contractual right or an established policy); *Cochrum v. Old Ben Coal Co.*, 102 F.3d 908 (7th Cir. 1996); EEOC, Technical Assistance Manual on the ADA, at 9.4. You may wish to decide whether such a restriction is appropriate for your jurisdiction.

An employer choosing to offer light duty should incorporate the following into its policy:

- If light duty positions are reserved, specify the number of positions;
- Explicitly limit the duration of light duty assignments for a specified period;
- Closely monitor the use of light duty for consistency, by requiring human resources department approval of all light duty assignments; and
- If a disabled employee can only perform his or her current job with a particular accommodation that might constitute an undue hardship, consider light

duty.

Return to Top of Document

ILLINOIS APPELLATE COURT SAYS RNS ARE NOT CERTIFIED SCHOOL NURSES

An Illinois appellate court has recently held that school districts may not employ registered nurse health aides who are not certified school nurses.

In *Brady v. Board of Education of Palatine Community Consolidated School District 15*, 672 N.E.2d 810 (Ill. App. 1st Dist. 1996), taxpayers sought to enjoin a school district's practice of replacing certificated school nurses with registered nurse health aides who did not have teaching certificates. The taxpayers claimed that this practice violated Section 10-22.23 of the School Code, which provides, "Any nurse first employed on or after July 1, 1976 must be certificated under Section 21-25 of this Act," and a similar provision in the Illinois Administrative Code. The trial court agreed and enjoined the school district from hiring any health aides who were not certified school nurses. The school district appealed.

On appeal, the school district first argued that the dispute was moot because it had received from the State Board of Education a waiver of the administrative code provision. The school district, however, had not sought or obtained a waiver of the school code provision. Accordingly, the appellate court ruled that a dispute still existed.

The school district next argued that Section 10-22.23 applies only when a nurse is hired to perform instructional work in addition to his or her nursing duties. The appellate court disagreed because the term "any nurse" was unambiguous. It also reasoned that if the legislature had wanted to limit the certification requirement to nurses who teach, it could have done so.

The appellate court also rejected the school district's argument that Section 10-22.34 of the School Code permits it to hire health aides without certificates. Although that provision does allow school boards to hire noncertificated personnel to perform certain nonteaching

duties, the appellate court found that it was inapplicable because it did not refer to nursing services specifically. To the extent a conflict existed between Sections 10-22.23 and 10-22.34, the appellate court said that the certification requirement in Section 10-22.23 would control because it was enacted 14 years after the enactment of Section 10-22.34.

Thus, the appellate court held that when a school district hires a school nurse, that nurse must be certified.

- Return to: Public Employer Bulletin Index
- Return to the Vedder Price: Publications Page.
- Return to: Top of Page.