A variety of regulations regarding the rights of employees with disabilities have spurred employers to reassess workers compensation and return-to-work programs.

In 2009, for example, the EEOC announced a record-setting consent decree involving a class action lawsuit under the Americans with Disabilities Act (ADA) for $6.2 million related to a workers compensation leave policy. The suit alleged that the employer maintained an inflexible leave exhaustion policy and terminated employees instead of providing them with reasonable accommodations.

In 2011, a $20 million disability suit alleged that another employer unlawfully denied reasonable accommodations to hundreds of employees and disciplined and/or fired them under a no-fault attendance policy.

Recently, the EEOC outlined its 2017-2021 “strategic priorities” for enforcement, including an increased focus under the Americans with Disabilities Act Amendment Act (ADAAA) on employers’ inflexible leave policies. The focus of EEOC enforcement could be impacted by political...
changes under the new administration, but for now the law remains, and failure to comply will impact employers. Companies are especially vulnerable to regulatory scrutiny if they require employees to be 100% healed before returning to work or have inflexible leave policies and job qualification standards that discriminate against individuals with disabilities.

THE CHANGING DEFINITION OF DISABILITY
Employers have long arranged various forms of job modifications or light duty to accommodate employees during their recovery from work-related injuries and illnesses. Unfortunately, these programs historically were reactive and lacked consistent application or a structured, iterative framework. Further, employers typically focused solely on work-related or occupational injuries and did not always link non-occupational injuries or illnesses to the same standards.

The ADAAA has expanded the definition of disability, however. According to the ADAAA, disability is now defined as a physical or mental impairment that substantially limits one or more major life activities; a record of a physical or mental impairment that substantially limited a major life activity; or an actual or perceived impairment that is not both transitory and minor (emphasis added). Under this expanded definition, an employer can no longer treat occupational and non-occupational conditions differently. Moreover, all restrictions to an employee’s activity and all requests from employees for accommodation must be evaluated individually—but according to the same internal process.

As a result, complex considerations including those involving compliance with ADAAA, the Family Medical Leave Act (FMLA), EEOC requirements and varying state regulations raise a number of issues that call for a proactive process and consistent approach to stay-at-work and return-to-work programs. Given their roles in workers compensation programs, many risk managers are well positioned to initiate collaboration with other functions in their organizations to develop a dynamic and comprehensive return-to-work/stay-at-work toolkit to manage absences and disability in the workplace. This toolkit should provide the mechanism to support day-to-day injury management activities and offer a consistent framework for preventing and managing absences.

A key aspect of the expanded definition of disability involves the concurrent, proactive evaluation of ADAAA and workers compensation, along with other overlapping obligations such as FMLA. Accordingly, reasonable accommodations should begin as soon as an employer becomes aware that an individual employee is having difficulties at work due to a serious medical problem.

An absence and disability management program should also operate without regard for the source of the disability. Under the ADAAA, an interactive process and a consistent, objective procedure are critical to comply with the expanded definitions of qualified employees.

INTEGRATING COMPLIANCE WITH STATE REGULATIONS
In addition to navigating a web of complex federal regulations, employers must address evolving state workers compensation requirements, potential union collective bargaining agreements and other state laws protecting workers. Benefit obligations also vary locally, adding further complexity.

For instance, Minnesota Workers Compensation Statute 176.82 allows employees to sue an employer who unreasonably “refuses to offer continued employment to its employee when employment is available within the employee’s physical limitations.” The employer is liable for one year’s wages up to a $15,000 maximum. Payment of this award is not covered by insurance and is civil in nature.

Meanwhile, under Section 132a of California’s Labor Code, employers are liable for discriminating or terminating employees under certain circumstances in coordination of workers compensation benefits. The employee’s compensation may be increased by 50%, up to $10,000, and costs and expenses of up to $250 reimbursed.

Thus, a workers compensation team needs to review overlapping and evolving legal obligations and ensure there are mechanisms in place to achieve and verify state and federal compliance.

OVERCOMING INTERNAL OBSTACLES
Risk managers, benefit managers and senior leaders can have a direct impact on the success of disability management programs by establishing best practice policies. An absence management program focused on capabilities, and not disabilities, best stems from an executive-level initiative, and should be presented as a key enterprise-wide leadership directive.

A plan developed and refined to address both occupational and non-occupational return-to-work efforts will also have a positive impact on plan costs and the overall experience of claimants. Short-term and long-term disability insured pricing is offset by workers compensation and therefore is directly reduced by return-to-work efforts.

Return-to-work efforts that facilitate an easy transition back
into the workforce improve the emotional state associated with a disability. It creates a focus more on what an individual can do rather than that they are not back to 100%. Return-to-work policies should allow for a partial return and describe in an equitable way how the compensation will encourage this. In many instances the policy “overpays” the individual for trial work days to help during this transition. The offsets ultimately keep the plan affordable for the participants and prevent abuse.

There are distinct advantages to a short-term disability design that encourages return-to-work. The most common of these is a return-to-work incentive that allows an individual to work a shortened day or week while receiving most or all of their weekly benefit.

Employers that manage obligations without an integrated panel overseeing the impact of day-to-day decisions are likely to face obstacles. Without the explicit guidance of an effective disability management function, organizations can risk reacting to perceived obligations as situations evolve, leaving them vulnerable to missteps, oversights and consequential legal actions. Instead, the focus needs to be on building a framework and creating a team to oversee the injury management process. This can include the following measures:

- Design an integrated management process
- Designate an integrated team
- Define core and overlapping responsibilities
- Develop measurable goals and benchmark performance metrics
- Outline communication triggers and coordination process
- Cross-train the team on overlap and core responsibilities
- Define meeting platform and objectives
- Support a continuous improvement process

It is vital to have an integrated team with assigned and understood responsibilities to support a comprehensive process. Individual departments have a core responsibility in the process, but may fail to identify overlapping responsibilities with other departments. Understanding the potential and practical implications of overlapping obligations, potential awards, enforcements, case law and key triggers is critical to developing an effective team and process.

COMMUNICATION GUIDELINES
As employers become increasingly concerned with compliance, it is important not to overlook requirements of day-to-day processes. Effective communication is crucial in a disability program. This starts with an organizational policy that supports communication between employee and employer. When an employee is unable to perform job tasks or an accommodation is needed, there should be clear communication guidelines in place to address the issue.

In effect, the disability management process should be managed using a practical framework that guides operations and fosters cooperation, rather than just adding administrative burdens. Key aspects of a practical return-to-work/stay-at-work policy include:

- Employee FAQ explaining the process and providing key contacts
- Supervisor conversation script to ensure proper questions are asked consistently
- Medical provider letter and workability form that properly outline capabilities
- Acknowledgment of limitations or capabilities aligned with work assignments
- Interactive guidelines to manage the accommodation process
- Benefits coordination letter when overlapping into workers compensation, FMLA and group health

While establishing such a framework is helpful, it is important to remember that each case may require additional review and consideration to determine reasonable accommodations.

VALIDATING JOB DEMANDS
The adage is true: What gets measured gets managed. Many organizations use broad, inconsistent or unclear job and task descriptions that make it difficult to properly guide the return-to-work process, assess job requirements and determine potential accommodations. Certified ergonomists can help organizations collect and analyze worker data to ensure that job demands are applicable to the required tasks. Defining what is required of an employee and outlining essential and non-essential functions will enhance the objectivity of the communication among all parties in the disability management process, including the employee, the employer, the medi-
An absence management program focused on capabilities, not disabilities, best stems from an executive-level initiative and should be presented as a key enterprise-wide leadership directive.

MEASURING SUCCESS
Data analytics and predictive modeling play a key role in effective claim management and injury prevention. Benchmarking key performance indicators can help identify areas of excess cost and improvement opportunities.

Tracking claim management metrics related to occupational health, benefits, employment practices, and legal requirements can be complicated when departments within an organization operate independently. When the process is integrated, metrics can provide insights for building and evaluating absence management programs, including identifying cost drivers, establishing benchmarks and measuring ongoing performance.

REAPING THE REWARDS
Any absence management effort must provide a coordinated and compliant process that not only addresses occupational and non-occupational health injury considerations, but also encompasses the disabled employee’s ability to return to work and stay at work.

Developing an integrated, comprehensive team and a progressive, interactive process is necessary to effectively manage the evolving and concurrent regulatory obligations associated with absence management. Compared to the potential exposure from EEOC suits and settlements, the costs related to implementing and sustaining a compliant return-to-work/stay-at-work absence management program will likely be minimal.

In addition, a well-designed and properly executed absence management program can improve employee productivity as well as reduce claim incidence and duration. Organizations can also realize savings from lower average workers compensation indemnity and short-term disability wage replacement benefits paid and reductions in labor replacement costs and associated workers compensation medical costs. This positive impact on absence in the organization will ultimately lead to greater employee satisfaction.

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