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In a Blink of an Eye: What Business Leaders *Still* Do Not Understand About the ADA/ADAAA: A Sequel

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Twenty-five years ago, George H. W. Bush signed the Americans with Disabilities Act (ADA) on July 26, 1990. The ADA Amendments Act of 2008 (ADAAA) clarified the scope of disability under the original Act and came into effect on January 1, 2009. The ADA and the ADAAA are considered the most comprehensive civil rights laws in the nation to date, protecting all Americans from discrimination based on disability or the perception of disability regardless of age, gender, race, or sexual orientation. More than twenty years ago, we authored *In a Blink of an Eye: What Business Leaders Still Do Not Understand About the ADA*.

In that article, we quoted the journalist and generally conservative commentator, George Will. Mr. Will emphasized the universal importance of ensuring equal opportunities for persons with disabilities: "The most striking fact about the [disabled population] ... is that it is the most inclusive. There is a sense in which we live in the antechamber of the handicapped community. I will never be black and I will never be a woman. I could be handicapped on the drive home tonight."

Of course, some of Mr. Will's word choices are now politically incorrect, but the truth of his statement remains clear and unchanged. The disabled population or potentially disabled population is the most inclusive, as anyone can become a member of that population "in a blink of an eye." Indeed, as it has been said, if you are not currently disabled, you are considered only temporarily able. The aging process alone levels us all. This is what business leaders still do not understand.

In our original article, we also reflected on a lesson that we learned in 1991 from a risk manager attending a self-insured business convention in Orlando, Florida where we were scheduled to speak about the ADA. Harry had spent thirty years as a risk manager for a self-insured county in Florida. He was not slated to speak, but after a special request to address the audience, he stood before the crowd and said goodbye. At age 55, Harry had been diagnosed with colon cancer that quickly spread to other organs, and Harry's employer wanted to place him on short-term disability. Harry was reasonably certain that he would then become dependent on long-term disability and eventually "retire on disability." He insisted that he could and still wanted to work until he was no longer able, but his self-insured county employer asserted that his condition was what "disability [insurance] is for" and that he should stop working. Harry was simply wishing his colleagues adieu.

Of course, all of us were stunned by Harry's farewell, and even those who did not know him felt his frustration, anguish, and resignation. However, the point had been made! Not even Harry's employer understood the civil rights protection afforded by the ADA, that is, the right to perform the essential functions of one's job even in the face of presumed disability.

Since that time, invitations for us to speak to business groups regarding the ADA and ADAAA have all but disappeared. Requests began to dwindle slowly at first, but increasingly as insurance managers and other business leaders acquiesced to the advice of their employment law and workers' compensation attorneys to "wait for court decisions to refine the ambiguities of the ADA." Following their lawyers' advice, they waited, and many conducted business as usual.

Nowhere have the customary and often dysfunctional practices associated with the employment of people with disabilities gone more unchanged than in the area of work-related injuries. Legal commentary on the ADA makes it clear – transient work injuries that do not "substantially limit" major life activities are not regarded as "disability." As a result, the ADA would not apply to workers' compensation cases involving injuries that resolve in short fashion unless the employee could prove that the injury was "regarded" as a disability. This would seem to be the case if an employer refuses to allow an individual to return to his or her position. In that case, the employer has essentially "regarded" the employee as having a physical or mental impairment that "limits a major life activity."

Although state workers' compensation laws were originally designed as "sole or exclusive remedies," they do not prevent injured workers from filing claims of discrimination under the ADA. And yet, the handling of workers' compensation claims and management of return-to-work programs remain primitive, much less sophisticated than the guidance found in the concepts of reasonable accommodation, essential functions, impairment, and disability.

For a while, following passage of the ADA, disability management programs, including transition to work protocols, were increasing in popularity and showing promise. On-the-job "work hardening" and return-to-work programs, sometimes referred to as "light-duty" programs, seem to have merit when properly designed and executed. The goal of return-to-work programs should be to facilitate restoration of optimal employment. However, so-called "light-duty" can be poorly designed and executed and/or carried out with the wrong intentions, sometimes as a form of punishment. Injured workers are too often viewed with suspicion fueled by a belief that they are "taking advantage" of the system. As a result, "light duty" can be meaningless work, created for no reason other than to demonstrate who is ultimately in control.

We recall one corporate client who ignored our advice regarding how to establish a meaningful return-to-work program, and instead created what company risk management personnel call a "light-duty" pool. Injured workers were assigned to a room in which others could observe them reviewing safety films adjacent to a glass-enclosed cafeteria. These employees were essentially placed in a fishbowl environment, and within a matter of weeks, individuals assigned to the "light-duty" pool were made to feel humiliated and isolated from the uninjured work population. When a temporary assignment (i.e., trash removal or bathroom cleaning) came to the in-house workers' compensation coordinator, the assignment was given to one of the members of the pool as others assigned to that program continued to review safety films. Sometimes the punishment worked. Those who felt sufficiently embarrassed found ways to return to "full duty." Others, however, continued to review safety films and clean bathrooms. This particular plant was unionized, and the union's lawyer decided to file a civil rights complaint. Counsel representing the injured employees argued to the U.S. Equal Employment Opportunity Commission (EEOC) that these workers were being segregated and discriminated against on the basis of disability.

We have long argued that "light-duty" programs be reconceptualized as transitional work, which could potentially lead to a return to pre-injury job assignment, with or without reasonable accommodation, or, following vocational assessment, alternative work. Proper use of vocational assessment can determine if an injured employee with a limiting impairment can learn other jobs within the company, with or without reasonable job accommodation within his or her restrictions. After all, when an employer hires an individual to perform a job, the organization generally hires someone that they find trustworthy and reliable. When an individual proves him- or herself to be reliable, the company should take advantage of

that relationship and help the employee find transitional work followed, if necessary, with alternative employment within the organization. Vocational evaluation and "rehabilitation" in workers' compensation matters are often misused, as a means for outplacement or for "proving" job availability/earning capacity.

Workers' compensation is an employer-financed, no-fault insurance that compensates employees who have been disabled due to work-related injury or disease. Historically, workers' compensation was intended to make the injured worker "whole" for "a compensation bargain" in which the employer agreed to provide medical benefits and wage replacement income in exchange for mandatory relinquishment of the employee's rights to sue the employer for tort (or civil wrong) of negligence. However, making an individual "whole" has reportedly become too expensive for employers and their insurance carriers, and many jurisdictions have rewritten their laws over the past two decades.

Even with significant reforms generally in favor of the employer, insurance carriers and employers have reportedly begun a wholesale betrayal of employee protections. After analyzing large volumes of insurance industry data, *ProPublica* and National Public Radio (NPR) found that "many states have not only shrunk the payments to injured workers" but shifted the cost to taxpayers through Social Security benefits. Employers in some jurisdictions simply stop paying injured workers "after an arbitrary time limit." What began as a program to reimburse employees for medical and wage losses associated with occupational injuries and/or disease, workers' compensation is being slowly dismantled from state to state, according to NPR, with "disastrous consequences to injured workers."

In Pennsylvania, where we most often practice, the workers' compensation system was reformulated in 1996 with Act 57. Vocational evaluation in work injury matters was reduced to establishing "earning power," which now ultimately leads to an agreement between the injured worker (claimant) and the employer (defendant) called a "Compromise and Release." The compromise is generally a cash settlement to "make the person whole," and the release is in the form of a signed agreement in which the claimant vows to end all claims and not bring forth additional claims, including EEOC complaints of discrimination against the defendant employer.

One somewhat jaded Pennsylvania Workers' Compensation Judge sarcastically deemed the workers' compensation system a program of "cash and carry." However, Act 57 has never truly served to make injured employees "whole." Often, the two parties simply assume a rate of "earning power" and cut to the chase, that is, the "cash and carry," more quickly. Seldom do "light-duty" programs lead to re-establishing the injured worker with the employer in a wholesome and dignified manner. Too often, the injured worker is a pawn in the bargaining between the employer's insurance carrier, who hopes to reduce its losses by commuting the benefits, and the injured worker's lawyer, who advocates quick case resolution in order to move on to the next opportunity to receive a 20% contingency fee.

In the process of resolving workplace injuries and illnesses through administrative means, such as a Compromise and Release, rather than actual transition to work and vocational rehabilitation, we have never fully grasped valuable rehabilitation concepts such as "reasonable job accommodation." Without sufficiently engaging in rehabilitating employees with disabilities in transition to work, employers have cheated themselves of successful experiences in understanding ergonomics and learning how to modify work in order to help employees carry out the essential functions of a job. This lack of job accommodation experience has perpetuated ignorance among corporate leaders regarding people with disabilities and how incumbents can continue to work following the onset of injury and/or illness.

More than twenty years have passed since our corporate client decided to create the segregated "light-duty pool," which ended with the embarrassing and painful lesson of not punishing or discriminating against employees simply because they have been injured at work. Much more recently, in a forensic assessment, we encountered the case of yet another risk manager, who was injured in a non-occupational motor vehicle accident. While this risk manager has continued to struggle with spinal impairment and physical limitations associated with chronic pain, her employer has sanctioned a change in her work schedule and venue for the past three years by allowing the employee to come to the office when she can and work from home when she cannot manage travel to the office. As a result, the employer has essentially provided her with what could be argued is "reasonable" accommodation given

the length of time that the "accommodation" has been in place. Apparently this risk manager, notwithstanding musculoskeletal disability, continues to carry out the "essential functions" of her job, but recently, the company's human resources department has allegedly made it known that the company has a "no telecommuting policy," suggesting that the accommodation may be deemed less than reasonable. We would suggest that they create a policy governing telecommuting, but not unilaterally revoke the risk manager's well-established job accommodation, as it may not be in the employer's best interest to now change the employee's pattern of alternating office and home work schedule.

It has been twenty-five years since the passage of the ADA and we have witnessed many issues in work organizations regarding proactive and reactive disability management. As examples, our two experiences with risk managers, ironically professionals responsible for employee safety, health, and productivity, tell us that there is much more to learn with regard to recruiting, hiring, and maintaining talented people, as well as reducing risk and leading the organization away from practices of disability discrimination. We have heard the mantra, "Safety first; safety last; manage the disability in between." When properly conceptualized and operationalized by business leaders, that precept still has merit.

We have continually encouraged employers and people with activity limitations to visit the Job Accommodation Network (JAN) and the Computer/Electronic Accommodations Program (CAP) websites. The JAN and CAP programs provide accommodation ideas for keeping work available to both injured employees and new hire candidates with activity limitations secondary to physical and/or mental impairments. Job accommodations are increasingly easy to make for a variety of activity limitations, both physical and mental. We again recommend that organizational leaders become more familiar with ways to facilitate work for all employees, but more needs to be done by leaders who have influence over creating solid risk management and human resources policies.

We also recommend that organizational leaders endeavor to make sure that their companies:

1) Establish talent recruitment and hiring policies that recognize the importance of inclusion and diversity in the employee population;
2) Write and maintain job descriptions that detail essential functions;
3) Assure that hiring decisions are based on a candidate's qualifications to carry out the essential functions of the position, with or without reasonable job accommodation;
4) Hire the best applicant for the job regardless of age, race, creed, gender, sexual orientation, or "disability" status;
5) Completely manage the recruitment, hiring, and orientation processes;
6) Do not panic and respond reactively when employees become injured or ill, but recognize that their talents, i.e. the reason that they were hired, may not have been compromised by injury or illness. People with medical impairments can still work, with or without job accommodation, and make continuing contributions to the organization;
7) Utilize vocational evaluation more proactively to assist in finding alternative work within the organization to maintain talented people, not as a last resort for the purpose of outplacement;
8) Do not abdicate the responsibility of a return-to-work to medical personnel. Instead, request that medical personnel become part of the team in the human resources efforts to keep people employed and productive. Take responsibility for helping people transition back to work;
9) Safety first, safety last, but manage the disability in between. That is, do not allow insurance carriers to make your company's human resources decisions. Actively manage disability (lost time) just as you actively create and oversee safe work environments;
10) Make sure that medical, human resource, and risk or insurance management personnel collaborate on all matters of health, safety, and return-to-work.

Twenty-five years have gone by "in a blink of an eye," and many of us have developed our own activity limitations that did not exist when George H. W. Bush signed the Americans with Disabilities Act of 1990. The ADA, however, is the broadest form of civil rights legislation, as it potentially protects any and all of us, even risk managers who serve as business leaders in keeping people safe and productive in the workplace. It is time that we fully embrace and implement the ADA, as it serves as both good human resources strategy and risk management policy. When properly used with comprehensive vocational

assessment, the ADA is a blueprint for return-to-work programs. Risk managers and business leaders need to know this.

Workers' Compensation: No Longer a "Sole Remedy"

ProPublica and NPR analyzed reams of insurance industry data, studied arcane state laws, and obtained often confidential medical and court records to provide an unprecedented look at the unwinding of workers' comp laws across the country.

Among the findings:

- Since 2003, legislators in 33 states have passed workers' comp laws that reduce benefits or make it more difficult for those with certain injuries and diseases to qualify for them. Florida has cut benefits to its most severely disabled workers by 65 percent since 1994.
- Where a worker gets hurt matters. Because each state has developed its own system, an amputated arm can literally be worth two or three times as much on one side of a state line than the other. The maximum compensation for the loss of an eye is $27,280 in Alabama, but $261,525 in Pennsylvania.
- Many states have not only shrunk the payments to injured workers, they've also cut them off after an arbitrary time limit — even if workers haven't recovered. After John Coffell hurt his back at an Oklahoma tire plant last year, his wages dropped so dramatically that he and his family were evicted from their home.
- Employers and insurers increasingly control medical decisions, such as whether an injured worker needs surgery. In 37 states, workers can't pick their own doctor or are restricted to a list provided by their employers.
- In California, insurers can now reopen old cases and deny medical care based on the opinions of doctors who never see the patient and don't even have to be licensed in the state. Joel Ramirez, who was paralyzed in a warehouse accident, had his home health aide taken away, leaving him to sit in his own feces for up to eight hours.

The scope of the changes, and the extent to which taxpayers are paying the costs of workplace accidents, has attracted almost no national attention, in part because the federal government stopped monitoring state workers' comp laws more than a decade ago.

The cuts have gone so deep in some states that judges who hear workers' comp cases, top defense attorneys for companies, and even the father of the modern workers' comp system say they are inhumane.

Presented with ProPublica and NPR's findings, Sen. Bob Casey, D-Pa., one of the leading worker advocates in Congress, said the changes undermine the basic protections for injured workers.

Reference:

Grabell, M., & Berkes, H. (2015, March 4). The Demolition of Workers' Comp. Retrieved 7/13/15.

"No purpose intervenes between I and You, no greed and no anticipation; and longing itself is changed as it plunges from the dream into appearance. Every means is an obstacle. Only where all means have disintegrated encounters occur." — A quote from *I and Thou* by Martin Buber (1923).

Do exclusive remedy provisions in workers' compensation laws bar employees from pursuing ADA claims?

No. The purpose of workers' compensation exclusivity clauses is to protect employers from being sued under common law theories of personal injury for occupational injuries. Courts have generally held that the exclusive remedy provisions of state workers' compensation laws cannot bar claims arising under federal civil rights laws, even where a state workers' compensation law provides some relief for disability discrimination.

Applying a state workers' compensation law's exclusivity provision to bar an individual's ADA claim would violate the Supremacy Clause of the United States Constitution and seriously diminish the civil rights protection that Congress granted to persons with disabilities.

Reference:

Brown, C., Brown, D., & Weigley, A., CPCU, PHR, MBA, (n.d.). Beyond Insurance –Interaction of the ADA and workers compensation 05/10. Retrieved 7/13/15.

ADA Exclusion of Transgender People Challenged

A transgender woman who was fired from her job at Cabela's filed a discrimination suit last summer making claims under both the ADA and Title VII of the Civil Rights Act, which is more often used in cases like this one. The employee, in a suit she filed against her employer, said she was forced to use the men's bathroom at work, and that her colleagues called her "ladyboy," "freak," and "sinner."

She and her lawyers filed a brief detailing a head-on challenge to the constitutionality of the ADA's exclusion of transgender people. During the same week that she filed her brief, Pennsylvania Gov. Tom Wolf announced that he had chosen a transgender woman to serve as the state physician general, and President Barack Obama included transgender people in a passage of his State of the Union address remarking on Americans' respect for human dignity.

Spencer, S. (2015, January 22). Transgender Woman Challenges Constitutionality of ADA Exclusion published by *The Legal Intelligencer.* Retrieved 7/13/15.