

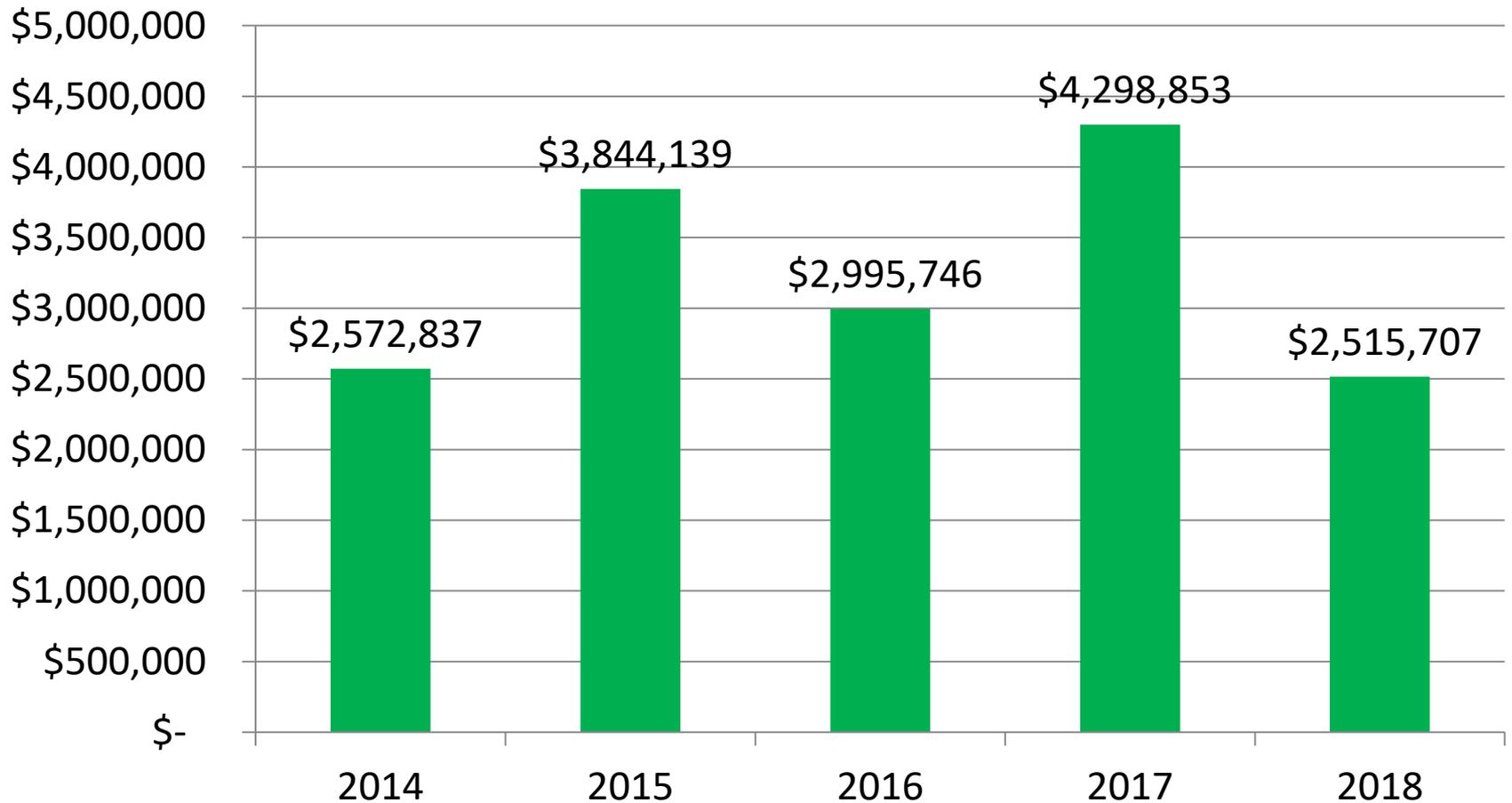


**The Challenges of Transitional Duty
July 26, 2019 TRICO Retreat**

TRICO JIF

W. C. Incurred Dollars

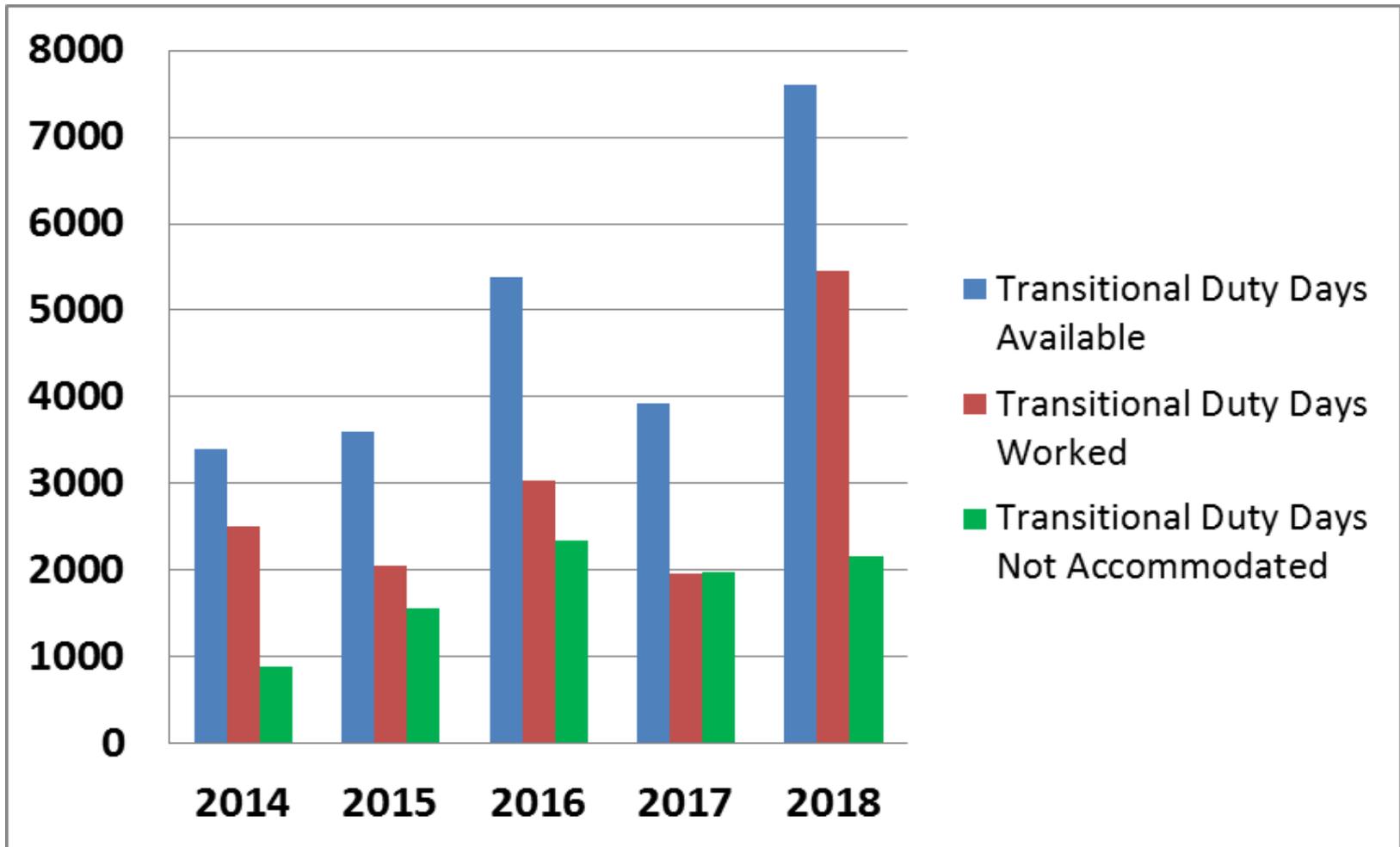
2014 to 2018



Valued May 31, 2019

Transitional Duty Utilization

2014-2018*

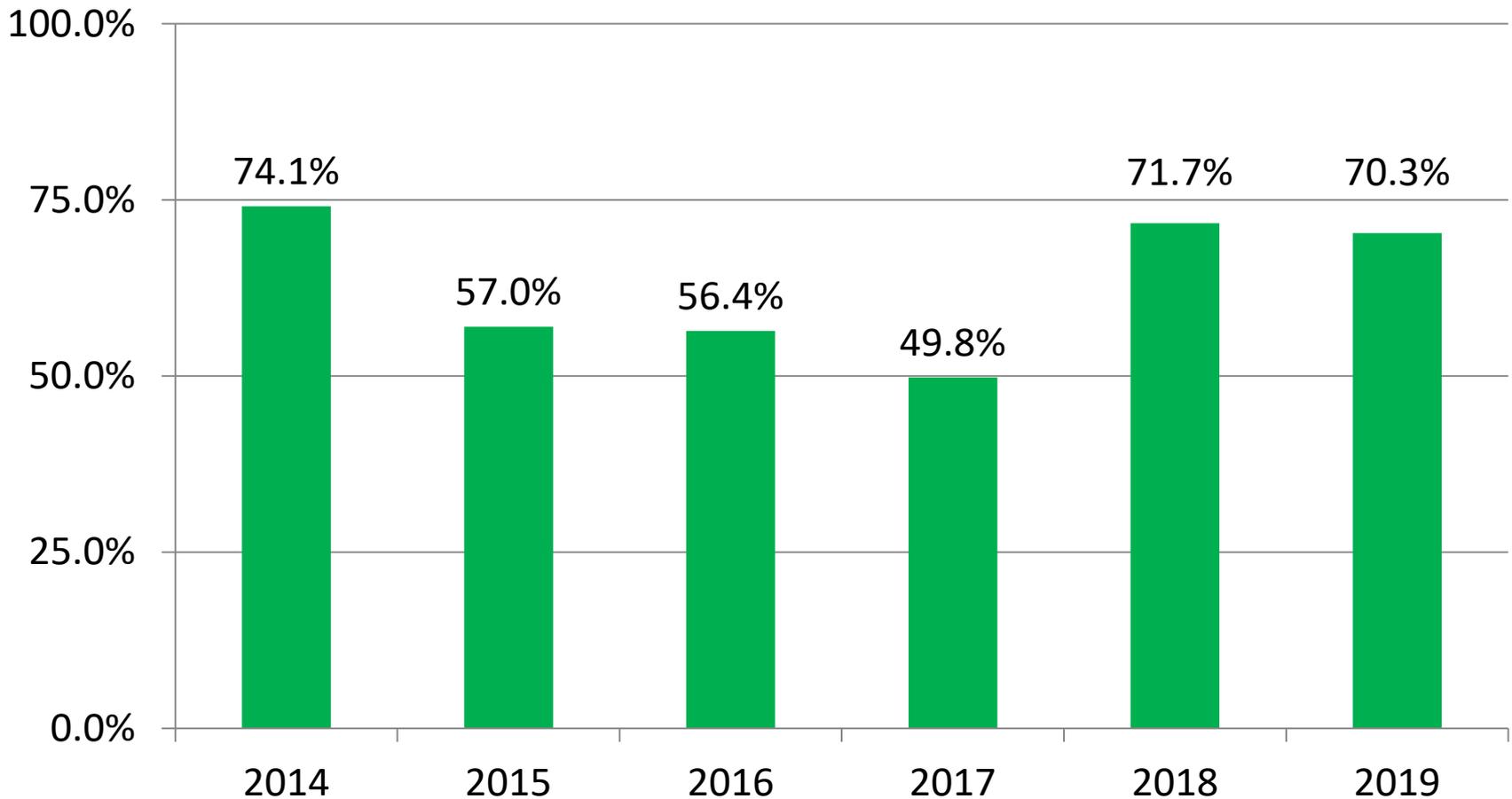


*Total during the Fund Year no matter the date of loss

TRICO JIF

Use of Transitional Duty Days

2014 – 2019*



Valued June 30, 2019

*Total during the Fund Year no matter the date of loss

Cost Impact Of Transitional Duty 2014-2018*

	2014	2015	2016	2017	2018
\$ Saved By Accommodating Transitional Duty	\$2,117,616	\$1,757,880	\$2,640,001	\$1,753,472	\$4,919,544
Cost Of Days Not Accommodated	\$740,154	\$1,324,395	\$2,044,237	\$1,768,704	\$1,943,256

*Total savings during the Fund Year no matter the date of loss

Partial Total Disability Example

180 Weeks (**30% Award**) = \$54,168

31% Award = \$79,980

33-1/3% = \$86,000

“Over The Hump”



Length of disability strongly influences judge's
award of benefits

TRANSITIONAL DUTY PROCESS

Studies have shown that many injured employees are capable of assuming their full responsibilities at an earlier date if they start a transitional plan before reaching MMI

- Nurses and Adjusters remind providers of availability
- Doctor evaluates the injured worker for capability and sets forth work restrictions
- Employer is notified
- Employer determines availability
- Second Effort
- Employer informs employee outlining alternative duty and sets a time for re-evaluation (not open-ended)
- Employee re-evaluated at next provider visit
- Transitional duty either continues or the employee returns to full duty



Best Practices for Creating an Effective Transitional Duty Program

Presented to:
Gloucester, Salem, and Cumberland Counties Municipal Joint Insurance Fund
(TRICOJIF)
2019 Retreat

Christopher J. Saracino, Esq

Certified by the New Jersey Supreme Court as a
Workers' Compensation Law Attorney

Pietras Saracino Smith & Meeks, LLP

cjs@pslawnj.com

856-761-3773



Pietras Saracino
Smith & Meeks LLP
Attorneys at Law

What is a Transitional Duty Program?

- A transitional, light or modified duty program is a mechanism to return an injured worker to work in lieu of paying temporary disability benefits within the restrictions established by the workers' compensation authorized treating physician. It is the bridge between being out of work and full-duty.
- Light duty is not defined in the New Jersey Workers' Compensation Act. The use of "transitional duty" as opposed to "light duty" is useful since certain employees may resent that the temporary duty is "light".
- The injured employee would have to qualify for TTD benefits (i.e., meet the waiting period of more than seven days out of work). N.J.S.A. 34:15-14.
- Temporary disability benefits would typically be calculated at seventy (70%) percent of the employee's average weekly wage subject to the statutory minimum and maximum rates. In 2019, the minimum temporary disability rate is \$246.00 per week and the maximum rate is \$921.00 per week.
- Temporary disability benefits compensate an employee for loss of wages while out of work due to a work-related injury. *Young v. Western Electric Company, Inc.*, 96 N.J. 220 (1984).

Maximum Medical Improvement and Transitional Duty

- Temporary disability benefits can be stopped once the employee has been deemed to be at *maximum medical improvement* from treatment or is able to *return to work* whichever occurs first.
- In many cases, the employee is unable to return to work but is placed at maximum medical improvement from treatment by the authorized treating physician so benefits can still be terminated. *See, Monaco v. Albert Maund, Inc. 17 N.J. Super. 425 (App. Div.), 21 N.J. Super 443 (App. Div. 1952)*. The inability to return to work then is considered when addressing the petitioner's claim for permanent disability.
- In addition to terminating TTD on maximum medical improvement, an employer can terminate benefits when the employee can return to work light, modified, or transitional duty. *Harbatuk v. S&S Furniture Systems Insulation, 211 N.J. Super. 614 (App. Div. 1986)*.
- The Appellate Division's decision in *Harbatuk* makes it possible for employers to implement successful transitional duty programs.

Rules on Transitional Duty Programs

- The basic rule established in the *Harbatuk* decision is this: **the employer must offer a light duty job to the employee in order to terminate temporary disability benefits.**
- It is **not** enough to rely on the doctor to tell the employee that he/she can return to work light, modified, or transitional duty. There must be an **affirmative** offer from the employer to the employee clearly communicating the offer of light, modified, or transitional duty. This offer should be clear enough to be easily defended in court if necessary.
- The offer should be for a modified or transitional duty job that meets the restrictions put in place by the authorized treating physician (i.e., no lifting more than 25 lbs., no overhead work, no bending, squatting or kneeling, etc.). An FCE can be used to determine whether or not the employee can safely perform the light-duty job.
- If the employee **rejects** the offer of a light duty job, then TTD can still be terminated.

Rules on Transitional Duty Programs

- Employers also need to be mindful of the fact that this provision is limited to the termination of the employee's workers' compensation benefits – not the termination of the worker's employment!
- Termination of employment will most certainly trigger a claim under the New Jersey Law Against Discrimination (NJLAD). *See, Carter v. AFG Industries Inc., 344 N.J. Super. 549 (App. Div. 2001), cert. den. 171 N.J. 340 (2002).*



Why Have a Transitional Duty Program?

- A transitional duty program will help cut your workers' compensation cost exposure dramatically if implemented properly. Outside of medical costs and significant permanent disability awards, lost time (TTD) represents one of the most significant costs in a workers' compensation claim.
- Example: IW collects 26 weeks of TTD at the max rates for 2019 (\$921.00 per week) for a total of \$23,946.00.
- Assume that your town has five (5) such claims this year alone. Your exposure for lost time is a whopping \$119,730.00.
- An effective transitional, modified, or light duty program can help reverse that trend if implemented properly.
- In addition, effective transitional duty programs help reduce fraud, help promote an effective return to work to full duty, makes employees focus on returning to work, and reduces the likelihood that he or she will immediately contact an attorney.

What to Do

- Keep in regular contact with your employees who are out of work.
- Make sure to stay in touch with the Qual-Lynx adjuster to determine whether or the authorized doctor has indicated that the employee may return to work in a modified or transitional duty capacity.
- Establish a clear policy regarding your transitional duty program and review that policy regularly with all employees. Make certain that all new employees are aware that as an employer you have a transitional duty program.
- Obtain stakeholder involvement with supervisors, chiefs, department heads to make certain that the policy is communicated when there is a work injury resulting in time lost from work.
- Make absolutely certain that you have good communication with your authorized treating physicians on this issue.
- For the program to work the employee, co-workers, supervisors, administration, care providers, and Qual-Lynx all need to work together.

What to Do

- Have a clear policy regarding transitional duty
 - Who is entitled to participate?
 - What is the rate of pay?
 - When can an employee enter the program?
 - Where will the employee be assigned?
 - How long can they stay in the program?



What to Do

- Assure your employees that there will be an open line of communication with his/her doctor so that they know that the doctor is satisfied that the employee can safely perform the transitional job.
- Make sure that the employee and supervisor are on the same page with you on this job
- Train employees in other jobs used as transitional duty so that they know exactly what they will be expected to do.

What Not to Do

- Do not attempt to bring an employee back in a transitional duty job at a rate less than their TTD rate.
- Example: IW is collecting \$921.00 per week in TTD benefits and is told that he can return to work modified duty with a restriction of no lifting more than 25 lbs. An affirmative offer of light duty is sent in writing to IW advising him to report for transitional duty on the assigned date and time. However, upon returning IW learns that the transitional duty job will pay him only \$350.00 per week. Is that okay?
- Do not make the transitional or modified duty a job that will be perceived as a “punishment”.



Do we have to include non-work injuries in our transitional duty program?

- Don't be tripped up your light duty obligations under the FMLA and ADA when it comes to implementing a successful transitional duty program for your workers' compensation program.
- As a general rule, you are permitted to reserve transitional duty positions for those with work-related injuries; however, the employer must examine for those seeking leave due to a non-work related injury whether or not a "reasonable accommodation" such as restructuring positions by redistributing the "marginal" functions of a job exists.
- Also, if there is a **vacant** transitional duty position available for a non-work related injured employee, the employer must reassign the employee to that position provided that the employee is qualified for the job, and it would not impose an "undue hardship" on the employer.
- An employer may not avoid its obligation to accommodate an individual under the ADA with a non-work related disability simply by asserting that the disability was not work-related.
- If you are concerned that an employee may have rights under the FMLA and/or ADA you should immediately consult with labor counsel to determine coverage issues before responding to a leave request.

Example

- Washington Twp. creates a transitional duty program for employees when they are injured at work if they are unable to perform one or more of their regular job duties. IW can no longer perform functions of her position because of a disability caused by an off-the-job motor vehicle accident. IW goes to HR and demands that Washington Twp. create a light duty position in the transitional duty program for her as a “reasonable accommodation.” The township denies the request and says she does not qualify to enter the transitional duty program since she was not injured at work. The township has not violated the ADA.
- However, the township must now engage in the interactive process and determine whether or not a reasonable accommodation can be provided absent undue hardship. If it is determined that the only effective accommodation under the ADA is to restructure IW’s position by redistributing the marginal functions, and the restructured position now resembles a light duty job, the township must provide the accommodation unless it can prove that the accommodation would present an undue hardship.

Example No. 2

- Washington Twp. has transitional duty positions which it reserves for employees in Public Works when they are unable to perform their regular job duties because of a work-related injury. IW, a Public Works employee, has multiple sclerosis (MS) which substantially limits a number of major life activities. Eventually IW is unable to perform the essential duties of his position, with or without a reasonable accommodation, because of the MS. As a reasonable accommodation, IW requests that he be reassigned to a vacant transitional duty position for which he is qualified. Washington Twp. says that the vacant position is reserved for employees who are injured on the job and refuses to reassign IW, although it is clear that it would not impose an undue hardship to do so. In this situation, Washington Twp. has violated the ADA by refusing the reassignment to the vacant position.
- Note: there would be no violation if the position was already filled or needed to be filled by an employee who had a work-related injury.

Do we have to include non-work injuries in our transitional duty program?

- The New Jersey Division of Workers' Compensation has no jurisdiction over any claim involving the ADA and/or FMLA. Therefore, issues involving non-work related injuries will never be brought in the Division of Workers' Compensation.
- When an employee seeks FMLA leave, an employer may offer a light duty assignment as an alternative (to keep the employee working). Light duty is not required.
- The employee has the right to take FMLA leave instead. The right to take FMLA leave (12 weeks of job protected leave in a 12 month period for eligible employees) is absolute.
- An employee must have a serious health condition which is defined as an illness, injury, impairment or physical or mental condition that involves: (1) inpatient care in a hospital, hospice, or residential care facility, or (2) continuing treatment by a health care provider together with incapacitation for more than three (3) days. 29 C.F.R. Sec. 835.112(a)(4).
- The employee must have been employed for at least 12 months and must have worked at least 1,250 hours during the 12 month period.

Do we have to include non-work injuries in our transitional duty program?

- You should be running FMLA leave time concurrent with any time an injured employee is out of work and receiving TTD!
- Since this is discretionary, you must include a provision in your policy manual advising employees that workers' compensation leave will be counted toward FMLA leave.
- Failure to run FMLA leave concurrent with workers' compensation leave may result in a situation in which the injured worker takes an additional 12 weeks of leave after workers' compensation benefits are ultimately terminated.
- You should be restricting your transitional duty positions to temporary status. Determining when the transitional duty position will end is often difficult (i.e., 3 to 6 months, upon MMI). Remember, an employee who cannot return to work full-duty yet but has exhausted the transitional duty program may still request leave under the FMLA and ADA.
- Where transitional duty is offered, the employer should make it clear up front that there is no permanent light duty.

Return to Work and 100% Healed Policies

- Many employers will not take an injured worker back until he or she is 100 percent healed.
- Unfortunately, this position is in direct conflict with the ADA. The emphasis of the ADA is on individualized assessment of abilities of the injured worker.
- Courts have consistently rejected 100 percent healed policies in favor of individualized assessments as found in a fitness for duty exam.
- The Equal Employment Opportunity Commission (EEOC) takes the position that 100 percent healed policies violate the ADA because full duty may include “marginal” as well as essential functions and marginal functions cannot be considered in determining whether or not an employee is fit for duty.

About the Author

Christopher J. Saracino, Esq., has been representing clients in litigated workers' compensation matters throughout the State of New Jersey for 22 years. During that time, he has handled literally thousands of workers' compensation cases involving everything from car accidents to multi-respondent occupational disease claims. He has a reputation for obtaining the absolute best results for his clients.

Mr. Saracino has a vast amount of experience as a workers' compensation trial lawyer. Accordingly, he is Certified by the Supreme Court of New Jersey as a Workers' Compensation Law Attorney which is a designation held by only 120 lawyers state-wide. In Camden County, Mr. Saracino is one of only 26 lawyers who hold that designation. He also has a wealth of appellate experience and literally helped shape the law in New Jersey in reported decisions such as *Stroka v. United Airlines*, 364 N.J. Super. 333 (App. Div. 2003), cert. denied, 179 N.J. 313 (2004).

In addition to his representation of the TRICO JIF, he represents a number of other public entities including the Atlantic County Municipal Joint Insurance Fund (ACMJIF), Burlington County Municipal Joint Insurance Fund (BURLCOJIF), Camden County Insurance Commission, Camden County Municipal Joint Insurance Fund, Professional Municipal Management Joint Insurance Fund, Municipal Excess Liability Fund, ACCASBO JIF, BCIP JIF, Gloucester, Cumberland, Salem School Districts Joint Insurance Fund (GCSSD JIF), and The School Pool for Excess Liability Joint Insurance Fund (SPELL)

Other significant cases that Mr. Saracino has personally litigated include:

- *Chiumento v. Camden County*, Docket No. A-0613-04T50613-04T5 (App. Div. July 31, 2006);
- *Huntoon v. Borough of Clementon*, Docket No. A-0956-09T3 (App. Div. July 28, 2010); and
- *McGlinsey v. George H. Buchanan Co.*, Docket No. A-4653-08T3 (App. Div. September 30, 2010), cert. den. 205 N.J. 102 (2011).

Mr. Saracino has been a featured lecturer on workers' compensation law with the New Jersey Association of Justice, Lorman Education Services, and the Council for Education in Management in addition to numerous in-house seminars and classes. He is a member of the American Bar Association, New Jersey State Bar Association (Workers' Compensation Section), Burlington County Bar Association, and the Camden County Bar Association. Mr. Saracino has been recognized in the field of workers' compensation litigation by various publications, including being selected as a "Top Attorney" in the area of Workers' Compensation Law by SJ Magazine several years in a row.

Examples of Modified Duty Assignments

- Operate computer, copy, fax and printer
- Assist with meeting plans and setting up for meetings
- Answering phones
- Updating Policy and procedure manuals
- Coordinate repair and maintenance schedules
- Track inventory and order supplies
- Sidewalk and Roadway inspections
- Accreditation programs
- Training/mentoring new employees
- Empty and clean trash cans, wash surfaces, sweeping, mopping, etc.
- Filing, archiving and shredding documents
- Assist safety department on routine inspections

Keys to a Successful Program

- Establish a written policy
- Educate supervisors, employees, physicians, and claims adjusters
- Have physician describe physical limitations
- Spell out “temporary” nature of assignment in writing



Work with your safety and claims professionals to develop your modified duty or early return to work program.

Questions

