

Returning to Work After a Job Injury



Tools for Injured Workers and Unions

Labor Occupational Health Program, University of California at Berkeley

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Acknowledgments

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Project Director Juliann Sum, J.D., Sc.M.

Other Contributors Laura Stock M.P.H.
Robin Dewey, M.P.H.

Editor Gene Darling

Designer Kate Oliver

Cover Photograph Robert Gumpert

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Table of Contents

| | | |
|----------------------|---|----|
| Introduction. | Using This Booklet | 4 |
| Section 1. | Making the Case for an Effective Return-to-Work Program | 5 |
| Section 2. | Elements of an Effective Program | 8 |
| Appendix A. | Resources | 10 |
| Appendix B. | Laws and Regulations | 11 |

Using This Booklet

Sometimes an employee who has suffered a work-related injury cannot do his or her usual job while recovering, but could do the same job with modifications or could do a different job. Suitable work, however, is not always available. This creates serious problems, because staying off work can slow down the recovery process.

In California, employers are not always required to retain or rehire employees with permanent disabilities caused by work. Unfortunately, when these employees lose their jobs, the disability benefits paid in the California workers' compensation system usually do not fully replace overall loss in income. This booklet describes important information and resources that unions can use to negotiate with employers to allow injured members to return to work.

Before negotiating over return-to-work, it is helpful to understand employees' rights and benefits in workers' compensation. To learn more about these rights and benefits, see *Workers' Compensation in California: A Guidebook for Injured Workers, 3rd Edition, November 2006*. To download the guidebook, go to: www.lohp.org (link to "Workers' Compensation"). In particular, see Chapter 6, "Working for Your Employer After Injury," and Chapter 8, "Benefits When You Need To Change Jobs."

Appendix B at the end of this booklet lists the California laws and regulations that govern return-to-work and related issues. It also explains how to obtain the laws and regulations.

This booklet describes rights and benefits in California as of October 2007.

Making the Case for an Effective Return-to-Work Program

Offering appropriate modified or alternative work not only helps the employee, but also can help the employer save money and avoid fines and penalties. In negotiating with employers, unions can point to the areas of savings below that will result from an effective return-to-work program (described in Section 2).

Employer Can Save Money

- **Temporary disability benefits.** Workers' compensation temporary disability (TD) benefits are paid if the injured employee cannot do his or her regular job while recovering, and the employer cannot offer work that meets the employee's work restrictions. If the employer *can* offer work that meets the restrictions, TD benefits are not paid, resulting in cost savings.
- **Permanent disability benefits.** If an employer with 50 or more employees offers suitable regular, modified, or alternative work to an injured employee, workers' compensation permanent disability (PD) payments may be reduced by 15%. If the employer does not make this offer, PD payments are increased by 15%. For definitions of regular, modified, and alternative work, see Appendix B of *Workers' Compensation in California: A Guidebook for Injured Workers*.
- **Supplemental job displacement benefits.** If an employer offers suitable modified or alternative work to an injured employee, the employer or employer's insurer is not required to offer a workers' compensation supplemental job displacement benefit, or "voucher," to the employee.
- **Reimbursement program for small employers.** The California Division of Workers' Compensation may reimburse an employer with 50 or fewer employees to help cover costs of making accommodations for injured employees:
 - Up to \$1,250 to accommodate a temporarily disabled employee
 - Up to \$2,500 to accommodate a permanently disabled employee.

- **Other savings.** Effective return-to-work programs:
 - Reduce the need to replace injured employees and train replacements
 - Improve productivity and morale among all employees
 - Increase the health and competitiveness of the business.

Employer Can Avoid Fines and Penalties

Workers' compensation anti-discrimination law

- **Illegal conduct.** California Labor Code section 132a says it is illegal for an employer to punish or fire an injured employee for filing a workers' compensation claim or for having a job injury, as long as the employer's conduct is not justified by "business realities." If an employer refuses to offer suitable work to an injured employee without a valid reason, this could be a violation of the law and can result in penalties.
- **Penalties for violating this law.** The employee can be awarded a 50% increase in workers' compensation benefits up to \$10,000, reinstatement, and reimbursement for lost wages and work benefits.

Disability rights and family leave laws

- **Legal requirements:**

The California Fair Employment and Housing Act requires an employer to provide reasonable accommodations to a disabled employee if doing so does not create an "undue hardship" on the employer. The employer is also required to engage in a timely, good faith, interactive process to determine reasonable accommodations for the employee. This means the employer must communicate openly with the employee and share important information about possible accommodations.

The California Family Rights Act requires all public employers and private employers with 50 or more employees to let employees take unpaid leave with continued benefits for up to 12 weeks in a 12-month period if the employee needs time off for a serious health condition.

- **Fines and penalties for violating either law:**

The Department of Fair Employment and Housing can require reinstatement, promotion, back pay, reasonable accommodation, actual damages including damages for emotional distress, administrative fines, and payment of attorney's fees. Actual damages, which are payable to the employee, and administrative fines, which are payable to the state, can be up to \$150,000 (total).

The Department may give permission to file a private lawsuit. In this case, the court may award the employee the same as listed above, with two exceptions:

- There is no limit on the amount of emotional distress damages.
- Instead of administrative fines, unlimited punitive damages may be awarded.

Elements of an Effective Program

Unions can negotiate for an effective return-to-work program in which the injured employee, treating physician, supervisor, others in management, and the union actively communicate soon after injury to ensure that the employee can return to work promptly and safely. These efforts should be supported by the claims administrator, who handles workers' compensation claims for the employer and usually works for the employer's insurance company. Everyone should continue to stay in touch to ensure that the work assigned supports the employee's recovery.

How Can the Employer Promote Return-to-Work?

- **Develop policies and procedures.** The employer should describe the return-to-work process in a written policy, including responsible persons and time frames.
- **Train staff.** Staff responsible for the return-to-work program should receive necessary training.
- **Encourage employees to return.** Injured employees should be encouraged to return to work as soon as is medically appropriate.
- **Identify possible modified or alternative work.** The employer should proactively identify and compile lists of specific jobs and tasks that can be done by injured employees with work restrictions. This should be done in collaboration with employees and the union. When an employee is injured, the employee and employer should give the treating physician a detailed description of the employee's job and the list of other available jobs and tasks that was previously compiled.
- **Offer modified or alternative work.** The employer should make available modified or alternative work whenever possible based on the treating physician's recommendations for safe return-to-work. The employer, injured employee, treating physician, and union should continue to work together to ensure that the employee is doing work that supports the recovery process.

How Can Medical Services and the Claims Process Support Return-to-Work?

- **Treating physician's role.** The treating physician should actively participate in helping injured employees return to work by specifying the kinds of work the employee can do safely while recovering. These recommendations should be based on the employee's medical condition and the employer's description of available jobs and working conditions.

Who may select the employee's treating physician?

Employees who are eligible to “pre designate” their personal physician may do so by notifying their employers in writing before injury. For employees who may not or do not pre designate, the claims administrator has the right to select the treating physician. However, if the claims administrator has created a workers’ compensation medical provider network (MPN), the injured employee may select a physician within the MPN. For more information, see pages 27-31 of *Workers’ Compensation in California: A Guidebook for Injured Workers*.

- **Claims administrator’s role.** The claims administrator should select physicians who are trained in how to help injured employees return to work and who will actively participate in the return-to-work process. Also, the claims administrator should pay the physicians for the time required to do this. In addition, the claims administrator should help the employer create and improve its return-to-work program.
- **Employer’s role.** The employer should select claims administrators who will choose the best physicians, pay them for the time required to participate in the return-to-work process, and assist the employer with its return-to-work program.



Resources

Physician's Role

- For more information about how physicians can help injured employees return to work, see “The Attending Physician’s Role in Helping Patients Return to Work After an Illness or Injury,” American College of Occupational and Environmental Medicine, position statement adopted in April 2002, available online at www.acoem.org.

Claims Administrator's Role

- For examples of insurers that actively support return-to-work and how they do so, go to the websites of State Compensation Insurance Fund, www.scif.com, and Zenith Insurance Company, www.thezenith.com.

Job Accommodations

- The Job Accommodation Network provides a “Searchable Online Accommodation Resource” at www.jan.wvu.edu.

Collective Bargaining

- Some unions have negotiated contract provisions to help injured employees return to work. See *Collective Bargaining for Health and Safety: A Handbook for Unions*, Labor Occupational Health Program, UC Berkeley, 2002, which can be ordered online at www.lohp.org (link to “Publications”).
- Workers’ compensation law allows unions and employers to “carve out” alternative ways to deliver workers’ compensation benefits and resolve disputes. A return-to-work program can be included in a carve-out agreement. See *How To Create a Workers’ Compensation Carve-Out in California: Practical Advice for Unions and Employers*, Institute for Research on Labor and Employment (formerly Institute of Industrial Relations) and Labor Occupational Health Program, UC Berkeley, 2006, available online at www.lohp.org (link to “Workers’ Compensation”).



Laws and Regulations

Laws and regulations that govern the rights and obligations described in this booklet are listed below. To download the California Labor Code and other laws (statutes), go to www.leginfo.ca.gov (link to “California Law”). To download the regulations, go to www.oal.ca.gov (link to “Cal. Code Regs”).

Also listed are page references to *Workers' Compensation in California: A Guidebook for Injured Workers*, 3rd Edition, November 2006 (“*Guidebook*”). To download the Guidebook, go to: www.lohp.org (link to “Workers’ Compensation”).

Caution: Some rules are based on legal interpretations found in case law and are not spelled out in statutes and regulations. Case law includes past decisions of workers’ compensation judges, the Appeals Board that reviews and reconsiders decisions of workers’ compensation judges, and state courts.

Making the Case: Employer Can Save Money

- **Temporary disability (TD) benefits:** Labor Code sections 4453-4459, 4650-4657, 4661, and 4661.5. For examples of TD benefits, see *Guidebook*, page 49.
- **Permanent disability (PD) benefits:** Labor Code sections 4453-4459, 4650-4651, 4658, 4658.1, 4659-4661, and 4662-4664. To learn more about the 15% adjustment in PD benefits, see *Guidebook*, page 65.
- **Supplemental job displacement benefits:** Labor Code sections 4658.5 and 4658; and California Code of Regulations, title 8, sections 10133.50-10133.60. To learn more about supplemental job displacement benefits, or “vouchers,” see *Guidebook*, pages 54-55 and 70-71.
- **Reimbursement program for small employers:** Labor Code section 139.48; and California Code of Regulations, title 8, sections 10004 and 10005. The form to request reimbursement is in section 10005.

Making the Case: Employer Can Avoid Fines and Penalties

- **Workers’ compensation anti-discrimination law:** Labor Code section 132a. For examples of how Labor Code section 132a may apply to injured employees seeking appropriate modified or alternative work, see *Guidebook*, pages 53 and 57.

- **California Fair Employment and Housing Act:** Government Code sections 12926(k), 12926.1(c), and 12940(n). Fines and penalties are listed at the website of the California Department of Fair Employment and Housing: www.dfeh.ca.gov.
- **California Family Rights Act:** Government Code sections 12945.1, 12945.2, and 19702.3. Fines and penalties are listed at the website of the California Department of Fair Employment and Housing: www.dfeh.ca.gov.

Elements of an Effective Program

- **Selecting the treating physician:** Labor Code sections 3550(e), 3551, 4600, 4600.3-4600.7, 4603.2, 4601, and 4616-4616.7; and California Code of Regulations, title 8, sections 9767.1-9767.15, 9770-9779.9, 9780-9783.1, and 9880-9884. To learn more about the rights of claims administrators and injured employees to select the employee's treating physician, see *Guidebook*, pages 27-31.