



Expert view

Q&A with Bryon Bass, SVP, Disability and Absence Practice & Compliance, Sedgwick

The "Expert view" column presents a wide range of topics offering valuable insights and information for customers.

edge:

The Americans with Disabilities Act (ADA) and return to work (RTW) continue to be hot topics among our clients and the industry in general. What questions are employers asking?

Bryon:

One of the most common things we hear is, "Do we have to engage in the interactive process, and when do we engage?" If given a medically reasonable accommodation request, whether related to an occupational or non-occupational injury or illness,

an employer is required to pursue the interactive process. There are different pathways that can lead to the interactive process. As soon as an accommodation request is made, or even if the employer knows - or should know - of an employee's need in the workplace that may

be related to a disability, the obligation to engage in the interactive process is triggered. It is also important to start the interactive process anytime an employee has exhausted leave.

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How can employers maintain compliance under ADA requirements?

Bryon:

Three keys to compliance are communication, documentation and consistency. The interactive process typically consists of a dialogue between the employee, supervisor and a human resource representative or ADA coordinator, and it is often beneficial to include the employee's healthcare provider for guidance. Regular communication throughout the process is essential. Engage with the employee to clearly understand the need, look for potential accommodation options and consider parameters, and monitor that the accommodation is being carried out appropriately and consistently.

Because an employee's need for a job accommodation can be prompted by a disability or leave of absence request, a workers' compensation claim, or can arise outside of those circumstances, a claims management system that

brings together information on all types of employee absences, tracks each step in the interactive process, and enables comprehensive documentation helps ensure compliance on multiple fronts. A centralized information platform can greatly reduce documentation risk and give employers a strong defense in the case of legal challenges.

Most important is consistency. Regardless of the nature of an injury or illness, your practices should be consistent across the board when considering the interactive process and RTW options, including light duty or transitional work opportunities. Risk management and human resources teams should follow a common process and communicate to ensure employees have equal access to accommodation choices. Also, avoid a "100% healed" mentality; organizations that maintain an employee must be completely healed before returning to work in any capacity are setting themselves up for challenges. This type of standard violates the ADA because it removes the opportunity for all employees to pursue reasonable accommodation.

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What are the most common hurdles employers must overcome in implementing the interactive process and RTW strategies?

Bryon:

Many common challenges we see among employers can be addressed with careful planning. First, do not get tripped up by job descriptions (or a lack thereof). It is important to ensure you have an up-to-date functional job description outlined for each position. If not documented, updated and readily available, this lack of information can delay the interactive process and make it tough to implement a reasonable accommodation or RTW plan. Some employers may have job descriptions on file, but they have not been reviewed in months or years. Validate essential functions as part of the interactive process to ensure the tasks identified reflect the current reality of each position.

Additionally, without a clear, written policy that is communicated and shared across the organization, employers may be setting themselves up for problems. A formal, written policy helps set expectations, and supports consistency when following ADA requirements and engaging in the interactive process – whether via occupational or non-occupational paths.

Finally, as part of planning and policy, clearly outline the roles and responsibilities of all players – risk managers, human resources, supervisors, business leaders, your third party administrator and the employee – to eliminate uncertainty and avoid missteps. Invest time and resources to train staff, especially front-line supervisors, on the basics of ADA, the requirements of the organization’s policy and how to consistently follow and document the steps of the interactive process.

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How should we consider leave in the accommodation equation, particularly after the recent 7th Circuit court decision?

Bryon:

We frequently answer questions from employers about using leave or intermittent leave as an accommodation. While leave, particularly intermittent leave, as an accommodation can be difficult for employers to track and manage, it is also an area that can prompt ADA-related lawsuits. In general, we have suggested that leave as an accommodation should be considered if it is appropriate, reasonable and practicable. Employees may request leave in order to facilitate the healing process and return to work or, in the case of intermittent leave, remain at work while also allowing time for treatment and recovery. The U.S. Department of Labor’s (DOL) Job Accommodation Network (JAN) offers some excellent guidance on conditions that might warrant leave under the ADA, as well as how to determine the appropriateness of a request.

Since the recent 7th Circuit decision (see *the article “Is a leave of absence still considered a reasonable accommodation?” in this issue*), some employers have shifted their thinking and no longer believe that leave is acceptable as an accommodation. Proceed with caution; based on court rulings in other jurisdictions, as well as repeated Equal Employment Opportunity Commission (EEOC) guidance and decisions, leave as an accommodation may still be considered reasonable when intended to help your employee get back to work. The focus should be on whether the employee would be able to perform the essential functions of their job at the end of the requested leave, as well as whether the accommodation would place an undue hardship on the employer. We recommend reviewing each request for leave as an accommodation on a case by case basis rather than setting absolute limits.

The EEOC offers a resource document titled “[Employer-Provided Leave and the Americans with Disabilities Act](#),” which offers insight into situations where employers would be expected to provide a leave of absence as a reasonable accommodation. We also advise consulting with your corporate legal counsel for specific direction.

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What additional resources can employers turn to for guidance on ADA compliance and RTW?

Bryon:

In addition to the Job Accommodation Network ([askjan.org](#)) the DOL’s Office of Disability Employment Policy offers more resources on its website ([www.dol.gov/odep](#)). The EEOC offers many

resources and guidelines ([www.eeoc.gov](#)). Employers can also turn to the Disability Management Employer Coalition ([dmec.org](#)) and similar industry associations. The FMLA Insights Blog ([FMLAInsights.com](#)) and Sedgwick’s own blog, *Connection*, ([blog.sedgwick.com](#)) can also be timely sources of information.

It is easy to get into the weeds when it comes to individual cases and circumstances. Contact your Sedgwick representative and your corporate legal counsel if you have questions or need specific advice.

BRYON BASS

Bryon Bass is responsible for overseeing disability and absence management product standards and compliance, quality and disability payroll. He has a wide range of experience in health and productivity management, both from an employer benefits role and third party administration. His responsibilities have included client relationships, service operations and oversight of disability and absence management products. Bryon has also been active as an author and seminar leader dealing with FMLA implementation, corporate health and wellness strategies, workers’ compensation metrics and disability program design. Previously, he was the director of integrated disability management for a large utility company, where he oversaw companywide integrated delivery of disability and absence management services, comprised of self-insured/self-administered workers’ compensation, fitness for duty, leave of absence, accommodation and time-off programs.