



## Could This Be You? From FMLA to Light Duty to Dilemma

September 14, 2012

A Human Resources Bulletin

Recently, a client called to discuss an employee who had been injured on the job. The employee had exhausted 12 weeks of Family and Medical Leave Act (FMLA) leave taken because of the injury, and the injury continued to prevent the employee from performing some of the essential functions of his regular job.

The company had a transitional duty program. Following the conclusion of the FMLA leave, the employee had been assigned a temporary (60 days) "light duty" job in accordance with the transitional work program. The light duty job did not require the employee to perform all of the essential functions of the employee's regular position. The temporary job was set to expire in a few days.

That day, the employee's physician had advised the employee that his injury precluded the employee for the "foreseeable future" from performing some of the essential functions required of the employee's regular position. The physician would not identify a date by which the employee would be able to perform the essential functions at issue. The employee requested that the light duty assignment be made permanent.

"What do I do?" the client asked. "I don't want to make the light duty assignment permanent."

We explained that the company could, but was not required to, continue the light duty assignment for a short period or indefinitely, or the company could decline to do so. We explained that the employee is required to provide an estimated date when he could resume performing the essential functions. We explained that a request for an assignment that would excuse the employee from performing essential functions of his regular position indefinitely would not constitute a "reasonable accommodation" under the Americans with Disabilities Act (ADA).

However, the company's ADA obligation did not stop there.

We advised the client that the ADA requires the company and employee to engage in an interactive process. We urged the client to sit down with the employee, "compare notes," and consider other options. Were there any job modifications (that would not constitute an undue burden) that would provide the employee the opportunity to perform the essential functions at issue? Could the employee be assigned to a different, vacant position that would not involve performance of the essential functions at issue? It could turn out that there is no reasonable accommodation; however, by engaging in the process, the company would be in a stronger position to argue that the company satisfied its ADA obligation to the employee.

Also, we advised the client how to properly document the interactive process and the communications to and from the employee.

