

RISK MANAGEMENT

Compliance Can Avert ADA Lawsuits by Employees

DURING THE last eight years since the Americans with Disabilities Act Amendments Act (ADAAA) was enacted, the landscape for employers has changed dramatically.

The odds of being sued have increased significantly and the onus is now on employers to engage in an interactive process with an employee who claims to be disabled or one that you, as an employer, consider to be disabled.

The original Americans with Disabilities Act has been in effect for 25 years, but the ADAAA shifted the emphasis to the interactive process and the efforts employers take to explore reasonable accommodation with employees. That is where the focus remains today.

The employment law firm of Foley and Lardner LLP, in a recent blog post, recommends the following whenever an employee mentions a potential disability or the circumstances suggest a potential need for accommodation:

1. Most people have a 'disability'

The law firm recommends that you start working from the position that if an employee begins talking about a mental health or physical condition affecting their ability to work, you should consider approaching the issue from the perspective that they potentially have a disability.

Better that than to ignore what you're hearing.

Many recent precedent-setting lawsuits have hinged on employers starting the interactive process too late or ignoring employees' requests for accommodation.

And some courts have ruled that even if the employer "perceives" that the employee is disabled, they may have an obligation to consider accommodation.

In other words, it's better to start interacting with the employee than shutting down the process before it has a chance to start.

2. Process matters

Under the ADAAA, the focus is on the interactive process with the end goal of identifying how the employer can reasonably accommodate the employee or job applicant so that they can do their job.

The process must be conducted in good faith and thoroughly with the goal of identifying a reasonable accommodation. Courts have increasingly viewed this process as crucial, and almost as important as the end goal.

3. Truly engage in the process

You'll need to back up your interactive process with proof that you were engaged in it.

Even when it may be clear to you that you won't be able to accommodate someone, you should still show that you tried to find a solution that would work.

Foley and Lardner recommends that you:

- Communicate with the employee and show that you either reached agreement on the

(See 'Approach' on page 2)



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If you have a question about any of the articles in this newsletter or coverage questions, contact your broker at one of our offices.

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WORKERS' COMPENSATION

New Legislation Aims to Cut Drug, Claims Costs

GOVERNOR JERRY Brown is expected to sign recently passed legislation that could further reduce workers' comp claims costs in California.

The Legislature last month passed AB 1124, which establishes a new drug formulary that would limit the types of medications that can be used to treat injured workers.

The legislation is seen as vital to controlling costs as the cost of some medications – particularly off-label, compound medications and specialty drugs – continues to rise at a quickening pace. A price formulary should address complaints of price-gouging for certain pharmaceuticals.

California insurance experts are optimistic that a new prescription drug formulary will help injured workers and reduce claims costs.

Both insurers and employers have expressed optimism about the effects of the legislation if signed into law.

Over the past decade, the workers' comp spend on prescription drugs has increased more than 250% through the first two years of treatment and accounts for some 13% of a claim's overall medical costs, according to the California Workers' Compensation Institute.

The institute's research suggests that a formulary could save California employers anywhere from \$124 million to \$420 million a year.

The estimate is based on the experience of Texas and Washington states when they adopted a workers' comp formulary to stem double-digit increases in spending on prescription drugs.

Not only that, but the increasing prevalence of doctors prescribing highly addictive opioid medications is also a concern for employers and insurers. While the drugs are not particularly expensive, overuse and abuse can lead to worse workers' comp outcomes, such as longer times away from work.

Mark Pew, senior vice president for Prium, told the news website *workcompcentral.com* that savings will follow from the

most important role of a formulary, that is, "to make sure injured workers are only taking drugs that are appropriate for their conditions. Cost savings are a side effect of doing the right thing for the patient from a clinical standpoint."

Pew said that for many providers and patients, prescribing or taking drugs is the easiest way to try to address pain.

But, many patients receiving narcotic painkillers don't report any improvement in function, and they still report significant pain, he added. Pain medications often do not address the root causes of the pain.

Pew said there might be some situations in which a strong opioid is appropriate for non-malignant cancer pain, and a formulary would still allow injured workers access to these drugs in such situations.

AB 1124 addresses this issue by requiring the Division of Workers' Compensation to include in the formulary guidance how an injured worker can access drugs for off-label use "when evidence-based and medically necessary."



(Continued from page 1)

Don't Take Single Approach to Accommodation Requests

restrictions or obtained supporting medical documentation.

- Show that you explored with the employee and the supervisor the possible reassignment of non-essential tasks.
- Show you assessed the employee's qualifications and looked at every open job for which they qualified to assess a potential transfer.
- Show you had a final conference with the employee before concluding reasonable accommodation was not possible.

Make sure that you have a record of the interactive process. The more you can back up your efforts to identify a reasonable accommodation, the more likely it will be that a court would view your efforts favorably and that you made good-faith steps in arriving at your conclusion.

4. No cookie-cutter approach

While many employers want to consistently perform the same kinds of steps from situation to situation, it is best to take each accommodation inquiry and each employee's circumstances on their own merits.

It's unlikely that multiple employees will have the same limitations and medical diagnoses, restrictions and prognoses regarding the various

essential functions of the job. Hence, there is no single approach to accommodation

5. Don't forget the FMLA and workers' comp

There is some overlap between the ADA and other legal frameworks like the Family Medical Leave Act and workers' compensation insurance.

For example, if an employee cannot return at the expiration of FMLA leave for his or her own serious health condition, the employer runs a serious risk of terminating the employee without first conducting an independent ADA analysis and assessing whether additional leave or moving them into a different position conforming with their restrictions is a reasonable accommodation.

The same applies after an employee receives a permanent and stationary workers' compensation diagnosis with restrictions that preclude maintaining him or her in the same position.

State workers' compensation requirements may not require an employer to take further steps in such a circumstance, but the ADA does. ❖

EL NINO RAINS

Homeowner's Insurance Won't Cover Flooding

ONE OF the most common insurance claims during heavy rains for homeowners is groundwater damage to the interior of a home – the result of spring rains and flooding. Unfortunately, this type of damage is excluded under homeowner's policies.

A homeowner's policy does not cover damage from water entering at or below the surface of the ground. Examples include sewer water that backs up into your home through the basement floor drain and water that seeps through your foundation from heavy rains.

That said, your policy would generally pay for damage from rain coming through a hole in the roof or a broken window – if the hole was caused by strong winds.

On the other hand, if you have a pipe leaking in your house and over time water damage occurs, that would not be covered because you didn't keep up with repairs.

What your homeowner's policy covers

For homeowner's insurance purposes, water damage is considered to occur when water damages your home before the water comes in contact with the ground. Some examples of water damage are:

- Hail breaks one of your windows, opening a hole for hail and rain to pour into your home.
- Rain soaks through the roof, allowing water to drip through your ceiling.
- You leave water on in a plugged washbasin and it pours onto your floor, causing water damage.
- A broken water pipe spews water into your home.

Even if flood or water damage is not covered by your homeowner's insurance policy, losses from theft, fire or explosion resulting from water damage are covered.

For example, if your home is flooded and looters steal some of your furnishings after you evacuate, the theft would be covered by your homeowner's insurance. However, the flood damage would be covered only if you have flood insurance.

Flood insurance

As the name implies, a standard flood insurance policy, which is written by the National Flood Insurance Program, provides coverage up to the policy limit for damage caused by flooding.

Generally, damage caused by water that has been on the ground at some point before damaging your home is considered to be flood damage. A handful of examples of flood damage are:

- A river overflows its banks and washes into your home.
- A heavy rain seeps into your basement.
- A heavy rain or flash flood causes the hill behind your house to collapse and the ensuing mudslide oozes into your home.

Flood damage to your home can be insured only with a flood insurance policy. That's available through us or your local Federal Emergency Management Agency office. Mortgage lenders won't lend you money if you live in a flood plain and don't secure flood insurance.

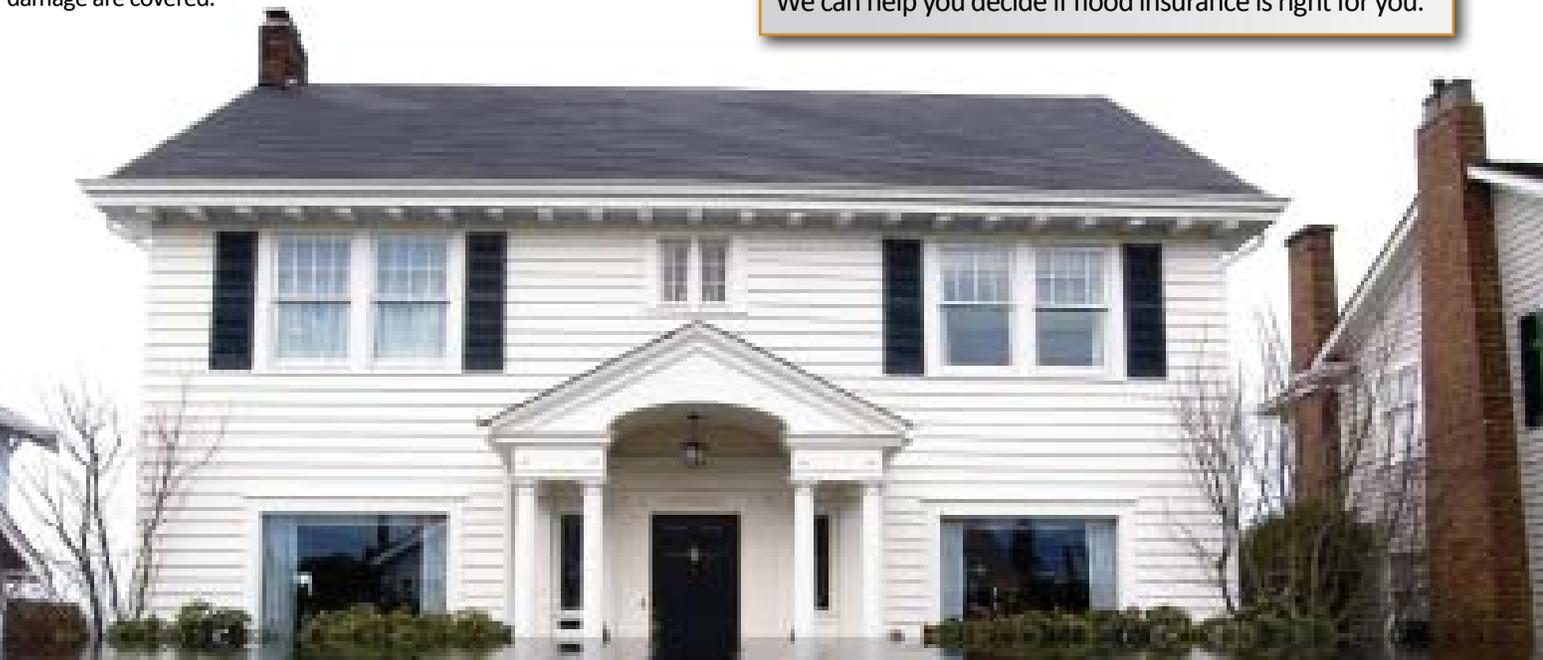
Contact our office if you need to determine whether your home is located in a flood plain. If it is, flood insurance is certainly a wise purchase.

The takeaway

Flood insurance and homeowner's insurance do not duplicate coverage for water damage. Instead, they complement each other. ❖

Call Us about Coverage

We can help you decide if flood insurance is right for you.



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ANCILLARY COVERAGE

The Voluntary Benefits You Should Be Offering

FIRMS ARE increasingly turning to voluntary benefits and services to personalize their benefit offerings, support their employees' overall well-being and security, and attract and retain talent.

Voluntary benefits and services offerings today tend to be geared toward baby boomers, who are a large segment of the workforce. But, as baby boomers will be retiring in increasing numbers across the next decade, expect to see voluntary benefits and services redesigned for younger generations, who are generally attracted to customized benefit packages.

Nearly half of 320 large employers polled for the Towers Watson "Voluntary Benefits and Services Survey" said they expect voluntary benefits and services to become more important than ever over the next five years.

The survey also found that the importance of voluntary benefits in companies' total rewards strategy will grow 27% in the next half-decade.

If you are considering starting to offer voluntary benefits, these might be a good place to start. They are the five voluntary benefits most commonly offered by employers:

1. Life

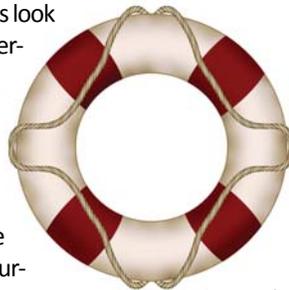
Life insurance is the most popular voluntary benefit, with 94% of employers surveyed offering it.

Individual life policies were some of the first voluntary products sold in the U.S. workplace. Today, 81% of individuals with life insurance have workplace coverage, while half of individuals look to their employer as the only source for coverage, according to a 2012 ING study.

But despite life insurance offerings at work, industry experts say most Americans are underinsured, if they are insured at all.

According to a survey by New York Life Insurance Co., Americans want their life insurance to last around 14 years beyond the breadwinner's death, but in reality they only have enough to last three years. That means the payout might need to be close to 15 or 20 times the breadwinner's salary, rather than the common rule of thumb of seven to 10 times the salary.

There are various calculators online that individuals can use to test if they are well insured.



2. Vision

Some 84% of employers offer vision insurance.

Voluntary vision coverage is typically a popular product. Employees view a vision benefit as a high-value/high-return product because they don't have to be sick to use it and its cost is typically one-tenth that of a medical plan.

It is also a product that appeals to many individuals: two-thirds of all adults report wearing some type of eyewear, on which they spend more than \$15 billion each year, according to the Towers Watson survey.



3. Dental

Eighty percent of employers offer dental coverage as a benefit.

Diabetes, heart disease, blindness and pregnancy complications all can be affected by dental hygiene and inflate health costs overall.

4. Disability

Benefits experts have long argued disability insurance is just as important as life insurance. And employers seem to agree: 80% of employers surveyed by Towers Watson offer it.

According to the Social Security Administration, 30% of people will have a disability of three months or longer at some point.

5. Accident

About 68% offer this coverage to their employees.

Accident benefits may help cover deductibles and other services standard health care coverage may not provide. Some voluntary accident benefits can be both a reimbursement and an indemnity insurance policy – expense reimbursements are paid for actual charges or up to the maximum amount stipulated in the plan.

Embedded benefits of accident coverage typically include:

- Accident medical expense
- Ambulance benefit
- Hospital confinement
- Accidental death and dismemberment

Optional benefits include accident total disability, hospital intensive care, bone fracture and dislocation, and spouse and children coverage. ❖



Want to Know More?
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