

## **The Rise of Temporary Transitional Employment (TTE)**

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The underlying purpose of the Workers Compensation Act – to return the employee to work – is often lost in the complexity of a workers' compensation case. It is easy to get caught up in "arising out of" and "in the course of" issues and issues of medical causation. Naturally, it is wise to review medical records and investigate any possibility that this alleged injury or condition pre-existed the work accident. Much time will be spent soliciting medical opinions to determine if treatment recommendations are appropriate and relates to the work injury.

One goal that we should strive for is to return an employee to work when he is medically released to do so in any capacity. Certainly it will be the primary concern of the arbitrator when the case eventually tried. Employers are likely to be better positioned to litigate the issue if they have addressed work restrictions throughout the claim and not just after a full release from medical care or right before arbitration.

### **Total Temporary Disability Benefits Generally**

As a bit of background, an employee that sustains a compensable work-related injury is entitled to temporary total disability (TTD) benefits for such a period of time until his condition stabilizes and he is capable of returning to work in some capacity. This does not mean the employee has to be returned to full duty, but rather is capable of working even with restrictions. However, in order for an employer to rightfully suspend TTD benefits, the employer must be able to show that the employee is capable of working and that the employer has offered work to the employee within those capabilities. So, if an employee is still actively treating for his work injury but is released to return to work with some restrictions, the employer must continue TTD benefits unless they can accommodate those restrictions and return the employee to work. Considering the nature of some employment, returning an employee to work with any restrictions might be difficult. Add to that the fact that some restrictions can be fairly restrictive – think sedentary duty only – and the issue becomes even more complex.

### **Temporary Transitional Employment**

One tool that is being used with more frequency to address return to work complexities is temporary transitional employment (TTE). Often called "modified duty off-site" or simply "off-site return to work programs," these programs typically use a third party vendor to locate temporary employment for the employee when their work restrictions cannot be accommodated by their employer. These programs

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come into play during two pivotal points in the handling of a case: (1) when the employee is first released to return to work with some restriction but is still actively receiving treatment, and, (2) upon completing treatment, when the employee is released to return to work with permanent restrictions. In both instances, the employer cannot accommodate the employee's restrictions.

Returning an employee to work as soon as they are medically cleared to do so is in the best interests of both the employee and employer. The employer saves money as a result of no longer paying TTD benefits. If the employee returns to work for the employer, the employer also gains the productivity of the employee returning to the workplace. The employee benefits by remaining physically active during his continuing treatment, which, many physicians agree can help facilitate faster and better recovery from an injury. The employee also benefits psychologically by returning as a contributing member of the work force. The goal of returning the claimant to work must remain front and center.

So, how can employers utilize a temporary transitional employment program to best position themselves for claim resolution?

### **Prior to Filing of the Claim**

The question of how to return an injured employee to work should be a concern for the employer before an injury even occurs. Although sometimes unavoidable, it is usually best to be proactive instead of reactive. Employers should consider having a policy specifically addressing return to work programs. If the employer's line of work allows flexibility to accommodate a wide range of restrictions, a statement in the employee handbook indicating that the employer will always attempt to accommodate restrictions upon receiving them from the employee could be included. If the employer wants to use TTE, more detailed information could be provided: (1) what employees are eligible; (2) whether participation is required as a term of employment; (3) how TTE would affect the employee's seniority; (4) whether a third party vendor may be used to arrange the employment, and so on. The agreement should outline the rights and responsibilities of the parties in a TTE situation. The employer should require the prospective employee review and sign the TTE policy upon accepting employment, and keep the signed policy with the employee's personnel file.

One of the most important concerns of arbitrators is the potential for an employee to be injured while working for the temporary employer. We need to be prepared to address that concern by being able to establish with whom responsibility lies in the event of an injury occurring in that TTE position. An argument can be made that the relationship between the employer and a temporary employer is no different than a borrowing/lending employment arrangement as contemplated by Section 1(a)(4), which specifically addresses liability in the event of an injury. Because TTE is still relatively new, it is unclear how this issue will be handled at arbitration. However, if there is a signed agreement between the parties addressing liability in the event of an injury, that factor should go a long way towards addressing some of the concerns voiced by arbitrators in recent decisions.

Next, employers should research vendors who can arrange TTE. Here, it is critical that the vendor understand what is involved with properly utilizing TTE and the benefits to everyone of returning an employee to the workforce. Employers should work closely with the vendor to address important issues between the employer and the transitional employer such as who pays the employee's wages, who provides benefits (if there are any), who has liability in the event of an injury at the transitional employer's facility, and so on. Keep in mind that the vendor used to arrange TTE might eventually be required to testify at trial so their credibility and availability to testify in Illinois are critical. In a case recently decided by Arbitrator Kane, the workers' compensation insurance company used a vendor to arrange TTE. However, the vendor company was actually owned by the insurance company. The

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arbitrator discredited the vendor's employment specialist's testimony by noting there was a clear financial bias in the matter.

## **Release with restrictions while actively treating**

Oftentimes, an employee will be released to return to work with certain medical restrictions, before they have concluded their treatment. If the employer cannot accommodate these restrictions, the employee is entitled to TTD benefits. One option is to start a vocational rehabilitation program to assist the employee in locating a position that can accommodate his temporary work restrictions. Normally, vocational rehabilitation counselors do not come into the picture until the employee concludes treatment and has permanent restrictions the employer cannot accommodate. In the case of a temporary position, the types of jobs the vocational expert would be finding could certainly be different – the claimant would likely argue it does not make sense for him to start a formal job at a place looking for a permanent position if they do not intend upon staying permanently. Some of the most common TTE facilities are non-for-profits such as Goodwill Industries and The Salvation Army. Perhaps the vocational expert can arrange a temporary position with a business that often participates in a formal TTE program through a third party vendor. The potential benefit, however, of using the vocational expert to locate the job is clear – if the employee refuses to accept the position, the employer can justifiably suspend benefits for the employee's non-compliance with vocational rehabilitation. It will then be up to the arbitrator to determine if the suspension of benefits was permitted under the Act.

The offer of temporary employment must be a "*bona fide*" job offer. An arbitrator recently discredited a temporary employment position, determined it was not a *bona fide* offer, and awarded benefits by finding that the transitional employment position was not a "competitive job." In so finding, the arbitrator noted that the employee did not do anything to secure the position. Although the employee was "interviewed" for the position, the temporary employer was paid to conduct the interview and received a fee from the employer to accommodate the employee.

## **Release with permanent restrictions, treatment concluded**

When the employee is released with permanent restrictions and the employer cannot accommodate the restrictions, vocational rehabilitation may be appropriate to assist the employee in securing a legitimate job in the current market that accommodates their restrictions. A vocational expert can assist the employee in preparing for the interview process and help locate potential jobs. That being said, it seems obvious that TTE would be a tough sell when the employee's restrictions are now permanent.

An arbitrator recently discredited a temporary employment position in a case where the employee was released from care with permanent restrictions. The employee presented evidence that there was no stable job market available for him and the employer relied on the TTE position a vendor had arranged for the employee. The arbitrator awarded permanent, total disability benefits, noting that the likelihood of the temporary job resulting in permanent employment was so slim, citing specific statistics to support his point, that he could not say the job was "competitive or real employment."

One consideration is to continue vocational rehabilitation to assist the employee in securing a more permanent position, but ask that he accept the temporary position while the job search is ongoing. Considering the advantages to both parties by the employee working in some capacity, an arbitrator might be more willing to find an employee's refusal to attend TTE is non-compliance if the employer represents they are continuing to assist the employee in their permanent job search.

Overall, there is no specific evidence an employer can present to force an arbitrator to accept a temporary, transitional employment position in Illinois. As issues resolve and new ones arise, we will continue to stay on top of the trend to help you best use it in the defense of your Illinois claims.

TTE programs are springing up all across the country. Several states are even incorporating TTE programs into their statutory provisions, adding legitimacy and predictability to the overall concept.

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