

## **Living Now: Legal Questions About Returning to Work**

August 6, 2008

### **Today's Agenda**

- Susan, Office of Patient Advocacy Case Manager
- Lindy Yokanovich, Cancer Legal Line
- Emily, Office of Patient Advocacy Case Manager
- Question and answer time with speakers

# **Living Now: Legal Questions About Returning To Work**

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## **Goals for today**

- **Enlighten not frighten**
- **Give an overview of programs and laws relevant when returning to work**
- **Raise awareness of issues**
- **Provide resources of where to turn for further assistance and more detailed information**

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## Going Back to Work

- Considerations When Returning to Same Job
  - Americans With Disabilities Act
  - Short Term and Long Term Disability
  - Social Security Disability Insurance/Supplemental Security Income\*\*
- Considerations When Looking for a New Job
  - Interviewing
  - Insurance: COBRA & HIPAA

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## State vs. Federal Law

- Today we're discussing Federal Law
- You also may be further protected by State Law
  - Individual states can raise the “ceiling” and provide more protections for their residents than the federal law may provide.
  - Varies greatly from state to state

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## Topics When Returning to Same Job After Leave

- ADA and reasonable accommodations
- Short and Long Term Disability
- SSDI/SSI

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## Americans with Disabilities Act

- The Americans with Disabilities Act (ADA) is a federal law prohibiting discrimination against people with disabilities
- Applies to public sector employers and private sector employers with 15 or more employees
- Many states have laws that provide additional protections to those with disabilities to prevent employment discrimination

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## ADA Protections:

1. Prohibit discrimination based on disability in all employment practices, including employment application, hiring, firing, advancement, compensation, training, recruitment, advertising, tenure, layoff, leave, and benefits
2. Require a covered employer to "reasonably accommodate" a qualified individual with a disability who can perform the "essential functions of the position with or without reasonable accommodation"

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## What is a Disability under the ADA?

- It depends on whether the individual meets one of the three definitions of "disability" of the ADA
- Only ONE of the three definitions must be met in order to be protected
- There is no clear answer. Determined on a case-by-case basis -- frustrating for all parties involved

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## Three Definitions

1. Substantial Limitation on a major life activity (walking, breathing, caring for oneself, working, etc.)
2. Whether an individual has a record of such an impairment
3. Whether an individual is regarded or perceived by the employer to have an impairment

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## Examples of Reasonable Accommodations

- *Example:* Karen the Grocery Store Checker-- stool to sit (most likely reasonable)
- *Example:* Emily the Grocery Store Shelf Stocker -- can't lift 10-20 pounds (most likely not reasonable)
- *Example:* Bakery sisters -- same job/disease but different employers/different outcomes

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## Interpretation of Law

- “Mitigating” measures (eyeglasses or medication) often render an otherwise “disabled” person no longer protected under the ADA
- Reality is that many who need protection no longer qualify as disabled



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## ADA Restoration Act

To restore the original intent of the ADA by:

1. Amending the definition of "disability" so that people intended to be protected from discrimination are covered under the ADA
2. Preventing courts from considering "mitigating measures" when determining whether a person qualifies for protection under the law

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## Bringing a Claim

- Strict timelines
- Case-by-case determination -- can be very frustrating
- Contact the your state's department of human/civil rights – your state's laws may offer greater protections

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## Short and Long-Term Disability

- Three Keys
  - Determine what (if any) policy your employer provides, and get a copy
  - Read your policy and ask HR any questions that come up
  - Be proactive in planning and managing your return to work

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## Considerations When Returning to Work Part-Time

- Whether your policy has a partial disability clause (cover the gap)
- If there is a pre-existing condition limitation clause in your policy (90 day look back)
- The possible effect of returning to lower paying/lower stress job (ex., CFO to accountant)

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## What If I Have More LTD/STD Questions?

- Policies vary greatly, so it is important to have a copy of yours and know what it covers
- The HR department is required to provide you with information and answer questions, if you ask them, but you must be proactive
- If you need help or have a complaint, ERISA is the government agency that covers group (non-government & church) plans

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## Social Security

### Three Keys

1. Determine how working will affect your benefits before deciding to go back to work
2. Keep the Social Security Administration informed of changes in employment status, income, expenditures
3. Take advantage of Employment Supports

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## What is Social Security Disability Insurance (SSDI)?

- Financial and medical benefits to individuals with disabilities who have paid taxes into the Social Security trust fund
- Individuals must meet the SSA's definition of disabled, and pass a test proving how recently they worked and the duration of their work
- Individuals receive a fixed monthly financial payments based on their average earnings, and are provided with Medicare

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## What is Supplemental Security Insurance (SSI)?

- Financial and medical benefits to individuals who are aged, blind, and/or disabled and who have limited financial resources, regardless of payments into Social Security
- The amount is fixed by the Federal Benefit Rate (FBR), and supplemented by most states. SSI recipients are eligible for health insurance under Medicaid
- Earnings affect SSI payments on a sliding scale until the income threshold is reached

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## What is a Disability under Social Security?

- “Inability to engage in any substantial gainful activity (SGA) because of a medically determinable physical or mental impairment(s) that can be expected to result in death, or that has lasted or that we can expect to last for a continuous period of not less than 12 months”
- For 2008, a monthly income averaging over \$940 is considered SGA

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## What is SGA and How is SGA Calculated?

- SGA is “the performance of significant physical and/or mental activities in work for pay or profit, or in work of a type generally performed for pay or profit, regardless of the legality of the work”
- Some things are deductible from your earnings when calculating SGA (so you can earn more than SGA without losing benefits)
  - Impairment-Related Work Expenses (SSI/SSDI)
  - Subsidy and Special Conditions (SSDI only)

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## What are Employment Supports?

- Programs intended to help individuals with disabilities become self-sufficient while protecting eligibility for benefits
- They allow you test ability to work but get benefits reinstated quickly if you need to stop working again

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## I'm on SSDI , which employment supports apply to me?

- Ticket to Work
  - Free access to vocational rehabilitation, no review of medical status while in use
- Trial Work Period
  - No loss of benefits for first 9 months of earnings
- Extended Period of Eligibility
  - Reinstatement of benefits if earnings go down
- IRWE/SSC

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## I'm on SSI , which employment supports apply to me?

- Ticket to Work Program and Impairment-Related Work Expenses exception
- Continuation of SSI
  - Earnings below income thresholds (which vary by state) will not stop your benefits or make you ineligible if you continue to have a disabling impairment
- Earned Income Exclusion
  - First \$65 and ½ remaining income excluded from “countable income”

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## What happens to my Medicaid or Medicare benefits if I work?

- SSDI - After the TWP, you remain eligible for Medicare Part A benefits for 93 months without paying any premiums
  - As long as you have completed or had waived the 24-month waiting period by the time you complete your TWP (you must remain eligible)
- SSI - Section 1619(b) - those on SSI can retain Medicaid while earning up to a certain level (varies by state)
  - Discuss with your local SSA office before working

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## What about long-term support for SSI and SSDI recipients?

### Expedited Reinstatement

- “Safety Net” for SSI and SSDI-eligible individuals with disabilities who return to work and lose entitlement because of work at SGA levels or over income thresholds
- Within 5 years of benefits ending, you may be eligible for 6 months of temporary benefits while SSA determines whether you are eligible again

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## What else do I need to know?

- This presentation does not cover all the programs and supports offered by SSA
- Be sure to talk to your benefits representative before you make any work decisions, especially if you have only recently been approved for benefits

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## Topics When Looking for a New Job

- **Interviewing After a Transplant**
  - ADA Protections – preventing discrimination
  - State Laws
- **Insurance**
  - COBRA
  - HIPAA
  - Other Resources

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## Interviewing after Transplant

- I am interviewing for a new job and had a bone marrow transplant three years ago. Can I be asked about my health history in my interview?
  - No. Under the ADA, an employer is prohibited from asking medical questions unless and until a conditional job offer is made
  - Before that time, no medical questions may be asked of a job applicant

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## What IS permissible for an interviewer to ask initially?

- *If you meet the qualifications for the tasks of the particular job*
- *About the ability to perform specific job functions*
- **ONLY** if they are asked of all people that are applying for the particular position, not just those who are thought to have a disability
- Ex. “Are you able to lift this?” vs. “Have you ever injured your back?”

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## After a conditional job offer has been made, what IS permissible?

- The ADA allows for medical history questions or examinations of any variety, regardless of whether or not the questions or exam have anything to do with the particular requirements of the job, so long as all prospective employees are subject to the same questions/exam
- Your state laws may go further than the ADA in this regard

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## Once someone is hired, is it ever permissible for their employer to ask them about their cancer?

### It depends!

- If an employer has a legitimate reason to believe that cancer is impacting an employee's ability to perform his or her job and do it safely, an employer may ask questions about the employee's cancer and require a medical examination
- Examples – Mary the bus driver; James the Waiter

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## Does an employer have to give preference to a qualified job applicant with a disability over qualified job applicants without disabilities?

- No. An employer is free to choose the most qualified applicant provided that a job applicant's disability is not taken into account in the decision
  - Law is there to level the playing field

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## Insurance: How to keep it

- **COBRA**
  - Continuing your coverage even after your employment ends
  - State law may provide additional protections
- **HIPAA**
  - Protects against discrimination based on health status
  - Provides limits for excluding pre-existing conditions

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## COBRA in a Nutshell

- Allows a “qualified beneficiary”
- After a “qualifying event” that makes him/her no longer eligible to participate in their employer’s “group health plan”
- To continue the coverage they have had, at their own cost, for a specified period of time

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## COBRA: Who

- “Group Health Plan”
  - Self-insured and fully insured plans offered by employers with 20 or more employees
- “Qualified Beneficiary”
  - Employee, their spouse, dependent child(ren)
  - Not domestic partners by law (although permitted by employer’s request)
  - If covered by plan, then qualified regardless of length of time covered

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## COBRA: When

- After a “qualifying event” such as:
  - Termination--quit/lay-off/firing for other than “gross misconduct”
  - Reduction in hours
  - Death/divorce/legal separation

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## COBRA: What

- A qualified beneficiary, after a qualifying event, is then eligible to elect to continue benefits at own expense
- *Example:* Employee share (\$400) + Employer share (\$600) + 2%= \$1020 “applicable premium”

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## **COBRA: How Long?**

- **Minimum: 18 months from the date of the qualifying event**
- **Many variables determine this (self vs. fully insured employer, type of qualified beneficiary--spouse, child)**

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## **COBRA: Grounds for Termination**

- **Failure to make timely payments**
- **Employer no longer offers group health plan to any of their employees**
- **Former employee qualifies for other insurance**

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## HIPPA in a Nutshell

- “P” is for portability (take your insurability with you)
- Other provisions as well
- Helps people with pre-existing conditions maintain their eligibility for health care coverage

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## HIPPA: Who

Who is protected?

- A person with “qualifying coverage” – individual or employer-sponsored comprehensive group health coverage-- is protected by HIPAA

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## HIPPA: What does it do?

### Gives individuals credit

- Against any pre-existing condition exclusionary period
- For the length of time they had prior continuous health coverage
- Without a significant break in coverage (63 days or more)

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## HIPPA: How a person with a pre-existing condition is protected by HIPPA

- Defines a “pre-existing condition” to the six months prior to enrollment in the new employer’s health plan
- Limits the time a plan may exclude a pre-existing condition from coverage to 12 months (or 18 months if a late enrollee)
- Provides credits against the pre-existing exclusion period for the time one has had continuous coverage without a significant break

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## HIPPA: How to avoid a significant break in coverage

- Obtain coverage under spouse's health care plan
- Elect COBRA continuation coverage
- Purchase an individual health insurance policy
- If turned down for insurance coverage, may be eligible for coverage under your state's high risk insurance pool

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## Fully Insured vs. Self Insured

- Fully Insured
  - Federal AND State law apply
  - Back of card – tells you which state agency to call
- Self Insured
  - ONLY Federal law applies
  - Back of card--to call DOL or EBSA, "Administered by..", mentions ERISA
  - <http://www.dol.gov/ebsa/aboutebsa/main.html>

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## Additional Tools and Resources

- Consumer Guides for Getting and Keeping Health Insurance ([www.healthinsuranceinfo.net](http://www.healthinsuranceinfo.net))
- Cancer Legal Resource Center
- Patient Advocate Foundation
- CancerCare- Annual Survivorship Series
- *nbn*LINK- chronic GVHD group
- NCCS booklets
- Office of Patient Advocacy resources

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## Questions?

Contact an Office of Patient  
Advocacy Case Manager

Phone: 1-888-999-6743

Email: [patientinfo@nmdp.org](mailto:patientinfo@nmdp.org)

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