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ON BEHALF OF THE

SOCIETY FOR HUMAN RESOURCE MANAGEMENT

SUBMITTED TO THE

**U.S. SENATE COMMITTEE ON HEALTH, EDUCATION, LABOR AND
PENSIONS**

HEARING ON

**“STAY-AT-WORK AND BACK-TO-WORK STRATEGIES: LESSONS FROM
THE PRIVATE SECTOR”**

MARCH 22, 2012

Introduction

Chairman Harkin, Ranking Member Enzi, and distinguished members of the Committee, my name is Christine Walters. Thank you for the invitation to appear before the Committee to share private sector lessons, experiences and challenges regarding disability management practices.

By way of introduction, I have 25 years of combined experience in human resources administration, management, employment law practice and teaching. Today I am an independent human resources and employment law consultant with the FiveL Company in Westminster, Maryland. I have served as an adjunct faculty member of the Johns Hopkins University, teaching a variety of courses in graduate-, undergraduate- and certification-level programs from 1999 to 2006 in human resource management topics. I am pleased to say that my first book, *From Hello to Goodbye: Proactive Tips for Maintaining Positive Employee Relations*, was published in March 2011 and was the publisher's #4 best seller last year.

I appear today on behalf of the Society for Human Resource Management (SHRM). SHRM is the world's largest association devoted to human resource management. Representing more than 260,000 members in over 140 countries, the Society serves the needs of HR professionals and advances the interests of the HR profession. Founded in 1948, SHRM has more than 575 affiliated chapters within the United States and subsidiary offices in China and India. On behalf of SHRM and its members, I thank you for this opportunity to appear before the Committee to share return-to-work strategies and other disability management practices in the 21st century workplace. My testimony will rely heavily on my experience working with small businesses.

How employers can leverage return-to-work strategies

What is a return-to-work (RTW) strategy? Also referred to as disability management, the U.S. Government Accountability Office (GAO) defines an RTW strategy as a "proactive approach to controlling disability costs while helping disabled employees return to work."¹ RTW programs and strategies have been the subject of national and international research and literature for decades. As examples:

- In 1998, the International Labour Organisation's International Research Project on Job Retention and Return to Work Strategies for Disabled Workers (IRP) examined the inter-relationships of public and enterprise policies and practices as they affect the retention and return to work of disabled workers in eight countries: Canada, France, Germany, the

¹ U.S. Government Accountability Office, Health, Education and Human Services Division (1996). Return-to-Work Strategies From Other Systems May Improve Federal Programs. <http://www.gao.gov/assets/160/155504.pdf>.

Netherlands, New Zealand, Sweden, the United Kingdom and the United States.²

- A 2001 IRP report addressed a major six-country study on work incapacity and reintegration (the WIR project) undertaken in the mid-1990s under the auspices of the International Social Security Association. The Project drew on data compiled in six longitudinal studies in Denmark, Germany, Israel, the Netherlands, Sweden and the United States.³
- A 2002 IRP report on a qualitative study of return to work in small workplaces, particularly its sociological dimensions. The study examined the strategy of Early and Safe Return to Work (ESRTW) used in Ontario — an approach that emphasized workplace self-reliance and early return to work before full recovery in modified jobs.⁴
- Also in 2002, IRP published a literature review that considered the matters of work preparation and vocational rehabilitation. The review focused mainly on the development of vocational rehabilitation in the United Kingdom, but also considered approaches to vocational rehabilitation drawing on international literature.⁵

In 1996, the GAO Health, Education, and Human Services Division published a report for the Chairman of the U.S. Senate Special Committee on Aging to respond to an inquiry regarding key private-sector practices used to return disabled workers to the workplace. The report also included examples of how foreign employers implement RTW strategies for persons with disabilities. The report found that other countries had implemented RTW strategies that were similar to those in the U.S. private sector. Although the study was published in 1996, its findings are still remarkably applicable today.

The GAO study found three common elements to successful RTW strategies including in the private sector in the U.S., Germany and Sweden:

1. Early intervention — The GAO reported that 50% of employees who go out on disability leave for five or more months will never return to work.
 - Know *your* RTW metrics. A successful program is dependent upon buy-in and support from all levels of the organization. Define your company's goals. Know your baseline measures. What are your average days-lost-from-work, average absence rate, on-the-job injury/illness incident report? What are the trends, e.g., are they increasing/decreasing? How do they compare to your market by

² Thornton P (1998) International Research Project on Job Retention and Return to Work Strategies for Disabled Workers - Key Issues, International Labour Organisation.

³ Bloch, F., and Prins, R. (2001). Who Returns to Work and Why? International Social Security Series, Volume 5, Transaction Publishers. USA, UK.

⁴ Eakin, J. M., Clarke, J., and MacEachen, E. (2002). Return to Work in Small Workplaces: Sociological Perspective on Workplace Experience with Ontario's "Early and Safe" Strategy, University of Toronto/Institute for Work and Health Study, Canada.

⁵ Riddell, S. (2002). Work Preparation and Vocational Rehabilitation: A Literature Review, Strathclyde Centre for Disability Research, University of Glasgow.

industry, geography and size? How will you measure success of your RTW program? I applaud SHRM's efforts to standardize employment metrics and its active engagement with ANSI towards new ISO initiatives.⁶

- Stay in contact with employees out on leave; help them feel still connected to the job.
- 2. Case management — Provide RTW assistance and manage cases to achieve goals. RTW requires an individualized approach, and may not always mean that an employee returns to the *same* job.
- 3. Providing RTW incentives —
 - Retain employer-sponsored medical benefits, which serve as an incentive to return to work.
 - The GAO report states that if disability benefits are too generous they can serve as a disincentive to return to work.
 - But incentives alone are not enough; they must be incorporated into RTW practices such as including a contractual requirement for cooperation with a RTW plan as a condition of eligibility.

One size does not fit all. How any given employer provides creative alternatives to work schedules and duties is very much driven by the industry and size of the employer. But even small business employers are becoming more learned and creative in finding ways to keep employees with disabilities gainfully employed. Just some of these flexible staffing models include:

- Flex time — permitting employees to work flexible schedules around a “core” set of hours
- Alternative work schedules (AWS) — alternate work schedules such as 4/10 workweeks
- Job sharing — where two employees may share the duties and work schedule of one FTE
- Teleworking — permitting employees to work from home or an alternate location

Key issues for small business

Life for a small business owner is hectic, and navigating the maze of laws with limited resources and personnel can be overwhelming. Smaller employers often have no in-house HR professional. If they have someone who is responsible for HR, that individual also probably handles two or three other job functions (for example, the HR manager may also be the payroll administrator and office manager).

In my experience, here are some of the primary disability management issues faced by smaller-sized employers:

⁶ Society for Human Resource Management (2011). Press release. ISO Approves U.S. Proposal for International Standards on Human Resource Management, March 3, 2011. <http://www.shrm.org/about/pressroom/PressReleases/Pages/ISOApprovesUSProposal.aspx>

Myriad federal and state laws — Despite their merits, the ADA, FMLA and workers' compensation laws are referred to as "the Bermuda Triangle of HR." They are particularly complex, overlapping and frustrating for small employers to administer — particularly for employers administering an RTW strategy. Those three and other statutes are discussed here:

- ADA — In light of the enactment of the ADA Amendments Act of 2008, the key point to focus on now is whether discrimination occurred, not whether an individual has a disability. This shift in focus may make RTW programs more difficult to "sell" to small business. Some employers may feel under the new analysis that it may be safer to do less for all than more for some.
- FMLA — Under the FMLA, providing same pay during light duty creates tension among co-workers. Time spent working light duty does not count towards FMLA leave. Reduced schedule leave = infinite FMLA leave (never exhaust 480 hours). Employee retains protected right to decline offer of light duty work, while employee out on non-FMLA medical leave has no such protected right.
- Workers' compensation (WC) — There are opportunities to partner with WC carriers to assess methods for balancing RTW, gainful employment and fiscal responsibility. As mentioned above with regard to FMLA rights, an employee has a right under FMLA to decline an offer of light duty work. Declining the opportunity to work light duty may, however disrupt or stop the employee's receipt of continued benefits. This strategy is similar to that described in the GAO reported referenced earlier in my remarks, e.g., a purpose of the study was to assess ways to reduce increasing DI costs paid by government agencies.
- FLSA and state wage and hour laws – Flexible staffing models such as AWS that include a 10-hour-a-day, 4-day workweek known as a 4-10 workweek must be implemented with consideration to federal and state wage and hour laws. Employers may find they inadvertently create increased labor costs when such models result in overtime that was not budgeted for nor anticipated or that violates state wage and hour laws that mandate overtime for hours worked in a day (such as in California) or in one of at least 14 states that limit or restrict mandatory overtime for certain professionals.
- Covered federal (sub)contractors and Executive Order 11246 — For many small employers, it is good news and bad news when they are awarded a government contract or subcontract and exceed the 50-employee threshold for the first time. On one hand, they are very excited about their success. On the other hand, they are also sometimes overwhelmed at the task ahead of them. Such contractors will quickly recruit qualified candidates in numbers greater than ever before to support the new contract. Then, I find more often than not they are stunned to learn about their obligations to now not only draft written affirmative action plans (Plans) but to administer those Plans and maintain all the corresponding documentation. With regard to the

recruitment, selection, hiring, training and other employment activities related to persons with disabilities covered contractors currently must:

- Annotate the application or personnel form of each covered individual to identify each vacancy for which the applicant was considered. Such annotation shall include (i) the identification of each promotion for which the covered employee was considered, and (ii) the identification of each training program for which the covered individual was considered.
- Where an employee or applicant is rejected for employment, promotion, or training, a statement of the reason as well as a description of the accommodations considered, where applicable.
- Where a covered applicant or employee is selected for hire, promotion, or training and the employer undertakes any accommodation that makes it possible to place the covered individual on the job, the application form or personnel record will contain a description of that accommodation.
- Review physical and mental job qualifications upon the development of any new position, update existing positions or position descriptions and recommend and implement any necessary changes. Such review shall take place on an on-going and as needed basis and no less than once each year upon update of the Plan.
- When a qualified candidate is referred or selected from federal, state or local agencies or other resources identified in the employer's Plan, formal arrangements must be made with the respective agency for the referral of the applicant, follow up and feedback on the disposition of applicant.
- Track and monitor all personnel activity, including referrals, placements, transfers, promotions, terminations and compensation at all levels.
- Provide training to all personnel involved in the recruitment, screening, selection, promotion, corrective action and other processes related to the employment of persons with disabilities and the commitments of the Plan.

Early intervention — Small business owners often do not have the same internal resources that larger employers have. Put another way, many small businesses know enough to know what they don't know about their legal liability. Without an in-house HR advisor and in an attempt to defer the expense of consulting external legal counsel, they may feel that silence and inaction are safer than saying or doing the wrong thing.

Case management — Small business owners have limited fiscal and staffing resources. Thus, where larger employers may seek second and third opinions on legal issues, a small business may be more likely to bypass these options for cost reasons. With regard to the strategies described above, small business' most frequent concern as I hear it expressed is lack of funding and/or expertise to implement the recommended case management strategies. Small business owners do not have case managers and often have little idea where to look or whom to ask to find one.

Providing RTW incentives — Most small businesses offer some form of paid leave program whether it is in the form of traditional vacation and sick leave or a combined “bank” of paid leave referred to by various names such as paid time off (PTO), paid leave days (PLD) or some other term. More and more laws are being passed, predominantly at the state level, that prohibit employers from requiring employees to use the benefit of paid leave for such activities as jury duty, leave to care for a family member, leave due to one’s own serious health condition, leave as the result of being the victim of a crime, , leave for service in the Uniformed Services, leave that runs concurrent with a state disability programs, and/or that bar employers from maintaining use-it-or-lose-it paid leave policies. While I understand the intent of such legislation, the practical impact to small business is that their accounts payable liability is reduced at a rate lower or slower than anticipated. That fiscal impact, since most employers pay out at least some portion of accrued, unused paid leave at termination, may result in small business reducing the amount of annual leave it provides to employees.

Setting precedent — The concern I hear most frequently from employers who may be less familiar with RTW strategies is about setting precedent. Employers aim to be fair and consistent with employees, but they may ask “If I do ‘x’ in this case, won’t I have to do the same for everyone?”

Self-fulfilling defeat of essential functions — one court held that when an employer accommodated an employee by permitting the employee to not perform an essential function of the job for some period of time and subsequently determined it could not continue to provide that accommodation, the employer had created its own defeating, self-fulfilling prophecy. The court held that if the employer was able to permit the employee to not perform that function for some period of time, it must be non-essential.

SHRM’s work to promote disability employment

All of us share a sense of duty to give back to those who serve our country. I find so much enthusiasm and passion from employers to recruit and retain veterans and those who are currently engaged in the armed forces and reserves. As employers become engaged in those processes, they may receive their first exposure to providing reasonable accommodation for an employee or applicant with a disability. Through those experiences I find concerns I have described above about setting precedent or creating an argument that will be used against you subsidies.

To boost veterans’ employment and help organizations meet the nation’s skills gap, SHRM is working with two organizations to help employers recruit and retain current and former members of the military, many of whom return home with service-related disabilities.

The Employer Support of the Guard and Reserve (ESGR) is a Department of Defense organization that promotes cooperation and understanding between Reserve component members and their civilian employers and assistance in the

resolution of conflicts arising from an employee's military commitment. SHRM signed a statement of support for ESGR and the more than 1.2 million citizens from all walks of life who have volunteered to serve during two long and difficult wars. In addition, the U.S. Department of Labor's Veterans' Employment and Training Service (VETS) provides resources to assist veterans and service members to boost their employment opportunities. Both of these organizations can help HR professionals and employers find, hire and retain skilled military service members.⁷We have much to learn about the experiences, perceptions, perspectives, needs and desires of our veterans, returning military and reservists. That broadened perspective can only enhance our understanding of overlapping, similar and different needs with regard to the employment and continued employment opportunities for persons with disabilities.

The Sloan Award for Excellence in Workplace Effectiveness and Flexibility

I also applaud SHRM's new initiative "When Work Works." The Sloan Awards are a signature piece of that initiative within the SHRM/Families and Work Institute partnership, which aims to educate employers about the benefits of workplace flexibility and to recognize best practices. In 2011, hundreds of organizations applied for the Sloan Award for Excellence in Workplace Effectiveness and Flexibility, resulting in 450 winning worksites! Since 2005, the Sloan Awards have been recognizing model employers of all types and sizes across the U.S. for their innovative and effective workplace practices. For more information, you may go to <http://whenworkworks.org/>.

Resources

I believe a key to continued enhancement in the employment, retention and advancement of persons with disabilities is education and resources for small business. I find the following to be just a few examples and opportunities:

- U.S. Department of Labor's Office of Disability Employment Policy's RTW Toolkit (for more information, see link below)⁸
- OSHA's Small Business Handbook⁹
- Federal and state agency (free) public technical assistance seminars
- Physician and employer partnerships and education
- Corporate wellness programs and legal parity (GINA, HIPAA, ADA challenges with compliance)
- Sample, model RTW programs — NY State Insurance Fund¹⁰
- State and local "green" tax credits for AWS programs

⁷ Society for Human Resource Management (2012). Military Employment Resource Page. <http://www.shrm.org/hrdisciplines/staffingmanagement/Articles/Pages/Military.aspx>

⁸ <http://www.dol.gov/odep/pubs/20100727.pdf>

⁹ <http://www.osha.gov/Publications/smallbusiness/small-business.pdf>

¹⁰ <http://ww3.nysif.com/SafetyRiskManagement/RiskManagement/LimitingLiability/ReturnToWorkPrograms.aspx>

Carrots versus sticks

Over the last year, I have seen a plethora of regulatory activity at the federal and state level that is impacting employment practices. Add to that employment-related federal and state legislation. As Congress, federal and state regulatory agencies consider proposals to support the employment, retention and advancement of persons with disabilities I respectfully suggest we focus our discussion on carrots rather than sticks. That is, applying the same philosophy as shared by the GAO to Congress in 1996 let us focus on incentives to entice employers to engage in proactive measures to recruit, hire, retain, train and advance in their individual workplaces persons with disabilities. Let us focus on rewards for engaging in such activities, be they tax incentives, safe harbors or recognition programs. Let us maintain that focus rather than shifting to discussions of mandates and adverse consequences if those mandates are not met.

These are exciting times and through joint efforts and initiatives between Congress, regulatory agencies, small and large business, physicians, employees and applicants I believe we can continue to enhance the employment and continued employment opportunities of all persons including those with disabilities.

Closing

Thank you again for the opportunity to appear before the Committee to share these experiences and challenges from the small business perspective regarding disability management practices.

I welcome your questions.

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