

Transitional Alternative Duty:
A New Hampshire Employer's Workers' Compensation Tool

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Transitional alternative duty (TAD) is an often overlooked tool available to employers working to effectively manage Workers' Compensation risks and costs. This article provides an outline of the New Hampshire Workers' Compensation TAD statute, suggests reasons why it is beneficial for employers and concludes with a proposed strategy for employers who can utilize TAD to reduce Workers' Compensation costs.

Statutory Intent and Language

Adopted in 1994, RSA 281-A:23-b, *Alternative Work Opportunities* was intended to protect employees from layoff or employment termination when that employee suffered a temporary reduced capacity for due to a work-related injury. The statute was amended in 1998, but in its entirety states:

All employers with 5 or more employees shall develop temporary alternative work opportunities for injured employees. If the employee fails to accept temporary alternative work, the employer may petition the commissioner pursuant to RSA 281-A:48, to reduce or end compensation. Notwithstanding RSA 281-A:22, if an injured employee returns to temporary alternative work within 5 days of sustaining the injury, such employee shall be paid workers' compensation from the first date of the injury. The commissioner shall adopt rules under RSA

541-A relative to the administration of this section.

Regulations were adopted by the New Hampshire Department of Labor and state:

- (a) All employers with 5 or more full time employees shall provide temporary alternative work programs to bring injured employees back to work.
- (b) Temporary alternative work shall be limited and transitional in nature. For the purpose of this provision, transitional means the duty elements are variable as the employee's work capacity increases.
- (c) The employer shall advise employees that there is a written alternative work program in place and advise employees of the established procedures to obtain alternative work in the event of an on-the-job injury.
- (d) The employer shall develop an outline of each position that details present requirements and essential functions of each job within the organization at the time of injury if lost time or restrictions are involved.
- (e) The employer shall review each position outline in conjunction with its joint loss management committees as described in Lab 603. This review shall begin with those positions, which experience most workplace injuries. Together they shall develop and describe a policy or process that facilitates return to work.
- (f) The employer shall provide the treating physician with the appropriate outline of the present position with an essential task analysis as soon as possible after the injury occurs if lost time or restrictions are

involved. The employer and employee shall have a joint responsibility to obtain needed medical information that will enable the employee to gradually increase their duties to bring the employee back to their original position.

(g) The employer shall offer a position as approved by the treating physician and the employee shall demonstrate a reasonable effort to comply.

Temporary Alternative Work

The mandate of Lab 504.04 is straightforward: If an employer has five (5) or more employees, then the law requires that TAD be provided. The nature of TAD is that it is temporary, transitional and intended to return the employee to the work capacity present prior to the work-related injury. The regulations then require the employer to develop an outline of tasks within an employee's job description, review those tasks against the employee's release to return to work, and prepare a proposal for return to work that can be reviewed by the employee's treating physician.

The attending physician will review the outline of the present position and determine whether the proposed TAD is medically appropriate for the employee. Once approved by the employee's treating physician, then the employer "shall offer a position as approved by the treating physician and the employee shall demonstrate a reasonable effort to comply." If the employee does not comply with the alternative duty offer, then the employer, or its Workers' Compensation insurance carrier, can request a hearing to reduce or terminate benefits pursuant to RSA 281-A:48. On the other hand, if alternative duty is not offered an employee who is receiving

total disability benefits with a restricted work release, then ongoing total disability benefits will most likely continue despite the presence of the employee having a work release.

There are several important observations to make with respect to the TAD statute and regulations. Nothing in the statute or regulations places any time limit on when TAD may be utilized by an employer, or asserted by an employee. Once it is determined that an employee has a release to return to work and there is no determination that the employee is prevented from transitioning into the job that they had prior to their injury, TAD is appropriate and the procedure outlined above must be followed. The practical effects of TAD are obvious: The employee returns to work when they have the capacity to work and does so within the "protective" environment of the treating physician's approval of the alternative duty work. The employer benefits from the employee's return to work both in the actual value of the services rendered (rather than no value for services when the employee is out of work on disability benefits) and, ultimately, a reduction in Workers' Compensation costs by the reduction in weekly benefits to the employee who has returned to work.¹

It is also noteworthy that nothing in the TAD statute or regulations limits their application to employment arrangements

² By definition then, TAD is not applicable to an employee who has permanent restrictions that preclude them from performing the essential functions of their job or where the employee's physician has indicated that they will not be able to return to their previous type of employment due to a work-related injury. In that circumstance, vocational services may be appropriate pursuant to RSA 281-A:25. Likewise, if an employee has a full duty release, then TAD is inappropriate as the employee may be reinstated to their pre-injury position with the employer pursuant to RSA 281-A:25-a.

that are governed by or not governed by collective bargaining arrangements. And while many employer and employee relationships are otherwise governed by collective bargaining arrangements that may have their own alternative duty provisions, nothing in those arrangements is granted authority under RSA 281-A:23-b to alter the application of that statute or its regulations. Had the Legislature intended to do so, it would have made a specific provision as it did in the “right to reinstatement” statute (RSA 281-A:25-a, I) which reads:

Reinstatement under this section shall be subject to the provisions for seniority rights and other employment restrictions contained in a valid collective bargaining arrangement between the employer and a representative of the employer’s employees.

At best, any collective bargaining arrangement could, and should, be written to state: “Subject to the provisions of RSA 281-A:23-b, temporary, transitional alternative work is regulated under the terms of this collective bargaining arrangement as follows. . .”

Finally, the language of the statute and regulations is important in that it requires approval of the TAD position by the treating physician. Thus, by itself, an independent medical examination report is an inadequate medical basis to compel an employee to accept TAD. There is, however, a useful strategy arising out of an independent medical examination report, which gives the employee a release to return to work where the treating physician has not released the employee to return to work.

The independent medical examination report should specifically address the proposed alternative work. The proposed alternative work and independent medical examination

should then be forwarded to the treating physician for review and opinion. The attending physician should be invited to make any changes to the proposed alternative work that the attending physician deems reasonable and appropriate. In many instances, the attending physician will release the employee to a trial alternative work under these circumstances. Then the previously outlined procedures should be followed in presenting the employee with a written offer of alternative duty.

Procedural Steps to Take

The practical benefits of an effective alternative duty program are measured not only by an employee’s return to work but the reduction in cost exposure to the employer. It is important, however, to make sure that the employee is informed about the return to work process and that the offer of transitional alternative duty is clearly documented. The steps in the procedure are straightforward:

1. Obtain a release to return to work from the employee’s treating physician.
2. Provide the treating physician with transitional alternative work tasks for review and approval.
3. Provide the employee with a written offer of return to work under the transitional alternative work program approved by the employee’s treating physician and

require the employee to present himself or herself for work on a specific date, at a specific time, and to report to a specific person.

4. Inform the employee in the written offer of TAD that failure to present themselves for the alternative work that has been approved by the employee's treating physician will result in a potential reduction or termination of benefits under the New Hampshire Workers' Compensation statute.

When TAD works, the benefit to the employer is reduced costs and a reduction in insurance or self-insurance premium/contribution. The employee's benefit is the opportunity to return to work and, ultimately, to be transitioned to the job they held prior to their work-related injury. Likewise, by accommodating an employee and enabling their return to work, employer/employee communication is enhanced and the relationship is preserved.

Employers are encouraged to contact their insurer or self-insurer to request a sample TAD policy that can be tailored to meet individual employer needs.