Learning Objectives

After reading this chapter, you will be able to:

- Distinguish between disability and impairment.
- Explain the legal and financial context of disability management.
- Identify and explain the major components of disability management programs.
- Identify the key stakeholders in disability management and explain how interests converge and conflict.
- Evaluate and critique the view of return to work as rehabilitative.
“Our research shows that if you don’t get a worker back within 90 days of their injury, the chances that they ever go back to work drop by 50 per cent,” said David Marshall, president and CEO of Ontario’s Workplace Safety and Insurance Board, in 2015.1 Marshall’s views are shared by many employers and OHS practitioners who see a return-to-work (RTW) program as a way to reintegrate injured workers into the workplace via practices such as modified work. As an added bonus, RTW programs save employers money on their workers’ compensation premiums.

Organized labour and injured worker advocates have a different view of RTW, with Ontario Federation of Labour president Sid Ryan calling Marshall “the equivalent of the modern day bounty hunter. His job is to disqualify injured workers from receiving their rightful benefits . . . [His] $400,000 [salary] is his bounty for his work over the last year.” Catherine Fenech, of the Ontario Network of Injured Workers Groups, notes “an increase in workers being told the board thinks they can go back to work no matter how badly injured they are.”

Return to work programs are part of the broader field of disability management. Disability management is a set of employer practices designed to prevent or reduce workplace disability and assist workers in recovering
normal functioning as quickly as and to the maximum degree possible. In sections that follow, we’ll examine each of the three interrelated aspects of disability management:

• Prevention: Employers may seek to prevent injuries and illnesses that give rise to disabilities through injury prevention efforts as well as employee assistance and wellness programs.

• Accommodation: Workers who have disabilities may require accommodation. This may include assistive technologies and modifications to work, work processes, and the workplace.

• Recovery: Some disabilities are temporary in nature. Sick leave, modified work, disability benefits (including workers’ compensation), and return to work programs can assist workers during the period of time required for them to recover.3

Before discussing disability management, it is useful to consider what the term disability means. Box 10.1 considers how disability is often discussed as a characteristic of a worker (i.e., the worker is disabled). While a worker may indeed have an impairment, it is important to remember that it is the workplace context that turns the impairment into a disability.

Box 10.1 Conflating impairment and disability

It is useful to be mindful of how we use the term disability. At a very basic level, disability means the condition of being unable to perform a function or task as a consequence of a physical or mental impairment. That definition seems pretty straightforward. But, as we saw in Chapter 1, definitions are social constructions. In this case, being unable to perform a function is only meaningful if performing the function is an expectation of a situation. What this means is that the existence of impairment (i.e., a cognitive or physical difference) does not cause a disability. Rather, it is the nature of the tasks in the workplace that turn impairment into a disability.

For example, pretend that your sense of smell is very limited. Is that olfactory impairment a disability? If you were a gas fitter, it might well be considered a disability because being able to smell a gas leak is an
expectation of the job (even though there are other ways to detect natural gas). In most other circumstances, few people would consider an impaired sense of smell a disability. Thus the work context turns the impairment into a disability. Impairments are, on their own, not necessarily troublesome, tragic, or disabling. Further, altering the context (e.g., modifying work) can eliminate the disability even though the impairment remains.

One of the ways disability and impairment are socially constructed is that we often associate them with traits that have some form of observable manifestation. It is important to remember that impairment and disability are not always visible or obvious. Much impairment is difficult to casually observe (e.g., diabetes or epilepsy). Cognitive and mental conditions can be particularly difficult to identify. Others can be cloaked through treatment (e.g., prostheses, medication). Society may overlook impairments that are less observable, and thus may be less likely to implement appropriate accommodations to address them.

It is also important to be mindful of the tendency to conflate illness and disability. Illness often entails discomfort, and we seek medical intervention to either resolve the underlying cause or treat the symptoms. Sometimes, illness can cause an impairment that, in specific workplace circumstances, creates a disability. Yet, in most cases, disability and impairment require neither medical supervision nor intervention. In this way, impairment and disability are not questions of health or ill health.4

Disability management is often said to minimize the cost of disability to employers.5 These practices also ensure that employers meet their duty to accommodate. As mentioned in Chapter 2, human rights legislation requires employers to avoid discriminatory workplace practices. This chapter focuses specifically on employers’ obligation to accommodate workers with temporary or permanent physical or mental injuries, regardless of whether the impairment was caused by a workplace injury.

Employers’ duty to accommodate requires employers to alter work, work practices, or the workplace in order to allow workers with disabilities to perform meaningful work. The duty to accommodate requires employers to
make any necessary efforts to accommodate the worker’s disability-related needs up to the point of *undue hardship*. The threshold of undue hardship varies from workplace to workplace. To claim undue hardship, typically, an employer is required to demonstrate that an accommodation is economically unsustainable, interferes with a legitimate operational requirement, or poses a health-and-safety threat. In these circumstances, an employer is still required to provide whatever accommodation is possible short of undue hardship.

**DISABILITY PREVENTION**

While all employers have legislative obligations to prevent injury (as outlined in Chapter 2), some employees also provide an *employee assistance program* (EAP) as part of their disability management program. These programs normally provide access to short-term psychological counselling to help employees to cope with personal problems. The underlying logic of EAPs is that personal issues can affect work performance and, if untreated, can sometimes become more profound.

EAPs are often one aspect of *workplace wellness programs*. Such programs are health promotion activities designed to help workers to improve their health and well-being. These programs often focus on specific issues (e.g., smoking cessation, weight loss, stress management). Again, the underlying logic of these programs is that healthier workers will be more productive workers. It is worth noting that many of these programs help workers to adapt to workplace hazards rather than seeking to remove the hazard by modifying the work. Stress management, for example, rarely seeks to eliminate the workplace causes of stress. Instead, it seeks to help the worker cope with that stress to maintain the worker’s productivity.

Some wellness initiatives that do actually modify the workplace are things like *flexible work arrangements*, such as *compressed workweeks*. In a compressed workweek, a worker puts in slightly longer hours but fewer days per week. Some workplaces will also allow *job sharing*, wherein two workers share a single position with each worker working some portion of the full-time job. Another option is telecommuting, wherein workers perform work away from the office (e.g., at home). This option can allow workers to better balance otherwise conflicting work and home responsibilities.
A different strategy for reducing the possibility of injury through interventions in workers’ personal lives is the use of alcohol and drug testing in the workplace. Some employers feel this private behaviour outside of work can affect safety at work, and therefore take steps to identify workers whose alcohol or drug use may affect their work. Box 10.2 explores this question.

Box 10.2. Alcohol and drug testing for injury prevention?

Some employers also engage in alcohol or drug testing as part of their injury prevention activities. Workplace alcohol and drug testing are emotionally and politically charged topics. Many workers see the fact and process of testing as an invasion of their privacy. Most employers (and many employees) suggest that testing makes workplaces safer. The topic of alcohol and drug testing is legally and practically complex, and discussion is often overshadowed by moral judgments about the acceptability of using alcohol and drugs.

There is some (but weak) evidence that workers who work while under the influence of alcohol are at greater risk of being involved in an incident or being injured. The evidence that alcohol testing (e.g., measuring the amount of alcohol in a worker’s breath or blood) reduces the incidence of errors is strongest in the transportation and construction industries. This likely reflects the nature of the hazards in those industries.

To the surprise of many, there is little evidence that drug use is associated with a heightened risk of workplace injury. This may explain the more ambiguous outcomes of research into the effect of drug testing on workplace injuries. While there is some evidence that pre-employment drug testing is associated with a lower incidence of injury, there is little credible evidence that randomly testing workers affects injury rates.

Human rights legislation limits the use of alcohol and drug testing in the workplace, although there are significant differences between jurisdictions. The Ontario Human Rights Commission, for example, notes that testing is considered to be prima facie (i.e., accepted as correct until proved otherwise) discriminatory. That said, employers can
justify discriminatory rules in the workplace if they can demonstrate the testing is a bona fide occupational requirement.

Similarly, there are restrictions on what an employer can do if a worker tests positive for drugs or alcohol. It is important to remember that alcohol and drug addiction are considered disabilities under Canadian law. Zero tolerance policies (where the worker is fired for a first offence) can run afoul of rules regarding duty to accommodate.

A *bona fide occupational requirement* (BFOR) is a rule necessary for the proper performance of a job, and such a rule can prevail even if it causes otherwise prohibited discrimination. For example, it is unlawful for an employer to refuse to hire a worker because the worker is blind. Yet, if an employer were hiring a pizza delivery driver, requiring the worker to hold a valid driver’s licence (which a blind worker cannot acquire) would be a bona fide occupational requirement. This requirement is permissible because holding a driver’s licence is rationally connected to the job and reasonably necessary for the accomplishment of a legitimate work-related purpose.

Ontario suggests a three-part test to determine if drug and alcohol testing is a BFOR:

- the standard or test has been adopted for a purpose that is rationally connected to the performance of the job
- the particular standard or test has been adopted in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose
- the standard or test is reasonably necessary to accomplish that legitimate work-related purpose (i.e., it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer)\(^8\)

This approach places significant restrictions on employer drug testing. For example, drug testing typically shows the presence of drug-related residue in a worker’s system, rather than measuring the actual degree of worker impairment. Since a test that does not measure impairment cannot be rationally connected to job performance, such testing is not a BFOR. Alcohol testing
after an incident, when an employer has cause to suspect impairment, or at random for workers in safety-sensitive positions, may be permissible because alcohol testing does measure impairment. It is important to be mindful that different rules may apply in different circumstances and jurisdictions.

**Disability Accommodation**

There are many causes of disabilities, including workplace injuries. As noted above, all Canadian jurisdictions require employers to accommodate workers with disabilities to the point of undue hardship. Yet not every obligation to accommodate a worker arises from a disability. In some cases, it is necessary to pre-emptively accommodate workers whose employment poses a threat to their health. For example, Quebec’s *Act Respecting Occupational Health and Safety* and *Act Respecting Industrial Accidents and Occupational Diseases* allow pregnant employees to refuse work that poses a risk to an unborn child. If such an employee cannot be reassigned to other, safe work, the employee can receive income replacement benefits equal to 90% of her salary. Despite the seeming progressive nature of this unusual law, Box 10.3 examines a case where an employer disputed the worker’s right to refuse unsafe work due to pregnancy.

**Box 10.3 Preventive accommodations**

Marilyne Dionne was a pregnant substitute teacher employed on contract. Her doctor advised her that she was susceptible to contagious viruses spread by children and this susceptibility might endanger her fetus. Her employer refused to provide her with alternative employment that eliminated the hazard to her fetus.

Dionne appealed this refusal to accommodate, and Quebec’s Commission de la santé et de la sécurité du travail (i.e., Quebec’s WCB) allowed Dionne to withdraw from the unsafe work and access the compensation she was entitled to under the Quebec legislation. Her employer, the Commission scolaire des Patriotes, argued that the withdrawal repudiated the contract and, further, that as a substitute teacher Dionne had no employment contract between periods of substitute teaching and so was ineligible to withdraw from unsafe work.

The Commission des lesions professionnelles (CLP) agreed with the employer, arguing that Dionne’s pregnancy precluded her from
performing her job and thus there was no contract of employment. Consequently, she was not a worker under the Act and thus not eligible to receive the income replacement. The decision was upheld by the Quebec Superior Court and Quebec Court of Appeal. The matter was appealed to the Supreme Court of Canada (SCC).

The SCC found Dionne to be a worker and entitled to refuse unsafe work.

[44] . . . Pre-emptively excluding a portion of the workforce from the protective scope of the Act, as the CLP did by excluding pregnant contract workers, ignores the broad legislative purpose. It puts these women in the untenable position of having to choose between entering into an employment contract in order to work and protecting their health and safety.9

Further, the SCC found it would be illogical to conclude that the legislated right of a pregnant worker to refuse unsafe work precluded her ability to form an employment contract.

[40] . . . In exercising her right to Preventive Withdrawal, she is not indicating that she is refusing to work, she is deemed to be asking instead that she be reassigned to safe tasks. What prevents the performance of work is the employer’s inability to provide a safe working alternative.

While Quebec’s legislative scheme is unique in that it mandates access to compensation when an employer will not provide safe work, human rights legislation in other jurisdictions may place similar obligations on employers to accommodate pregnant workers.

Both workers and employers have roles to play in ensuring that a disability is accommodated. The Alberta Human Rights Commission summarizes these rights and obligations as follows:

- Workers must inform their employer of the need for an accommodation. This includes explaining why the accommodation is needed and providing evidence (e.g., a note from a doctor) to substantiate the claim. This medical evidence must explain the worker’s functional
limitations (e.g., cannot stand more than 60 minutes) and provide some indication of the duration of the accommodation that will be required.

- Employers must consider the request and evidence provided, keeping in mind any obligations they have under privacy legislation. If an accommodation is warranted, the employer must offer a reasonable accommodation to the worker. If the accommodation is deemed unwarranted or not possible because it would cause undue hardship, this must be communicated to the worker. The employer must also be prepared to revisit the accommodation should circumstances change.

Employers do not have to implement the accommodation suggested by a worker. Rather, they are obligated to reasonably accommodate the worker. Once an accommodation is established, the worker is obligated to inform the employer if the need for or nature of the required accommodation changes and provide documentation to support such accommodation.

There are a number of ways that employers commonly accommodate disabilities. The duties of worker may be modified so that the worker is able to perform them despite the disability. For example, a warehouse worker with a torn rotator cuff in her shoulder may still perform those parts of her normal duties that do not require lifting, pushing, pulling, or overhead work. A restaurant worker who develops contact dermatitis on his hands from washing dishes may be assigned to an entirely different job, such as seating diners and clearing tables. Such modified work may be permanent or temporary, depending upon changes in the worker’s abilities. Accommodating permanent disabilities may also entail retraining workers to perform jobs they are presently unqualified to perform. For example, a carpet installer who has developed an allergy to glues may be retrained as an estimator.

Employers may also make workplace modifications in order to accommodate disabilities. A common and obvious change is adjusting buildings, equipment (e.g., work stations), and tools to accommodate workers with mobility impairments. Less obvious changes to the workplace including providing nitrile gloves to staff members who are allergic to latex products or adopting scent-free workplace policies to accommodate workers with chemical sensitivities.
DISABILITY RECOVERY AND RETURN TO WORK

The final component of disability management consists of programs designed to assist workers in recovering from temporary impairment (such as injuries and illnesses) that cause disabilities. The most common disability recovery program is sick leave, which is paid leave designed to help workers recover from short-term illness or injury. Sick leave is so widely available because it is sometimes specifically required by employment standards legislation and generally seen as a reasonable accommodation required by human rights legislation.

As noted in Chapter 2, most employers are required to enroll their workers in their provincial or territorial workers’ compensation system, which provides wage-loss and other benefits in the event of a work-related injury or illness. Some employers also provide workers with disability insurance purchased from a private insurer. Disability insurance benefits provide wage-loss replacement for workers who require a longer period of time away from work for reasons other than a work-related injury. The specifics of disability insurance vary among workplaces and frequently reimburse only a portion of the wages lost.

Modified work (as discussed above) may also be used to help workers to recover from a temporary impairment that causes disability. Work hardening entails providing a worker with the opportunity to gradually return to work (via increasing hours and work demands) in order to build stamina. Employers may also provide coaching or other forms of support to workers who are returning to work. As noted below, the beliefs underlying these return-to-work strategies and their manner of implementation are the subject of some controversy. Box 10.4 discusses the National Institute of Disability Management and Research, which provides research-based evidence for practitioners.

Box 10.4 Credentials in disability management and OHS

The National Institute of Disability Management and Research (NIDMAR) provides education, training, and research focused on the implementation of workplace-based reintegration programs based on research evidence. Recently, NIDMAR has partnered with British
Columbia’s Pacific Coast University for Workplace Health Sciences to offer programs focusing on disability management and return to work. This partnership builds upon NIDMAR’s existing (and very good) professional certifications in disability management and return to work.

Many professions—including doctors, lawyers and architects—are subject to regulation by their respective provincial and territorial governments. Such regulations are generally managed through government-appointed professional regulatory organizations (PROs), such as a provincial law society or college of physicians and surgeons. PROs generally determine the qualifications required for practice, certify practitioners, and investigate misconduct. While performing a valuable regulatory function, PROs can also limit access to a profession. For example, foreign-trained doctors often complain that accreditation requirements prevent them from practising.

Over time, many otherwise unregulated occupations have developed voluntary associations that often provide professional development opportunities for their members. Some associations have also developed voluntary credentials and certifications. The Certified Human Resource Professional (CHRP) and the Canadian Registered Safety Professional (CRSP) accreditations are two examples. Accreditation is typically awarded based upon a combination of work experience, formal education, completing a certification exam, and paying an annual membership fee. Accreditation may also require ongoing professional development. While these accreditations are not required to gain employment, many employers use these credentials as a screening tool.

Accreditation in unregulated professions likely enhances the knowledge of practitioners. Yet it is useful to consider what other functions accreditation serves. Accreditation gives a small group of actors the power to determine what knowledge, skills, and behaviour are considered necessary and appropriate. Those workers who possess accreditation often have increased legitimacy and standing, even if the knowledge they have been accredited as possessing is contested terrain. As we’ll see in Chapter 11, the professionalization of safety also has subtle and sometimes negative implications for the effectiveness...
of the IRS. Finally, meeting the requirements of accreditation can pose an occupational barrier to traditionally disadvantaged workers.

As noted above, return-to-work (RTW) programs are designed to reintegrate injured workers into the workplace via practices such as modified work. This approach stands in contrast to the historical practice of having workers stay off work (most often collecting workers’ compensation wage-loss benefits) until they are fully recovered. By providing injured workers with modified work, employers are able to reduce the cost of injury borne by workers’ compensation claims. As we saw in Chapter 2, in jurisdictions that operate experience-rating programs, reducing workers’ compensation claim costs can result in a reduction in an employer’s workers compensation premiums. In short, RTW programs can save employers money.

The opening vignette of this chapter framed RTW programs as a way to ensure that injured workers return to work. As David Marshall said, “Our research shows that if you don’t get a worker back within 90 days of their injury, the chances that they ever go back to work drop by 50 per cent.”¹³ The view that bringing workers back to work as soon as possible somehow increases the likelihood that they will return to work is widely held. It is also used to publicly justify RTW programs and policies, particularly by workers’ compensation boards. Yet not everyone accepts that these RTW programs increase the likelihood of workers returning to work.

When considering the relationship between injury duration and the likelihood of workers returning to work, it is important to be mindful that correlation (i.e., two things occurring together) does not necessarily imply causation (i.e., one thing resulting in another). For example, the correlation between injury duration and the rate of eventual return to work rates may be explained by the severity of the injury. Specifically, more seriously injured workers are likely to both require a longer period of recovery and have a lower chance of ever returning to work.¹⁴ This is a very plausible explanation for why workers who are off work longer may also be less likely to return to work. This alternative explanation undermines the widely accepted rationale for RTW programs.

There is evidence in the psychological literature that absence from work is associated with poorer mental health. This correlation is often mistaken
for a causal relationship (i.e., unemployment causes poorer mental health). Given the economic incentives for employers to minimize the duration of work absence, it is understandable that employers might extend the causal argument. That is to say, employers may believe that, if unemployment harms mental health, then employment must improve it. There is, however, no meaningful evidence that supports this view.

There is some evidence that workers with back pain recover more quickly when they remain active. On the surface, this correlation might seem to suggest that RTW can, in fact, be rehabilitative. It is not clear, however, to what degree work is analogous to the more generalized term activity. Work differs from other activities (e.g., going for a walk) because it occurs in the context of a power relationship designed to maximize productivity. Consequently, some employers will promise, but not truly provide, suitable modified work. When this occurs, workers face pressure to work in a manner that can be contrary to their medical restrictions, thereby creating the risk of re-injury. More troubling is that there is no evidence to support the notion that activity aids recovery from injuries other than lower back injuries. That is to say, proponents of RTW are not only misstating the benefits of RTW but are also overstating the medical benefits of activity in general.

Workers who resist employer pressure to do things contrary to their rehabilitative best interests risk being labelled uncooperative and having their workers’ compensation benefits reduced or terminated. This reflects the fact that pain is difficult to quantify and, therefore, difficult to factor into adjudicative decisions. This lack of quantification raises the spectre of moral hazard (i.e., there are incentives for workers to exaggerate the extent, nature, or duration of their injuries for financial gain). The fear that workers will malinger harkens back to the negative views about workers discussed in Chapter 1. Indeed, RTW is often offered as a remedy for moral hazard because it returns workers to work and thereby deprives them of the purported benefits of exaggerating their injury.

This analysis suggests that employers have socially constructed return-to-work as a broadly beneficial component of disability recovery programs. In fact, RTW primarily benefits employers and has mixed outcomes for injured workers. For example, the possibility that RTW programs will harm workers is usually ignored. Unmasking this social construction allows us to see that there is more to disability management than simply a series of interconnected disability prevention, accommodation, and recovery programs.
Stakeholders—primarily employers and workers, but also governments, unions, and medical practitioners—seek to advance their own interests. To the degree that these interests clash, disability management can be marked by conflict. The asymmetry of power evident in the employment relationship, combined with the situational vulnerability of injured workers, means that practitioners should be aware of the potential for injured workers to acquiesce to demands that may not be in their best interests.

SUMMARY

The field of disability management encompasses disability prevention, accommodation, and recovery. A complete disability management program serves to meet employers’ statutory obligations to prevent and accommodate disabilities created by occupational health and safety, human rights, and workers’ compensation legislation. Such programs can also minimize the cost of injuries and disabilities borne by employers, primarily by returning workers to productive work as quickly as possible.

Like most aspects of workplace injury, disability management entails both converging and conflicting interests. Workers can indeed benefit from disability prevention accommodation and recovery programs. Nevertheless, the greater power of the employer, coupled with the financial incentives employers have for returning workers to work as quickly as possible, creates the possibility for abuse. Phony return-to-work programs may jeopardize workers’ recovery. And, as we saw in Chapter 2, they may also be degrading to workers. Further, employers’ incentives to operate such programs can be intensified by workers’ compensation experience-rating programs.

DISCUSSION QUESTIONS

› What causes an impairment to become a disability? What does this tell us about the role of the workplace in disability management?

› How can employers meet their duty to accommodate? What limits exist to employer’s duty to accommodate?

› What are the major components of a disability management program? How does each component act to reduce the impact of disability in the workplace?
How do the interests of employers and workers converge around disability management? How might their interests conflict?

Do you accept the argument that return-to-work programs are rehabilitative? Why or why not?

EXERCISES

Go online and identify the legislative requirements in your jurisdiction that require employers to accommodate workers with disabilities. In a short essay of 200 words, explain how a worker would go about enforcing those rights in your jurisdiction.

Pretend that you are an HR practitioner tasked with developing an accommodation for a warehouse worker based on the following scenario:

- The worker’s job has three components: (1) lifting materials on and off a skid, (2) moving materials around the warehouse using the skid, and (3) recording such movements and performing periodic inventory.
- The worker is unable to lift materials because of a disability but can perform the other tasks. It is unknown how long the worker will be unable to perform the lifting component.
- There are five other workers in the warehouse performing the same job. Each warehouse worker performs all three tasks and each is busy all of the time. There is also a supervisor who monitors performance and resolves problems.
- The injured worker is personally unpopular and there is skepticism among the other workers about whether his disability is real.

1. In a short essay of 500 words, propose a way to accommodate the worker’s disability, identify at least two potential barriers to a successful accommodation, and develop strategies to resolve each barrier.

2  Ibid.


11  For more information about NIDMAR, see: https://www.nidmar.ca

12  For more information about Pacific Coast University, see: http://www.pcu-whs.ca


15  Ibid.

16  Ibid.