A guide to assist Midwestern Insurance Alliance insured employers in developing a company-specific, modified-duty / return-to-work policy
Modified Duty Guide for Employers

Section I – Important Background Information and Disclaimer

This guide has been developed to assist Midwestern Insurance Alliance (MIA) insureds and agents in developing a company-specific, modified-duty and return-to-work policy. This document provides both instructive guidance and sample policy language. As with any policy, those that are drafted with careful consideration of an individual company’s needs are usually the most practical and effective. Therefore, MIA strongly encourages insureds and agents to use this document as a guide and foundation for a modified-duty return-to-work policy that will ultimately be tailored to a specific company’s needs. More succinctly stated, companies should not simply adopt this document on a wholesale basis. Please be sure to read the important disclaimer at the end of this document.

Section II – Overview of this Guide

This guide provides instruction and then accompanying sample policy language for the various elements of a light and modified duty return-to-work policy in Section III. In Section IV, this guide will provide information concerning implementation and application of the policy as well as considerations for company practices as they pertain to a light and modified duty return-to-work program. Whenever text appears in brackets, [ ], that content is provided instruction and / or a prompt for the employer to fill-in material that pertains to their organization.

Section III – Policy Contents

A. Purpose and Scope of Policy. A good start for drafting this policy, or any other policy, is to set forth its overall purpose. This statement should be somewhat generalized and need not be too lengthy. The language should clearly state that the policy has been developed to set forth duties and policy for administering light and modified duty work assignments. While light and modified duty work accommodations are many times a win-win situation for both employer and employee, it is not necessary to write “fluffy” language that espouses the company’s desire to benefit employees by keeping them working (although that should be an important goal). In fact, in some company cultures such statements are viewed with a high degree of cynicism and can prove more detrimental than helpful. For the most part, employers, employees and insurance companies understand that there must be economic reasons behind light and modified duty, therefore the written purpose for a policy need not sell its users on the benefits of light and modified duty – it only need to explain the purpose for the policy itself.

Sample Policy Language
Sample Company, LLC, has developed this policy to set forth duties, responsibilities, and practices for administering light and modified duty work assignments within the company.
B. Definitions - Light Duty, Modified Duty and LHCP. While many times the company’s approach to managing light duty or modified duty will be the same, it may prove helpful in some situations to distinguish between the two terms. Light duty ordinarily refers to an employee being assignment to a job that is different from the one they normally perform within the organization and comports with the restrictions placed upon them by a licensed health care provider (LHCP). Modified duty refers to the employee remaining in their normal job or role in the organization, but with modifications so that the normal job can comply with restrictions placed upon the employee by the LHCP. Modified duty may mean the employee will be excused from performing a particular task of their normal job, being provided an aid to perform the particular task (i.e., chair, lift, etc.); reducing the amount of time they perform a particular task, etc.

While in some states defining a LHCP may not be essential, there are some states that recognize a wider variety of medical professionals that have authority to treat and / or direct the treatment in a worker’s compensation claim. Therefore, putting forth in the policy a basic understanding that an authorized LHCP may prescribe restrictions may help alleviate any questions as to whether a return-to-work slip / document signed by someone other than a physician is legitimate should the individual normally responsible for coordinating light or modified duty be absent at the time an accommodation is necessary.

Sample Policy Language

LHCP refers to any health care provider that is licensed by the appropriate state medical board and has the appropriate authority to prescribe restrictions on an employee’s work. Examples of LHCPs include physicians (medical doctors and osteopathic physicians), physician’s assistants, nurse practitioners, and chiropractors. [appropriate authority may vary from state to state]

At Sample Company, LLC, light duty refers to an employee being assigned to a job that accommodates the restrictions placed upon them by a LHCP, and is different from the one they currently and normally perform at Sample Company, LLC.

Modified duty refers to an employee performing their normal job or role within Sample Company, LLC, with modifications to accommodate restrictions placed upon them by a LHCP.

C. Scope and Provision of Light and Modified Duty. The policy should dictate the scope of situations for which it is applicable. Some employers extend light or modified accommodations only for work-related injuries\(^1\), but other companies will extend light duty accommodations for non-work related injuries and illnesses. Whether light or modified duty will be offered for restrictions resulting from non-work related injuries and illnesses is a decision each company must make for itself, however careful consideration should be given to the availability or capacity to accommodate light duty restrictions and the resources within the company to manage light and modified duty assignments.

\(^1\) Work-related injury is term used in this guide to refer to injuries or illnesses that are, or have the potential to be, compensable workers’ compensation claims.
The company should keep in mind that accommodating restrictions arising from non-work related injuries and illnesses could increase the demand for light duty assignments – the amount of which may be very limited. It is possible that while a particular light duty accommodation for a non-work-related injury is in progress, a work-related injury could occur that calls for the same light duty accommodation. In situations like this, the employer may be faced with the decision of which employee will be afforded this accommodation; a problematic situation that, in some cases, may present other personnel / human resources issues. Before completely adopting a policy that states that employees sustaining work-related injuries will automatically have priority and / or “bumping” power over those being accommodated for non-work related injuries, an employer may wish to consult their legal counsel for human resources matters. Some employers simply find it easier to accommodate only work-related injuries.

In addition to establishing the scope of the policy, it is also advisable to communicate the company’s commitment and intent to offer and provide light or modified duty accommodations in each situation that falls within the scope of the policy. As a best practice, the company should make every reasonable attempt to provide a light and / or modified duty accommodation for every injury related to a compensable, or potentially compensable, worker’s compensation claim. It is important to remember that although companies should aggressively and creatively seek to provide light or modified duty assignments, “every reasonable effort” should be confined to providing work that is meaningful and has some degree of value to the employer. Jurisdictions take varying views on employers going too far with light or modified-duty assignments, and employers can get in trouble for having employees perform tasks that may be deemed meaningless and / or degrading simply to avoid the employee being off work.

**Sample Policy Language**

**Option 1 – Accommodation for Only Work-Related Injuries and Illnesses:** It is the policy of Sample Company, LLC, to make every reasonable effort to provide an appropriate light or modified duty accommodation for restrictions imposed by a LHCP in conjunction with every injury or illness arising-out-of and in-the-course of their employment at Sample Company, LLC.

**Option 2 – Accommodation for Work-Related and Non-Work-Related Injuries and Illnesses:** It is the policy of Sample Company, LLC, to make every reasonable effort to provide an appropriate light or modified duty accommodation, subject to other provisions of this policy, for restrictions imposed upon an employee of Sample Company, LLC, by a LHCP

**D. Light or Modified Duty Work – Temporariness.** It should be expressed clearly in the policy that light or modified duty work is provided on a temporary basis, and there should be no expectation that the assignment is one that would continue or be permanent in nature. The policy should make clear that light or modified duty work is offered with the understanding that the employee’s physical restrictions are temporary, and that the employee is progressing toward a return to full capacity. There is risk that if light or modified duty restrictions are accommodated for a lengthy duration, and the employee later needs an accommodation on a permanent basis, the employer may not be able to
argue that the light or modified duty accommodation is an unreasonable, permanent accommodation. (This matter is discussed in more detail in Sec. IV. C.1 of this guide.)

Specifying a specific frequency for which a periodic review of an employee’s return-to-work status may not be advisable; due to management time resources and circumstances particular to each employee’s injuries. However, as provided below in Section IV. C.1., such reviews should occur regularly as a matter of practice and good faith.

**Sample Policy Language**
All light and modified duty accommodations are provided on a temporary basis and are offered with the understanding that an accommodated employee’s physical restrictions are temporary, and that said employee is progressing toward a return to full work capacity. Under no circumstances shall a light or modified duty accommodation be construed as an offer for a permanent (meaning regular) position within Sample Company, LLC, nor is it to be deemed as a reasonable, permanent accommodation for a permanent impairment or disability of any kind. A light or modified duty assignment does not change an employee’s at-will employment status [or contractual employment agreement if so applicable] with Sample Company, LLC. Sample Company, LLC, reserves the right to terminate a light or modified duty accommodation at any time.

**E. Duty to Communicate and Request Light or Modified Duty Accommodations.** It should not be assumed that every LHCP will automatically prescribe light or modified duty restrictions, nor should it be presumed that they will ask the injured employee if his or her employer accommodates light or modified duty restrictions. Very arguably, LHCPs are under no duty to make such an inquiry. Therefore, the responsibility to request light or modified duty work restrictions ultimately lies upon the employer and / or insurer. While it is ideal for an employer representative to be present with the employee at the medical provider’s office (within the parameters of health care privacy laws) and ask the treating LHCP about light or modified duty restrictions at the time of treatment, this is seldom practical. Therefore, employers should establish a policy that requires employees, whenever they are being treated for a work-related injury to inform their treating LHCP that their employer accommodates light and / or modified duty restrictions and to request a return-to-work slip / release that provides specific light or modified duty restrictions. Because circumstances can vary greatly from situation to situation, and because the employer or injured employee cannot control the actions of LHCPs, it is often difficult to enforce this aspect of a light or modified duty policy, however it is a policy element that nonetheless has utility and should be adopted.

**Sample Policy Language**
Whenever an employee is being treated for a work-related injury or illness, she / he is required to inform the treating LHCP that Sample Company, LLC, will accommodate most all light or modified duty work assignments, and she / he shall request the treating LHCP, at the time of each treatment, for return-to-work status slip or document documenting such restrictions.
F. **Requirement for Restrictions to be Specific.** Injured employees and / or employers should request that LHCPs provide light or modified duty restrictions that are specific in nature. Many times, particularly with LHCPs who are not accustomed to treating work-related injuries or illnesses, work restrictions will very simply and generically be stated as “light duty”. As anyone can see, “light duty” alone is very vague and subjective, and worse yet, it tempts the employer to engage in prescribing work they think is light duty but may be inappropriate for a particular injury. Ideally employers will, in states where it is permissible, pre-plan with potential treating LHCPs what types of light duty they can accommodate by providing such LHCPs with lists of various tasks that may be available to accommodate an injured employee. However again, such pre-planning is not always possible and the treating LHCP may not understand the employers business, and will therefore need to specify the types of movements, lifting restrictions, posture restrictions, etc., that are required in order to accommodate the employee. In practice, employees should be required to ensure that the treating LHCP writes specific light or modified duty restrictions in the return-to-work slip / release.

A final strategic step in this element of a policy is to require that the employee make sure they understand the parameters of the restrictions before leaving the treating LHCP’s office. This step helps address a frequent problem of injured employees returning to the employer and then claiming they didn’t understand a specific restriction. Despite a LHCP’s best efforts, sometimes even specifically written restrictions may not be completely clear.

**Sample Policy Language**

Whenever an employee obtains a return-to-work slip or document, the employee shall review the document with the LHCP, prior to leaving their office, to ensure that restrictions are specific and that they are fully understood.

G. **Prohibition of Employees Working Beyond Restrictions.** This element of a light or modified duty return-to-work policy addresses a common concern of employers; an accommodated, injured worker injuring themselves further while working on light or modified duty. Provided that the restrictions of the LHCP are strictly followed, the accommodated employee’s injury should not be made worse by performing this job. However, if the light or modified duty assignment actually exceeds the parameters of the restrictions, or if the injured employee chooses to act in a manner that does not comply with the restrictions, the employee’s injury can be exacerbated and several other difficulties arise; such as delaying resolution of a worker’s compensation claim, increasing expenses, and in some cases even creating additional liability. Therefore, it is important that supervisors and employees alike understand that whenever a light or modified duty accommodation is being made, absolute, strict compliance with the LHCP’s prescribed restrictions is required.

**Sample Policy Language**

All supervisors shall ensure that light or modified duty accommodations comply with restrictions prescribed by a LHCP and that the injured employee understands their restrictions. Furthermore, the supervisor in charge of the accommodated employee’s light or modified duty work shall at least verbally communicate to the accommodated employee that they are strictly prohibited from performing tasks that do not comply with their restrictions.
While working on light or modified duty status, employees are strictly prohibited from performing any task that does not comply with their restrictions. If at any time during a light or modified duty work assignment the employee encounters a situation that even potentially requires them to perform a task that does not comply with their work restrictions, they must not perform the task and shall report the situation to their current supervisor immediately.

H. Compensation While on Light Duty. In many states an employee who is working in a light duty position does not have to be paid the same wages as they would be in their normal position. Several employers have chosen, for various reasons such as keeping payroll calculations simple and extending good will to the work force, to pay employees on light or modified duty their normal wages. Several others choose to alter the wage while performing light or modified duty work for economic reasons and to provide another incentive for the injured worker to return to their normal job as quickly as possible. When an employee who is a worker’s compensation claimant is paid a lower wage for light or modified duty work by their employer, and that wage is lower than the temporary-total disability benefits that the injured employ would have received as a worker’s compensation benefit, the worker’s compensation carrier will be responsible for paying the difference in the amounts to ensure the employee receives at least what would have been their temporary total disability benefits through worker’s compensation. Employers ultimately choose the wages paid for light or modified duty work assignments, and they should carefully evaluate their work culture and objectives with their return-to-work efforts to make a decision. Regardless of the approach, the employer must consistently apply their approach and still abide by state wage and hour laws (i.e., minimum wage requirements, overtime pay, etc.).

With respect to modified duty, employers should carefully evaluate the extent to which the employee is not performing their normal work before reducing pay for modified work. If only minimal modifications are made to an employee’s normal job, employers may not be legally permitted to lower the compensation. In some situations though, such as with trucking companies, an employee may still perform their normal job, but may be assigned to a different area or route that ordinarily receives a lower compensation. For example, a flat-bed truck driver may need an accommodation that keeps them from securing freight or tarping loads, and his employer may temporarily assign him or her to dry van freight hauling where there is no interaction with the freight. Frequently, flat-bed drivers receive a higher wage than those drivers only pulling freight that requires no driver interaction; such as general dry van freight. In situations such as this, it is generally more acceptable to reduce compensation for such assignments, because those employees ordinarily receive a lower compensation because the work demands much less of the employee. However, regardless of the situation, employers should carefully evaluate all of the circumstances surrounding a modified work assignment to determine if a lower wage for the modified work is in order.
Wages earned by an employee working in a light duty assignment will be based upon the work being performed, and may be less than the wages paid to that employee for performing their normal job functions. In the event that an employee has been assigned light duty work in conjunction with an injury or illness that has arose-out-of and in-the-course of their employment at Sample Company, LLC, and the wages paid for performing a light duty work assignment is less than the employee’s average weekly wage, it is possible that the employee will be compensated, through worker’s compensation benefits, for the difference between the amount earned and the amount of temporary total disability benefits the employee would have been paid had no light duty been provided.

[The term “average weekly wage” is used by many states. A company may need to insert their state’s proper terminology for the method of calculating temporary total disability benefits.]

III. Duty of Conduct and Performance During Light or Modified Duty.

Sometimes while working in a light or modified duty capacity, employees may become complacent with following other, fundamental policies of the company, such as required attendance, timeliness, meeting minimal performance standards, etc. Often accompanying this complacency is the employer’s fear of enforcing other employment policies while an employee is working on light or modified duty status. An element of a light or modified duty policy that clearly states an expectation of continued compliance with company policies should help address this fear and complacency. Employers should know that there are other factors, such as past failures to consistently enforce other employment policies, which can still leave them exposed to liabilities, such as retaliatory discharge. Liabilities frequently arise when the employer enforces another policy, such as an attendance policy, on an employee on light or modified duty but have allowed a pass for other employee(s) who did not file a claim. However in most cases, as long an employer has consistently held other employees accountable for the same, well-developed policies, holding an employee being accommodated by light or modified duty to the same conduct standards – provided the conduct being sought is not related to their restrictions – should not create such liabilities.

The key to avoiding liabilities associated with disciplinary action taken on an employee being accommodated for light or modified duty is to be sure that that employee cannot show that a potential reason they are being disciplined or terminated is because they had a worker’s compensation claim / injury. More discussion of this matter is given below in Section IV.C.3.

An employee working on light or modified duty is still expected to follow all applicable employment and conduct policies. Any such employee who fails to follow such policies is subject to disciplinary action according to Sample Company LLC’s, progressive disciplinary policy and employment manual.
Section IV – Important Company Practice

From both a legal and practical standpoint, a company’s practice is many times just as important as what its policy states; in many cases it is more important. In fact, when practice does not match policy, an employer’s risk of liability increases and their ability to meet the objectives of the policy are diminished. For maximum benefit and protection, a company needs to both effectively and consistently manage light and modified duty. The following are offered as considerations and helpful tips for employers in implementing and managing their light or modified duty return-to-work policy.

A. Communication of Policy  As with any other policy, it is imperative that the employer effectively communicate the light or modified duty return-to-work policy in order for it to impact the company’s operations in the desired fashion, and for accountability or disciplinary action taken in connection with the policy to survive any legal scrutiny. Therefore, the following are important considerations for employers in communicating this policy:

- Provided that other employment policies are formally communicated upon an employee’s hire, the contents of this policy should be communicated in the same method.
- It may be advisable to periodically communicate the contents of this policy during safety meetings.
- The policy should be made available to employees in the same fashion that other employment policies are made available.

B. Application of Policy

- It is important for the employer to consistently apply this policy. Unfortunately, some employers tend to pick and choose which injured employees they will accommodate and what pay rate they will be paid. However, employers MUST AVOID this practice, and consistently apply this policy with respect to both accommodation and pay.

- An indirect benefit of light or modified duty accommodations is combating the practice of malingering. Employees who may wish to use an injury as means to avoid coming to work, will be dissuaded by consistent application of the light or modified duty policy. Again, consistent treatment of employees is key.

- The employer must rely upon the LHCP to prescribe restrictions and must avoid, at all cost, speculation as to what an employee’s restrictions may be. Therefore, consistent demand of return-to-work slips / releases is another imperative step employers must take when applying this policy.
C. Dealing with Problematic Situations

**Prolonged Light or Modified Duty Assignments.** As mentioned above in Section III.D., the duration of light or modified duty accommodations can become a concern for various reasons. Whether an accommodation made for light or modified duty would be required of an employer on a permanent basis will hinge largely on: 1) whether the employee’s condition would be a “disability” for which the American’s with Disabilities Act would apply, and 2) whether or not the accommodation would be considered reasonable. The American’s with Disabilities Amendment Act, passed in 2008, and its accompanying regulations have attempted to address some of the ambiguities with respect to what is considered a disability (expanding) and other areas where application of this law is unclear. Ordinarily, and generally speaking, creating a new position for an employee has not been considered a reasonable accommodation. While the degree of economic hardship an accommodation will have on an employer is a significant consideration in determining reasonableness, that factor alone may be insufficient to show an accommodation is unreasonable in certain circumstances (i.e., past practices or treatment of other employees, etc.)

It is important for an employer to keep in mind the long-term implications when accommodating light or modified duty, however the employer should not operate in fear that their attempt to accommodate a light or modified duty assignment will eventually turn into a “reasonable accommodation” for a permanent disability. Most work-related injuries and illnesses do not result in permanent impairments or disabilities and the injured employee eventually returns to their normal job without a need for a permanent accommodation. But, employers must be prepared for instances when an injured employee reaches a state of maximum medical improvement (MMI – as good as she / he will get) and has an impairment that prohibits them from fully performing the job they were working in prior to the injury. Therefore, the following are some considerations to help with situations such as this:

- Rotating an employee through various tasks that are only occasionally needed by the business and are routinely a peripheral task of another job / role can be beneficial to show the accommodation’s temporariness.
- Reiterating to the injured employee at the outset of the accommodation that the light or modified duty is only temporary and is offered with the understanding that they are working toward returning to their normal job within the company is important.
- Again, an employer’s practice should not be contrary to what is communicated to an employee either verbally or through formal policy.
- When an employee on light duty has worked for a lengthy period of time in a full-time position that was vacant and awaiting hire, it can be difficult to say hiring that employee to work in that position is not a reasonable accommodation should their condition later be determined to be a protected disability.
There is no well-defined length of time in a light or modified duty position that constitutes a reasonable, permanent accommodation. Six months to one year is frequently viewed as the window of acceptable duration, however particular circumstances could influence this.

The employer should actively work with the worker’s compensation insurer, employee and LHCP to monitor the plan and prognosis for the employee to return to full-duty capacity. By being diligent and documenting this involvement and interaction (even if it’s email correspondence or simple memorandum with either the insurer or LHCP), can help show the employer was actively involved in protecting the interests in the accommodation strictly being temporary.

Employee Refusal of Light or Modified Duty Assignments. Many times employers are faced with the situation where an injured employee refuses to accept a light or modified duty accommodation despite the fact that the position complies with the LHCP’s prescribed restrictions. If the injury is in connection to a worker’s compensation claim, situations such as this should be reported immediately to the worker’s compensation claims adjuster. In most instances, when a worker’s compensation claimant refuses to perform available light or modified duty work, the claimant will not be permitted to receive temporary total disability benefits through worker’s compensation. Some employers also choose to treat such refusals as they would the employee refusing to come to work at any other time and follow their disciplinary policy relating to such. Many employers have successfully addressed such refusals through disciplinary means (in some cases even termination), employers should do so with caution and heed other warnings put forth in this guide. Again, the key to successfully addressing refusals to accept light or modified duty work is consistency and evaluation of all surrounding circumstances.

Employees Who Must Commute Considerable Distances to Work Light Duty. Some organizations, such as trucking and construction companies, may employ individuals who live a considerable distance from company headquarters or the nearest office location – locations where typical light duty assignments are available. In situations such as this, making the employee drive a significant distance simply to work a light-duty assignment is frequently frowned upon by state worker’s compensation commissions, and in many instances it can even be the basis for fines and / or adverse rulings in worker’s compensation claim adjudication. Further complicating this situation is when an employee’s restrictions entail them being prohibited from driving altogether and they may have no means of transportation to the light duty assignment. As with many things in this area of employment law, there are no bright lines and opinions vary from state to state. Therefore, in situations where the injured employee lives a considerable distance from the light duty assignment, or may have considerable challenges in arranging transportation to the light duty assignment, the employer should contact the worker’s compensation claims adjuster to discuss the feasibility of a light duty assignment. In instances where an employee may not have a means of transportation to the light duty assignment, some employers have arranged
transportation provisions. Regardless of the circumstances, employers should use caution before taking adverse employment action if the employee does not show up for a light duty assignment because they live a significant distance from the assignment/employer, or they are not permitted to drive because of an injury they sustained while in the organization’s employ.

D. Maintain Inventory of Light Duty Assignments.

Employers are encouraged to pre-plan and identify some tasks within the company that are suited to various light duty assignments. This inventory should include tasks that are not regular, part-time or full-time employment positions, but are tasks that are common or peripheral to some other job. This listing of jobs should identify the tasks and physical demands of the tasks. A further, desirable trait of this inventory is to identify the types of restrictions the tasks may be appropriate for.

**Disclaimer:** Every company’s work environment and personnel history is different; therefore every policy should be developed with careful consideration of a company’s practices and other policies – both past and present. While every reasonable effort has been made to ensure this document will provide effective guidance, there are no warranties, expressed or implied, as to its efficacy. Also, because each company’s history, business practices, culture, and/or consistent application of policies may vary, and because such factors may impact the legal soundness of any policy, there are no warranties, express or implied, for developed policies’ compliance with any local, state or federal statute(s) or regulation(s), nor their ability to protect an employer from any liabilities.