



Addressing Mental Health in the Workplace

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Agenda

- Mental Health in the U.S.
- Mental Health in the Workplace
- ADA, FMLA and OSHA Considerations Related to Employee Mental Health
- When an Employee's Mental Health Becomes a Workplace Hazard
- Employer Responses




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Mental Health Generally

- According to a Kaiser Family Foundation/CNN survey published in March 2023, 90% of U.S. adults believe the country is facing a mental health crisis. <https://www.kff.org/coronavirus-covid-19/issue-brief/the-implications-of-covid-19-for-mental-health-and-substance-use/>
- Approximately 20% of adults in the U.S. experienced some form of mental illness in 2020, according to the National Alliance on Mental Illness (NAMI).
- During the pandemic, many adults reported symptoms of anxiety and depression. While approximately 40% of adults reported these symptoms by early 2021, that declined to approximately 30% as the pandemic continued.
- Drug overdose deaths have sharply increased, and, after a brief period of decline, suicide deaths are increasing.

Mental Health Generally (cont'd)

- Nearly half of the U.S. population lives in a mental health workforce shortage area.
- The end of Medicaid's continuous enrollment provision in March 2023 resulted in millions of disenrollments, which could disrupt access to behavioral health services.
- While most adults with mental illness have private insurance, rates of mental illness and substance use disorders are most prevalent among nonelderly adults with Medicaid.

Mental Health in the Workplace

- 27% of Millennials surveyed who resigned in 2022 said they did so because their job was not good for their mental health. <https://time.com/6189818/workplace-mental-health-policies/>
- That same year, 48% of large employers saw an increase in the share of employees seeking mental health services, and 43% were at least somewhat concerned with the growth of substance use conditions among their employees. <https://www.kff.org/report-section/ehbs-2022-summary-of-findings/>
- Bank of America ad, June 2022: “We drive open and ongoing conversations to help break through the stigma around mental health.” <https://time.com/6189818/workplace-mental-health-policies/>

Mental Health in the Workplace (cont'd)

- In February 2022, one-third of working Americans said it's more acceptable now than before the pandemic to ask their employer for mental health support.
- 45% of Americans said they would have taken a “mental health” day off before the pandemic, compared to 65% of working Americans who say they would now.

Workplace Stressors

- Concerns about job security (e.g., potential lay-offs, reductions in assigned hours).
- Lack of access to the tools and equipment needed to perform work safely.
- Fear of employer retaliation.
- Facing confrontation from customers, patients, co-workers, supervisors, or employers.
- Adapting to new or different workspace and schedule or work rules.
- Having to learn new or different tasks or take on more responsibilities.
- Having to work more frequent or extended shifts or being unable to take adequate breaks.

Workplace Stressors (cont'd)

- Physically demanding work.
- Learning new communication tools and dealing with technical difficulties.
- Blurring of work-life boundaries, making it hard for workers to disconnect from the office.
- Finding ways to work while simultaneously caring for children or juggling other caregiving responsibilities while trying to work, such as caring for sick, elderly, or disabled household members.
- Concerns about work performance and productivity.
- Concerns about the safety of using public transit as a commuting option.

Practical Realities

- The nationwide worker shortage has placed a strain on Human Resource professionals.
- The US Chamber of Commerce estimates that there are 1.9 million missing workers post Covid.
- As of mid July, 2023 they estimate 5.9 million unemployed workers for 9.8 million open jobs.
- The “Great Resignation,” or better stated, the “Great Reshuffle” is real.

ADA Considerations

- The ADA prohibits discrimination against individuals with mental health conditions and requires employers to provide reasonable accommodations to qualified individuals who need them.
- The ADA sets forth specific guidelines on when and how an employer may seek medical related information from the employee.

ADA Basics

- Prohibits discrimination against persons who are or who perceived to be disabled
- Applies to employers with 15 or more employees
- Makes it unlawful to discriminate against qualified individuals (job applicants and employees) on the basis of a disability

ADA Basics (cont'd)

- Must reasonably accommodate a qualified individual with a disability unless the accommodation causes an undue hardship
- Retaliation and harassment are also prohibited
- Applies to any aspect of employment

ADA Basics (cont'd)

- May establish qualification standards that exclude individuals who pose a direct threat to the health or safety of the individual or of others if that risk cannot be lowered to an acceptable level by reasonable accommodation.
- May not simply assume that a threat exists:
 - Must establish that there is genuine risk that substantial harm could occur in the workplace.
 - Decision must be individualized judgment based on reliable medical or other objective evidence.

ADA Definitions

- **Qualified Individual with a Disability:** A person who, with or without reasonable accommodation, can perform the essential functions of his or her job.
- **Disability:** A physical or mental impairment that “substantially” limits one or more major life activities (e.g., walking, lifting, seeing, hearing, concentrating, breathing).
- **Reasonable Accommodation:** A change in the work environment or processes that enables an individual with a disability to perform their essential job functions.

ADA Definitions (cont'd)

- **Undue Hardship:** Accommodation would require significant difficulty or expense when considered in light of a number of factors, i.e. the nature and cost of the accommodation in relation to the size, resources, nature, and structure of the employer's operation.
- **Direct Threat:** A significant risk of substantial harm to the health or safety of the individual or of others.

Initial Considerations

- What limitations is the employee experiencing?
- How do these limitations affect the employee and the employee's job performance?
- What specific job tasks are problematic as a result of these limitations?
- What accommodations are available to reduce or eliminate these problems?
- Are all possible resources being used to determine possible accommodations?

Initial Considerations (cont'd)

- Has the employee been consulted regarding possible accommodations?
- Once accommodations are in place, would it be useful to meet with the employee to evaluate the effectiveness of the accommodations and to determine whether additional accommodations are needed?
- Do supervisors and employees need training?

The Interactive Process

- Very important with mental health issues.
- Medical information is usually more vague than it is for physical injuries, and the mental health equivalent to a functional capacities assessment is more difficult and usually less useful.
- Medical restrictions are generally very generic, i.e. “periodic breaks,” “time off during flare ups” or “needs a reduced stress environment.”
- Need to set parameters and request information from both the employee and medical provider, if necessary.

The Interactive Process (cont'd)

- Employers can ask for clarification from the medical provider and can ask the provider if a particular proposed accommodation is reasonable.
- Employers can set protocols for instances in which the employee will be away from work.
 - Easy contact for HR notification.
 - Ways to notify supervisor of breaks or time off.
- Goal is to strike the proper balance between accommodating the employee and the employer's legitimate business interests.

Department of Labor Examples

- Flexible Workplace - Telecommuting and/or working from home.
- Scheduling - Part-time work hours, job sharing, adjustments in the start or end of work hours, compensation time and/or "make up" of missed time.
- Leave - Sick leave for reasons related to mental health, flexible use of vacation time, additional unpaid or administrative leave for treatment or recovery, leaves of absence and/or use of occasional leave (a few hours at a time) for therapy and other related appointments.
- Breaks - Breaks according to individual needs rather than a fixed schedule, more frequent breaks and/or greater flexibility in scheduling breaks, provision of backup coverage during breaks, and telephone breaks during work hours to call professionals and others needed for support.
- Other Policies - Beverages and/or food permitted at workstations, if necessary, to mitigate the side effects of medications; on-site job coaches.

Modifications to the Job

- Reduction and/or removal of distractions in the work area.
- Addition of room dividers, partitions or other soundproofing or visual barriers between workspaces to reduce noise or visual distractions.
- Private offices or private space enclosures.
- Office/workspace location away from noisy machinery.
- Reduction of workplace noise that can be adjusted (such as telephone volume).
- Increased natural lighting or full spectrum lighting.
- Music (with headset) to block out distractions.

Equipment and/or Technology

- Tape recorders for recording/reviewing meetings and training sessions.
- "White noise" or environmental sound machines.
- Handheld electronic organizers, software calendars and organizer programs.
- Remote job coaching, laptop computers, personal digital assistants and office computer access via remote locations.
- Software that minimizes computerized distractions such as pop-up screens.

Job Duties

- Modification or removal of non-essential job duties or restructuring of the job to include only the essential job functions.
- Division of large assignments into smaller tasks and goals.
- Additional assistance and/or time for orientation activities, training and learning job tasks and new responsibilities.
- Additional training or modified training materials.

Management and Supervision

- Implementation of flexible and supportive supervision style; positive reinforcement and feedback; adjustments in level of supervision or structure, such as more frequent meetings to help prioritize tasks; and open communication with supervisors regarding performance and work expectations.
- Additional forms of communication and/or written and visual tools, including communication of assignments and instructions in the employee's preferred learning style (written, verbal, e-mail, demonstration); creation and implementation of written tools such as daily "to-do" lists, step-by-step checklists, written (in addition to verbal) instructions and typed minutes of meetings.

Management and Supervision (cont'd)

- Regularly scheduled meetings (weekly or monthly) with employees to discuss workplace issues and productivity, including annual discussions as part of performance appraisals to assess abilities and discuss promotional opportunities.
- Development of strategies to deal with problems before they arise.
- Written work agreements that include any agreed upon accommodations, long-term and short-term goals, expectations of responsibilities and consequences of not meeting performance standards.
- Education of all employees about their right to accommodations.
- Relevant training for all employees, including co-workers and supervisory staff.



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Issues Outside of Reasonable Accommodation

- Production Standards - An employer does not have to excuse failure to meet production standards that are consistently applied, even if the difficulty was caused by a health condition or the side effects of medication.
- Illegal Drug Use – ADA excludes current illegal drug users.



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Work from Home

- Requests are prevalent post-Covid.
- If on-site presence is required, include the requirement in the job description.
- Include ways to allow the employee to work on-site in the interactive process.
- Do not reject a request for remote work unless you can demonstrate that on-site work is actually essential, or that continued remote work poses an undue hardship.

Family and Medical Leave Act (FMLA) Basics

- Covers private sector employers with 50 or more employees.
- Provides job security protections for eligible employees taking leave for qualifying reasons.
- Prohibits interference with attempts to take leave and retaliation for taking leave.
- Leave is unpaid (employer can require or employee can request to use accrued paid leave).
- FMLA leave can run concurrently with other forms of leave.

FMLA Considerations

- Eligible employees entitled to up to 12 workweeks of unpaid leave a year
- For mental health issues, leave would be because the employee is unable to work because of a serious health condition.
- Leave may be taken intermittently when medically necessary
 - Separate blocks of time for a single qualifying reason or
 - Reducing the employee's usual weekly or daily work schedule.
- FMLA does not necessarily allow unscheduled and unpredictable, but cumulatively substantial, absences.

FMLA Considerations (cont'd)

- Planned medical treatment should be scheduled so as not to unduly disrupt operations.
- Employee is generally required to notify the employer of the need for leave
 - Objective information may place the employer on notice of a mental health related disability and trigger the employer's obligations to provide the employee with the prescribed FMLA paperwork.
 - Implementing the FMLA process without an employee request could implicate the ADA, i.e. unlawfully regarding the employee as disabled.

FMLA: Serious Health Condition

- Serious health conditions that qualify for FMLA leave generally:
 - require an overnight stay in a hospital or other medical care facility;
 - incapacitate the individual for more than three consecutive days and have ongoing medical treatment (either multiple appointments with a health care provider or a single appointment and follow-up care such as prescription medication);
 - involve chronic conditions that cause occasional periods when the individual is incapacitated and require treatment by a health care provider at least twice a year.

FMLA: Chronic Health Conditions

- Employees may use FMLA leave for any period of incapacity or treatment due to a chronic serious health condition.
- A chronic serious health condition:
 - requires periodic visits (at least twice a year) for treatment by a health care provider or nurse under the supervision of the health care provider,
 - continues over an extended period of time, and
 - may cause episodic rather than continuing periods of incapacity.

FMLA: Serious Mental Health Conditions

- Mental and physical health conditions are considered serious health conditions under the FMLA if they require
 - inpatient care or
 - continuing treatment by a health care provider.
- A serious mental health condition that requires inpatient care includes an overnight stay in a hospital or other medical care facility.

FMLA: Serious Mental Health Conditions (cont'd)

- A serious mental health condition that requires continuing treatment by a health care provider includes—
 - Conditions that incapacitate an individual for more than three consecutive days and require ongoing medical treatment, either multiple appointments with a health care provider, including behavioral health providers, or a single appointment and follow-up care (e.g., prescription medication, outpatient rehabilitation counseling, or behavioral therapy); and
 - Chronic conditions (e.g., anxiety, depression, or dissociative disorders) that cause occasional periods when an individual is incapacitated and require treatment by a health care provider at least twice a year.

FMLA: Serious Mental Health Conditions (cont'd)

- Any mental health condition has the potential to qualify as a serious mental health condition, including depression and anxiety and workplace stress under certain circumstances.
 - Diagnosis alone is not enough to qualify as a serious condition.
 - Many mental health conditions are on a spectrum, with variations ranging in severity.
 - Whether an employee's condition qualifies for FMLA leave needs to be determined on a case-by-case basis.

FMLA: Serious Mental Health Conditions (cont'd)

- Employers should consider whether the mental illness:
 - Continues over an extended period of time.
 - Requires periodic doctor's visits because of, or to prevent, episodes.
 - Prevents the employee from performing regular daily activities.
- Where there is no continuing treatment, no period of incapacity, or no chronic impairment, the mental health condition is not sufficiently serious.
- Acute medication side effects do not qualify as a serious medical condition, though chronic ones might.

FMLA: Notice of Condition

- Employees must do more than simply state that they have a mental illness for an employer to be considered “on notice” of a serious mental health condition.
- Generally, an employee must provide details about the mental condition, including severity and any incapacity.
- Where an employee has a drastic and noticeable change in behavior or mood, an employer may be considered “on notice” without a disclosure.
- If an employer is already “on notice” of a serious mental health condition, an employee may simply inform the employer that they need leave for that same mental illness, even if the employee does not spell out the severity for each leave request.
- An employee just saying that “I’m sick” is insufficient.

FMLA Documentation

- Employer may ask for certification of the serious health condition.
- Only a health care provider(usually a doctor or a therapist) can complete the certification.
- Employer must allow the employee at least 15 calendar days to obtain the medical certification.
- An employer may require a second or third medical opinion (at the employer’s expense) if the employer has reason to doubt the validity of the medical certification.
- The employee is not required to provide actual medical records.
 - Employer may request that the certification contain sufficient medical facts to establish that a serious health condition exists.

HIPAA and FMLA Certification

- An employer may contact an employee's health care provider as authorized by HIPAA.
- Employers may contact an employee's health care provider for authentication or clarification of the medical certification by using a health care provider, a human resource professional, a leave administrator, or a management official.
- The employee's direct supervisor may NOT contact the employee's health care provider.
- The employee will need to authorize the health care provider to disclose health information to the employer.
- Employers may not ask the health care provider for additional information beyond that contained on the medical certification form.

FMLA Recertification

- An employer may request recertification no more than every 30 days unless the condition will last for more than 30 days.
- For conditions that are certified as lasting more than 30 days, the employer must wait to request a recertification until the specified period has passed.
- In all cases an employer may request recertification every six months.

FMLA Recertification (cont'd)

- An employer may request recertification in less than 30 days if
 - the employee requests an extension of leave,
 - the circumstances described in the previous certification have changed significantly, or
 - if the employer receives information that casts doubt upon the employee's stated reason for the absence or the continuing validity of the certification.
- Employers may request a new medical certification each leave year for medical conditions that last longer than one year. New medical certifications are subject to second and third opinions.

FMLA: Fitness for Duty

- May require all similarly situated employees who take leave for certain conditions to submit a certification that the employee is able to resume work.
- May require that the certification address the employee's ability to perform the essential functions of the position if the employer has notified the employee that this information will be required and has provided a list of essential functions.
- May require a fitness-for-duty certification up to once every 30 days for an employee taking intermittent or reduced schedule FMLA leave if reasonable safety concerns exist regarding the employee's ability to perform his or her duties.

FMLA: Employee Noncompliance

- If an employee fails to timely submit a properly requested medical certification without explanation, the leave may be delayed or denied.
 - If the employee never provides a medical certification, then the leave is not FMLA leave.
- If an employee fails to submit a requested fitness-for-duty certification, the employer may delay job restoration.
 - If the employee never provides the certification, he or she may be denied reinstatement.

OSHA Considerations

- The Occupational Safety and Health Administration (OSHA) is responsible for ensuring safe and healthy working conditions for employees.
- OSHA recognizes the importance of addressing mental health concerns in the workplace to promote overall well-being and productivity.
- Employers have a “general duty” to provide a workplace that is free from recognized hazards that may cause death or serious physical harm to employees.
 - Duty includes addressing mental health issues if they are identified as hazards in the workplace.

When is an Employee's Mental Health Issue Considered a Workplace Hazard?

- A mental illness is work-related IF the employee voluntarily provides the employer with an appropriate professional opinion that the employee has a job-related mental illness.
- An opinion from a licensed health care professional may not be required for an employer to recognize an employee's mental health issue as a potential hazard under the ADA.

Employer Solutions

- Recognize that employees may be experiencing:
 - heightened levels of loneliness, isolation, uncertainty, grief, and stress;
 - family demands, such as parents caring for children or elderly household members; or
 - existing mental health or substance use challenges.
- Identify factors making it harder for workers to get their jobs done and determine if adjustments can be made.
- Show empathy:
 - Reassure employees that they can discuss their work stress;
 - Create safe and trustworthy spaces.
- Provide access to coping resources, workplace and leave flexibilities without penalty, or other supportive networks and services.

Employer Solutions (cont'd)

- Mental wellness employee resource group to help employees understand the mental wellness resources offered; encourages employees to participate in training that, among other things, advises how to respond when someone under stress reaches out to them. (Accenture North America)
- 170,000 Accenture employees completed a “Thriving Mind” program to learn how to handle stress and improve their well-being. The company reported that those who completed the program reported an average 8 to 11% increase in their ability to handle stress and 90% of participants said they felt significantly better able to handle workplace challenges.



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Employer Solutions (cont'd)

- Implement business practices that support better mental health.
 - Shortening meeting times by five minutes to allow employees time to get up and stretch between meetings.
 - Encouraging employees to step away from their desks for lunch.
 - Instead of sending out business emails late in the evening, using time-delay, so they're not sent until the following morning.



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Resources

- FMLA
 - <https://www.dol.gov/agencies/whd/fact-sheets/28o-mental-health>
 - <https://www.dol.gov/agencies/whd/fmla/mental-health>
- OSHA
 - <https://www.osha.gov/workplace-stress>
- ADA
 - <https://www.eeoc.gov/laws/guidance/ada-questions-and-answers>



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Thank you for joining us!

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