



Accommodating Employees with Mental Health Conditions

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Introduction



Mental Health Conditions as Disabilities

Mental Health Conditions Can Qualify as Disabilities

- The Americans with Disabilities Act (ADA)
- The Wisconsin Fair Employment Act (WFEA)

The Interactive Process and Reasonable Accommodations

- An employee's request for accommodation
- An employee and employer exchange information
- Identify appropriate reasonable accommodations
 - Categories of accommodations that might be required
 - Categories of accommodations that will generally not be required

Undue Hardship

- Case by case analysis that looks at specific circumstances of the employer:
 - employer's size and financial resources
 - Impact of accommodation on employer's operations
 - Specific accommodation requested by employee
- Reduced workforce morale unlikely to constitute an undue hardship

Direct Threat

- A significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation
- Employers must consider
 - Duration of the risk
 - Nature and severity of the potential harm
 - Likelihood that potential harm will occur
 - Imminence of potential harm

The Interactive Process Takes Time

- “He who breaks down the accommodation process loses.”

Mental Health Conditions and the FMLA



Under Federal FMLA, a Serious Health Condition Means

- An illness, injury, impairment, or physical or mental condition that involves:
 - Inpatient treatment, or
 - Continuing treatment by a health care provider during which the employee due to the serious health condition is incapacitated from working, attending school, or performing other daily activities for more than 3 consecutive full calendar days.

Under Federal FMLA, a Serious Health Condition Means, con't.

- Any period of incapacity or treatment for incapacity due to a chronic serious health condition.
- A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective.
- Any period of absence to receive multiple treatments by a health care provider for a condition that would likely cause incapacity for 3 or more full calendar days if not treated.

Under State FMLA, a Serious Health Condition Means

- A disabling physical or mental illness, impairment, or condition that involves any of the following:
 - Inpatient care in a hospital, nursing home, or hospice; or
 - Outpatient care that requires continuing treatment or supervision by a health care provider.
- There is no express “three day” incapacity requirement.

Intermittent Leave

- Under federal FMLA, leave may be taken intermittently.
- An employee taking leave for planned medical treatments must make reasonable efforts to schedule the leave so as not to unduly disrupt the employer's operations.
- Under state FMLA, an employee can take intermittent FMLA leave in the same increments that the employer allows employees to take any other form of leave.

Forms

- Request employee submit a certification form at the time the employee gives notice of the need for leave.
- Employee has 15 calendar days to submit the certification form.
- Employer should ensure the form is complete and that the employer understands it.
- An employee might authorize his/her health care provider to follow up directly with the employer regarding the certification form.
- An employer can authenticate and clarify the certification form with the health care provider.

Validity of Forms

- If the employer doubts the validity of the form, the employer can require the employee to get a second opinion from the doctor of the employer's choice (at the employer's expense), so long as the employer does not employ this doctor on a regular basis. If the two opinions differ, the employer may require a final, binding third opinion (at the employer's expense).

Validity of Forms, con't.

- Employer may request recertification every 30 days or after the expiration of the minimum duration stated on the certification form, whichever is longer.
- Regardless of the minimum duration on the form, an employer can request recertification once every six months.

Validity of Forms, con't.

- An employer may request recertification in less than 30 days if:
 - The employee requests an extension of the initial medical leave.
 - Circumstances stated in previous certifications have changed.
 - The employer receives information casting doubt on the continuing validity.

Anti-retaliation

- Employers cannot take adverse employment actions based on employees taking state or federal FMLA leave.

Managing FMLA Fraud

- Employers should not assume FMLA fraud.
- An employer cannot have an FMLA policy that prohibits an employee from working another job while on FMLA leave.

***The Interaction Between
the ADA / WFEA and
State and Federal FMLA***



Unpaid Leaves of Absence

- Unpaid leaves of absences can be a reasonable accommodation even for an employee who is not eligible for leave under state or federal FMLA or who has used all of his/her FMLA leave.
- An indefinite period of absence is not a reasonable accommodation.
- When a leave of absence due to disability can be properly categorized as FMLA, the employer should provide the FMLA notices and certification forms.
- A strict “cap” on the number of days employees can be on unpaid leave is generally considered a per se violation of the ADA.

Disability-Related Inquiries or Medical Examinations

Prior to an Offer of Employment

- The ADA prohibits all disability-related inquiries and medical examinations.
- Examples of disability-related inquiries.

After an Applicant is Given a Conditional Job Offer, but Before the Applicant Starts Work

- Employer may make disability-related inquiries and conduct medical examinations, as long as it does so for all entering employees in the same job category.
- Examples.

After Employment Begins

- A disability-related inquiry or medical examination of an employee must be “job-related and consistent with business necessity.”
- Examples.
- An employer may require an employee to provide documentation that is sufficient to substantiate that the employee has an ADA disability and needs the reasonable accommodation requested.

After Employment Begins, con't.

- The employee has a duty to cooperate with such inquiries.
- An employer may make disability-related inquiries or require a medical examination when an employee who has been on leave for a medical condition seeks to return to work.

***Keys to Addressing Performance
and Conduct Concerns for
Employees with Mental Health Issues***

General Legal Standards

- It is not discriminatory under the WFEA to discipline or terminate an employee if the employee's disability is reasonably related to the individual's ability to adequately undertake the job-related responsibilities of the employment.
- The question becomes whether the employer can establish that it did not refuse to reasonably accommodate the Complainant's disability, or that any accommodation which might have been made would have posed a hardship on the employer's organization.

Conduct Issues: Case Study

- Your employee has recently become very irritable at work and has yelled at co-workers in meetings.
- She has also used inappropriate language in emails complaining of customers and recently “provided” her co-worker a stack of papers by angrily throwing them to the ground in front of the co-worker.
- You are not aware that the employee has any type of medical issue.
- What are recommended steps to address this?

Performance Issues: Case Study

- You have an employee whose primary role is to generate financial analysis reports for others in your organization. The role requires that the employee can process complex information, use independent judgment to assess what information should be included in the report and set priorities.
- The employee has historically been a decent performer, but not in the top tier. He has started to miss deadlines and internal customers have complained that his reports contain errors.

Absences: Case Study

- A teacher takes repeated absences after being assigned to a new classroom. She quickly uses up all her available sick leave. Now the teacher begins to come in late to work almost every day.
- You sit the teacher down to talk about her absences, she explains that she is suffering from seasonal affective disorder that is exacerbated by being in a classroom with no windows.

Impact of Wisconsin Bell, Inc. v. LIRC

- The Supreme Court ruled that employees can no longer prove discrimination without evidence of discriminatory intent or that the employer knew that the employee's conduct or performance issues were caused by a disability.
- The case will likely result in employers prevailing in more disability discrimination cases involving terminations for misconduct or performance issues.

Recent Developments



Supervisor Induced Anxiety Is Not a Disability Under the ADA

- An employee was diagnosed with an anxiety and panic disorder after working under a specific supervisor for approximately a year.
- An employee who cannot work under a specific supervisor is not substantially limited in his capacity to work.
- Even if the employee had a disability, Target's refusal to transfer him was not a failure to accommodate. The ADA does not require an employer to transfer an employee to a different supervisor.

Obesity, by Itself, is Not a Disability

- A 566 pound Chicago Transit Authority bus driver failed a special assessment designed to ensure drivers weighing over 400 pounds could safely perform their jobs.
- The court held that in the absence of an underlying physiological disorder or condition that caused the obesity, obesity was not a covered disability.
- Employers should also be aware that some recent scientific research indicates a bidirectional relationship between depression and obesity.

General Best Practices

- Address conduct and performance issues head on and early.
- Ensure that performance evaluations, performance improvement documents and written discipline and warnings are vetted to avoid raising legal issues.
- Ensure that all communication about the employee's situation is discrete, professional and fact based.

General Best Practices, con't.

- Make sure job descriptions capture key conduct and performance elements of the job, just as the ability to handle stressful situations professionally and the ability to process complicated information and set priorities.
- Maintain confidentiality of all medical information.

Questions ?

