

BARRAN LIEBMAN_{LLP}

A T T O R N E Y S

MANAGING MENTAL HEALTH
IN THE WORKPLACE

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MENTAL HEALTH CONDITIONS ON THE RISE

- The National Alliance on Mental Illness reports that 1 in 5 adults in the U.S. experience some form of mental illness each year, with 1 in 20 adults experiencing serious mental illness
- According to Mental Health America's 2023 report, Oregon ranks 48th out of all U.S. states and Washington D.C. for prevalence of mental illness (with a ranking of 1 being the state with the lowest prevalence of mental illness, and 51 being the highest prevalence)
- The COVID-19 pandemic caused many Americans to experience isolation, stress, depression, anxiety, or other mental health issues at unprecedented high levels

HOW CAN EMPLOYERS PROMOTE EMPLOYEE MENTAL HEALTH?

- EAP – Employee Assistance Program
 - According to a 2019 SHRM article, EAPs typically cost between 75 cents and \$1.50 per member per month
 - Sometimes included in an employer’s existing health or life insurance plans
 - EAPs intended to assist/connect employees with resources for dealing with personal challenges. Can connect employees to mental health counseling, financial service assistance, family service assistance, etc.
- Provide training for managers on how to effectively communicate with employees
 - Respect
 - Consistent feedback
 - Clear communication
- Provide management training on how to effectively respond to mental health concerns in the workplace
- Wellness plans/benefits
- Be nice!!!

WHAT LAWS DO WE NEED TO BE THINKING ABOUT?

- ADA
- State Discrimination Laws
- FMLA/OFLA/OST/Paid Leave Oregon/WA PFML
- Workers' Compensation

STATE & FEDERAL DISABILITY LAWS

- Prohibits discrimination if:
 - Qualified individual with a disability (or “regarded as” such)
 - Able to perform essential functions of the job
 - With or without reasonable accommodation
- Requirement to engage in interactive process
 - To determine whether a reasonable accommodation may permit an employee with a disability to perform the essential functions of his/her position
- There is no waiting or vesting period before an employee may request an accommodation

STATE & FEDERAL LEAVE LAWS

- Provide protected leave to qualified individuals with a “serious health condition”
 - Absences attributable to incapacity due to a chronic serious health condition do not require medical treatment from a healthcare provider during the absence, nor does it have to last more than three consecutive, full calendar days
- Provide protected leave to qualified individuals to care for family member with a “serious health condition”
- Waiting periods and other requirements before employees become eligible

DO'S & DON'TS

- Do:
 - Ask how the organization can help the employee be successful
 - Point out benefits that may be offered such as Employee Assistance Programs and short-term and long-term disability insurance, if applicable
 - Be compassionate and show concern for the employee
 - Document as much as you can, including when and where you met with the employee
- Don't:
 - Jump to the conclusion that there is a disability
 - Be confrontational or attempt to diagnose the employee
 - Make age-related or disability-related comments
 - Question any diagnoses

IT ALWAYS DEPENDS

- Whether an employee is considered a qualified individual with a disability for purposes of federal or state disability laws is a fact-intensive inquiry which is always going to depend upon individual circumstances. This is the same with determining whether an employee has a serious health condition which might entitle them to protected leave.
- Why does it matter?
 - Because we want to be helpful to our employees
 - Because it can trigger a duty to engage in the interactive process
 - Because it gives rise to legal protection and legal claims

ADA

- ADA applies to employers with 15 or more employees
- An individual with a disability is defined by the ADA as a person who has a physical or mental impairment that substantially limits one or more major life activities, a person who has a history or record of such an impairment, or a person who is perceived by others as having such an impairment
- An individual must be able to perform the essential functions of their job or position with or without a reasonable accommodation
- Need to engage in the interactive process to determine whether they are in fact a qualifying individual for purposes of the ADA, and whether they require an accommodation
- So the question is: does the mental health disclosure amount to a physical or mental impairment that substantially limits one or more major life functions?
- Major life functions include: performing manual tasks, seeing, hearing, speaking, breathing, eating, concentrating, thinking, communicating, and working
- Does the mental health impairment *substantially limit* the given major life function?

STATE DISABILITY LAWS

- Oregon disability laws apply to employers with 6 or more employees
- State disability laws interpreted in a manner consistent with federal laws
- Go through the same evaluative process as you would under the ADA

INTERACTIVE PROCESS

- Employer is responsible for initiating the interactive process **without being asked by the employee** if the employer:
 - Knows that the employee has a **disability**;
 - Knows or has reason to know that the employee is experiencing **workplace problems because of the disability**; and
 - Knows or has reason to know that the **disability prevents the employee from requesting a reasonable accommodation**

QUESTIONS TO ASK YOURSELF FOLLOWING DISCLOSURE

- Does this disclosure trigger a duty to engage in the interactive process or to provide leave?
 - If they tell you they are disabled or need an accommodation, potentially yes.
 - If they tell you they are just stressed and had a long week, probably no.
- Did the employee request anything of me? Do I need to provide the employee with anything (e.g. FMLA Notice of Eligibility & Rights and Responsibilities)?
- Do I need additional information?
- Does the disclosure implicate other employees (e.g. stress related to harassment)?
- Did I document what happened?
 - For example, if an employee expressly says to you that they are not seeking an accommodation or leave of any kind, contemporaneously document that.

MENTAL OR COGNITIVE IMPAIRMENTS

- The following are typical examples of mental impairments that constitute a disability or serious health condition:
 - Major depression
 - Bipolar disorder
 - Anxiety disorders such as PTSD and obsessive-compulsive disorders
 - Schizophrenia
- The following are not impairments that must be accommodated:
 - Feeling stressed
 - Irritability
 - Chronic lateness
 - Poor judgment
 - Transitory and minor ailments

SERIOUS HEALTH CONDITION (FMLA / OFLA) AND SICK LEAVE

- Does the mental health condition amount to a serious health condition which would entitle the employee to protected leave?
 - FMLA serious health condition
 - OFLA serious health condition
 - WA Paid Family Leave
 - Oregon Paid Family Leave
 - Oregon Sick Time

- Defer to the healthcare provider!

REASONABLE ACCOMMODATION & THE INTERACTIVE PROCESS

- Reasonable accommodation
 - Must provide for the known disability of a qualified applicant or employee unless it would impose undue hardship on the employer
 - You do not have to provide the accommodation the employee requests, but rather, you must provide a reasonable accommodation that is “effective”
 - Example: If employee requests leave because they cannot get to work on time in the morning, employer can flex schedule to offer later start and end times to accommodate difficulty getting to work early in morning

INTERACTIVE PROCESS

- Mandatory and must be done in good faith
- Step one: recognize a need or request for accommodation
- Step two: meet and confer
- Step three: get more information if needed
 - May request medical information from employee or healthcare provider if need for accommodation is not obvious to employer and employer has not already obtained the information

GET MORE INFORMATION IF YOU NEED IT

- All medical inquiries must be job-related and consistent with business necessity, and limited to questions eliciting information about a disability
- Employer may require employee to go to healthcare professional of employer's choice if employee provides insufficient information from their healthcare professional
 - Insufficient documentation does not specify existence of disability or explain need for reasonable accommodation
 - Employer must provide employee opportunity to provide missing information
- Fitness-for-Duty: Employer may require fitness-for-duty exam if it has reasonable belief that employee's present ability to perform essential job functions will be impaired by a medical condition or that the employee will pose a direct threat due to medical condition

REASONABLE ACCOMMODATIONS

- Reasonable accommodations may include:
 - Change work schedules
 - Restructure certain job duties
 - Provide assistive technology
 - Help with organization, checklists, and breaking up of tasks
 - Reduce distractions and interruptions
 - Leave (OFLA/FMLA as well as additional, reasonable leave)
 - Transfer to available alternative position
 - Allow an emotional support animal
 - Allow to work at home

“UNREASONABLE” ACCOMMODATIONS

- The ADA does not require employers to:
 - Eliminate essential functions
 - Lower production or performance standards
 - Excuse violations of conduct rules that are job-related and consistent with business necessity
 - Take actions that would result in an undue hardship
 - Change an employee’s supervisor

A WORD OF CAUTION ABOUT UNDUE HARDSHIP

- Rule Number 1: It's Probably Not
- Rule Number 2: Providing the accommodation must result in **SIGNIFICANT** difficulty or expense when considered in light of:
 - Nature and cost of accommodations needed
 - Overall financial resources of the business
 - Type of operation of the business
 - Impact of accommodation upon the operation of the business

WHAT ABOUT WORKERS' COMPENSATION?

- Oregon law includes mental disorders as a recognized injury for purposes of workers' compensation claims, though they are generally difficult for employees to prove
- If an employee is connecting their mental illness with the workplace (e.g., “my anxiety is really bad because of xyz at work.”), provide 801 form
 - Your workers' compensation insurer will then evaluate the claim and alleged workplace injury and make a determination as to whether it is compensable or not
 - Generally, these claims are denied

BEST PRACTICES

- Train your supervisors
- Err on the side of being as accommodating as possible
- Do not assume anything
- Be kind and compassionate
- Thoroughly document your efforts
- Revise overly strict or inflexible leave policies
- Critically evaluate any “undue hardship”
- Defer to the doctor!
- Use severance agreements to mitigate risk

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THANK YOU!



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