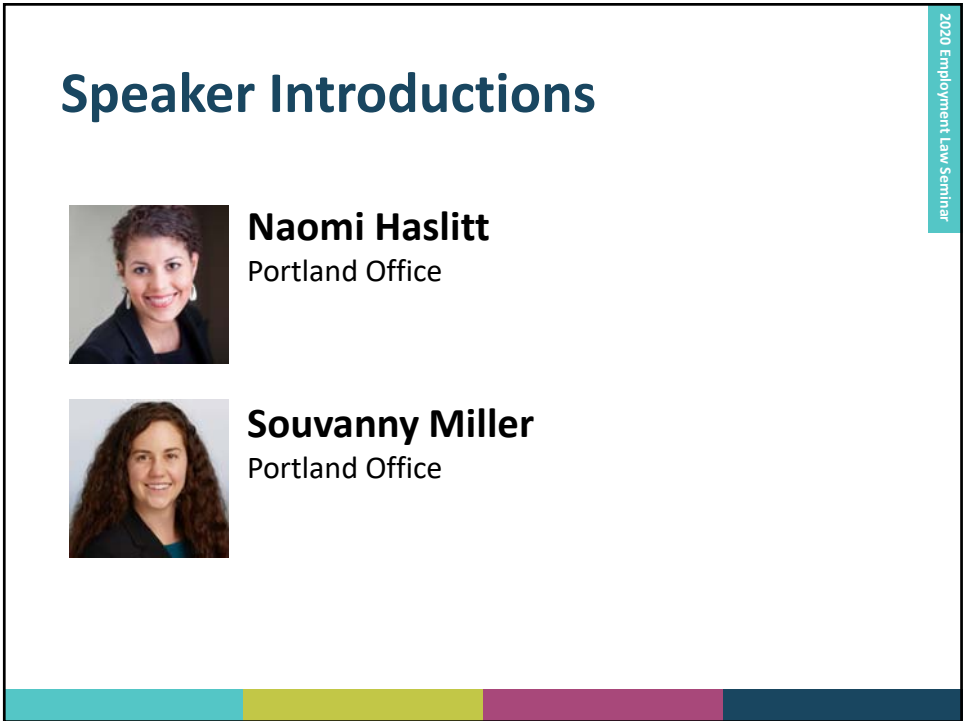





**Reinforcing the Structure:
Employee Mental Health and Mental
Health Accommodations in Times of
Enhanced Societal Pressures**


2020 Employment Law Seminar
Day 1: COVID-19 Workplace Issues




Speaker Introductions



Naomi Haslitt
Portland Office



Souvanny Miller
Portland Office



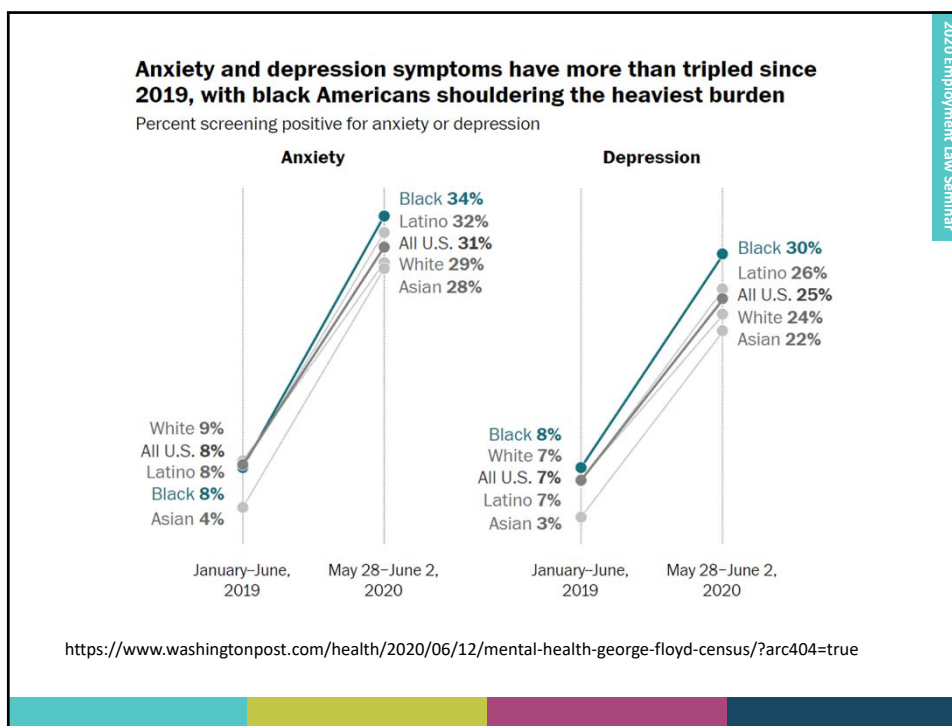
2020 Employment Law Seminar

It's 2020

- Mental health and substance abuse issues are rising
- Employers' obligations remain the same
- Implementation/accommodation may change

Consider: Then and Now

- Compared to conditions prior to the pandemic—are you seeing in your workforce:
 - A. More mental health concerns relating to outside-of-work stressors?
 - B. Fewer mental health concerns relating to outside-of-work stressors?
 - C. No change



Legal Obligations

- ADA
- State nondiscrimination laws
- Leave laws

Changes...

- Employee struggles may:
 - Present differently
 - Be harder to recognize
- Employers may need to adjust:
 - Interactive process
 - Typical accommodations

The Anxious Returner

- One of your supervisors is concerned about returning to work
- The building they work in recently re-opened for business, albeit with limited capacity and strict safety protocols. More of your employees are returning to work, including the team that this person oversees.

The Anxious Returner

- There have not been any cases in your workplace thus far. Another employee tested positive for the virus while on vacation, but that person hadn't had a shift between the vacation and the diagnosis.
- The supervisor tells you they are worried about coming back to work in person

Your Employee Is Not Alone

- According to a May 2020 survey:

Top reasons that Americans would not be able to return to work

Fear of getting sick from being at work
 51%

Unwilling to use public transportation for my commute
 24%

My responsibilities as a parent or caregiver
 21%

Taking care of sick family members
 15%

Source: PwC COVID-19 US Employee Pulse Survey
 May 8, 2020; base 468 (those forced to stop working, but still being paid and those forced to work remotely)
 Q: Which of the following would prevent you from returning to your office or work site location, if your employer asked you to return tomorrow? Please select all that apply. *main categories
 Note: Workers in the Northeast are more likely to select unwillingness to use public transportation.

<https://www.pwc.com/us/en/library/covid-19/employees-anxious-about-returning-to-workplace-1.html>

Consider: Potential Next Steps

- What should you do with your Anxious Returner?
 - A. Nothing. They haven't stated that they have a disability, and so there is no obligation to inquire further.
 - B. Ask follow up questions. The supervisor hasn't given enough information to determine whether there is an ADA issue or not, so you should follow up.
 - C. Immediately put the employee on leave. The supervisor has indicated that they are worried about returning to work, so you should provide a reasonable accommodation—they don't have to return to work.

Next Steps

- The information provided to you doesn't give you enough information to discern whether this "worry" is a symptom of a disability, generalized fear, or something else
- You follow up with the supervisor, "Can you tell me more specifically about your concerns in returning to work?"

Identify the Parameters

- Leave
- ADA
 - ADA – 15+ employees
 - OR nondiscrimination – 6+ employees
 - WA nondiscrimination – 8+ employees

Ask Questions

- Is there a disability or medical condition?
 - Disability-related medical inquiries
- If disability, then what?
 - Qualified?
 - Perform essential functions with or without an accommodation?
 - Undue hardship?

Interactive Process

- Work with the employee to determine whether any reasonable accommodations are available
- How will your interactive process look now?

Accommodate

- Work from home?
 - Essential functions vs. marginal functions
- Work environment in the office?
 - Secluded area, additional precautions
- Leave?

The Distracted Work-From Home

- Your employee has been late to the morning team meetings, and often appears distracted when they do show up. They can't focus, they go off topic, and lately have not been prepared for anything they were supposed to present. You are surprised, because this person is usually a strong team member. You noticed this behavior about a month after your team went remote, but figured it would go back to normal eventually. Instead, it has been getting worse.
- What do you do?

What's Going On?

- You decide you need more information so you check in with this employee, noting your observations about the decrease in work performance
- The employee admits to struggling at work, particularly in the mornings, and admits to underperforming while working remotely
- The employee also discloses that they are receiving treatment for depression

What Next?

- Leave may be implicated.
- ADA, as well.
 - Evaluate essential functions.
 - Accommodation
 - › Schedule change?
 - › How work product is delivered?
 - Undue hardship

Substance Abuse

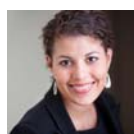
- Drug and alcohol testing
 - Legal and policy parameters
 - Practical considerations
 - › How and where will testing occur?
- Leave and accommodation for treatment.

Key Takeaways

- Keep in mind that state requirements may apply even when the ADA doesn't
- Be proactive with respect to employee mental health—reach out, normalize mental health conversations, and offer resources
- Be creative and flexible with accommodations

2020 Employment Law Seminar

Thank You!



Naomi Haslitt

naomi.haslitt@millernash.com
503.224.5858



Souvanny Miller

souvanny.miller@millernash.com
503.205.2363

2020 Employment Law Seminar