

REINFORCING THE STRUCTURE:



Employee Mental Health and Mental Health Accommodations in Times of Enhanced Societal Pressures

It's 2020, and in the face of unprecedented societal pressures, employers are looking to reframe employee mental health supports to adapt to the new normal. External stressors and work environments may be different from "normal times," and employees are experiencing and expressing stress, anxiety, and other mental health issues in new ways. But legal considerations for employers remain the same. Employers will need to ensure that their processes respond to this new normal, both in how they recognize employee mental health concerns and in employee accommodations.

Stressors inside and outside the work environment may overload your workforce:

- COVID-19;
- Social and racial justice issues;
- Politics;
- Kids at home;
- Work at home;
- Changes to schedules or working conditions;
- Limited social interaction; and
- Disruptions in public life.

These stressors manifest in employee work performance, accommodation requests, and employee behavior. Unsurprisingly, employees are reporting increased levels of anxiety, stress, depression, conflicts at work and with coworkers, and substance abuse.¹ This paper will provide a refresher on employer legal obligations and address challenges in recognizing and accommodating employee mental health in the virtual, partially virtual, or COVID-19-restricted world.

¹According to the American Psychiatric Association Foundation Center for Workplace Mental Health, "with the COVID-19 pandemic, our nation is experiencing a surge in people showing signs of depression, anxiety, and other serious mental health distress. Recent data from the U.S. Census Bureau shows nearly a tripling of people experiencing signs of depression and anxiety." Center for Workplace Mental Health, [Employee Mental Health & Well-being During & Beyond COVID-19](#).

EMPLOYERS' LEGAL OBLIGATIONS TO ADDRESS MENTAL HEALTH

Employers remain obligated to respond appropriately to mental health disabilities even in a different work environment than existed at the beginning of 2020. Because employee mental health concerns may appear differently in the virtual, partially virtual, or socially distanced workplace, employers may need to adjust how they implement disability and leave laws.

Americans with Disabilities Act (ADA)

The ADA requires employers to provide reasonable accommodations to qualified employees with disabilities to allow those employees to perform the essential functions of their positions. This requires engaging in an interactive process to determine whether any reasonable accommodations are available. The interactive process is a unique and valuable opportunity for an employer and employee to discuss how the employer can assist the employee in performing a job's essential functions. And the interactive process may become even more important as employers and employees explore how to work under the unprecedented societal pressures and environmental changes.



WRITTEN BY:
Naomi Haslitt
Souvanny Miller

What is a disability?

A disability is:

- A physical or *mental impairment* that substantially limits one or more of an employee's major life activities;
- There is a record of such an impairment; or
- The employee is regarded as "having such an impairment" (whether or not the impairment limits or is perceived to limit a major life activity).

What is a mental health impairment under the ADA?

- "Mental health impairment" means any mental or psychological disorder. A mental impairment will be considered a disability if it meets any of the three prongs above.
- A mental health impairment does not include undesirable personality traits such as a bad temper (unless the traits are symptoms of a mental or psychological disorder).
- A mental health impairment that is episodic or in remission is considered a covered disability if it would substantially limit a major life activity when active.

Are all employees with a disability protected?

Only qualified employees are protected. A qualified employee is an employee who can perform the essential functions of the job, with or without reasonable accommodation. The essential functions, including necessary interpersonal skills, should be spelled out in the job description, contract (if not governed by a collective bargaining agreement), and/or an employee handbook. Additionally, employees who pose direct threat of harm are not protected under the ADA. A direct threat is "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."²

What is included in a typical interactive process?

In a typical interactive process, the employer will discuss with the employee to answer the following questions:

- Is the employee a qualified individual under the ADA or state law?
 - Does the employee have the skills and experience to perform the job with or without an accommodation?

- Does the employee's mental impairment substantially limit one or more major life activities?
 - If the ADA does not apply, consider whether this step is required under state law.
- Does the employee need an accommodation to perform the essential functions of his or her job?
 - Distinguish between the "essential" and "marginal" functions of a job.
 - Keep in mind that employers cannot force leave or accommodations on employees.

How will your interactive process need to change during the COVID-19 pandemic?

Your typical interactive process will still apply, but it may look different as your workplace and workforce adjust to COVID-19. For each step of the process, consider how the logistics of the interactive process should change. Will you be able to collect all necessary information from the employee? Will there be delays due to COVID-19? You must talk to your employees to answer these questions. During these conversations, discuss job-related limitations and potential accommodations, and also consider the employee's preferences. You should also document each conversation and send a follow up e mail outlining what was discussed and any decisions made following any meeting.

How will you accommodate in a remote, partially-remote, or socially distanced environment?

Reasonable accommodations are modifications that will allow the employee to perform the essential functions of the job without causing an undue hardship for the employer.³ An employer's duty to provide reasonable accommodation is ongoing, although an employee's needs may change over time. What may be considered a reasonable accommodation is individualized to each employee's situation.

² 29 C.F.R. § 1630.2(r). Four factors are considered when determining whether an employee poses a direct threat under the ADA:

"(1) The duration of the risk;

"(2) The nature and severity of the potential harm [to the employee and others];

"(3) The likelihood that the potential harm will occur; and

"(4) The imminence of the potential harm." *Id.*

³ "Undue hardship" is a high legal standard that is seldom met. To determine if an undue hardship exists, courts will review overall financial resources of the employer. However, employers may consider the impact on other employees and the ability of the employer to conduct its business. When there is an option of reasonable accommodations, employers can choose what to provide. Employers who intend to invoke the "undue hardship" defense to deny accommodations should consider consulting counsel first.

Applying this typical framework while your workplace and/or workforce is in flux can be challenging. Some additional factors to consider are:

- Although accommodations may look different in a remote or partially remote environment, employers' duty to accommodate continues.
- What types of accommodations are available now? Which are not?
 - Job restructuring (without removing essential functions). A modified or reduced work schedule—for example, to allow an employee to attend counseling sessions.
 - A temporary (or even long-term) leave of absence to allow the employee to seek treatment or to recover to the point of being able to perform the essential job functions, or if the employee is temporarily unable to work. According to the Equal Employment Opportunity Commission (EEOC), however, indefinite leave is not a reasonable accommodation.
 - Reassignment to a vacant position, if one is available and the employee is minimally qualified.
 - Providing more (or different) support and supervision, such as a written list of work tasks, more frequent contact with a supervisor, and altering supervisory methods.
 - Allowing an employee to provide equipment or devices that the employer is not required to provide—though the employer should be cautious not to impose an obligation on the employee to provide an accommodation that should be the employer's responsibility.

State disability laws

Oregon and Washington each have broader protections for employees than the ADA. Oregon covers more employers than the ADA. Washington provides more coverage for employees that the ADA because it applies to more employers and conditions, and is not restricted to conditions that substantially limit a major life activity. If both the ADA and state law cover an employer, the employer is required to apply the standard that is most beneficial to the employee.

Oregon

Oregon's protections for employees with disabilities track the ADA in most respects, except that Oregon's disability laws cover employers that

have six or more employees, while the ADA covers employers of 15 or more employees.

Washington

Washington's disability protections differ from the ADA in several important ways.

- Disability is defined more broadly,⁴ in that:
 - It includes temporary impairments;
 - The condition need not have an impact on a major life activity; and
 - The impact of the condition need not be substantially limiting.
- Applies to employers with eight or more employees.

Employee leave: FMLA, OFLA, WFLA, and sick-leave laws

Employees affected by a mental health condition may be entitled to various forms of leave. The stressors of the current environment may exacerbate existing conditions and create the need for leave that was previously unnecessary. For example, if an employee's anxiety condition is impacting their ability to return to an in-person work environment or is experiencing substance abuse and seeks treatment, they may be entitled to various types of leave.

Federal Medical Leave Act (FMLA): Considerations for employees addressing mental health or substance abuse challenges

FMLA provides covered employees⁵ with the right to take an unpaid leave of absence from work for certain serious health conditions.

⁴ RCW 49.60.040 (7)(a): "Disability" means the presence of a sensory, mental, or physical impairment that:
 "(i) Is medically cognizable or diagnosable; or
 "(ii) Exists as a record or history; or
 "(iii) Is perceived to exist whether or not it exists in fact.
 "hardship" defense to deny accommodations should consider consulting counsel first.
 "(b) A disability exists whether it is temporary or permanent, common or uncommon, mitigated or unmitigated, or whether or not it limits the ability to work generally or work at a particular job or whether or not it limits any other activity within the scope of this chapter.
 "(c) For purposes of this definition, "impairment" includes, but is not limited to:
 "(i) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitor-urinary, hemic and lymphatic, skin, and endocrine; or
 "(ii) Any mental, developmental, traumatic, or psychological disorder, including but not limited to cognitive limitation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.
⁵ To be eligible for FMLA leave, an employee must have worked for a covered employer for at least 12 months and completed at least 1,250 hours of service in the 12-month period immediately preceding the leave. Covered employers include private employers with 50 or more employees, public agencies of any size, and public or private schools, regardless of the number of employees.

- **Under some circumstances, mental illness is an FMLA-covered serious health condition.**

Under FMLA, a serious health condition is “an illness, injury, impairment, or physical or mental condition” that requires either (1) “inpatient care in a hospital, hospice, or residential medical care facility,” or (2) “continuing treatment by a health care provider.” 29 U.S.C. § 2611(11). FMLA regulations provide that a mental illness may be a serious health condition if the conditions above are met. See 29 C.F.R. § 825.113(d). The FMLA regulations provide detailed definitions of these terms, including the amount, type, and timing of treatment that an employee must receive to meet the definition of “serious health condition” under the “continuing treatment” option. See 29 C.F.R. § 825.115.

Courts have recognized a variety of mental health diagnoses as “serious health conditions” under FMLA, including depression, anxiety, and bipolar disorder. See, e.g., *Collins v. NTN-Bower Corp.*, 272 F.3d 1006, 1008 (7th Cir. 2001) (depression); *Hurlbert v. St. Mary’s Health Care Sys., Inc.*, 439 F.3d 1286, 1294 (11th Cir. 2006) (anxiety). The employee must demonstrate not only that the employee has a mental health diagnosis, but that the treatment requires inpatient care or continuing treatment. If the employee cannot meet these requirements, then the mental health condition alone may be insufficient to qualify the employee for FMLA leave. See, e.g., *Pivac v. Component Servs. & Logistics, Inc.*, 570 F. App’x 899, 903 (11th Cir. 2014) (seeking treatment for depression and anxiety on a single occasion insufficient to qualify for FMLA leave); *Hoban v. WBNCC Joint Venture*, No. 06-13142, 2007 WL 1101217, at *5 (E.D. Mich. Apr. 5, 2007) (employee who was a “nervous wreck” after brother’s death, but did not seek medical treatment, not covered by FMLA).

- **FMLA leave may also be available for employees struggling with substance abuse. Substance abuse may be a serious health condition if the FMLA requirements listed above are met.** Importantly, however, FMLA-protected leave can be taken only for *treatment* of substance abuse by a health care provider or by a provider of health care services on referral by a health care provider. FMLA leave is not available for absences due to an employee’s use of the substance, rather than for treatment. See 29 C.F.R. § 825.119(a). Note also that treatment for substance abuse does not prevent an employer from taking

employment action against an employee who is impaired in the workplace, or whose substance abuse violates a workplace policy. 29 C.F.R. § 825.119(b).

State Leave Law Protections

State laws in both Oregon and Washington provide similar family and medical leave protections for mental illness or treatment for substance abuse as under FMLA, and in some situations provide additional protected leave. Employers also should be aware of paid sick-leave requirements mandated by state and local laws, as well as the state-provided paid family and medical leave benefits that are new to Washington this year, and will begin in Oregon in 2022 and 2023.

- **WFLA.** Washington’s Family Leave Act (WFLA), RCW Chapter 49.78, provides protected leave for serious physical or mental health conditions, consistent with FMLA. For the most part, WFLA has the same coverage and eligibility requirements as FMLA, but in certain situations WFLA may provide additional leave after FMLA leave is exhausted.
- **OFLA.** As with FMLA, the Oregon Family Leave Act (OFLA), ORS 659A.150 et seq., includes both physical and mental conditions in its definition of serious health conditions qualifying for protected leave under the law. However, OFLA’s coverage and eligibility requirements are broader than either FMLA or WFLA. Rather than being limited to employers with at least 50 employees, OFLA applies to employers with 25 or more employees working during the current or previous year. Employees are eligible for OFLA-protected leave after working for 180 calendar days (and an average of 25 hours per week during that period), rather than the 12-month and 1,250-hour requirement of FMLA and WFLA.

In some situations, OFLA provides additional protected leave after FMLA leave is exhausted. OFLA also has a greatly expanded list of “family members” compared to FMLA, providing for protected time off for the serious health condition of not only the employee, spouse, child, or parent, but also grandparents and grandchildren, parents-in-law, same-gender domestic partners and children, and parents of same-gender domestic partners.

- **Paid sick-leave laws.** Leave under FMLA and similar state family and medical leave laws is generally unpaid, although it may run concurrently with paid leave under employer

sick leave, paid time off, or other paid-leave policies. In considering leave protections for employees with mental health conditions, employers must also pay attention to the paid (and unpaid) sick-leave mandates in Oregon and Washington state law, as well as local ordinances such as Seattle's Paid Sick and Safe Time (PSST) law. Each of these laws requires coverage for employees with both physical and mental health conditions.

Nearly every employer in Oregon must comply with the Oregon Sick Leave Law. All employers must provide up to 40 hours of unpaid protected sick time per year. That leave must be paid if an employer has ten or more employees in Oregon (six or more in Portland).

ADDRESSING PARTICULAR ISSUES ARISING IN REMOTE WORKPLACE ENVIRONMENT

Recognizing employee mental health issues

It may be more challenging to recognize employee mental health issues during these times of enhanced external stressors and remote work. For example, it may be more difficult (or less comfortable) for an employee to reach out to employers about needs for accommodation in a remote environment. Lapses in work performance that would be readily apparent in person may be more difficult to identify in a remote environment, and it may be more difficult to recognize when an employee's mental health is the reason for the lapse. The Center for Workplace Mental Health recommends that leaders, human resources personnel, and supervisors check in often with employees about work.⁶ Employers should also monitor employees' work performance and address apparent work performance issues as they arise. Disability and accommodation needs often arise when the employer raises concerns about work performance. Employees do not need to use "magic words" to request an accommodation, so employers should listen for signs that an employee is seeking leave or an accommodation.

Recognizing and addressing substance abuse

It may also be difficult to identify signs of substance abuse on the job in the remote and socially distancing work environment. Public employers or those with reasonable suspicion drug-testing policies must have an articulable suspicion (not a hunch), based on reliable information before requiring a test. For instance, an employer may have reasonable suspicion if

it directly observes drug use or possession, or the physical symptoms of being under the influence. Direct observation may be more difficult in the new environment. For example, it may be more difficult to observe the smells associated with alcohol consumption if an employee is wearing a face mask or participating in remote videoconference meetings. Employers should pay attention to sudden negative trends in work performance or irregular behaviors.

Employers should consider the practical challenges in administering drug testing and connecting employees to programs and resources in a remote environment.

Note that the ADA does not protect employees from the consequences of *current* drug use, although it does protect employees with a current substance abuse disorder, against discrimination and requires accommodations for treatment.

Employees refusing to return to in-person work

Employees may be hesitant to return to in-person work because of a generalized concern about exposure to COVID-19 or other safety concerns arising from societal unrest. Though a general concern is not usually sufficient to justify an employee's refusal to return to an in-person position, employers must consider whether underlying disabilities would require an accommodation for remote work. Employers must listen carefully to an employee's request for continued remote work and ask questions about the reasons for it. If the employee is having difficulty because of an underlying mental health or physical disability, the employer should explore reasonable accommodations.

OSHA and state equivalents may also have requirements and guidance available regarding COVID-19-related workplace safety, and when an employee may have the right to refuse to return to work.⁷ Some state gubernatorial orders also require remote work whenever possible.

Keeping employees connected with mental health resources and checking in

During these unprecedented times, it is critical for employers to educate their workforce about mental illness and the resources available to employees through the accommodation process, the employer's Employee Assistance Program (EAP), and other sources.

⁶ Center for Workplace Mental Health, *supra*.

⁷ <http://www.millernash.com/oregon-osh-adopts-significant-covid-19-workplace-safety-and-health-rules-11-13-2020/>.

⁸ The Center for Workplace Mental Health has additional practical tips for employers to support employee mental health and well-being. See Center for Workplace Mental Health, *supra*.

Employers should reject generalizations and stereotypes about mental health and substance abuse as they work with employees to address and overcome these issues.

In doing so, employers should not avoid discussions with underperforming employees because they may be uncomfortable. Being available and creating a safe space for employees to raise these issues will help employees bring challenges that they may be experiencing to the forefront before they become insurmountable.

KEY TAKEAWAYS

1

Be proactive with respect to employee mental health—reach out to employees about work, normalize mental health conversations, and offer resources.

2

Be creative and flexible with accommodations.