EMPLOYEE MENTAL HEALTH

ISSUES and ACCOMMODATIONS

A. Lynn Himes

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SIXTEENTH ANNUAL CONFERENCE

EMPLOYEE MENTAL HEALTH ISSUES AND ACCOMMODATIONS

I. ONE IN FIVE AMERICAN ADULTS EXPERIENCE A MENTAL HEALTH IMPAIRMENT IN A GIVEN YEAR (National Alliance On Mental Illness)

II. ONE IN TWENTY INDIVIDUALS LIVES WITH A SERIOUS MENTAL HEALTH IMPAIRMENT, SUCH AS SCHIZOPHRENIA, MAJOR DEPRESSION, OR BIPOLAR DISORDER (National Alliance On Mental Illness)

III. LEGAL ISSUES COMMONLY ASSOCIATED WITH EMPLOYEE MENTAL HEALTH ISSUES

A. FAMILY AND MEDICAL LEAVE ACT (FMLA)

1. Employees with mental health problems can be entitled to leave under the FMLA if they are eligible.

    a. Eligibility requires at least 12 months of employment, and at least 1,000 hours worked in the 12 months preceding the requested start of the leave.

2. An "eligible" employee may take up to 12 work weeks of leave during any 12-month period for certain qualifying reasons, including when a "serious health condition" make the employee unable to perform one or more of the essential functions of his or her job.

3. A "serious health condition" is an illness, injury, impairment, or physical or mental condition that involves inpatient care or continuing treatment by a health care provider."

4. A mental health problem, like physical impairment, must require hospitalization or ongoing treatment that meets the FMLA description:

    a. A period of incapacity of more than three consecutive calendar days involving treatment two or more times by, or under the orders of, a health care provider, or treatment by a health care provider on at least one occasion that results in a supervised regimen of continuing treatment.

5. "Health care provider" includes clinical psychologists and clinical social workers, as well as physicians.

6. Common mental health conditions include anxiety, depression, panic disorder, post-traumatic stress disorder and substance abuse.

    a. Remember that FMLA does not protect an employee from the consequences of his/her substance abuse. It simply provides a form of leave to seek treatment.

    b. FMLA is also available if the employee needs leave to attend events associated with the treatment of a spouse, son, daughter, or parent with a mental health problem (e.g. family counseling sessions ordered by the health care provider.)

7. Leave for mental health issues may be taken on an intermittent basis, or require a reduced schedule.

    a. Intermittent leave is often requested in connection with anxiety and/or depression disorders. The employee may not know of the need for leave until they wake up and feel crippling anxiety or depression symptoms.

    b. If intermittent or reduced schedule leave is requested in connection with a mental health issue, contact legal counsel as these situations can be very frustrating for managers, and sometimes lead to rash decisions or statements.

8. Once FMLA leave is exhausted, the employee will need to look at statutory or contractual leave rights to continue to be absent.

B. CONTRACTUAL RIGHTS

1. Sick and Personal Leave – Can run concurrently with FMLA.

2. Sick Bank – Governed by rules established in the bargaining agreement.

3. Unpaid leave of absence – check eligibility per terms of the bargaining agreement.

4. Special request from union – the union may request a leave of absence for a particular member outside the terms of the bargaining agreement.

    a. These requests must be considered carefully to avoid discrimination claims.

    b. A written agreement is recommended with clear terms, including consequences for failing to return at the end of the agreement.

    c. The agreement must be non-precedential.

5. Disability – Does your agreement provide for private disability insurance? If not, refer the employee to TRS/IMRF to explore disability benefits.

C. AMERICANS WITH DISABILITIES ACT

1. The ADA is intended to provide an opportunity for disabled persons to attain and retain employment provided that the employee can perform the essential functions of the job, with or without reasonable accommodations.

2. Reasonable accommodations must be discussed through and interactive conference between the employee and the employer when a disability is identified and accommodations are requested, or the need is blatantly obvious.

    a. Skipping the interactive conference is extremely risky. Courts have reinstated employees without even reaching the merits of the dismissal decision when the employer failed to engage in the interactive process.

3. In the context of mental health issues, reasonable accommodations may include:

    a. Use of stress management techniques to deal with frustration.

    b. The presence of a support animal.

    c. Allow telephone calls during work hours to doctors and others for needed support.

    d. Use a mentor or supervisor to alert the employee when his/her behavior is becoming unprofessional or inappropriate.

    e. Restructure job to include only essential functions during times of stress.

    f. Refer to counseling, employee assistance programs (EAP).

    g. Provide backup coverage for when the employee needs to take breaks.

    h. Allow flexible work environment, such as flexible scheduling, modified break schedule, leave for counseling, work from home.

    i. Allow the employee to take a break and go to a place where s/he feels comfortable to use relaxation techniques or contact a support person.

4. A change of supervisor is not a reasonable accommodation. However, make sure the supervisor is not harassing or retaliating.

5. An employer is not required to provide accommodation if it will impose an undue hardship on its operations. Factors to consider include:

    a. the nature and cost of the accommodation needed;

    b. the overall financial resources of the employer; the number of persons employed; the effect on expenses and resources of the employer;

    c. the impact of the accommodation on the employer's operations.

6. An employer may refuse to employ or provide accommodations to someone who poses a "direct threat" to the health or safety of him/herself or others in the workplace. Must assess:

   a. the duration of the risk;

   b. the nature and severity of potential harm;

   c. the likelihood that the potential harm will occur; and

   d. the imminence of the potential harm.

D. LEAVE AS A REASONABLE ACCOMMODATION

1. The EEOC maintains that an unpaid leave of absence is a reasonable accommodation for a disabled employee.

2. The EEOC does not accept any duration on the length of the leave, instead requiring the employer to prove that duration of the leave would amount to an undue hardship.

3. Recently, the Seventh Circuit court of appeals rejected the EEOC's position and severely curtailed the use of unpaid leave (in excess of any leave the employee had the right to) as a reasonable accommodation.

4. In *Severson v. Heartland Woodcraft, Inc., (September 20, 2017)* the employee worked in a physically demanding job as a fabricator. He took 12 weeks of FMLA leave to deal with back pain, and on his last day of leave, he had back surgery requiring two to three more months of time off. Severson asked his employer to continue his medical leave, but the company denied his request and terminated his employment, inviting him to reapply when he was medically cleared for work. A few months later, Severson was cleared to return to work but did not reapply for his job. Instead, he sued the company for disability discrimination.

   a. The court found no discrimination, holding that the "ADA is an antidiscrimination statute, not a medical-leave entitlement."

   b. It further held that the term "reasonable accommodation" is limited to those measures that enable the employee to work, and an employee who needs long-term medical leave cannot work and thus is not a qualified individual with a disability under the ADA.

c. The court found the EEOC's interpretation effectively turned an accommodation statute (the ADA) into an extended leave statute (the FMLA).

d. The court left open the possibility of a short-term (i.e. one month or less) leave being a reasonable accommodation.

E. MENTAL HEALTH INQUIRIES

1. Current Employees

   a. Disability related inquiries and medical examinations of current employees must be "job-related and consistent with business necessity."

   b. Inquiries are permitted if an employer has reasonable belief, based on objective evidence, that:

      i. an employee's ability to perform essential job functions will be impaired by a medical condition; or

      ii. an employee will pose a direct threat due to a medical condition.

      iii. Rumors are not a sufficient basis.

      iv. Be careful what you ask. You will be stuck with the answers.

2. Applicants

   a. Prior to an employment offer, the ADA prohibits all disability-related inquiries and medical examinations, even if they are related to the job.

   b. After an offer, but before start of work, employer may make disability-related inquiries and conduct medical examinations, regardless of whether they are related to the job, as long as it does so for all entering employees in the same category.

3. Inquiries or medical examinations are permitted if:

    a. They follow-up on a request for reasonable accommodation when the need for accommodation is not obvious; or

    b. If they address reasonable concerns about whether an individual is fit to perform essential job functions.

    c. Must not exceed the scope of the specific medical condition and its effect on employee's ability, with or without reasonable accommodation, to perform essential job functions or to work without posing a direct threat.

    d. The cost of an employer-required examination is to be paid by the employer.

4. All medical information related to an employee's disability must be kept separate from the personnel file and restricted to those supervisors with a need to know.

5. The employer cannot share with other employees whether and why accommodations are being provided.

    a. This can lead to frustration among co-workers (e.g. why does Jane get to take extra breaks?)

    b. Co-workers should be told that management is doing what they are required to do and that they should not dwell on Jane's situation.

    c. Sometimes the employee will let it be known that they have a mental health condition. The employee can do this, but not the employer.

MENTAL HEALTH CONDITIONS CAN BE DIFFICULT TO IDENTIFY, AND DIFFICULT TO ACCOMMODATE. INEXPERIENCED SUPERVISORS CAN MAKE MANY COSTLY MISTAKES IN THESE SITUATIONS. TO AVOID DISCRIMINATION AND RETALIATION CLAIMS, LEGAL COUNSEL SHOULD BE INVOLVED EARLY IN THE PROCESS.