Blog Post

COVID's Impact on Mental Health Prompts New Agency Guidance

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The peak of COVID-19 infections may have passed, but the mental health effects of the pandemic continue to be felt, and government agencies are taking note. The U.S. Department of Labor (DOL) issued new guidance during Mental Health Awareness Month in May, reminding employees with mental health issues of their rights under the Family and Medical Leave Act (FMLA). And the Equal Employment Opportunity Commission (EEOC) last December added a section to its COVID-19 Technical Assistance, expressly noting that COVID may qualify as a disability under the Americans with Disabilities Act.

There is plenty of evidence to support their concerns about mental health issues being on the rise. A March 2022 study by the World Health Organization indicated that the pandemic has led to an increase in mental health problems, including widespread depression and anxiety. It also noted that before COVID-19, only a minority of people with mental health problems received treatment, and that the pandemic has further widened the treatment gap. In issuing its May guidance, the DOL also focused on the treatment gap, noting that "many people coping with mental illness may face barriers to treatment including social stigmas, a lack of available services or financial resources." The DOL cited reports by the National Institute of Health estimating that nearly

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one in five U.S. adults live with a mental illness, with only about half receiving the help needed.

Government agencies are taking note, and so should employers.

FMLA Protections

Under FMLA, eligible employees may take up to 12 weeks of leave for their own serious health condition or to care for a spouse, child, or parent because of their serious health condition. A mental health condition can qualify as a serious health condition if it requires inpatient care or continuing treatment by a healthcare provider, such as an overnight stay in a treatment center for addiction or continuing treatment by a clinical psychologist.

Employers should recognize that they have an obligation to notify employees of their FMLA rights within five days of becoming aware of a potentially FMLA-qualifying condition. A passing reference can be enough; the employee need not specifically reference the FMLA, as long as they provide enough information for the employer to recognize a potentially FMLA-qualifying condition. For example, let's say an employee tells her supervisor that her husband is undergoing cancer treatment and is not doing well, and the employee is suffering from depression because she is overwhelmed with taking care of him and their children. The supervisor should recognize that the employee may qualify for FMLA leave, both for her own serious health condition and for taking care of her spouse as he undergoes treatment for his serious health condition. The supervisor should know enough to tell the employee to contact Human Resources to determine if she is eligible for FMLA leave. Supervisors should be trained not to ask for medical details themselves, but rather to recognize a potentially FMLA qualifying condition, and then to refer the employee to HR to be provided with the appropriate paperwork and information.

Further, employers should recognize that once an employee with their own serious health condition has exhausted their available FMLA leave, employers are *not* free to simply terminate an employee, nor are they required to automatically grant additional leave. Instead, the employer should first analyze the situation under the Americans with Disabilities Act (ADA). In other words, the employer must first determine if the employee has a disability and if so, go through the "interactive process" with the employee to determine whether there is a reasonable accommodation the employer could make that would enable the employee to perform the essential functions of the job.

ADA Protections

Early on in the pandemic, the EEOC noted in its FAQs on COVID-19 and the Americans with Disabilities Act, "[a]lthough many people feel significant stress due to the COVID-19 pandemic, employees with certain preexisting mental health conditions, for example, anxiety disorder, obsessive-compulsive disorder, or post-traumatic stress disorder, may have more difficulty handling the disruption to daily life that has accompanied the COVID-19 pandemic." In such circumstances, the EEOC made clear that employers were permitted to ask questions to determine whether the condition is a disability; discuss with the employee how the requested accommodation would assist the employee and enable the employee to keep working; explore alternative accommodations that may effectively meet the employee's needs; and request medical documentation, if needed.

In December 2021, the EEOC added a new section to its FAQs, noting the ways in which COVID-19 might qualify as a disability, including an example of an individual who after being diagnosed with COVID-19 continues to experience ongoing but intermittent multiple-day headaches, dizziness, brain fog, and difficulty remembering or concentrating, which the employee's doctor attributes to COVID-19. An individual with such a mental health condition

would qualify as “substantially limited” in neurological and brain function, concentrating, and/or thinking, among other major life activities.

Separate and apart from mental health issues, “long COVID” also has been recognized as a disability. Such individuals may continue to experience symptoms that can last months after first being infected, or may have new or recurring symptoms after seeming to recover, even where the initial illness was mild. In light of the rise of long COVID as a persistent and significant health issue, the Office for Civil Rights of the Department of Health and Human Services and the Civil Rights Division of the Department of Justice joined together in July 2021 to issue separate guidance on how long COVID can be a disability under Titles II (state and local government) and III (public accommodations) of the ADA, Section 504 of the Rehabilitation Act of 1973 (Section 504), and Section 1557 of the Patient Protection and Affordable Care Act (Section 1557).

Employers are likely seeing mental health issues emerge firsthand and should try to address mental health issues caused or exacerbated by the pandemic, both to support employees, and also to reduce the risk of workplace claims. With that in mind, here are some best practices:

Train Manager and Supervisors

As indicated above, employers should engage in the interactive process with employees who are unable to return to work after exhausting FMLA leave. In addition, most employers know they have a duty under the ADA and parallel state and local laws to engage in that interactive process when an employee or applicant *asks* for reasonable accommodation related to a disability to determine whether there is a reasonable accommodation that would enable the employee to perform the essential functions of the job.

What some employers forget, though, is that the duty to engage in the interactive process also arises if the employer otherwise becomes aware of the need for an accommodation, *even if it is not framed as such*.

Employees may increasingly place their mental health at issue in informal settings. For example, an employee may text their supervisor that they are struggling to get by; an employee may repeat how depressed they are feeling; an employee may mention the inability to concentrate due to stress; an employee may suffer from panic attacks about returning to work. There are no magic words needed to trigger the duty to engage in the interactive process. Depending on the circumstances, informal disclosures to management can trigger the duty to engage in the interactive process, so long as the employee indicates he/she needs some form of accommodation. So, all levels of management should be trained to recognize and respond to requests for accommodation.

Likewise, supervisors and managers should be trained on what they should and should not ask of employees, the importance of maintaining the confidentiality of medical information that is shared with them and the importance of not sharing why a given employee is receiving a particular accommodation.

In some jurisdictions, failure to engage in the interactive process can by itself give rise to a claim. Accordingly, it's best to err on the side of caution and engage.

If an employee is struggling to perform, the manager should meet with the employee and counsel the employee about the performance issue. If the employee blames the issue on a medical condition, including a mental health issue, and asks for job modification, the disclosure and request trigger the duty to engage in the interactive process. In such circumstances, the manager should contact HR so that HR can assess the situation and work with the

employee to determine whether the employee has a disability and if there is any reasonable accommodation that may effectively help the employee perform the essential functions of the job. Accommodations for a mental disability could include, among other things, offering a flexible schedule, a quiet office space, or a short-term leave of absence. The manager should not ask for more information, or share with others anything about the employee's underlying medical condition.

There are also some circumstances when a covered employer should initiate the interactive process *without being asked for an accommodation.* For example, where the employer knows the employee has a disability and knows or has reason to know that the performance issue is because of that disability, the employer should initiate the interactive process, according to the EEOC's *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act.* Other circumstances in which the process should be initiated include when an employee has exhausted or is not yet eligible for leave under Family and Medical Leave Act (or similar state family leave law), but has a medical disability necessitating leave. In short, supervisors should be trained to recognize the duty to consider an accommodation even in the absence of an employee request.

As the EEOC noted in its FAQs on COVID-19, as with any accommodation request, employers may ask questions concerning the individual's functional limitations in order to identify an effective accommodation, explore alternative accommodations that may effectively meet the employee's needs, and request medical documentation to support the need for the accommodation.

Remember that an employer need not provide an accommodation under the ADA if it would result in an "undue hardship" on the employer's operations,

meaning significant difficulty or expense when considered in light of certain factors, such as size and structure of the workforce, the accommodation's nature and cost, and other relevant factors. An employer also need not provide an accommodation unrelated to the employee's disability, or an accommodation that will not be effective in allowing the employee to perform the essential functions of his or her job. The undue hardship analysis can be complicated, and managers should seek support from trained HR or other professionals before denying an accommodation on such ground.

Employers should also check applicable state and local laws, as some state and local laws may impose different or greater obligations on employers when it comes to accommodating employees with disabilities.

Once the interactive process is initiated, document all conversations and accommodations requested, considered, and implemented. Review the employee's essential job duties during the interactive process meeting. Explore potential accommodations and whether and how they would enable the employee to perform his/her job functions. Do not forget to document all follow-ups.

Remember that health-related information should be kept in a confidential file, separate and apart from the employee's personnel file.

Conclusion

Mental health conditions can qualify as disabilities under state and federal law and they should be treated accordingly. Training supervisors on recognizing and responding to references to potentially FMLA-qualifying conditions and on the employer's duty to engage in the interactive process under the ADA are important. Supervisors do not need to become HR or employment law experts; they simply need to know when to call HR so HR can promptly determine whether there is a duty to

provide FMLA paperwork or to start the ADA interactive process.

Please contact your Akerman labor and employment counsel for help addressing situations when medical issues impact employee performance, or with other leave or accommodation issues.
