



Mental Health Accommodations in Municipal Human Resources

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Prevalence of Mental Health Illness in the Workforce

- Mental Health illness leads to more lost workdays than arthritis, back pain, asthma, diabetes, hypertension and heart disease

HR Magazine, SHRM, *Opening Minds, fight the Stigma of Mental Illness*, Dori Meinert, October 2014

Prevalence of Mental Health Illness in the Workforce

- 1 in 5 adults will experience a diagnosable mental illness in any given year
- More than 50% will go untreated
 - Stigma related to illness
 - Will not seek or find appropriate treatment

Partnership for Workplace Mental Health, Making the Business Case, website, April 2017

Prevalence of Mental Health Illness in the Workforce

- Persons with psychiatric disabilities can be indistinguishable from other employees
- May occasionally become disruptive
- HR needs to know how to discipline or take other corrective action when workplace behavior affects job performance

SHRM.org, Employing Persons with Psychiatric Disabilities,
Oct 13, 2016

Prevalence of Mental Health Illness in the Workforce

- Up to **65-80 percent** of individuals with a mental illness **will improve** with appropriate diagnosis, treatment and monitoring.
 - Lower total medical costs
 - Increased productivity
 - Lower absenteeism
 - Decreased disability costs
 - Decrease labor and employment costs

Partnership for Workplace Mental Health

American Psychiatric Association

- <http://www.workplacementalhealth.org/>
- Mental Health Topics
 - AD/HD in Adults
 - Autism Spectrum
 - Insomnia
 - Depression and Anxiety
 - Alcohol and Substance Misuse
 - Eating Disorders
 - Opioid Disorders
 - Post-Traumatic Stress
- Working Well, Leading a Mentally Health Business – June 2016 <http://www.workplacementalhealth.org/getattachment/Making-The-Business-Case/Link-2-Title/working-well-toolkit.pdf?lang=en-US>

Department of Labor Specific Guidance on Psychiatric Disabilities

- DOL.gov
- Office of Disability Employment Policy
- Maximizing Productivity, www.dol.gov/odep/pub/fact/psychiatric.htm
- ADA Anniversary toolkit

HR - Uniquely Positioned to Intervene

- Already manages FMLA Leave, Workers Compensation and 111F leave, and corrective actions
- HR works closely with Department Heads to tackle these difficult employee issues
 - As point person, HR can insulate the organization from liability (breaches of confidentiality, discrimination)
 - Ensures consistency across departments
 - Ensures employees are getting the assistance they need to perform the essential functions of their job

HR Uniquely Positioned to Intervene - Partners

- Partner with EAP to provide:
 - Employee resource
 - Supervisor resource
- Other resources include unions, other community resources (veterans, religious groups, community mental health providers)
- Use legal counsel as appropriate

How to Talk about what you see

What Not to Say:	Try Instead:
"How's your health?"	"How can we help you with your job?"
"You seem depressed."	"You're not your usual self"
"Snap out of it"	"Do you want to talk about it?"
"Think positive."	"It's always okay to ask for help."
"I know exactly what you're going through"	"It's hard for me to understand exactly what you're going through, but I can see that it's distressing for you."

HR Uniquely Positioned to Intervene – Bring Awareness

- Create awareness and fight stigma of mental health illness
- Employees with disabilities want to do their jobs well like other employees
- Employees will be dedicated and loyal employees if they feel supported
- Addressing issues early can reduce costs for employer in lost productivity, lower health care costs, and reduce legal costs

Legal Framework: Americans with Disabilities Act

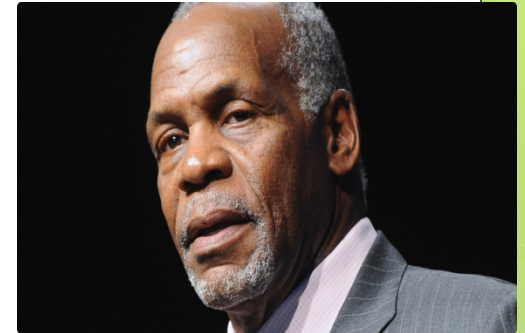
- Civil rights law that prohibits employers from discriminating against disabled persons
- Purpose to ensure people with disabilities have the same rights and opportunities as others.
- The term “disability” under the ADA is a legal definition. It is not a medical definition.

Legal Framework: Americans with Disabilities Act

- Legal “Terms of Art”
 - Cannot discriminate against *qualified* individuals with a disability.
 - Qualified – able to perform the essential functions of the job with or without a reasonable accommodation.
 - Must have a “substantial limitation” in a major life activity (sleep, work)

Definition of “*Disability*”

- Has a physical, mental, or developmental impairment
- Has a record of having an impairment
- Regarded as having an impairment



ADA Legal Quagmire – “regarded as”

- “Regarded as” means that the person either:
 - Has an impairment that does not substantially limit a major life activity;
 - Does not have any impairment, but is treated by an entity as having an impairment.
- **Focus on job performance, not diagnosis**

Exclusions from *“Individual with a Disability”*

- Current user of illicit drugs
- Direct threat to property or safety of self or others
 - Safety sensitive functions
 - Police, Fire, DPW
 - May change over time, e.g. blind driver

Exclusions from *“Individual with a Disability”*

- Personality traits such as irritability, chronic lateness, poor judgment and stress are not “disabilities” BUT they may be linked to mental or physical impairments.
- Again, do not try to diagnosis. Rather address the work performance or misconduct with the employee.

“This is not a social service agency”

- Help employees to be productive
- Be respectful and professional
- Focus on performance issues, how to improve
- HR should look for signs but not diagnose
 - Not our job to treat
 - Do not want to make any assumptions
(perceived disability is unlawful)
- Help managers understand they need to address the problem, not ignore it or excuse it

Educate and Support Managers

- Do not dismiss or excuse misconduct or poor performance.
 - We know she's an alcoholic but when she comes to work she's my best employee. Her spouse just kicked her out. She needs this job but last night she slept in the conference room.
 - We know he gets "depressed" and we just cover for him when he has a rough time. But he hasn't been to work in a week and we have a deadline.
- Much easier to address if the conduct is addressed early and in a straight forward manner.

First Steps when incident Occurs – Overall Objective

- Address Situation
- Gather Preliminary Information
- Craft a Flexible Plan with Manager (encourage baby steps)
 - Highly variable, no predictable outcomes
 - Address issues as they unfold
 - May have to address from multiple perspective (FMLA, ADA, Worker's Comp, Grievances, investigation)

First Steps when Incident Occurs - Safety

- Separate employees from the situation
- Attend to medical needs, if any
- Identify witnesses and employees directly involved
- Send individual home (safe to drive?)
Clear directive regarding next steps
 - Do not need to determine discipline immediately
 - Instruction to meet upon return to work

First Steps Following an Incident

- Support Manager and co-workers (EAP)
- Begin an investigation or inquiry as soon as possible, speaking with employees individually (formal or informal)
- Goal: get the facts of incident and history of similar conduct or behavior
 - Scope of problem
 - History of managing conduct or behavior

First Steps Following an Incident – Meeting with the Employee

- Prep the Manager
 - Meet in advance and listen to how the manager is describing the situation
 - Explore whether there has been any change in behavior, performance or conduct
 - Ask about the work rule or performance standard. Is it consistently applied?
 - Encourage constructive, straight forward discussion about work performance
 - If the manager has not started documentation, review process and ask manager to prepare a summary of conduct or behavior

Following an Incident – Meeting with the Employee

- Ensure the employee has Union representation if appropriate
- Start the conversation regarding specific examples of misconduct or performance issues
- Put the employee on notice that he is not meeting performance standards (ensure that the standards are consistently applied).

Following an Incident – Meeting with the Employee

- Be mindful and listen to what employee is telling you
- Key phrases such as “my therapist” or “my doctor” or “my prescription” may indicate there is an underlying issue

Following an Incident – Meeting with the Employee

YOUR EAP IS YOUR PARTNER

- If employee discloses that she has been under stress, or is depressed or overwhelmed, etc..
 - Refer them to the EAP, and
 - Hold them accountable for the behavior
- Do not assume the individual has a mental disability

Following an Incident – Corrective Action

- Corrective action is critical
 - Discipline
 - Performance Improvement Plan
 - Leave of absence (FMLA is possible)
 - Reasonable Accommodation
- A Performance Issue is a Performance Issue whether the underlying cause is related to a disability or not.

Can hold to the same work standards

- Can discipline employee with mental illness without going through the interactive process if:
 - They engage in misconduct
 - Presents a threat of safety
- Caution: Do not confuse a direct threat with something that is uncomfortable or scary

Corrective Action Following an incident

- Supporting an employee and providing opportunities to become more productive can be a double benefit
 - Employee feels supported and becomes engaged
 - Employer is building a foundation for a reasonable accommodation if needed

Corrective Action Following an incident

- Be Proactive - DOL suggests the following for psychiatric disabilities:
 - Implement a flexible and supportive supervision style
 - Additional forms of communication or written and visual tools, e.g., step by step checklists
 - Regularly scheduled meetings to discuss issues
 - Strategies to deal with problems proactively
 - Written work agreements
- Maximizing Productivity, www.dol.gov/odep/pub/fact/psychiatric.htm

When to Discuss Accommodations?

- Do not assume the employee needs an accommodation. Rather, assure the employee she will be supported in her efforts to improve her performance
- Once an employee discloses a disability or their disability is apparent, you must consider reasonable accommodations,
 - I've gone off my meds because they make me anxious
 - I'll be late because I'm in the ER. I had an anxiety attack



Defining “*Interactive Process*”

- Once employer is on notice of need for accommodation, they initiate an interactive dialogue
- Process identifies any potential reasonable accommodations to overcome employee’s particular limitations



Defining “*Reasonable Accommodation*”

- Enables an otherwise qualified individual with a disability to perform the essential functions of his or her position
- Not required if poses an “undue hardship”
 - Most accommodations are not costly
 - If refusing, contact your legal counsel

Reasonable Accommodations Determinations

- Human Resources works with Departments to determine what is a reasonable accommodation or an “undue hardship.”
- May need legal counsel to help with determination of what is reasonable
- Supervisors must ensure reasonable accommodations are implemented and maintained

Reasonable Accommodations Mental Health

- ◉ Reduced work hours
- ◉ Reallocate or alter nonessential tasks
- ◉ Adjust schedule
- ◉ Work from home
- ◉ Alternative location
- ◉ Time off for treatment
- ◉ Reassignment or transfer to vacant position

Defining “*Undue Hardship*”

Depends on:

- Overall size of employer, type of facilities, and size of budget or assets
- Type of operation, including composition and structure of workforce
- Nature and cost of needed accommodation



Mental Health Accommodations ADA vs FMLA

- ◉ FMLA leave may be appropriate
- ◉ FMLA Standard is much lower than the ADA
 - ◉ FMLA - *a serious health condition that makes the employee unable to perform the essential functions of his or her job*
 - ◉ ADA - *"individual with a disability" as a person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.*

Mental Health Accommodations Returning employees to work

- Use EAP – both employee and manager
- Return to work as in other illnesses or injury
 - Return to work is a return to normalcy
 - Can restore dignity and confidence
- Accommodation management with HR
 - Modified work schedule/duties
 - Clear goals toward performing their essential functions
 - Regular check-ins, address employee's need

Mental Health Accommodations Returning employees to work

- Must respect the dignity of the Individual
- Maintain Confidentiality
- An accommodation could include workplace education including a clear statement that harassment will not be tolerated.
- Discuss accommodation with employee

Mental Health Accommodations Workplace Safety

- Two situations where no accommodation is required: Direct Threat of Safety to self or others
 - Violent behavior
 - Impairment on the job
- **REQUIRES CONSISTENCY** – An employer does not have to tolerate threats of violence or other conduct that causes a safety risk if the same action would be taken against person who are not disabled, e.g., intoxication on the job; assault

Workers Compensation and 111F

- Routinely will deny a claim where employee claims the workplace situation caused the psychiatric disability
- Burden of proof will be on the employee to establish causation (111F and WC to a degree)
- Employer will generally be able to provide evidence that there was an underlying condition
- May require a fitness for duty exam by municipal health provider

Family Medical Leave

- Can be used as a sword or a shield
 - Allow an employee time to get appropriate treatment
 - Employee can linger without any ongoing treatment
- Have the employee fill out the WH380
- Must be complete, e.g., dates condition began and is expected to end
- Must be sufficient information, cannot be vague, unclear or non-responsive

Family Medical Leave

- Once FMLA leave is exhausted, perform the ADA analysis
 - Engage in interactive dialogue regarding reasonable accommodation
 - Short-term leave is reasonable, while a long-term leave is not reasonable
- May have to separate due to incapacity
- Important to partner with legal counsel

Success Stories do Exist

- Continued employment
- More consistent productivity, more confident and engaged employee
- Success following separation

Applications and Job Duties

- **Job Descriptions** – carefully crafted to ensure all essential functions are listed
- **Applications and Interviews** - Do not ask questions regarding disabilities or medical conditions (pre-offer)
- **Medical questions**, can ask post offer if
 - Related to the essential functions of the job AND
 - Question is asked for all applicants in the group (Public Safety-Psych exams)