



WEBINAR OVERVIEW

Reasonable Accommodation Requests Related to Mental Health Issues

February 22, 2023

Intro/Setting the Stage

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- The Numbers – Mental Health in the Workplace

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Reasonable Accommodations and Mental Health Conditions

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WEBINAR OUTLINE

I. Intro/Setting the Stage

A. The Rise of Mental Health Disorders – The “Second Pandemic”

- The advent of the COVID-19 pandemic engendered a precarious environment that significantly exacerbated existing mental health disorders and triggered new ones.
- Numerous studies have shown that diagnoses of mental health disorders have increased, especially anxiety and depression. This includes people who did not suffer from mental health conditions before the pandemic as well as people whose conditions have worsened.
- A mental health condition can impact various aspects of an individual's life, including the ability to achieve maximum productivity in the workplace. The rise in diagnoses of mental health disorders in the last two years has been called a “second pandemic.” The social isolation, stress, anxiety, illness and loss of loved ones resulting from the pandemic have exacerbated and accentuated mental health issues.

B. The Numbers – Mental Health in the Workplace

- Examples of psychiatric diagnoses include anxiety disorder, depression, attention deficit/hyperactivity disorder (ADHD), bipolar disorder and schizophrenia.
- Overall, about 44 million adults (over age 18) in the U.S. report having had any mental health condition during the past year, representing about 18.5% of the U.S. population.
- Among these U.S. adults, the National Institute of Mental Health estimates that:
 - 18% have an anxiety disorder (including post-traumatic stress disorder, obsessive-compulsive disorder, panic disorder and generalized anxiety disorder)
 - 9.5% have depression

- 4% have attention deficit/hyperactivity disorder
 - 2.6% have bipolar disorder
 - 1% have schizophrenia
- About 18% of workers in the U.S. report having a mental health condition in any given month. This means that psychiatric disability is one of the most common types of disability covered under the ADA.

The National Institute of Mental Health estimates...

- That one in five people will experience a mental health condition in their lifetime.
- One in four Americans currently knows someone who has a mental health condition.
- Just over half of adults aged 18-44 have reported symptoms of anxiety and depression.

It is **LIKELY** that most employers have at least one employee with a mental health condition.

Source: <https://adata.org/factsheet/health>;
<https://www.jamsadr.com/files/uploads/documents/articles/gise-robin-american-lawyer-reasonable-accommodations-05-2022.pdf>

II. Americans With Disabilities Act

A. What is the Americans with Disabilities Act (“ADA”)?

- The ADA prohibits discrimination against people with disabilities in several areas, including employment, transportation, public accommodations, communications and access to state and local government’ programs and services.
- The ADA covers employers with 15 or more employees, including state and local governments.

Notes: <https://www.eeoc.gov/laws/guidance/fact-sheet-disability-discrimination>

The ADA is a federal civil rights law that was passed in 1990 and went into effect beginning in 1992. Its purpose is to protect people with disabilities from discrimination in employment, in the programs and activities offered by state and local governments, and in accessing the goods and services offered in places like stores, hotels, restaurants, football stadiums, doctors’ offices, beauty parlors, and so on. <https://askjan.org/publications/employers/employers-guide.cfm>

B. Defining a Disability

The ADA defines disability as a physical or mental impairment that substantially limits one or more major life activities. When job applicants or employees have a mental health condition that meets this criteria, they have workplace rights under the ADA.

An individual with a disability is 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.

A qualified employee or applicant with a disability is an individual who, with or without reasonable accommodation, can perform the essential functions of the job in question. Reasonable accommodation may include, but is not limited to:

- Making existing facilities used by employees readily accessible to and usable by persons with disabilities.
- Job restructuring, modifying work schedules, reassignment to a vacant position;
- Acquiring or modifying equipment or devices, adjusting or modifying examinations, training materials, or policies, and providing qualified readers or interpreters.

An employer is required to make a reasonable accommodation to the known disability of a qualified applicant or employee if it would not impose an "undue hardship" on the operation of the employer's business.

C. Mental Health and the ADA

The ADA Amendments Act of 2008 (ADAAA) broadened the definition of disability to provide legal protections against employment discrimination for more individuals with disabilities, including people with psychiatric disabilities.

Employers must provide reasonable accommodations to applicants and workers with psychiatric disabilities (and other disabilities) unless this causes undue hardship. In most cases, individuals with diagnosed mental health conditions are covered under the ADA and have a right to job accommodations.

Record of psychiatric disability.

The ADA also prohibits discrimination against individuals who have a record (history) of a psychiatric disability or are regarded as having a psychiatric disability. This means,

for example, that qualified individuals who have a history of psychiatric disability cannot be discriminated against just because of that history.

Also, employers can't take actions (such as failing to hire, demoting or denying training opportunities) because they believe a qualified applicant or employee might have a psychiatric disability.

Rights under the ADA.

Applicants and employees with psychiatric disabilities have two main rights under the ADA. First, they have a right to privacy. Except when asking for an accommodation, they can choose whether to tell the employer about their disability.

Second, they have a right to a job accommodation unless this causes undue hardship for the employer.

III. Reasonable Accommodations and Mental Health Conditions

A. The Accommodation Process for Mental Health Issues

The accommodation process involves an in-depth review of the job requirements and the limitations or performance problems the employee's disability creates to identify changes or modifications that will allow the employee to perform the essential duties of his or her job.

Notes: The employer begins by reviewing the essential job duties of the position, engaging in an interactive process with the employee and conducting a careful analysis of the employee's requested accommodation. An employer may determine that providing the requested accommodation creates an undue hardship when the cost of providing the requested accommodation has a grave financial impact on the organization or is unduly disruptive.

An openness and willingness to address employee mental health concerns is critical. For an employee who may have an entitlement to accommodation, it is vital to engage in an effective interactive process and be proactive in identifying reasonable accommodations that will enable that employee to succeed at work without imposing an undue burden on the employer.

Step 1: Determine Whether the Employer Is Covered by the ADA

Notes: All employers, including state and local government employers, with 15 or more employees are covered employers under the ADA. Federal government employers are covered by the Rehabilitation Act of 1973 instead of the ADA, although the protections are very similar.

Step 2: Ensure a Policy and Procedure Exist for Handling Accommodation Requests

Notes: Organizations should implement and/or review their policies and procedures for handling requests for disability accommodations. Existing job descriptions should also be reviewed to confirm they include all aspects of the job and list all essential functions, including any physical requirements such as standing or sitting for long periods of time or lifting requirements.

Step 3: Determine Whether the Employee with a Disability Is "Qualified"

Notes: The term "qualified" with respect to an individual with a disability means that the individual satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires and, with or without reasonable accommodation, can perform the essential functions of such position.

Employers should determine if the employee has a disability under the ADA. (See Step 5 for more information and the assessment process.) and potential procuring preliminary documentation from health care provider about employee's disability (HIPAA compliant) and impact disability has on employee's ability to perform their job.

Step 4: Initiate the Interactive Process

Notes: Upon learning of the possible need for a reasonable accommodation under the ADA, organizations should engage in a process in which the employee, health care provider and employer each share information about the nature of the disability and the limitations that may affect the employee's ability to perform the essential job duties.

This process is referred to as the interactive process and involves a good-faith effort by the employer and the employee to discuss the limitations or performance issues the employee's disability may pose. The purpose of this discussion is to determine what (if any) accommodations may be needed.

The interactive process involves a review of the accommodation request from the employee or a health care provider. Although the ADA does not require the request to be put in writing, having documentation of the request is a good practice.

The employee should be asked to provide appropriate documentation from a health care provider regarding the nature of any impairment(s), severity, duration, activities limited by the impairment(s) and the extent to which the impairment(s) limits the employee's ability to perform the job's essential duties/functions. See Accommodation Medical Certification.

In the event the employer needs to consult with the employee's health care provider, the employer must obtain a written medical release (HIPAA compliant) or permission from the employee. The employee's health care provider may not disclose information or answer questions about the employee's disability without the employee's permission.

Step 5: Assess if the Employee Has a Disability Under the ADA

Notes: Organizations should use the definition of a "disability" and a "qualified individual with a disability" under provisions of the ADA, along with information from the employee's health care provider, to help make this determination.

- The ADA defines a disability as one of the following: a) a physical or mental impairment that substantially limits a major life activity; b) a record of a physical or mental impairment that substantially limited a major life activity; or c) being regarded as having such an impairment.*
- The ADA Amendments Act (ADAAA) identifies medical conditions that would virtually always be considered a disability within the meaning of the law. They include deafness, blindness, intellectual disability, completely or partially missing limbs, mobility impairments that require the use of a wheelchair, autism, cancer, cerebral palsy, diabetes, epilepsy, HIV or AIDS, multiple sclerosis and muscular dystrophy, major depression, bipolar disorder, post-traumatic stress disorder, obsessive-compulsive disorder, and schizophrenia.*
- The definition of major life activities includes caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working. Major bodily functions includes functions of the immune system; normal cell growth; and digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions.*
- The definition of a disability also includes situations in which an employer takes an action prohibited by the ADA based on an actual or perceived impairment – for example, removing from customer contact a bank teller who has severe facial scars because customers may feel uncomfortable working with this employee or may perceive the employee as having an impairment when, in fact, the employee does not.*
- The ADAAA directs that if a "mitigating measure," such as medication, medical equipment, devices, prosthetic limbs or low vision devices eliminates or reduces the symptoms or impact of the impairment, that fact cannot be used in determining if a person meets the definition of having a disability. Instead, the determination of disability should focus on whether the individual would be substantially limited in performing a major life activity without the mitigating measure. This rule, however, does not apply to people who wear ordinary eye glasses or contact lenses.*

Employers must consider whether the impairment substantially limits a person's ability to work or meet certain job-related requirements, even though the impairment may not impose substantial limitations outside the workplace. For example, the employee may still be able to operate a personal motor vehicle but may have limitations in performing the essential job duty of

operating and driving a commercial truck, which is regulated by the U.S. Department of Transportation. In this case, the ADA recognizes this employee as having a disability.

Employers may feel uncertain about whether an employee has a disability. However, employers are cautioned against trying to prove an employee does not have a disability; employers should instead focus on whether an employee's request for accommodation under the ADA is reasonable. Frequently, this is a judgment call unless observable impairments affect the employee's ability to perform the essential functions of the job or the employee's health care provider submits reliable information. When the disability is not apparent or observable, the employer may ask the individual about the disability and functional limitations in light of the employee's request for accommodation. This discussion is usually a part of the interactive process outlined in Step 4.

Employers should review all factors to determine if there is a disability that needs to be accommodated.

Step 6: Determine Accommodations

Notes: The ADA does not require employers to have a particular policy and procedure in place for determining or granting reasonable accommodations, but it does recommend that employers develop their own policy meaningful to employees and the organization.

An accommodation can be a change or modification to the workplace, allowing the employee with a disability to perform his or her essential job duties or enjoy the benefits and privileges of employment. Examples include job restructuring, reassignment or transfer to a vacant position, making existing facilities more readily accessible, modifying or using alternative work schedules, acquiring or changing equipment or devices, and adjusting training materials or using interpreters for people with hearing or visual impairments.

Reasonable accommodations can vary in price and scope. Some are free or low-cost, such as a change in work schedule, granting extended unpaid leave or telecommuting. Others may be costlier, such as installing an elevator or modifying restrooms.

The types of accommodations needed and provided will depend on the limitations of the disability and the individual employee's ability to perform the essential job duties of the position. One standardized type of accommodation may not meet the needs of employees who have similar disabilities but different impairments/limitations when performing their essential job functions. Accommodations are designed to meet the specific circumstances of the individual.

The Job Accommodation Network is an organization that can assist employers in the accommodation process with information and accommodation ideas. Its consultative services are free to employers.

Employers should next review the accommodation request from the employee or health care provider to determine whether the requested accommodation would create an undue hardship to

the employer (see Step 7, below). Alternatives to the requested accommodations can be suggested if the initial request creates an undue burden but there is another cost-effective way to provide the needed accommodation.

Organizations must continue the interactive process until they find the accommodation(s) that meets the needs of the employee and does not create an undue hardship on the employer.

They must also obtain verification from the employee and his or her health care provider that the agreed-on accommodation will not worsen the employee's disability or cause other problems.

Step 7: Determine if the Accommodation Is "Reasonable" or Creates an "Undue Hardship"

Notes: Employers should be careful when using the undue hardship defense as a rationale to not accommodate an ADA/ADAAA request.

- *The EEOC, when determining if the employee request creates an undue hardship to the employer, looks not only at the cost of the particular accommodation but also at the financial stability of a company. If the company is making significant profits or has a sizable net worth, the employer may not be able to prove that the requested accommodation would have a significant financial impact, therefore creating an undue hardship. For example, it may be an undue hardship for a nonprofit organization with limited funds to provide a special chair that costs \$1,000 as an accommodation to an employee. However, the same request by an employee working in a for-profit organization that made sizable profits may not be seen as an undue hardship for that employer.*
- *Accommodations that could result in an undue hardship include modifications that are "unduly extensive or disruptive, or those that would fundamentally alter the nature or operation of the job or business," according to the EEOC. For example, small employers that require their employees to be able to perform a number of different jobs and tasks may not find it feasible or cost-effective to provide job restructuring as a "reasonable accommodation," whereas in larger organizations, this may be a free or low-cost option.*
- *The EEOC does not see impact on employee morale as a reasonable undue hardship defense.*

Organizations should seek input from the employee's supervisor, who has knowledge about the duties of the position and the worksite, to help determine the feasibility and what may be a "reasonable" accommodation.

Massive modifications/restructuring to the essential job duties so that the position no longer resembles its purpose are also not considered reasonable – for instance, removing driving duties from a truck driver position.

After the type of accommodation has been determined, the employer should document specific accommodations that will be made.

Step 8: Notify the Employee

Notes: The next step is for HR to notify the employee in writing that his or her requested accommodation has been approved or denied. Details of the accommodation and the anticipated start date should be included.

HR must maintain all copies of accommodation requests, supporting medical information and documentation, including denials, in a file separate from the employee personnel file, consistent with the confidentiality requirements of the ADA.

Step 9: Review and Modify

Notes: The accommodation process can be tricky to navigate for employers of all sizes. Employers can contribute to their success with reasonable accommodations for those who need them. Implementing reasonable accommodations can smooth the transition back to work after disability leave, reducing costs associated with lost productivity and performance. This can be key in retaining valuable employees.

<https://workplacementalhealth.org/mental-health-topics/reasonable-job-accommodations>

B. Examples of Accommodations

1. Workplace Accommodations Examples for Mental Health Conditions

- **Flexible Workplace** - Telecommuting and/or working from home.
- **Scheduling** - Part-time work hours, job sharing, adjustments in the start or end of work hours, compensation time and/or "make up" of missed time.
- **Leave** - Sick leave for reasons related to mental health, flexible use of vacation time, additional unpaid or administrative leave for treatment or recovery, leaves of absence and/or use of occasional leave (a few hours at a time) for therapy and other related appointments.
- **Breaks** - Breaks according to individual needs rather than a fixed schedule, more frequent breaks and/or greater flexibility in scheduling breaks, provision of backup coverage during breaks, and telephone breaks during work hours to call professionals and others needed for support.
- **Other Policies** - Beverages and/or food permitted at workstations, if necessary, to mitigate the side effects of medications, on-site job coaches.

Notes: This list does not include all possible accommodations, but it is a good starting point and provides some of the most effective and frequently used workplace accommodations.

2. Workspace Modifications

- Reduction and/or removal of distractions in the work area.
- Addition of room dividers, partitions or other soundproofing or visual barriers between workspaces to reduce noise or visual distractions.
- Private offices or private space enclosures.
- Office/work space location away from noisy machinery.
- Reduction of workplace noise that can be adjusted (such as telephone volume).
- Increased natural lighting or full spectrum lighting.
- Music (with headset) to block out distractions.

3. Equipment/Technology

- Tape recorders for recording/reviewing meetings and training sessions.
- "White noise" or environmental sound machines.
- Handheld electronic organizers, software calendars and organizer programs.
- Remote job coaching, laptop computers, personal digital assistants and office computer access via remote locations.
- Software that minimizes computerized distractions such as pop-up screens.

4. Job Duty Modifications

- Modification or removal of non-essential job duties or restructuring of the job to include only the essential job functions.
- Division of large assignments into smaller tasks and goals.
- Additional assistance and/or time for orientation activities, training and learning job tasks and new responsibilities.
- Additional training or modified training materials.

5. Management/Supervision Changes

- Implementation of flexible and supportive supervision style; positive reinforcement and feedback; adjustments in level of supervision or structure, such as more frequent meetings to help prioritize tasks; and open communication with supervisors regarding performance and work expectations.
- Additional forms of communication and/or written and visual tools, including communication of assignments and instructions in the employee's preferred learning style (written, verbal, e-mail, demonstration); creation and implementation of written tools such as daily "to-do" lists, step-by-step checklists, written (in addition to verbal) instructions and typed minutes of meetings.
- Regularly scheduled meetings (weekly or monthly) with employees to discuss workplace issues and productivity, including annual discussions as part of performance appraisals to assess abilities and discuss promotional opportunities.
- Development of strategies to deal with problems before they arise.

- Written work agreements that include any agreed upon accommodations, long-term and short-term goals, expectations of responsibilities and consequences of not meeting performance standards.
- Education of all employees about their right to accommodations.
- Relevant training for all employees, including co-workers and supervisory staff.

Sources:

<https://www.dol.gov/agencies/odep/program-areas/mental-health/maximizing-productivity-accommodations-for-employees-with-psychiatric-disabilities>

<https://cpr.bu.edu/resources-and-information/reasonable-accommodations/what-accommodations-work-on-the-job/>

IV. Hypotheticals

A. Elvira

Elvira has been working for Blooms Florists for 10 years as a billing assistant. Bob was hired as head accountant and Elvira's supervisor 2 years ago. Prior to that time, Elvira loved coming to work and her performance reviews were stellar. Lately, she has reportedly been irritable, in a bad mood and her work is suffering due to lack of attention to detail.

Elvira mentioned to a coworker that coming to work has become intolerable because Bob is so cruel to her. She said he chastises her, calls her names, makes fun of her clothing and degrades her work. The coworker mentioned to her employer that she thinks Elvira might be depressed. When the employer reached out to investigate the complaints against Bob, Martha asks to either work remotely or intermittently (when Bob isn't in the office). What should the employer do?

B. Martha

Martha has been on FMLA leave caring for her father who has been being treated for cancer. When Martha returns from leave, she notifies her employer that she is suffering depression/anxiety due to the stress from caring for her close family member with cancer. She asks for an accommodation. How should the employer handle this?

C. Phil

Phil has been working for Witty Widgets Co. as a warehouse foreman for 15 years. He was always known to be a very reliable employee, was always punctual and had very little absences over the years. The COVID-19 pandemic caused the warehouse to close and Phil was furloughed for a period of time.

Since then, the warehouse has reopened and Phil is back at work but now he seems different. He has exhibited a pattern of marked attendance changes. Phil is often late to work and misses days of work. When Phil does arrive for work he often smells like

alcohol. A co-worker mentioned that he thinks Phil might have some mental health issues and is “self medicating” with alcohol. What should the employer do?

V. HRtelligence TIPS

Obtain knowledge in the area of mental health and identify a responsible person in your organization.

Identify at least one person in your organization that is "accountable" for dealing with mental health issues. This person should receive training on mental health issues and be fully aware of the company's policies on point and what the options are in responding/dealing with mental issues that arise.

Mental health person should be responsible for training supervisors/managers on this issue and what the company's applicable processes are for dealing with mental health issues in the workplace.

Understand legal risks and what laws might apply to each situation.

Typically accommodation issues that involve mental health issues also involve other laws such as FMLA.

Know what events are catalysts for starting the interactive process.

Be familiar with various accommodation options for mental health issues and essential job functions (job description).

- EAP
- Remote work
- Scheduling
- Essential job functions
- Changing job tasks
- Changing reporting structure
- Leave/time off

Have documents related to the interactive process prepared and be familiar with how to complete them.

Fully engage in the interactive process and document along the way.

Follow-up with the employee and keep track/log.

Maintaining ongoing communication - Because making accommodations is not always a quick fix, employers and employees should keep the lines of communication open.

Source: <https://adata.org/factsheet/health>