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Richard D. Alaniz • Mar. 23, 2020

Employers today are routinely confronted with employee medical issues that impact the workplace. Despite the ever-increasing focus on issues under the Americans with Disabilities Act (ADA), the Family and Medical Leave Act (FMLA) and their state and local counterparts, one employee medical issue that has received scant attention is mental illness.

The National Alliance on Mental Illness reports that 43.8 million people experience mental illness in a given year. Approximately 10 million will experience a "serious

mental illness" that substantially limits one or more major life activities. It costs the

Mental Health Conditions

While distinct mental health conditions number in the hundreds, among the most common mental health impairments or disabilities that employers may confront are the following: Bipolar disorder; Post-traumatic stress disorder; Panic disorder; Borderline personality disorder; Obsessive compulsive disorder; Schizophrenia; and Major depression. It is reported that major depression is the largest cause of disability in the United States.

In California, which defines mental disabilities more broadly than the ADA, emotional illnesses and intellectual learning disabilities are included. This means that such conditions as ADHD and dyslexia would qualify as mental disabilities under California law. The same is likely true in other states with employee-friendly laws that have defined "mental illness" for disability purposes.

Virtually all the conditions classified as mental illness may or do have symptoms that could impact an employee's ability to perform the essential functions of their job. In many cases the illness manifests itself in conduct, behavior, or performance issues that affects their co-workers as well. Because such mental health impairments are almost always protected disabilities under the ADA and similar state laws, an employer must proceed cautiously in attempting to address these issues when they arise. Medical privacy rules similarly require discretion in addressing employee mental health conditions.

Inquiries to Employees

The EEOC has stringent standards regarding what and when an employer may ask an employee about information regarding an employee's medical (mental) health.

The four circumstances under which an employer may ask questions of an employee

Employers sometimes become aware that an employee may be suffering from a mental impairment or disability that is affecting the workplace through reports from fellow employees. In most cases some problem behavior or incident triggers a concern among co-workers that something is amiss with the employee. A major change in personality, such as from happy to moody, confrontational or argumentative behavior and similar uncharacteristic conduct may be signs of a problem. On some occasions the employee's supervisor may become aware of a problem when having to respond to complaints about an incident involving the employee.

The possibility that a supervisor or manager may encounter an employee mental health condition in the workplace underscores the need for the issue to be addressed in their employment issues training. Most companies seek to educate supervisors and managers regarding the appropriate response to ADA issues. Basic information on the proper response to an employee mental condition should be a part of work training.

The appropriate response to a potential mental health issue is to carefully gather as much information as possible while maintaining appropriate confidentiality and medical privacy. A human resources representative or appropriate member of management, working in conjunction with the plant nurse or a medical practitioner, should confidentially interview witnesses to the abnormal conduct.

These are not issues that should be permitted to become part of the shop talk. Once confirming information in the form of objective evidence of the questionable conduct is obtained, the employer may question the employee regarding the condition, if any, that is causing the problem behavior. Employers can request disability information only if it is job-related and consistent with business necessity.

Therefore, there must be a reasonable basis to believe that the condition causes the

Permissible Action

If it is determined that the employee's medical (mental) condition is limiting the employee's ability to properly perform his/her job or creating disruptions or safety issues in the workplace, especially if the employee denies there is an issue, the employer may require a fitness for duty examination. The examination must be "job related and consistent with business necessity."

A fitness for duty exam would also be appropriate if it appears that the employee's mental condition could pose a danger to the employee or co-workers. It is precisely in these circumstances that an established relationship with a medical clinic that is familiar with industrial medicine, and your specific jobs is most useful.

The medical professional conducting the exam should have available the employee's job description or at a minimum, the essential job functions. The employee's personal physician or medical provider should be consulted for any input that may help in performing the assessment. If the exam does not totally disqualify the employee from employment, potential reasonable accommodations should be discussed with the employee in conjunction with the medical professionals involved.

If the employee does not have an on-going relationship with a personal physician or proper medical provider, referral to an Employee Assistance Program might be appropriate. When the interactive process to address the potential reasonable accommodations for the condition occurs, it should focus solely on the limitations on the ability to perform the job created by the mental condition and what accommodations might be available.

In some cases, prescription of medication or the modification of an existing medication regimen may be sufficient. Such action would obviously involve the

employee's treating health care professional. In some cases, a job transfer, flexible

accommodations, the employer may have no choice but to terminate the employee. Taking such action should be rare and only come after all possible reasonable accommodations have been considered and found unfeasible. Involvement of the medical professionals would be critical before reaching a termination decision. A combination of leave along with a regimen of appropriate medication are often the types of reasonable accommodations recommended by the treating physicians before a termination decision is needed. The ultimate goal and concern should be the well-being of the employee. If medically supervised leave, even for an extended period would enable the employee to improve and possibly return to work, it could be the best course of action.

Conclusion

Each year employers are confronted with an increasing number of interactions where the ADA and/or FMLA are implicated. It is likely that some may involve cases of employee mental illness. The best course of action for employers is to be cautious and patient all times in addressing mental health issues in the workplace. The issues are highly personal and can be complex.

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