COMPLYING WITH THE FMLA AND ADA WHEN YOUR EMPLOYEE IS DEALING WITH A MENTAL HEALTH CONDITION

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The Plan

• The Big Picture: Mental Conditions & the Workplace
• FMLA and ADA Generally
• Selected FMLA and ADA Issues:
  • “Stress” as Mental Illness or Exacerbating Mental Illness
  • Caring for Family Members with Mental Conditions
  • Employee in Denial or Silent About Mental Condition
  • Employee not Ready to Return to Work
• Wrap-Up and Questions
The Big Picture: Mental Conditions & the Workplace

- **Stress caused by work**
  - Excessive workload
  - Difficult coworkers
  - Juggling work and personal life
  - Lack of job security

- **High rates of anxiety and depressive disorders**
  - Anxiety, major depression, panic disorder, OCD, PTSD, manic-depression ("bipolar disorder), and seasonal affect disorder (SAD), among others

- **Untreated mental conditions costs employers**
  - Estimated $300+ billion annually
  - Accidents, absenteeism, turnover, productivity, medical costs, legal costs, insurance costs, workers’ compensation claims
The FMLA

- **Family Medical Leave Act (FMLA)**
  - Purpose is to provide job security/stability for employees dealing with medical issues
  - Applies to private sector employers with 50 or more employees
  - Employees entitled to benefits:
    - Have worked at least 12 months
    - Have worked at least 1,250 hours in past 12 months
    - Works at a location where the employer has at least 50 employees within 75 miles.
  - Up to 12 weeks leave annually to care for own or family member’s serious health condition
  - “Serious health condition” = illness, injury, impairment or physical or mental condition that involves in-patient care in hospital, hospice, or residential medical care facility, or continuing treatment by healthcare provider
The ADA

• **Americans with Disabilities Act (ADA)**
  • Purpose is to prevent workplace discrimination against those with disabilities
  • Applies to all employers with 15 or more employees and all disabilities, including mental health conditions
  • Protects qualified individuals whose mental health conditions, if left untreated, interfere with performance of essential functions of job
  • “Disability” = physical or mental impairment that substantially limits one or more major life functions
    • “Major life functions” = caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, etc.
  • If qualified to perform essential functions of job with or without disability and reasonable accommodation available, must provide reasonable accommodation unless unduly burdensome
Mental Condition: Serious Health Condition or Disability?

FMLA
- Serious health conditions
- Period of incapacity or treatment
- Gives employees temporary leave

ADA
- Disabilities
- Substantially limits life functions
- Gives employees reasonable accommodations
“STRESS” AS MENTAL ILLNESS OR EXACERBATING MENTAL ILLNESS
“Stress” as Mental Illness

• Employee had emergency appendectomy and gall bladder surgery, requested FMLA leave
• Employer grants FMLA leave, but terminates before employee returns
• Employee sues for violation of FMLA … ADA?
  • Employee believed employer thought employee could not handle work stress, and work stress caused appendicitis and gall bladder condition
  • Argued that inability to tolerate work stress was disability (mental impairment), so employer perceived employee had disability, resulting in ADA coverage
• Court dismissed
  • Inability to tolerate work stress, alone, is NOT disability
“Stress” as Mental Illness

- Inability to cope with stress is NOT a disability
- Furthermore, ability to work in stressful situations is an essential job function
- No accommodation required

What would you do?
Stress Exacerbating Disability

- Employee threatened other employees with violence in violation of Workplace Violence Policy, suspended for 15 days
- Returned to work, but felt uncomfortable/ineffective working with “people who believed him to be mentally disturbed”
- Disclosed bipolar disorder diagnosis, requested transfer away from current coworkers as accommodation
  - Diagnosis and accommodation supported by doctor’s letter
- Employer refused, employee sued for ADA violation
Moving the employee away from the stressor may or may not be a reasonable accommodation.

Is the alleged stressor:
  - ...Coworkers?
  - ...Sound?
  - ...Darkness?
CARING FOR FAMILY MEMBERS WITH MENTAL CONDITIONS
• Employer was hiring for computer programmer
• Best qualified candidate disclosed during interview that he had sole custody of son with severe autism
• Employer selected second-best candidate based on concerns about best-qualified candidate’s “ability to prioritize work”
• If best-qualified candidate sues under ADA, what result?
Caring for Family Members with Mental Conditions

- Employer violated ADA
  - But employee’s son, not employee, had disability?!
- ADA protects not just those with disabilities, but also those who are “associated” with individuals with disabilities
- Particularly relevant for the growing “sandwich generation”

Can you see any other legal issues?
- Sex discrimination
EMPLOYEE IN DENIAL OR SILENT ABOUT MENTAL CONDITION
Employee in Denial or Silent About Mental Condition

- Ordinarily employee has responsibility to disclose
- But sometimes employer has duty to act to accommodate or suggest leave
Employee in Denial

- Employee with numerous medical conditions, including chronic pain and severe depression and anxiety
- Only poor performance reviews over years of employment
- Mentioned chronic pain to supervisor once, and supervisor suggested disability retirement. Employee never followed up, stating her commitment to work.
- Employee continued to perform poorly, but applied for multiple promotions and transfers, even to non-vacancies
- Employee put on performance improvement plan (PIP), and failed; left on FMLA leave before being notified of failure
Employee in Denial

- While on FMLA leave employee provided doctor’s note stating she could not perform work
- Employee returned to work and stayed (performing poorly), in spite of second doctor’s letter saying she could not work
- Employer asked employee which job functions she could perform. Employee did not respond, but continued to report for work.
- Employee terminated based on poor performance and failure of PIP
- Employee sued under ADA
Employee in Denial

- No ADA violation
- Employee did not engage in interactive process by showing she could perform essential functions of job or requesting accommodation
- Employee whose performance does not improve despite long and continuous efforts on employer’s part, and who does not pursue accommodations or discuss disability may be terminated without violating ADA
  - (when disability or accommodation not obvious)
Employee Silent About Mental Condition

• Employee of six years who had endured work environment hostile to her race began crying regularly and uncontrollably at work
• Requested to be assigned to different position and repeatedly complained to supervisor
• Supervisor denied reassignment request and repeatedly told employee she needed to choose between continuing working or resigning
• Employee resigned “for medical reasons,” but wanted position back after a few days. Employer refused.
• (Former) employee hospitalized, diagnosed with depression, anxiety, panic disorder, and insomnia; sued for FMLA violation
Employee Silent About Mental Condition

- Employer had responsibility under FMLA to engage in interactive process
- Direct notice of health condition or request for FMLA benefits not necessary for employee to be entitled to FMLA benefits
- “[O]bservable changes in an employee's condition or uncharacteristic or unusual conduct at work may themselves provide an employer with adequate notice of a serious medical condition and obviate the need for an express request for medical leave.”
- Crying spells unusual for employee, so employer should have investigated whether cause of behavior was protected
Employee Silent About Mental Condition (Take Two)

- Employee in position that requires good interpersonal relationship management begins acting erratically at work—unproductive, disruptive, aggressive
- Other employees lodge numerous complaints; numerous incidents involving employee “not making sense” and exhibiting “mania”
- Employee eventually disciplined, requests FMLA leave. Employer grants FMLA leave.
- Employee returns, seems improved, but then begins acting out again
- After further discipline, employee terminated for continued misconduct
- Employee sued, alleging disability discrimination and failure to accommodate
  - Surprise! Employee never revealed she had bipolar disorder
Employee Silent About Mental Condition (Take Two)

- No ADA violation because employee not qualified for position
- Essential function of job was managing interpersonal relationships; employee could not perform essential functions of job
- But what about accommodation?
- Employee might have been able to perform, but how would employer know accommodation needed?
- Employers not required to guess that employee has disability and needs accommodations when not obvious

Is this consistent with the previous case?
EMPLOYEE NOT READY TO RETURN TO WORK
Employee not Ready to Return to Work

- Employee with chronic back pain
- Employer had granted accommodation (stretching every 30 minutes)
- Back pain worsened, exhausted FMLA leave, and then employer leave
- Attendance essential to position
- Doctor’s note did not explain
  - Whether employee receiving treatment
  - Likely effectiveness of treatment
  - Medical likelihood that leave would enable return to work
- Employee terminated; sued for ADA violation
Employee not Ready to Return to Work

- No ADA violation
- Employee failed to establish that she was qualified for job
  - Position required regular attendance
  - Employee did not offer evidence regarding effectiveness of course of treatment or medical likelihood of recovery
  - Wasn’t clear that she would have been able to return if employer had given additional unpaid leave
- Employee was essentially requesting indefinite leave

What would you have done?
Employee not Ready to Return to Work

- **Specific** fitness-for-work certification from doctor or specialist
- Employer must provide written notice to employee
- With notice that FMLA leave granted and essential job functions to be reviewed
- Uniformly applied policy
WRAP-UP: WHAT HAVE WE LEARNED?
Lessons

• Focus on **performance** and **support**
• **Ask** the questions. Do not assume or guess.
• Engage in the **interactive process**
  • Don’t give up too easily if employee doesn’t want to talk about it but doesn’t improve
• Consult resources if unsure how to proceed
Resources

- Society for Human Resources (SHRM)
- Labor and Employment Attorney
QUESTIONS?

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THANK YOU

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