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**Agenda**

Discuss common scenarios relating to employees with behavioral health conditions who need leave and review:

- What we **must** do (FMLA, ADA requirements, etc.)
- What we **can** do (How can we help our employees through the process)

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**Behavioral Health Trends: State of Mental Health**

- About 1 in 4 American adults suffers from a diagnosable mental disorder in a given year
- Approximately 9.5% of American adults ages 18 and over, will suffer from a depressive illness each year
- Approximately 18% of individuals aged 18- 54 have an anxiety disorder in a given year (highest reported mental health issue in the U.S. with 42.5 million Americans suffering from anxiety).
- Almost 6 in 10 people with mental illness get no treatment or medication.

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### Behavioral Health Trends: Impact on Employers

- Nearly one-fifth (19%) of U.S. workers rate their mental health as fair or poor
- These workers report about four times more unplanned absences due to poor mental health than their counterparts who report good, very good, or excellent mental health
- Projected over a 12-month period, workers with fair or poor mental health are estimated to have nearly 12 days of unplanned absences annually compared with 2.5 days for all other workers
- Generalized across the U.S. workforce, this missed work is estimated to cost the economy \$47.6 billion annually in lost productivity.
- Mental illness drives 200 million lost workdays each year at a cost of \$17 to \$44 billion to employers annually
- 73% percent of people with disabilities identify mental health as a significant concern, compared to 33% of the general population

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### Behavioral Health Trends: Impact on Absence

- DMEC 2022: Over 60% of employers over 1000 employees, link their absence and mental health programs.
- Accusations of unlawful discrimination based on an employee's mental health condition accounted for about 30 percent of all ADA-related EEOC charges filed in 2021.
- EEOC statistics: claims based on anxiety disorders alone nearly doubled between 2013 and 2021.
- Over the last 3 years, we have seen behavioral health leave cases increase 233% and that trend is continuing.
- Stress-related absenteeism attributed to loneliness costs U.S. employers an estimated \$154 billion annually

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**Scenario 1**  
The Employee's Request



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### Employee's Request

When an individual informs an employer that an adjustment or change is needed simply because of "a medical condition," that is enough to qualify as a reasonable accommodation request.

- EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the ADA, (10/17/02) at Question 1.

**Ok, but what if the employee isn't clearly communicating because of their condition?**




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### Scenario 1

- Gary has been working your front desk for years. He's the face of the company, and always greets visitors with a smile & wink.
- In the last few weeks:
  - Seen uncontrollable sobbing at front desk. Not like Gary.
  - Tells you he's not sleeping, not eating, overwhelmed, burned out, and may need to resign.




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### Scenario 1

- You: "Gary we wish you well, but you need to decide whether you can stay or need to resign"
- Gary resigns
- Later: Sues for FMLA and ADA violations
- Never requested leave or accommodation
- "I never acted like that before. You should've known something was wrong!"

**Should you have known? Offered FMLA or an ADA accommodation?**




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### Scenario 1 – FMLA Protection?

**Maybe Yes**

- "Crying regularly and uncontrollably" at work may be notice of FMLA leave. *Valdivia v. Township High School Dist. 214* [N.D. Ill. 2017]

**Older cases**

- Madel, long-time employee now exhibiting strange behavior = FMLA notice. *Byrne v. Avon Products* (7th Cir. 2003)
- Erratic, agitated, hostile behavior after stray dog enters workplace = FMLA notice. *Stevenson vs. Hyre Electric Co.*, (7th Cir. 2007)
- Change in "behavior (fatigue) was... so obviously a manifestation of an underlying [ADA] disability" *Hedberg v. Ind. Bell Tel. Co.* (7th Cir. 1995)

**Maybe Not**

- There must be a "stark behavioral change" and six times in 18 months is not that. *Guzman v. Brown County* (7th Cir. 2018)




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### Employee Notice - ADA

- The duty of an employer to initiate or react ... is heightened when the employee's disability is related to his/her mental, rather than physical, health
- Employee with a mental illness may have difficulty effectively relaying medical information about her condition, particularly when the symptoms are flaring"
  - *Walters v. Mayo Clinic Health Sys.-Eau Claire Hosp., Inc.*, [W.D. Wis. 2014]. Also, *Bultemeyer v. Ft Wayne Cnty. Schools*, (7th Cir.1996)
- Employer responsible even when the employee "did not consider himself to be disabled "
  - *Brady v. Wal-Mart Stores* (2nd Cir. 2008)
- Adequate notification where employee made employer "aware of the need" for an accommodation by reporting "various medical conditions, that those conditions had been worsening and had required regular doctor visits, and that she had repeatedly inquired about a leave of absence to deal with them"
  - *Garrison v. DolgenCorp. LLC*, (8th Cir. October 3, 2019)




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### Practical Tips

Although employers cannot assume employees are disabled and need accommodations, keep in mind:

- Can be made by a family member
- No "magic words"
- Don't worry about the **how** (verbal/writing) or **who** (family member)
- Make sure policies are clear
- "How can we help?"




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**What Can You Do?**

- **What trainings do you provide for your managers and team leaders?**
  - How can you spot employees who are in emotional pain or experiencing mental health symptoms?
  - How to do you have supportive conversations about mental health?
  - What are the resources available to employees to support their well-being? How do you make those referrals?
- **Example signs of possible mental health issues:**
  - Change in appearance
  - Change in demeanor
  - Change in work habits/performance
  - Change in mood/mood swings
  - Withdrawal/ avoiding interactions with others
- **What trainings do you provide all employees to support them?**



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**Scenario 2**

**Participating In The Process**



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**Participating In The Process**

- Stacy is server at your restaurant.
- Recently, she has been suffering from extreme anxiety.
- She has trouble sleeping, and coworkers scared of her.
- Stacy's manager: Take time off!
- Hospitalized. Leave extended.
- Told to return FMLA medical certification
- Stacy: not following rules. returns doc – 81 days later.
- Tries to return to work – denied and terminated.

**Valid termination?**



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### Participating In The Process

#### FMLA

- No. "cannot use the basic fact of a delay in the return of the medical certification to completely absolve itself of potential liability under the FMLA"  
• Stroud v. Connor Concepts, Inc., (M.D. Tenn. Dec. 2, 2009)
- FMLA: 15 days or **as soon as practicable**




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### ADA: What the Employer Knew

- Employee – school secretary for 20 years.
  - Recent evaluation - "high praise" - never any disciplinary notice.
- Suddenly she "began acting strangely, alarming;" experiencing delusions
- Employer aware.
  - So disturbed by [her] behavior that they doubted her capacity to leave on a train by herself and had someone at the school district contact her son."
  - Knew she was hospitalized and administered lithium.




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### Employee's Behavior

- She reported:
- Someone after her
  - Had to disguise herself with a scarf
  - On the ride to the hospital, thought police helicopter escort and firefighters were trying to protect her.
  - Told employer she was just admitted to hospital for "acute stress" and "just needed some rest"
  - Employer: relied upon employee's representations.




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### Employers Must Consider What They Know

- Employee "had obvious difficulty conveying the extent of her illness. We should not insist that all plaintiffs with bipolar disorder must have the self-awareness and expressive powers of a Robert Lowell (who had the illness) before we allow that their condition is substantially limiting."
  - Taylor v. Phoenixville School District (3rd Cir. 1999)
- Communication "even more difficult in a case involving an employee with a mental disability, ... necessary accommodation is often non-obvious to the employer."
  - Ekstrand v. School Dist. of Somerset (7th Cir 2009)



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### Practical Tips

- "Ostrich Defense" - bad idea.
  - If you know, you need to engage and you need to consider additional efforts to engage.
- FMLA - Remember, standards include considerations
  - Notice: "unless unusual circumstances"
  - Certification: unless "delay was due to extenuating circumstances outside his/her control"



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### What Can You Do?

- **Important considerations for mental health diagnoses/issues:**
  - Can impact cognition
  - Can impact reality testing
  - Can impact insight
  - Symptoms/cognition can fluctuate/change
- **How can you determine if someone is struggling with the process due to the cognitive/emotional symptoms? E.g.**
  - Asking the same question over
  - Difficulty focusing/paying attention
  - Increased task errors
- **Examples of practical steps you can take to support the employee with the process:**
  - Write information down
  - Offer multiple opportunities to describe the required steps and allow for Q&A
  - Involve a family member or trusted other
  - Request information from physician



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**Scenario 3**

## Possible Accommodations



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### Is It "Reasonable"

Courts:

While employers must be flexible, courts have not required:

- "Stress-free" environments
- Reassignment (where the employee could not get along with his manager/coworkers)
- New Managers

Keep in mind - no "reasonableness" analysis under the FMLA



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### Ruth's Accommodation Requests

- You hired Ruth one month ago.
- She then began reporting late to work sporadically and missed a few days for vague reasons
- Abrupt with her co-workers, known to have an "attitude"
- Meet with Ruth:
  - Reports that she has long suffered from depression
  - Several of her colleagues are creating stressful working environment (cliquey, not collaborative)

Ruth: I need to get rid of this stress, and/or a new job, and/or a new manager! And I'm taking leave until this is fixed.

**What do you do?**



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### Stress-Free Workplace?

- Employee's acknowledgement that she could work other jobs undermined her claim – job-specific stress is not a disability.
  - Adetimihin v. Healix Infusion Therapy, Inc. (SD Tex 2015)*
- Bank teller with PTSD subject to harassing or "ribald" behavior. Court upheld rejection of request "peaceful calm environment"
  - Posteraro v. RBS Citizens, NA (D. NH 2016)*



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### Other Accommodations

#### Reassignment

- EEOC:** Employees unable to perform job duties permanently, may ask for reassignment to a different job
  - U.S. EEOC, "Depression, PTSD & Other Mental Health Conditions in the Workplace", (2016)*
- Principal with PTSD can be reassigned so that not working with students even if not the accommodation he wanted.
  - Adams v. Ann Arundel County Pub. Sch. (4th Cir. 2015)*

#### Absences and Rest Breaks

- A customer service representative with depression/anxiety required frequent and unplanned absences, and breaks. Court: regular and reliable attendance = essential function.
  - Williams v. AT&T Mobility Servs. LLC. (6th Cir. 2017)*



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### Other Accommodations

#### Change of Manager

- Inability to work under a particular supervisor not a disability.
  - Higgins-Williams v Sutter Medical Foundation (Cal. Ct. App. 2015)*
- Employer not required to provide new manager to (or position for) mechanic with depression/anxiety who was called 'stupid,' 'idiot,' 'mental case,' 'dumb, and 'incompetent' by his managers on a nearly daily basis." Court: "cessation of harassment is [not] a required reasonable accommodation."
  - Schwarzkopf v. Brunswick Corp., (D. Minn. 2011); Also, Tamlinson v. Wiggins, (W.D. Ark. May 16, 2013).*



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### Back To Ruth

Ruth: I need to get rid of this stress, and/or a new job, and/or a new manager! And I'm taking leave until this is fixed.

What do you do?

- Just reject her requests? Engage with her?



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### What Can You Do?

What are practical tips to helping employees reduce stress at work, improve job performance and job satisfaction?

- Can you offer short breaks?
- Is there a quieter space the employee can work to facilitate improved services?
- Ask employees what they may need and see if it is reasonable
- Can you offer resources (EAP counseling)
- Can you offer a peer champion program?



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### Scenario 4

- Returning to Work
  - Preventing return to work for employees who **should not** be working
  - Facilitating return to work for employees who **could be** working



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### Scenario 4

- What if they insist they can come back? Can you "force" FMLA or ADA?
- Can you require a medical exam?
- Can you terminate an employee whose presence is a problem?



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### Donna and Threatening Behavior

- Donna is a middle-school teacher whose mental health has deteriorated after the death of her father last year.
- Took FMLA.
  - Major depressive disorder and anxiety.
  - Struggled, returned to work.
  - Now: Medicated but threatens self-harm and harm to others.
- Put on FMLA again. Returns again. More threatening behavior again.
- Investigation. Donna's fired.

FMLA interference? ADA violation?



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### Donna and Threatening Behavior

**FMLA**

- No violation. "legitimate reason for ending the employment, 'wholly unrelated to the FMLA leave' The right to reinstatement" is not absolute.

**ADA**

- No violation. Although the behavior "likely stemmed from her major depressive disorder" decision was not discriminatory but because she made threats against herself and others.
  - *Todd v. Fayette County School Dist. (11th Cir. 2021)*



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### Other Guidance On Return To Work

- **Employers can seek independent medical exams.** *White v. County of Los Angeles, (2nd App. Dist., 3rd Div. 2014)*
    - Request must be job-related and consistent with business necessity, and
    - Employee must be unable to perform the essential functions of her job, and/or she's a direct threat.
  - **"Preventing employees from endangering their coworkers is a business necessity."** *Painter v. IDOT (7th Cir. 2017)*
  - **"Forced leave"?** If employee says "I'm not sick! I can work!" then no right to FMLA/ADA and they're at will. *Walker v. Trinity Marine Prods., (8th Cir. 2013)*
- But be careful for "100% healed" standards → Potential ADA violation



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### What Can You Do?

- Can you offer resources to support them while they are out to improve functioning and well-being?
- Can you bring them back gradually? Discuss a plan to ease the back into their work/tasks and routine?
- Can you discuss resources that will be available once they return?
- Do you have a peer support network that can be available (ERGs, Peer wellbeing champions, etc.)
- Can you schedule regular check-ins with the manager?
- Are there small changes that could make a big difference (e.g. desk location)?



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**Scenario 5**

We need to talk about your managers



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### Jamie's Manager

- Jamie works for a diagnostics company. His birthday is on Monday.
- Jamie to office manager: Please don't have a celebration for me. I have an anxiety disorder and I won't be able to process it effectively.
- Office manager forgets to tell "birthday party coordinator." Party happens. Jamie has a panic attack and sent home.
- Three days later: Jamie is fired. Reason: other employees concerned when Jamie suffered panic attacks.
- Jamie sues.



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### Jamie's Manager

- Jamie sues.
- Jamie won \$450,000 under the state ADA (Kentucky; effectively the same, other than no damage cap).
  - *Berling v. Gravity Diagnostics, LLC, (2022)(state court jury verdict)*
- Jury: Employer showed he could perform essential functions of his job and his accommodation requests ignored (no interactive process).



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### Management Decisions

#### Other Recent Cases Where Employer Lost:

- Court clerk with PTSD who asked not to work on domestic violence court cases.
  - *Herrmann v. Salt Lake City Corp., (10th Cir. 2021).*
- Postal worker with depression, although accommodated by employer, an "avalanche of emails" about derogatory in nature showed the employee may have been discriminated against.
  - *Schneider v. U.S. Postal Serv., (E.D. Wis. 2022).*
- Employee told to "suck it up!" (after employee requests FMLA for depression)
  - *Bartman v. Wegmans Food Markets, Inc. (D. Mass 2018)*
- \$175,000 settlement. Employer asked staffing agency to replace employee after her "nervous breakdown" because environment too stressful for her.
  - *EEOC v. Pivotal Home Solutions (2022).*



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### Takeaways

#### Four Things to Do:

1. Be aware
2. Train your managers
  - Schneider case comments: Emails calling employee "crazy," "nuts" and "a head case."
3. Engage in the interactive process. Talk to Jamie. Ask, "How can I help you"
4. Connect to well-being programs and resources



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### What Can You Do?

#### Training

- **Doubling down: Are you conducting manager trainings?**
  - Mental health awareness
  - Psychological safety
  - How to have supportive/empathic conversations on mental health
  - How to have appropriate and respectful communication
  - When and how to escalate employee needs to HR/benefits representative, etc.
- **Do you offer Management Consultations for managers as a benefit?**

Managers have just as much of an impact on people's mental health as their spouse (both 69%) — and even more of an impact than their doctor (51%) or therapist (41%; Workplace Institute, 2023)

#### Stigma Busting

- **Are you creating a positive mental health culture (destigmatizing mental health issues)?**
  - Do leaders talk about their own mental health struggles (show vulnerability, it's ok to not be ok)?
  - Do you encourage managers to conduct regular well-being status check-ins with their team members?
  - Can you destigmatize mental health needs through champions and peer advocates?
  - Do you regularly educate on, and normalize, available well-being resources?

75% of employers acknowledged the presence of mental health stigma in their workplaces (-McKinley and Company, 2021)



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## Questions?



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