Mental Health Not-So-Basics Under the ADA

Marti Cardi, Esq.,
Vice President, Product Compliance

DMEC Dallas Chapter
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Mental Health Not-So-Basics Under The ADA

Agenda

- ADA Overview
- When is a Mental Health Condition Protected by the ADA
- Leave as an ADA Accommodation
- Obtaining Medical Information Under the ADA
- Additional ADA Mental Health Challenges
- Avoiding ADA Litigation
- Resources
Mental Health Not-So-Basics Under The ADA

1. Applies to employers with 15 or more employees

2. Employees have coverage & protections from Day 1

3. Employer duties (1) provide reasonable accommodations (including leave of absence) and (2) not discriminate

4. Coverage based on employee’s “disability” as defined by ADA/ADAAA

5. Vague parameters (what is reasonable, undue hardship; what medical info can be obtained; job and benefits protections)
Impact of the Expansion of ADA

ADA first effective in 1991 – lots of court wrangling over coverage

- Does the employee have an impairment?
- “Major life activity”
- “Substantially limits”
- Effect of mitigating measures
- Impairments episodic or in remission

Supreme Court weighed in
Congress and EEOC didn’t like results

- Sutton v. United Air Lines
- Williams v. Toyota
Impact of the Expansion of ADA

In 2009, the ADAAA expanded definition of “disability”

- Clarified activities considered “major life activities”, including addition of the “major bodily functions” category
- Defined a broad scope of what “substantially limits” a major life activity
- Established episodic impairment or impairment in remission as a “disability” if the impairment would substantially limit a major life activity in its active state
- Dictated that disability determinations be made regardless of mitigating measures such as hearing aids, medication, medical supplies, auxiliary
- Directed that disability determinations be made with consideration of the negative effects of medication or treatment

In short, greatly expanded the classes of individuals covered by the ADA
Factors Creating ADA Risk

• ADA is **complex** and imposes inherently **vague** standards
• **No waiting periods** for new employees – Day One coverage
• **ADAAA changed the game:**
  o made it easier for employees to qualify as “disabled”
  o shifted focus to interactive process
• **Overlap** of ADA, FMLA, and state leave, disability, and WC laws
• EEOC focus on **systemic ADA violations** – policies & practices
• ADA charges against employers continue to rise
• Market pressures drive demand for **improved attendance** and greater productivity
• Many companies are not built to determine **accommodations** for one employee at a time
### Mental Health Not-So-Basics Under The ADA

#### ADA Charges Filed in 2015 by Mental Impairment

<table>
<thead>
<tr>
<th></th>
<th>2011</th>
<th>2012</th>
<th>2013</th>
<th>2014</th>
<th>2015</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Total ADA Charges Filed</strong></td>
<td>25,742</td>
<td>26,379</td>
<td>25,957</td>
<td>25,369</td>
<td>26,968</td>
</tr>
<tr>
<td><strong>Anxiety Disorder</strong></td>
<td>1362 – 5.3%</td>
<td>1609 – 6.1%</td>
<td>1662 – 6.4%</td>
<td>1795 – 1.7%</td>
<td>1934 – 7.2%</td>
</tr>
<tr>
<td><strong>Autism</strong></td>
<td>51 – 0.2%</td>
<td>54 – 0.2%</td>
<td>53 – 0.2%</td>
<td>63 – 0.2%</td>
<td>70 – 0.3%</td>
</tr>
<tr>
<td><strong>Depression</strong></td>
<td>1837 – 7.1%</td>
<td>1755 – 6.7%</td>
<td>1837 – 7.1%</td>
<td>1769 – 7.0%</td>
<td>1837 – 6.8%</td>
</tr>
<tr>
<td><strong>Manic Depressive Disorder</strong></td>
<td>861 – 3.3%</td>
<td>836 – 3.2%</td>
<td>884 – 3.4%</td>
<td>755 – 3.0%</td>
<td>816 – 3.0%</td>
</tr>
<tr>
<td><strong>Other Psychological Disorders</strong></td>
<td>436 – 1.7%</td>
<td>411 – 1.6%</td>
<td>415 – 1.6%</td>
<td>362 – 1.4%</td>
<td>389 – 1.4%</td>
</tr>
<tr>
<td><strong>Post Traumatic Stress Disorder</strong></td>
<td>593 – 2.3%</td>
<td>699 – 2.6%</td>
<td>729 – 2.8%</td>
<td>797 – 3.1%</td>
<td>941 – 3.5%</td>
</tr>
<tr>
<td><strong>Schizophrenia</strong></td>
<td>144 – 0.6%</td>
<td>101 – 0.4%</td>
<td>99 – 0.4%</td>
<td>93 – 0.4%</td>
<td>91 – 0.3%</td>
</tr>
<tr>
<td><strong>Total Mental Health Charges Filed</strong></td>
<td>5,233 – 20.5%</td>
<td>5,465 – 20.8%</td>
<td>5,679 – 21.9%</td>
<td>5,634 – 16.8%</td>
<td>6,078 – 22.5%</td>
</tr>
</tbody>
</table>

*Numbers indicate total charges of type filed, and its percentage of total ADA charges filed*
Mental Health Not-So-Basics Under The ADA

Following the ADAAA – Interactive Process is King!

The process followed in exploring potential reasonable accommodations can be equally as important as the decision to accommodate.

Certainty lies in the process of searching for a reasonable accommodations, not necessarily in the results.

Employers who have engaged in the interactive process with the employee in good faith will find either a workable accommodation or will develop a defense to failure to accommodate.
When is a Mental Health Condition Protected by the ADA?
What is a Mental Disability under the ADA?

1. A mental impairment that *substantially limits* one or more major life activities

2. A *record* of such an impairment:
   - Employee has a history of, or has been misclassified as having . . .
   - A mental or physical impairment that substantially limits one or more major life activities

3. Being *regarded* as having such an impairment *(accommodation not required)*
   - Employer regards an employee as disabled because of an actual or “perceived” mental or physical impairment or restriction . . .
     - whether or not that impairment substantially limits a major life activity.
   - Minor/transitory impairments are excluded (less than 6 months)
Mental Health Not-So-Basics Under The ADA

What is a Mental Disability under the ADA?

Mental impairment: "[a]ny mental or psychological disorder, such as . . . emotional or mental illness."

ADA examples:
- Major depression
- Bipolar disorder
- Anxiety disorders (including panic, obsessive compulsive, and post-traumatic stress disorders)
- Schizophrenia
- Personality disorders

BUT, employer’s focus should not be on whether an impairment is a “disability”

EEOC expects employers to fulfill their obligations by seeking a reasonable accommodation.
What is a Mental Disability under the ADA?

Traits and behaviors are not mental impairments:

ADA examples:
- Feeling stress
- Irritability
- Chronic lateness
- Poor judgment

But traits or behaviors may be related to or a manifestation of a mental impairment
When does a mental impairment “substantially limit” a major life activity?

- Impairment substantially limits a major life activity as compared to most people in the general population.

- Impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity to be considered substantially limiting.

- Evaluated in terms of severity and length of time
  - Can be a “sliding scale” – e.g.,
    - more severe, shorter duration
    - less severe, longer duration
When does a mental impairment “substantially limit” a major life activity?

• Requires an “individualized assessment”
• Based on individual, not generalizations about condition
• Prevents individual from performing a MLA OR
• Significantly restricts condition, manner, or duration of performing a MLA compared to average person in general population
• Determined by the condition’s effect on individual in its natural state, not with medication or other mitigation
When does a mental impairment “substantially limit” a major life activity?

Examples of “substantially limits” (or not):

- **Ability to interact with others:**
  - Regular severe problems (e.g., high levels of hostility, social withdrawal, or failure to communicate)
  - Unfriendliness with co-workers or supervisor not a substantial limitation

- **Ability to concentrate:**
  - Frequent distractions, drawn to irrelevant sights, sounds, or thoughts, mind going “blank”
  - Difficulty when tired or in long meetings not a substantial limitation
Which Major Life Activities are Affected by a Mental Health Impairment?

No exhaustive list – always an individualized assessment

Typical examples: communicating, interacting with others, learning, thinking, concentrating, caring for oneself, speaking, performing manual tasks
Major Life Activities as defined by ADA regulations:

- **In general**, life activities such as caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working; and

- **The operation of major bodily functions**, including functions of the immune system, special sense organs, and skin; normal cell growth; and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions.
Leave as an ADA Accommodation
Leave of Absence as an ADA Accommodation

• Basic rule: leave of absence can be a reasonable accommodation under the ADA

• EEOC very active – Multi-million dollar consent decrees against companies with inflexible leave policies
  ○ Most recent: Lowe’s $8.6 Mil  05-13-2016

• There are limits: indefinite / open-ended leave is not a reasonable accommodation

• Undue hardship defense still applies
Are There Limits to Length of Leave as a Reasonable Accommodation?

The Courts Think So:

“There are two limits on the bounds of reasonableness for a leave of absence.

The first limit is clear: the employee must provide the employer with an *estimated date* when she can resume her essential duties …

The second is durational. A leave request must assure the employer that an employee can perform the essential functions of her position in the ‘near future’.

*Robert v. Board of County Commissioners, 691 F.3d 1211(10th Cir. 2012)*
Are There Limits to Length of Leave as a Reasonable Accommodation?

The Courts Think So:

“[R]easonable accommodations…are all about enabling employees to work, not to not work.”

“By her own admission, she couldn’t work at any point or in any manner for a period spanning more than six months. It perhaps goes without saying that an employee who isn’t capable of working for so long isn’t an employee capable of performing a job’s essential functions – and that requiring an employer to keep a job open for so long doesn’t qualify as a reasonable accommodation.”

Rejecting EEOC’s [overbroad?] position on inflexible leave policies

Hwang v. Kansas State Univ., 753 F.3d 1159 (10th Cir. 2014)
Are There Limits to Length of Leave as a Reasonable Accommodation?

The EEOC Does Not Think So:

“Employer-Provided Leave and the Americans with Disabilities Act” – issued by EEOC May 9, 2016 (“Resource Document”). The EEOC:

• Assumes all examples in the Resource Document are reasonable leave requests
• Does not provide a time limit for a “reasonable” leave
• Jumps over reasonableness in analysis to whether leave is an undue hardship
• Acknowledges that leave required indefinitely, or leave without a specified or estimated end date may cause undue hardship

https://www.eeoc.gov/eeoc/publications/ada-leave.cfm
A Word on FMLA and Alternatives to Leave

Can employer require employee to accept a workplace accommodation rather than take an FMLA leave of absence?

NO – if supported by CHCP, right to FMLA leave is nearly absolute

• If the FMLA entitles an employee to leave, an employer may not, instead, require an employee continue working with a reasonable accommodation

• But, ADA may require the employer to OFFER the position. 29 C.F.R. § 702(d)(1)

Also, employer cannot change the essential functions of a position in order to deny FMLA leave
Giving the Employee the Opportunity to Stay at Work – Alternatives to Leave of Absence
Why do we care about keeping the troubled employee at work?

“The longer an employee is absent from work, the greater the cost to the employer and less chance of the employee making a successful return.”

Consequences of “losing” an employee to a mental health impairment:

• Lost productivity on team
• Disruption to management of business unit due to unpredictable or prolonged absences
• Impact on morale of remaining employees
• Costs of training a replacement employee
Assessing Accommodations

- Employer can choose between effective accommodations.

- Employer can require employee to accept a workplace accommodation rather than take an ADA leave of absence if:
  - The alternative accommodation is effective
  - The alternative accommodation does not interfere with the employee’s medical care/recovery

- If employee declines an effective alternative accommodation, employer can count disability-related absences against attendance policy.
Assessing Accommodations

A 3-step process:

1. **Is it reasonable?**
   Seems reasonable on its face, i.e., ordinarily or in the run of cases; appears to be feasible or plausible

2. **Is it effective?**
   Will enable employee to perform the essential functions in the “near future”

*If answer to 1 and 2 is “yes”, employer’s only reason not to provide the accommodation is:*

3. **Will it cause an undue hardship?**
   Causes significant financial or operational difficulty
Alternatives to leave of absence for mental health condition

• ADA accommodation possibilities include:
  o Workplace accommodations
  o Modified schedule
  o Modified policies
  o Job restructuring / Modified duties
  o Light duty
  o Reassignment to alternative position

• Any one or more of these are required if effective (and not an undue hardship)

• **REMINDER**: It may take MULTIPLE accommodations to enable employee to perform essential functions
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Mental Health – Workplace Accommodations

**Suggestions to increase concentration, focus**

- **Reduce distractions:**
  - Provide secluded space, white noise, sound absorption panels, visual dividers
  - Provide space organizers
  - Listen to music on headphones

- **Provide lighting alternatives, increase natural light**

- **Help with organization and tasks:**
  - Use daily, weekly, monthly task lists
  - Divide large tasks into smaller tasks
  - Assign a mentor or a job coach
Mental Health – Workplace Accommodations

Suggestions to manage stress, emotions, panic attacks:

- Allow presence of a support animal
- Refer employee to EAP resources
- Provide back-up support for employee to take breaks
- Let employee call doctors, counselors, or others for support while at work
- Assign a mentor or supervisor to alert employee when behavior is becoming inappropriate
- Encourage employee to use stress-management techniques at work – e.g., walk away from frustrating situation or confrontation

Suggestions to aid memory deficiencies:

- Allow employee to record meetings
- Post instructions for use of equipment
- Provide SOPs for important processes
Modified Schedules

- Adjust shift start/end times
- Allow flexible scheduling
- Provide periodic breaks
- Change when certain functions are performed (marginal and/or essential)
- Combine short breaks into one longer break
- Allow employee to leave for counseling
- Allow work from home
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Job Restructuring / Modified Duties

- Distribute or eliminate marginal job functions
  - permanently or during times of stress
- Alter when and/or how a job function is performed (essential and/or marginal)
- Employer is not required to eliminate an essential function but can choose to do so or choose to reassign an essential function
Light Duty

Light duty” – temporary or permanent position mentally less demanding than employee’s normal job duties

- Excusing employee from some of the more demanding functions of position
- Transferring the employee to a position that is less demanding than usual position
- Includes using an existing bank of jobs, or a position created for a specific circumstance

Employer may be required to offer light duty under ADA if it reserves certain jobs for light duty and if:

- Employee cannot perform current position with or without RA; and
- Employee can perform the light duty position with or without RA; and
- Reassignment to vacant light duty position would not cause an undue hardship
Reassignment to Alternative Position

- Reassignment is ADA “accommodation of last resort”
- Required only after it has been determined that:
  - There are no effective accommodations that will enable the employee to perform the essential functions of his/her current position OR
  - All other reasonable accommodations would impose an undue hardship
- Order of reassignment:
  - Vacant position with equivalent pay, benefits, status, etc.
  - Vacant lower position (with pay/benefits for that position)
  - No vacant position = no duty to reassign
- Employer must search for position – open now or in near future
- Employee does not have to compete or be best qualified

The Job Accommodation Network (JAN) is the leading source of free, expert, and confidential guidance on workplace accommodations and disability employment issues.
Obtaining Medical Information under the ADA
Mental Health Impairments: When can employer get medical information?

- Employer can require medical info if employee’s disability, its effects, or the need for an accommodation are not obvious
- Employer can require employee to go to provider of employer’s choice, at employer’s cost
Mental Health Impairments: Why do we care about getting medical information?

- Ensure that employee in fact has a mental impairment
- Understand the employee’s actions, limitations, capabilities
- Identify which essential or marginal functions the employee cannot perform
- Identify possible reasonable accommodations
- Differentiate between impairment-related conduct and non-related conduct for discipline, coaching
ADA Limitations on Medical Inquiries

• A “disability-related inquiry” must be job-related and consistent with business necessity

• ADA definition of a “disability-related inquiry”: “a question (or series of questions) that is likely to elicit information about a disability.”
Examples “disability-related inquiries”:

• Inquiring about the nature or severity of an employee’s disability
• Asking an employee to provide medical documentation regarding his/her disability
• Asking an employee about current or past use of prescription medications
• Asking a broad question: “What impairments do you have?”
Permitted questions under the ADA – examples:

• Asking an employee whether he/she can perform the functions of the position
• Asking an employee whether he/she has been drinking or is currently using illegal drugs
• Asking a pregnant employee how she is feeling or when her baby is due
Employer can ask for medical information when:

• Employer has a reasonable belief, based on objective evidence, that:
  
  o an employee’s ability to perform essential job functions will be impaired by a medical condition; OR
  
  o an employee will pose a direct threat due to a medical condition

• The inquiry follows up on a request for reasonable accommodation, where the disability or need for accommodation is not known or obvious
Contact with employee’s provider

- No set procedures like under FMLA
- Still need authorization from employee
- Use of form for provider a good start, but beware of one-size-fits-all – See EEOC Informal Discussion Letter 02/25/2014
- Discussions direct with provider can be very productive
- Include employee so that it is part of the interactive process
- Ensure provider has list of employee’s essential functions
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Use the Medical Provider in the Interactive Process

- Facilitate discussions and communications with employee
- Obtain provider’s medical opinion on requested accommodations based on employee’s condition
- Get ideas for alternatives to the accommodation(s) requested by the employee
Additional ADA Mental Health Challenges
Supervisors and Supervisory Methods

- Common mental health workplace issue
- Employer is not required to change supervisors
- Changing supervisory methods can be a reasonable accommodation:
  - Day-to-day guidance & feedback
  - Written job instructions
  - Clear performance expectations and consequences
  - Frequent meetings to check on progress, provide next steps
  - Encourage questions
  - Develop strategies to deal with conflict
Conduct & Performance Issues

Employer’s options and requirements under ADA may depend on whether the employee’s conduct or performance at issue is a violation of a “conduct standard”:

• A conduct rule that is job-related for the position in question and consistent with business necessity

• Examples for any position:
  o Rules against theft, violence, threats

• Examples for a specific position:
  o Absence and tardiness rules for a receptionist
  o Rules requiring professionalism and courtesy for a customer service position

• Example not a conduct standard: dress code and workplace courtesy rules for a warehouse employee with no customer contact and little interaction with coworkers
Conduct & Performance Issues

Employer does **not** have to:

- Tolerate misconduct or poor performance caused by a disability if it doesn't know about the disability
- Excuse past misconduct once disability is disclosed
- Rescind discipline – even termination – when employee later discloses the issues were caused by a disability
- Excuse misconduct caused by employee’s failure to take mental health medication
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Conduct & Performance Issues

Employer may have to:

• Provide accommodation to enable mentally impaired employee to comply with conduct and performance requirements

• As an accommodation, excuse noncompliance with rules that are not a conduct standard
Direct Threat

- **Direct threat**: a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.
  - **Significant risk**: a high (not just slightly increased) risk of harm

- **Assessment is based on**
  - Individualized assessment of employee’s condition
  - Most current general medical information
  - Most current specific medical information about employee and medications

- **Not based on**
  - Assumptions of employee’s abilities
  - Assumptions about employee’s type of mental impairment
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Direct Threat

Examples:

• **No direct threat**: An employee with a mental impairment has a job operating an electric saw. She discloses she takes medication that may decrease concentration and coordination. Employer’s doctor learns that the employee takes a relatively low dose with minimal side effects, and past work history reveals no safety issues.

• **Direct threat**: An applicant was recently terminated by prior employer for escalating incidents of workplace confrontations and threats. The applicant took time off from his prior job to receive medical treatment but returned with the same issues and was terminated. Since then he admits he has not received any further treatment.
When Can an Employer Ask About a Mental Disability?

ADA has strict limitations on ability to inquire about an employee’s mental impairment:

- **Application stage**: when a applicant asks for an accommodation in the hiring process and disability is not obvious – employer can require medical documentation

- **Post-offer/pre-employment**: employer can ask about mental impairment or require psychiatric exam if same is required of all employees hired into same job
  - Does not have to be job-related and consistent with business necessity
When Can an Employer Ask About a Mental Disability?

- **During employment**: Must be job-related and consistent with business necessity

- Available when employer has reasonable belief based on objective evidence that:
  - Employee’s ability to perform essential functions impaired by mental impairment OR
  - Employee poses a direct threat due to mental impairment
Avoiding ADA Litigation
### Mental Health Not-So-Basics Under The ADA

#### What Employers Must Do to be ADA Compliant

1. **Have compliant ADA policies to express company compliance and ensure consistent application.**

2. **Identify essential functions in job descriptions**
   - *Doak v. Johnson (Dept. of Homeland Security)* *(D.C.Cir. 8/18/15)*
   - *EEOC v. Wal-Mart*, 187 F.3d 1241 *(10th Cir. 1999)*

3. **Train Supervisors**
   - *EEOC v. Wal-Mart*, 187 F.3d 1241 *(10th Cir. 1999)*

4. **Eliminate all inflexible leave polices**
   - *Lowe’s, Verizon, Sears ...*

5. **Recognize leave of absence as a reasonable accommodation in general.**
   - *Roberts v. Bd. Of County Comm’rs*, 691 F.3d 1211 *(10th Cir. 2012)*
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**What employers must do to be ADA compliant**

6. Engage in the interactive process in good faith

7. Don’t forget the “accommodation of last resort” — reassignment
   - *EEOC v. United Airlines* (Consent Decree 6/11/15)

8. Undue hardship is very difficult to establish – be sure to consider all factors, not just cost

9. Follow up with the employee - accommodation not “one and done.”
   - *EEOC v. UPS Supply Chain Solutions*, 620 F.3d 1103 (9th Cir. 2010)

10. REMEMBER: ADA applies to employees even when covered by other laws – WC, FMLA, state leave laws, disability plans, medical leave policies . . .
ADA Policy Essentials

1. General EEO policy, including individuals with a disability
2. Discrimination, harassment, retaliation on the basis of disability will not be tolerated
3. Disciplinary action will be taken against any employee who engages in prohibited actions
4. Employees must report complaints of disability discrimination, harassment, retaliation to employer [provide at least 2 options]
5. Any complaint of discrimination, harassment, retaliation will be investigated promptly
6. Employee with a disability who needs an accommodation must notify company [provide at least 2 options]
7. Company will engage in interactive process with the employee to determine an appropriate accommodation
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- Job Accommodation Network:  http://askjan.org/
  - Accommodation Ideas for Mental Health Impairments
    - http://askjan.org/media/Psychiatric.html
- State vocational rehabilitation agency: find your state agency at http://askjan.org/cgi-win/TypeQuery.exe?902
- Other state agency assistance: http://www.servicelocator.org/
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  https://www.eeoc.gov/policy/docs/psych.html

  http://www.eeoc.gov/policy/docs/accommodation.html

- EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA) (2000)
  http://www.eeoc.gov/policy/docs/guidance-inquiries.html
EEOC Informal Discussion Letter 02/25/2014: Usage of ADA forms

EEOC Fact Sheet: Work At Home/Telework as a Reasonable Accommodation (2005)
http://www.eeoc.gov/facts/telework.html

www.Matrix-Radar.com
Questions?
Thank you.

Marti Cardi, Esq.
VP, Product Compliance
Matrix Absence Management, Inc.
Marti.Cardi@matrixcos.com