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Employee Mental Health Issues

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Agenda

- Mental Health Facts and Employment
- FMLA and Mental Health
- ADA and Mental Health
- How Can the Employer Help

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Mental Health Facts & Employment

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Mental Health Facts

- 1 in 5 U.S. adults experience mental illness each year.
- 1 in 20 U.S. adults experience serious mental illness each year.
- 1 in 6 U.S. youth aged 6-17 experience a mental health disorder each year.
- 50% of all lifetime mental illness begins by age 14, and 75% by age 24.
- Suicide is the second leading cause of death among people aged 10-34.

Source: www.nami.org

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Mental Health Facts

- 11 years is the average delay between symptom onset and treatment
- 19% of U.S. adults with mental illness also have a substance use disorder
- Depression and anxiety have a significant economic impact; the estimated cost to the global economy is US\$1 trillion per year in lost productivity
- Harassment and bullying at work are commonly reported problems, and can have a substantial adverse impact on mental health
- According to the World Health Organization, for every US\$1 put into scaled-up treatment for common mental disorders, there is a return of **US\$4** in improved health and productivity

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Mental Health Facts

- According to the CDC, poor mental health and stress negatively affects employee:
 - Job performance and productivity
 - Engagement with one's work
 - Communication with coworkers
 - Physical capability and daily functioning
- Mental illnesses such as depression are associated with higher rates of disability and unemployment
 - Depression interferes with a person's ability to complete physical job tasks about 20% of the time and reduces cognitive performance about 35% of the time.
 - Only 57% of employees who report moderate depression and 40% of those who report severe depression receive treatment to control depression symptoms

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Mental Health Facts

- In a 2021 Mental Health at Work Report
 - 50% of full-time U.S. workers have left a previous role due, at least in part, to mental health reasons
 - This number rises to:
 - 81% of Gen Z respondents
 - 68% of Millennial respondents
 - 32% when considering voluntary departures
 - On average, workers reported performing at 72% of their full capacity in the past year when considering their mental health
 - Absenteeism is on the rise
 - On average, respondents missed 8 days due to mental health
 - Younger workers and historically underrepresented communities are disproportionately impacted

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Common Warning Signs of Mental Illness

- Feeling very sad or withdrawn for more than two weeks
- Trying to harm or end one's life or making plans to do so
- Severe, out-of-control, risk-taking behavior that causes harm to self or others
- Sudden overwhelming fear for no reason, sometimes with a racing heart, physical discomfort or difficulty breathing
- Significant weight loss or gain

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Common Warning Signs of Mental Illness

- Seeing, hearing or believing things that aren't real
- Excessive use of alcohol or drugs
- Drastic changes in mood, behavior, personality or sleeping habits
- Extreme difficulty concentrating or staying still
- Intense worries or fears that get in the way of daily activities
- Inability to cope with daily problems or stress

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Challenges of Hidden Disabilities

- Employers and co-workers don't understand and are suspicious
- Employees reluctant to disclose due to stigma
- Accommodation process can be overwhelming
- Can lead to performance issues
- Difficult to manage absenteeism

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What Do These Facts Mean For You?

- There is a high probability that several of your coworkers and/or those you supervise are living with a mental health condition
- Employees often are reluctant to disclose that they suffer from a mental impairment for multiple reasons:
 - Desire for privacy
 - Fear of stigma
 - Desire not to look weak
 - Fear of losing the job
- What can employers do to help? Are there limits on the steps employers are allowed to take?

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What Do These Facts Mean For You?

- Employees do not have to be disabled to engage in misconduct or be unfit for a job
- However, when an employee with a known mental impairment engages in misconduct or is unable to perform her job, the ADA, FMLA and other laws may protect both the employee and the employer
- When a mental health impairment causes misconduct or fears about the ability of the employee to safely perform the job, there are two clear paths and knowing which to take often determines the outcome if legally challenged

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FMLA and Mental Health

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What are the rules?

- Employers do not have a “duty of care” that requires them to take certain steps if an employee is at risk
- In fact, employers may be restricted in their ability to investigate and help an employee who is struggling
- BUT no employer wants to watch its employees struggle with mental health and not attempt to help
- So . . . What are the rules that limit an employer’s options when helping an employee with mental illness?

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The Family and Medical Leave Act (FMLA)

- The Family and Medical Leave Act (FMLA) of 1993 allows eligible employees to take job-protected leave to obtain treatment for mental health issues, or when such medical issues render the employee unable to perform essential job functions
- “Serious Health Condition” includes most mental health issues, unless those issues are extremely minor
- Includes time away from work for alcohol or drug rehabilitation

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The Family and Medical Leave Act (FMLA)

- It is the employee’s responsibility to request FMLA leave or to put the employer on notice of a need for leave
- No “magic words” are needed
- An oral request to a supervisor is sufficient. A written request, or a request made to a particular person, is not required
- The employee’s family member, friend or other spokesperson can make the request for the employee

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The Family and Medical Leave Act (FMLA)

- Employees should not be asked to perform work during leave, except extremely infrequently (i.e., to help locate a file; to participate in an occasional call *if* the employee's health care provider permits it)
- Employees should never be criticized for taking leave
- They should not be expected to perform the same amount of work notwithstanding their leave

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Intermittent FMLA Leave: Basics

- Medical leave need not be taken in a large or continuous block
- FMLA can be taken intermittently in days, hourly increments or fractions of hours
- FMLA can also be taken on a "reduced schedule" basis
- Intermittent or reduced schedule leave may be taken for a serious health condition of the employee or for care of a family member

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Intermittent Leave: Basics

- A doctors' note cannot be required for each absence
- Exempt employees can be docked in partial day increments, if they have no paid leave available
- Group health benefits must be maintained
- Employees can be required to re-qualify each year, on the anniversary of the start of intermittent leave

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FMLA Retaliation

- The FMLA prohibits an employer from “interfering with, restraining or denying” FMLA leave rights
- Also prohibits retaliation against employees who take leave
- Communications with employees regarding FMLA leave should be respectful and cooperative, not hostile
- Emails among managers and HR also should not reveal resistance to FMLA leave

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ADA and Mental Health

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The American With Disabilities Act (ADA)

- The ADA provides:
 - Non-discrimination
 - Reasonable accommodation
 - Restrictions on medical exams and inquires
 - Medical confidentiality
 - No retaliation for asserting ADA rights

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Who is Eligible: the ADA's Definition of "Disability"

- A "disability" under the ADA includes a medical or mental impairment that substantially limits one or more major life activities
- According to the EEOC, *most of the time*, the following impairments will qualify:
 - Major depressive disorder
 - Bipolar disorder
 - Post-traumatic stress disorder
 - Obsessive compulsive disorder
 - Schizophrenia
- Other mental impairments will also qualify, depending on the circumstances

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Definition of "Disability"

- Under the ADA Amendments Act (ADAAA), the term "disability" "shall be construed in favor of broad coverage of individuals . . . to the maximum extent permitted by the terms of [the ADA.]
- As a result, it is no longer useful to analyze whether an employee is "disabled" under the ADA, except in very marginal cases

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What Triggers Reasonable Accommodation Obligations?

- Generally, the burden is on the employee to request an accommodation
- What counts as a “request”?
 - Again – no magic words are needed
 - A request for a change in the work environment or policies, OR
 - Raising a medical issue to explain a performance or conduct problem

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Undue Hardship

- An employer does not have to provide a reasonable accommodation that would cause an “undue hardship”
- An almost impossible standard to meet
- Generalized conclusions will not suffice
- Requires “significant difficulty or expense”

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ADA Retaliation

- The ADA prohibits retaliation against employees who have asserted ADA rights
 - Communications with employees regarding ADA issues should be respectful and cooperative, not hostile
 - Employers should fully engage in the interactive process to explore ADA accommodations with employees suffering from mental health issues

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Basics of Interactive Process

- Four-step interactive process:
 - Determine the job's essential functions
 - Establish the individual's limitations
 - Explore potential accommodations
 - Select the most appropriate accommodation
- Failure to engage in the process can be deemed an ADA violation
- An employer does not have to choose the "best" accommodation or the employee's first choice, so long as the accommodation is effective

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The ADA's Confidentiality Requirement

- The ADA requires that employers maintain employee medical information in a confidential manner
- Must be stored on separate forms and in separate medical files
- Exceptions:
 - Supervisors as needed
 - First aid and safety personnel
 - Government officials (such as the EEOC)

How Can Employers Help?

Determine Whether the Mental Health Impairment is Creating a Workplace Misconduct or Fitness for Duty Issue

- Path 1: Does the situation involve workplace misconduct that would make the employee unqualified for the job and result in discipline?
 - If misconduct occurred, it would result in discipline
 - Investigate
 - Check comparators/discipline consistently
 - Ignore medical issues

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Determine Whether the Mental Health Impairment is Creating a Workplace Misconduct or Fitness for Duty Issue

- Path 2: Does the situation involve only whether the employee can effectively perform the job without risk to self or others?
 - Address situation as a “fitness for duty” issue
 - “Medicalizes” the situation
 - Evaluation by employee’s healthcare provider and possible second opinion by employer’s doctor
 - If you choose the fitness for duty path, you can’t practically go back to termination if the employee passes the evaluation

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Performance Problems and Misconduct

- Address in the same way you address with every employee
- Having a disability does not excuse a person from workplace rules and policies
 - Except to the extent exceptions are granted as reasonable accommodations
- Conduct regular performance evaluations
 - Make sure there's a good job fit
 - Make sure everyone is on the same page
- Discipline and eventually remove employee from position

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Why Current and Accurate Job Descriptions are Important

- Understanding corporate structure and everyone's role
- Day-to-day HR functions
- Defending employment litigation
- Identifies essential job functions
- Strengthens arguments about which accommodations are unreasonable
- Identifies duties for healthcare providers to evaluate when releasing employees to return for work/identifying restrictions
- Determines whether position is appropriate for employee's need for light duty

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Guidance and Resources

- EEOC Guidance: Depression, PTSD, & other Mental Health Conditions in the Workplace: Your Legal Rights (directed at employees)
- EEOC Guidance: The Americans With Disabilities Act: Applying Performance and Conduct Standards to Employees With Disabilities
- EEOC Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act
- EEOC Guidance on the Americans with Disabilities Act and Psychiatric Disabilities

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Make Resources Known

- Employee Assistance Programs
- Confiding in Management and HR
- Local Counseling Services
- National Hotlines
- CDC website
- National Institute of Mental Health
- National Alliance on Mental Illness

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Actions Employers Can Take

- According to the Kaiser Family Foundation's 2021 Employer Health Benefits Survey, during the pandemic, employers with at least 50 employees made benefit changes, including:
 - 31% increased ways to access mental health services such as telemedicine
 - 16% increased EAP offerings
 - 6% expanded access to in-network mental health providers
 - 4% reduced cost sharing for such visits
 - 3% increased coverage for out-of-network services

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Actions Employers Can Take

- Host seminars or workshops that address depression and stress management techniques, like mindfulness, breathing exercise, and meditation, to help employees reduce anxiety and stress and improve focus and motivation
- Create and maintain dedicated, quiet spaces for relaxation activities
- Provide managers with training to help them recognize the signs and symptoms of stress and depression in team members and encourage them to seek help from qualified mental health professionals
- Give employees opportunities to participate in decisions about issues that affect job stress

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Create a Culture of Health

- The workplace is an optimal setting to create a culture of health because:
 - Communication structures are already in place
 - Programs and policies come from one central team
 - Social support networks are available
 - Employers can offer incentives to reinforce healthy behaviors
 - Employers can use data to track progress and measure the effects
 - Distribute materials, such as brochures, fliers, and videos, to all employees about the signs and symptoms of poor mental health and opportunities for treatment
- Office culture contributes to the likelihood that an employee will share potential signs of distress in others
- Create a culture where employees can seek help

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Create a Culture of Health

- If managers/supervisors are caring and accessible, employees are more likely to seek help for their mental health challenges
- Be aware of upcoming challenges at work that might affect an employee's personal life
- Managers can check in after unexpected and expected life events or work stresses
- The more information employees share, the easier it is to anticipate and prevent an escalation
- Encourage and create spaces for self-care: Break room, relaxation room, events unrelated to work objectives

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Thank **you.**