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Mental Health Issues in the Workplace: A Global Perspective

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The intentional crash of Germanwings flight 9525 into the French Alps in March by an apparently mentally ill co-pilot shocked and distressed not just the millions of people who fly each day, but also the millions of responsible employers who strive to provide safe workplaces for their employees. The employers' distress stems not just from the potential tragic consequences, but also from the challenges intrinsic in monitoring the mental health of employees.

Monitoring the mental health of employees is difficult, if not impossible. That is because of the inherent nature of mental illness: it can be difficult to diagnose—usually the employee must first acknowledge a potential issue—and mental illness can be hidden from or downplayed to both employers and

health care professionals. Point in fact: the U.S. National Institute of Mental Health estimates that almost 20 percent of American adults suffer from some kind of mental illness, but that only about half of those affected receive any kind of treatment.

Policing a workplace for possible mental health issues is most important and most challenging in a safety-oriented business such as aviation, other forms of transportation, utilities, health care and education. In aviation, and in other safety-sensitive industries, government regulation usually supplements an employer's efforts to ensure the physical and mental fitness of its employees. But employer efforts always must comply with the legal restrictions, which vary widely by jurisdiction. After a tragedy like the Germanwings crash, those regulations and employer policies and practices are closely scrutinized and criticized by the government, the employer and the victim's families and attorneys.

Although laws vary by jurisdiction, at the heart of this issue in most countries are the same compelling, but competing, interests: employers must ensure workplace safety for all employees while still maintaining employees' medical confidentiality. Where the line is drawn between these competing interests has a role in preventing workplace tragedies. The laws of Germany, the United Kingdom and the United States are instructive.

Germany

In Germany, for example, legislation related to workplace mental health is fragmentary at best and in need of reform. Government regulations address obligatory health checks, medical data protection and professional confidentiality obligations for company medical officers, but how these provisions interact is left largely for the courts to determine on a case-by-case basis.

Most relevant is how medical privacy and doctor-patient confidentiality laws interact with the employer's strong interest in receiving accurate information about employee job fitness. Confidentiality laws cover any information shared between doctor and patient, including any potential health issues, diagnoses or treatments, and also include any medical examinations required by government regulations. Similarly, data protection laws generally require the employee's prior consent to permit a medical professional to transmit even basic information (such as "fit" or "unfit") to the employer or the authorities. Only three exceptions exist:

1. When there is a statutory obligation to do so (as in case of infectious diseases).

2. When the patient has confided that they are planning a criminal offense (such as a pilot who shares plans to crash his plane).

3. When there is an emergency (perhaps a school bus driver who confides during a work break that he is an alcoholic).

German law puts a heavy burden on medical professionals, who risk criminal prosecution if they err on the side of public safety. On the other hand, employers cannot force employees or doctors to provide additional information or they will risk criminal prosecution. Employers can act only on the information they receive from the medical officer, who in turn—for his own protection—will not share any information with the employer unless one of the three exceptions applies. I believe that legislative action is clearly needed, although a careful approach is required to prevent employees from simply ceasing to report mental health issues to their medical professionals.

United Kingdom

By comparison, the laws in the U.K. are quite different and thus more functional for employers. U.K. employers owe a "duty of care" to all of their employees and to each employee individually, including those with mental illnesses. Mental illness can constitute a disability under U.K. law, which then requires the employer to make reasonable adjustments to employees' working environments and to not discriminate against them. When U.K.-based employers learn of a potential mental issue, regardless of the source, they may raise the issue with the employee.

In the U.K., potential employees can be asked about their medical history or required to submit to medical examinations, but only after a job offer has been made. Employers should frame questions carefully and ensure that offers of employment are conditional on satisfactory completion of the medical screening process to be able to rely on any declarations made in this process. When addressing safety concerns related to possible mental illness, employers must obtain a proper understanding of the condition and its potential impact. An employer should not respond in a knee-jerk fashion, such as insisting that it does not employ persons with bi-polar disorder, but instead deal appropriately with the behavior or issues it has observed that it believes may be related to an employee's condition.

United States

U.S. law on the issue is very similar to what we see in the U.K. In the U.S., workplace medical privacy and treatment of employees with medical issues are largely regulated by the Americans with Disabilities Act. The ADA prohibits employers from discriminating against employees with disabilities and requires

that the disabilities be accommodated. A disability is technically defined as a physical or mental impairment that substantially limits a major life activity, but is broad enough in reality to include most medical conditions. The ADA also requires that:

1. Employee medical information be treated as confidential.
2. Employees be subjected to medical examinations and inquiries only after a conditional job offer is extended or, later, if job-related and truly necessary.
3. Employees with disabilities be accommodated in the workplace, if necessary and reasonable.

Although the ADA is primarily an employee-protection statute, it is rife with flexible language (such as requiring only "reasonable" accommodations) that affords employers a number of options for addressing concerns over employees' mental health. These concerns may derive from low productivity, poor attendance, interpersonal conflict, odd behavior or even employee gossip. Regardless of the source, employers can and should investigate the issue to ensure first and foremost that there are no workplace safety issues, but also that employees are performing to expectations.

I advise clients that the key to addressing such issues is to focus on facts, not suspicions. If performance is markedly low, attendance poor or behavior unacceptable, that should be the only topic of conversation with the employee. An employer's suspicions about the source of the problem should not be raised. Talk only about the employer's legitimate expectations and the points where the employee's conduct either is or may be falling short. If the conduct or deficiencies are tied to a mental health issue, only the employee should make that connection. And employees who raise mental health issues should be cautioned to share only the information related to the conduct or performance at issue and assured that any information they share will be treated confidentially. If at all possible, HR should be involved in the discussion.

Suggestions for Addressing Employee Mental Health Issues

When employees raise mental health issues in the workplace, employers should satisfy themselves that employees remain fit to perform their job functions and that no job accommodations are required. This first requires a discussion with the employee to understand the employee's perspective on the situation. Documentation or additional information may be needed from the employee's treating medical professional, either to confirm what the employee has reported or to obtain additional facts about it. Employers also

may need to consult with their own medical or mental health professional to better understand a situation or obtain guidance on next steps. An employer ultimately may decide that it is prudent to send the employee for a fitness-for-duty examination by a medical specialist that it trusts. Especially in that case, a medical professional should be consulted so that the decision is based on a professional medical assessment, not a lay assessment, in the event the decision is later challenged.

Ultimately either the employee's own health care provider or the employer's fitness-assessing physician likely will provide advice and recommendations on whether and how to manage the condition in the workplace. If an employee's mental illness is medically assessed as posing an ongoing workplace risk, the employer may not be able to accommodate it. Or the condition may be suited to accommodation, but not in the employee's current role. Employers should consider what other positions the employee could safely and adeptly fill, or whether aspects of the employee's current position (such as work hours or work environment) could be adjusted to better enable the employee to perform the job.

Simply engaging employees in these conversations exposes employers to legal claims. That is one of many reasons why it is so important to approach these conversations properly. Concern over legal liability, however, should never be prioritized over workplace safety, especially in safety-sensitive industries. Employers must realize, however, that the reality of mental illness means that the risk of workplace incidents like the Germanwings crash simply cannot be completely eliminated.

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