

The New Era of Mental Health in the Workplace; the FMLA and ADA Implications

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Executive Summary:

There is no denying that the COVID-19 pandemic has changed the landscape of the workplace. Whether for better or for worse may be subject to debate and personal opinion, but what is a fairly certain point is that the pandemic, now in its third year, has forced the United States workers and their employers to gradually become more and more aware of mental health in the workplace. It's a new era for mental health for sure—one that requires U.S. companies to be closely aware of their legal obligations with respect to recognizing and accommodating mental illness. Both the Wage and Hour Division of the United States Department of Labor (DOL), which enforces the Family and Medical Leave Act of 1993 (FMLA), and the Equal Employment Opportunity Commission (EEOC), which enforces the Americans with Disabilities Act of 1990, as amended (ADA), have signaled, since the start of the pandemic, their interest in enforcing compliance, and so employers are well-advised to understand their legal obligations to employees when it comes to mental health.

Mental Health Statistics:

About one-fifth of U.S. workers reportedly suffer from mental illnesses, but only about half of them reportedly seek treatment. The failure to seek care is historically blamed on the shame and stigma associated with being known as someone with mental illness. That's a problem for individuals themselves, but is also a problem for their employers as untreated mental health conditions cost U.S. companies billions of lost revenue every year. That is because untreated mental health illness may be the cause of poor performance, burnout, and problematic behaviors in the workplace. Mental health issues can also create other, physical disorders including heart disease, diabetes, or respiratory issues, which further decrease workers' physical and cognitive performance and productivity, and, overall, their job satisfaction.

Prior to the beginning of the COVID-19 pandemic, workplace policies regarding mental health were nice-to-haves; in the era of the pandemic, they are becoming must-haves. Indeed, reports indicate that COVID-19 has had serious effects on workers' mental health and that cases of mental disorders have skyrocketed during the pandemic, including tens of millions of new cases of depression and anxiety disorders. COVID-19-related mental health issues are said to have become the "second pandemic."

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DOL's New Guidance on FMLA and Mental Health

To increase awareness of FMLA rights as they relate to mental health and in recognition of May being Mental Health Awareness Month, the DOL recently issued new FMLA mental health resources. The high note of DOL's May's publication is that no FMLA-eligible worker should "ever worry or hesitate to request time off due to a serious mental health condition."

By way of a succinct overview, FMLA covers all U.S. states including Florida and provides eligible employees with up to 12 weeks of unpaid, job-protected leave for specified reasons, including medical and family leave needs. FMLA protects employees from losing benefits and their current position if they need to take leave. An eligible employee may take FMLA leave for her own "serious health condition," or to care for a spouse, child, or parent because of a serious health condition. Serious health conditions include mental health conditions that require inpatient care or continuing treatment by a health care provider. Employers probably deal most often with the latter kind, which includes conditions that incapacitate an individual for more than three consecutive days and require ongoing medical treatment, and chronic conditions (e.g., anxiety, depression, or dissociative disorders) that cause occasional periods when an employee is incapacitated and requires treatment. Leave may also be taken to provide care for a spouse, child (generally, a minor, but also an individual 18 years old or older if incapable of self-care), or parent with a mental health condition, which includes providing psychological comfort and reassurance that would be beneficial to a family member with a serious health condition who is receiving inpatient or home care.

Although whether the FMLA extends to an employee's specific medical situation is fact-specific, what follows are a few examples of when employees would be entitled to FMLA leave, assuming they work for a covered employer and are otherwise eligible:

- An employee who reports being unable to work because of severe anxiety and who sees a physician monthly for her condition to manage symptoms. This example concerns a chronic mental condition that causes occasional periods of incapacity and requires ongoing treatment, and so it is covered under the FMLA;
- An employee who is under the care of a psychologist and attends psychotherapy sessions regularly for anorexia nervosa. The employee may take FMLA for treatment visits and therapy sessions for the condition, and may use leave when unable to work or when receiving treatment for her condition;
- An employee whose 24-year-old daughter was recently released from inpatient treatment for a mental health condition and is unable to work or go to school and needs help with cooking, cleaning, shopping, and other daily activities because of her condition. The employee may take FMLA because

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her adult child is incapable of self-care because of a serious health condition and needs care because of that condition;

- An employee who attends a family counseling session for her spouse who is in an inpatient treatment program for substance abuse. The employee may use FMLA to provide care for her spouse, which includes participating in her spouse's medical treatment program or attending care conferences with the spouse's health care providers;
- An employee whose mother, after the employee's father passed away, began to see a doctor for depression and needs assistance with day-to-day self-care because of her depression. The employee in this situation may use FMLA to take her mother to medical appointments and help with the mother's day-to-day needs, and to provide physical and psychological care to her mother. Importantly, the employee does not need to be the only individual or family member available to help in order to use FMLA leave for her mother's care. Caring for a family member under the FMLA includes helping with basic medical, hygienic, nutritional or safety needs, and filling in for others who normally provide care.

As a reminder, the FMLA requires employers to keep employees' medical records confidential and maintain them in separate files from more routine personnel files. Careless record-keeping and/or failure to maintain confidentiality about employees' or their family members' mental health conditions and illnesses may lead not only to litigation under the FMLA, but also under other causes of action such as the ADA, the Genetic Information Nondiscrimination Act (GINA), or Florida common law causes of action such as invasion of privacy, assuming the underlying conduct is highly offensive to a reasonable person and other elements of the tort are met.

Implications Under the ADA:

The FMLA's "serious health condition" is generally perceived as a somewhat less stringent standard than the standard for "disability" under the ADA. In practice, a mental health condition which satisfies the FMLA definition will likely be considered an ADA-qualifying disability as well, even though the statutory tests are different. Because the Florida Civil Rights Act of 1992 (FCRA) is generally analyzed consistent with the ADA, an FMLA serious health condition will likely qualify as a "handicap" under the FCRA, as well.

Considering whether an employee is entitled to FMLA benefits in connection with a mental health condition often goes hand-in-hand with considering the ADA—especially where the FMLA entitlement has run out or is about to run out. "Disability" under the ADA encompasses mental impairments that substantially limit a major life activity and is broad enough to include most mental conditions. EEOC regulations make clear that any mental or psychological disorder, including an emotional or mental illness, qualifies as a

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covered impairment and that major life activities include, but are not limited to, “[c]aring for oneself, performing manual tasks, ... sleeping, ... concentrating, thinking, communicating, interacting with others, and working.” ADA requires employers to accommodate qualified employees with mental health disabilities. Because Florida courts interpret the FCRA consistent with the ADA, an employer that has failed to reasonably accommodate an employee’s mental health condition will likely be found to have violated the FCRA, as well.

The EEOC’s Pursuit of Cases Involving Mental Health:

The EEOC has demonstrated that it is serious about pursuing cases where the employer subjected an employee to adverse employment action where the employee’s mental health condition and/or treatment for same and/or exercise of the leave rights in connection with same were involved. The EEOC’s “select” list of resolved cases “involving mental health under the ADA,” as of May of 2022, can be found [here](#).

As specific to Florida, on December 18, 2020, the EEOC issued a press release, stating that a Florida electronics manufacturer had agreed to pay \$35,000 and furnish other relief to settle a disability discrimination lawsuit filed by the EEOC in the U.S. District Court for the Middle District of Florida. The EEOC alleged the company unlawfully demoted and later fired an employee after she was hospitalized and diagnosed with major depressive disorder. When she returned to work, the company stripped her of her job duties and later demoted her and cut her pay. The company terminated her employment about four months after her hospitalization. The EEOC took the position that the above conduct violated the ADA. In addition to the \$35,000 in monetary relief, the three-year consent decree settling the lawsuit required the company to appoint an ADA coordinator, develop and distribute a written policy against disability discrimination, and to conduct anti-discrimination training for all company personnel. The company was also made to post a notice at its worksite about the lawsuit and submit annual written reports to the EEOC.

Conclusion: With May being Mental Health Awareness Month, the issue of mental health came again to the forefront of the DOL’s and the EEOC’s attention. Both agencies have demonstrated they are intent on pursuing FMLA and ADA/FCRA violations when it comes to mental health. While we have somewhat learned to live with the COVID-19 pandemic in the background, it does not look like it is going away. Nor do the mental health issues, especially in the light of the current events that have compounded the COVID-19 situation, including high-profile murders, political unrest, mass shootings, and the war in Ukraine. In light of these current events, it is more important than ever for employers to be sensitive to their workers’ and their family members’ mental health needs, not only to maintain their productivity and job satisfaction, but potentially to avoid costly litigation.