



MANAGING EMPLOYEE WELLNESS & DISABILITIES IN THE WORKPLACE

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AGENDA

- ▶ Americans with Disabilities Act
- ▶ Mental Disabilities
- ▶ Accommodation Obligations
- ▶ Best Practices

Statistics

- ▶ According to National Alliance on Mental Illness
 - ▶ 1 in 5 adults go through mental illness each year
 - ▶ 1 in 20 adults have serious mental illness each year
 - ▶ 50% of all lifetime mental illness begins by age 14 and 75% by age 24
 - ▶ Suicide is the 2nd leading cause of death for people aged 10 - 34

Statistics

- ▶ Top Mental Health Conditions by Condition:
 - ▶ Major Depression: 8.4%
 - ▶ Anxiety Disorders: 19.1%
 - ▶ Posttraumatic Stress Disorders: 3.6%
 - ▶ Bipolar Disorders: 2.8%
 - ▶ Borderline Personality Disorder: 1.4%

Mental Health and the Workplace

- ▶ Affects of mental condition on production
- ▶ Affects of mental condition on morale of co-workers
- ▶ Potential workplace violence issues
- ▶ Confidentiality issues - medical information

Issues Addressing Mental Disabilities in the Workplace

- ▶ Mental disabilities and stigma
- ▶ Mental disabilities often times hard to detect
- ▶ Employers do not know how to respond to mental disabilities
- ▶ Potential claims of discrimination in managing employee performance

Common Problems in the Workplace

- ▶ You have a dependable long-term employee that recently exhibits unusual behavior never seen before
- ▶ You recently hired a new employee and s/he informs you she suffers from anxiety, depression, bi-polar disorder
- ▶ You have spent months training, mentoring, coaching an underperforming employee and when you decide to issue the first written reprimand, s/he informs you of mental disabilities as the cause for the poor performance

What Are the Issues?

- ▶ Is the employee disabled under the law?
- ▶ Is the employee entitled to an accommodation?
- ▶ When or is the employer is obligated to initiate the reasonable accommodation process
- ▶ Identifying the essential job functions
- ▶ Can or when can the employer terminate an employee with a mental disability

What is a Mental Disability?

- ▶ Americans with Disabilities Act
- ▶ California Fair Employment and Housing Act
- ▶ ADA Definition
 - ▶ A physical or mental impairment that substantially limits one or more of the major life activities of an individual, a record of such an impairment and being regarded as having such an impairment.
 - ▶ Mental Impairment includes:
 - ▶ Any mental or psychological disorder such as emotional or mental illness
 - ▶ Mental disability must substantially limit one or more major life activities

Mental Disabilities

- ▶ Mental Disabilities Recognized by EEOC
 - ▶ Major depression
 - ▶ Bipolar Disorder
 - ▶ Anxiety
 - ▶ Panic Disorder
 - ▶ Obsessive Compulsive Disorder
 - ▶ PTSD
 - ▶ Schizophrenia
 - ▶ Personality Disorders

Mental Disabilities

- ▶ Traits and Behaviors are not, alone, mental impairments although these traits may be linked to a mental disability
- ▶ Examples of traits and behaviors:
 - ▶ Stress
 - ▶ Irritability
 - ▶ Chronic lateness
 - ▶ Poor judgment

Major Life Activities

- ▶ Major Life Activities Limited by Mental Impairments, other than Working
- ▶ Learning
- ▶ Thinking
- ▶ Concentrating
- ▶ Interacting with others
- ▶ Sleeping
- ▶ Unable to care for oneself



Major Life Activities

When does the impairment substantially limit major life activities of interacting with others, concentrating, thinking, sleeping?

- ▶ The employee meets the standard if, due to the impairment, he/she is significantly restricted compared to the average person in the general population.
- ▶ Interacting with others
 - ▶ i.e.: consistent high levels of hostility, withdrawal, unwilling to communicate when needed
- ▶ Concentration
 - ▶ i.e.: employee is easily distracted, frequent intrusive thoughts
- ▶ Sleeping
 - ▶ i.e.: sleeping few hours due to depression

Essential Functions of the Position

- ▶ What are Essential Functions?
- ▶ Essential Functions are the basic job duties to be performed with or without an accommodation
- ▶ Examine each job to determine which tasks are essential to performance
- ▶ Factors to consider in determining essential job functions:
 - ▶ Does the position exist to perform that function?
 - ▶ Number of employees available to perform that function
 - ▶ Degree of expertise or skill required to perform the function

Understanding “Essential Functions”

- ▶ Essential functions are fundamental to the position
- ▶ Consider the following:
 - ▶ Ability to work in stressful conditions/environment?
 - ▶ Ability to get along with co-workers and students?
 - ▶ Attendance?
 - ▶ Punctuality?



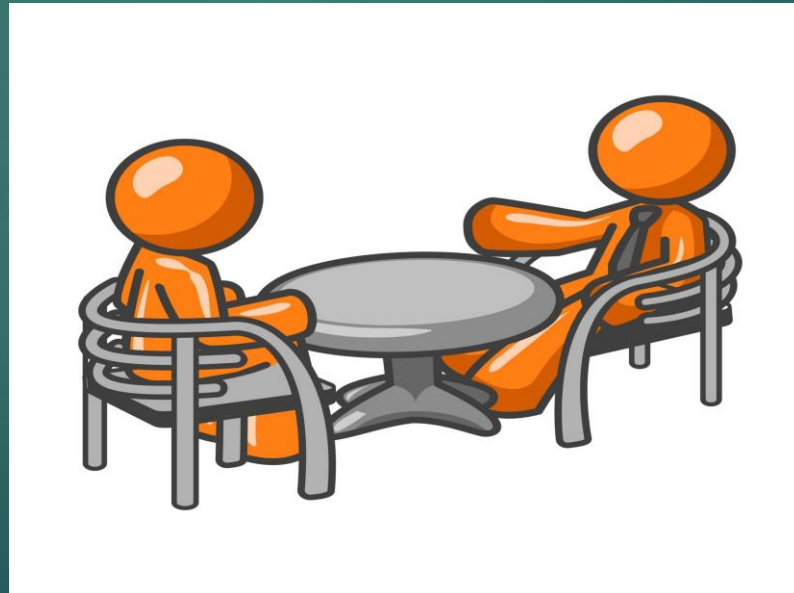
Americans with Disabilities Act/Fair Employment & Housing Act

- ▶ General Obligation under ADA and FEHA
- ▶ The employer must **reasonably** accommodate a disabled employee or applicant unless doing so is an **undue hardship** or creates a **direct threat** to health or safety.



The Good Faith Interactive Process

- ▶ Under the ADA and FEHA, the employer is required to engage in a good faith interactive process to explore reasonable accommodations for the employee.



How and When does the Employer Start the Interactive Process?

- ▶ Start the process when:
 - ▶ Employee asks for accommodation
 - ▶ Employer learns of the employee's need for an accommodation
 - ▶ Employer has reason to know of a need for an accommodation
 - ▶ Examples:
 - ▶ Difficulty performing some aspect of the job
 - ▶ Exhaustion of all leaves including FMLA/CFRA, workers' compensation leave
 - ▶ Unusual or change in behavior

Asking for Medical Documentation

- ▶ Employer may ask for reasonable medical documentation when the disability is not obvious
- ▶ Contents of the medical documentation
 - ▶ EE has a condition that limits a major life activity or medical condition
 - ▶ Describes why accommodation is needed – functional limitations in performing the essential functions – Disclosure of disability not required
- ▶ ER may ask EE to supplement note if it is insufficient
 - ▶ EE's documentation may be insufficient if it does not specify existence of a disability and explain need for accommodation
 - ▶ Documentation is insufficient if provider does not have expertise to confirm the disability or need for accommodation
 - ▶ If EE fails to provide sufficient documentation, ER still obligated to provide an accommodation but only to the extent the documentation supports the accommodation.
 - ▶ If the note doesn't support an accommodation, no accommodation is required

The Interactive Process

- ▶ Important to document the entire process
 - ▶ All communications with employee
 - ▶ All efforts to find accommodations
 - ▶ All efforts to search for alternate
 - ▶ All communications regarding employee's failure to cooperate



The Interactive Process Steps

- ▶ Determine the essential functions of the job
- ▶ Review and identify potential accommodations
- ▶ Review all lateral positions and lower-level positions
 - ▶ Review job description for lateral and lower-level positions
- ▶ Know specific functional limitations
 - ▶ Hold off on meeting until clear on limitations

The Interactive Meeting

- ▶ Ideally in person
- ▶ EE's inability to engage in the process is not a breach in either party's obligation to engage in the interactive process in good faith
- ▶ Direct communication with EE is preferred but not required.
 - ▶ Through a third party is sufficient
- ▶ Confirm functional limitations and its affect on essential functions
- ▶ Explore options/accommodations



Assistive Animals/Emotional Support Animal

- ▶ If EE wants to bring an assistive animal as a reasonable accommodation, ER may require the following:
- ▶ Animal is free of offensive odors and displays habits appropriate for a work environment (i.e., elimination of feces and urine)
- ▶ Does not engage in behavior that endangers the health and safety of the EE and others



Examples of Accommodations

- ▶ Managing Panic Attacks
 - ▶ Rest area/private space
 - ▶ Identify and reduce triggers
 - ▶ Flexible scheduling
- ▶ Concentration/Attention
 - ▶ Written instructions/more frequent supervision
 - ▶ Privacy panels, shields, cubicles, white noise machine
 - ▶ Alternative lighting
- ▶ Control of Anger/Emotions
 - ▶ Disability awareness training/etiquette training
 - ▶ Alternative lighting
 - ▶ Behavior modification techniques
 - ▶ Remote work

4 – Steps to a Mental Health Friendly Workplace

- ▶ Awareness
 - ▶ Build a supportive work culture
 - ▶ Train Supervisors how to respond to mental illness
 - ▶ Demonstrate empathy
 - ▶ Know the ADA/FEHA accommodation process
 - ▶ Educate employees on symptoms of mental illness
- ▶ Accommodations
- ▶ Assistance
- ▶ Access

Mental Health and Wellness Checklist

- ▶ Awareness
 - ▶ Promote a culture to increase mental health and wellbeing
 - ▶ Offer stress management training
 - ▶ Create a conducive work environment
 - ▶ Plants, natural light, colors, pets(s)
 - ▶ Teach good communication skills and emotional intelligence among supervisors
 - ▶ Train management to recognize signs of mental illness
 - ▶ Inform employees of available resources
 - ▶ Implement strong anti-bullying policies

Mental Health and Wellness Checklist

- ▶ Accommodations
 - ▶ Allow use of sick leave, FMLA/CFRA
 - ▶ Allow unpaid leave for treatment and recovery
 - ▶ Allow flex scheduling for therapy, related appointments, family issues
 - ▶ Remote working, job sharing, adjusting start and stop times
 - ▶ Allow flexibility in breaks to accommodate individual needs instead of requiring employee to rigid break schedules
 - ▶ Job coaching

Mental Health and Wellness Checklist

- ▶ Accommodations
 - ▶ Modifying Work Areas to Help Employee Concentrate
 - ▶ Modify/remove distractions
 - ▶ Room dividers, partitions, sound proofing, private space enclosures
 - ▶ Reduce work noise, use of headsets
 - ▶ Equipment to Help Improve Organization, Limit Distractions, Improve Learning
 - ▶ Recording devices to review meetings
 - ▶ White noise machines
 - ▶ Modifying Job Duties
 - ▶ Remove non-essential job duties
 - ▶ Divide large assignments into small blocks
 - ▶ Additional training to learn job duties

Mental Health and Wellness Checklist

- ▶ Assistance
 - ▶ Consider job coaching, mentoring, training
 - ▶ Flex scheduling policies, remote work policies
 - ▶ Emphasize stress management and training
 - ▶ Offer physical fitness programs
 - ▶ Implement strong anti-stigma campaign for mental illness
 - ▶ Train managers on Conflict Resolution to reduce workplace stress

Mental Health and Wellness Checklist

- ▶ Access
 - ▶ Know your health benefits for mental health coverage
 - ▶ Know your EAP resources
 - ▶ Train all managers on all employer-provided benefits and policies

Performance Issues

- ▶ **QUANTITATIVE AND QUALITATIVE STANDARDS**
- ▶ May an employer apply the same quantitative and qualitative requirements for performance of essential functions to an employee with a disability that it applies to employees without disabilities?

Performance Issues

- ▶ **QUANTITATIVE AND QUALITATIVE REQUIREMENTS**
- ▶ **YES.**
- ▶ Employee with a disabilities must meet the same production and qualitative standards but a reasonable accommodation may require the employer to assist the employee in meeting the production and/or qualitative standard.

Performance Issues

- ▶ **Performance Evaluations**
- ▶ If an employer gives a lower performance rating to an employee and the employee then tells you he/she has a disability that is causing the performance problem, can you still give the lower rating?

Performance Issues

- ▶ **Performance Evaluations**

- ▶ **Yes.**

- ▶ The rating reflects the performance regardless of the reasons for the lower rating.
- ▶ Employer should follow up and reiterate the performance standard and ask why the employee believes his/her disability is affecting the performance standard.
- ▶ If the employee does not request an accommodation, what should you do?

Performance Issues

- ▶ **Accommodations and counseling session**
- ▶ What do you do when, in response to a oral or written counselling meeting, the employee asks for an accommodation for the first time?

Performance Issues

- ▶ **Accommodations and counseling**

- ▶ Employer may continue with the counseling session.
- ▶ But – follow up with starting the interactive process and ask how the disability is affecting work performance and how an accommodation will improve performance.

Note:

If the employee does not inform the employer of the needs for the accommodation until after the performance problem has occurred, the ADA does not require the employer to:

1. Excuse the poor performance
2. Withhold discipline
3. Give an inaccurate evaluation

Performance Issues

- ▶ **Withdrawing Remote Work Due to Poor Performance**
- ▶ Can or should you withdraw a remote work arrangement or a modified schedule provided as a reasonable accommodation because the employee received an unsatisfactory evaluation?

Performance Issues

- ▶ **Withdrawing Remote Work due to Poor Performance**
- ▶ **No.**
- ▶ Employer may not withdraw remote work to punish an employee for poor performance.
- ▶ Employer should not assume the poor performance is related to the accommodation that was provided.
- ▶ Proceed with the poor evaluation and analyze with the employee the effectiveness of the reasonable accommodation provided. If the current accommodation is not working, the parties may need to discuss changes to the accommodation.

Performance Issues

- ▶ **Disability and violation of employer's policies**
- ▶ Can you discipline an employee for violating a workplace rule or policy caused by the disability?

Performance Issues

- ▶ **Disability and violation of workplace policies**
- ▶ **Yes.**
- ▶ If the policy is job-related and consistent with business necessity and other employees are held to the same standard, employer may hold employee to the same standard.
- ▶ Make sure the rule is job-related and consistent with business necessity.
- ▶ Examples of policies that are enforceable:
 - ▶ Violence, threats of violence, stealing, destruction of property
 - ▶ Safety and operational rules
 - ▶ Respect towards supervisors, clients, customers, colleagues

Performance Issues

- ▶ **Discipline for Unacceptable Conduct**
- ▶ What do you do if the employee mentions a disability and the need for an accommodation for the first time in response to discipline for unacceptable conduct?

Performance Issues

- ▶ **Discipline for Unacceptable Conduct**
- ▶ Assuming the rule is job-related and consistent with business necessity, employer may still discipline the employee
 - ▶ Follow up with interactive process
- ▶ However, if the proposed discipline is termination, ADA requires further discussion about the disability and the request for reasonable accommodation.



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