

EEOC targets mental health accommodation

Citing a strong uptick in complaints about mental health disability discrimination, the EEOC has taken steps to inform employees suffering from common conditions like depression about their workplace rights.



The commission just released a step-by-step guide for workers entitled “Depression, PTSD, & Other Mental Health Conditions in the Workplace: Your Legal Rights.”

Preliminary data for fiscal year 2016 shows that EEOC resolved almost 5,000 charges of discrimination based on mental health conditions. It obtained approximately \$20 million for people with mental health conditions who were denied employment and reasonable accommodations.

The new guide is designed to help more applicants and employees understand their rights and what types of accommodations they may be entitled to. An EEOC statement said it addressed post-traumatic stress disorder because the condition is common among veterans trying to reintegrate into the civilian workforce.

In addition to the workers’ rights document, the EEOC also released a guide that specifically addresses the role mental health professionals play in recommending reasonable accommodations under the ADA.

The document, “The Mental Health Provider’s Role in a Client’s Request for a Reasonable Accommodation at Work,” helps therapists and other health professionals advise clients on the ADA and what accommodations they may be entitled to. For example, the guidance suggests that therapists may provide:

- Information about the client’s condition
- How the client would function without treatment
- Whether an accommodation is needed and, if so, what kind.

Expect more applicants and employees with mental health disabilities to know their rights and begin requesting specific reasonable accommodations. Make sure you are ready to engage in the ADA’s required interactive accommodations process.

ONLINE RESOURCES:

Find the explanation of employee rights at www.eeoc.gov/eeoc/publications/mental_health.cfm.

Find the mental health reasonable accommodations document at www.eeoc.gov/eeoc/publications/ada_mental_health_provider.cfm.

Accommodating mental disabilities: 5 key questions answered

The ADA requires employers to reasonably accommodate applicants and employees who have mental or physical disabilities if they are qualified to perform the job's essential functions with or without a reasonable accommodation. These questions and answers come from recent court cases and EEOC guidance:

1. Slipping performance

Q. How should we handle an employee whose performance is deteriorating and whom we suspect may have a mental disability?

A. You can inquire about an employee's potential mental disability if the inquiry is job-related and consistent with business necessity. The EEOC says that means an employer can ask about possible mental disabilities when the employer has a reasonable belief that performance of essential job functions is impaired by a medical condition.

The EEOC says you must first have some objective evidence that the deteriorating performance is related to a mental condition (such as knowledge that the employee suffered from a mental impairment in the past) before making such an inquiry. Thus, a supervisor can inquire about an employee's repeatedly forgetting tasks or being late for work. Supervisors cannot, however, ask whether a mental condition has caused those problems, unless they have some objective evidence.

2. Confidentiality concerns

Q. What should we tell other employees about the accommodation?

A. Keep private all information on employees' medical conditions, including any mental disability. Maintain such information separate from general personnel files as a confidential medical record. You may need to disclose the employee's mental disability to a supervisor if it's necessary to provide an accommodation.

3. Misconduct excuse?

Q. Do we have to tolerate misconduct by employees with mental disabilities?

A. No. Most courts and the EEOC agree that employers can discipline employees with mental disabilities for conduct-rule violations. You can generally hold mentally disabled employees to the same job-related standards that apply to all employees.

4. EAP referrals

Q. If we refer someone to our employee assistance program (EAP), have we now "perceived" the individual as disabled?

A. Not necessarily. Courts in a number of jurisdictions have held that referral to an EAP does not establish conclusively that an employer regarded the referred employee as disabled. In most instances, the employer referred an employee to determine if the employee would constitute a direct threat to himself or others, or to

determine whether the employee was fit to return to duty. The safest course is to permit a satisfactorily performing employee to continue working while participating in the program.

5. Reasonable accommodations

Q. What kinds of accommodations are reasonable?

A. Employers should assess an employee's request for accommodation on a case-by-case basis, evaluating the preferred accommodation and, if warranted, suggesting alternatives. This exchange is the "interactive process" envisioned by the EEOC and is expected in any accommodations case. For people with mental disabilities, you can consider modified work schedules, time off (both paid and unpaid), room dividers, minimizing distractions, offering instructions in a variety of formats and modifying workplace policies. Let's look at the two hypothetical scenarios mentioned above:

- **Work-schedule modifications**, such as permitting an employee to start work later, are often reasonable accommodations to counter the effects of medication taken by employees with mental disabilities. Each situation should be decided on a case-by-case basis. One employer lost the argument that an 8:00 a.m. start time was a bank marketing manager's essential job function. The bank could not articulate a reason for the start time apart from "setting a good example." (*Conneen v. MBNA*)
- **Job coach.** A job coach assists in training a person with mental disabilities to perform the job's essential functions. The EEOC says an employer can be required to provide a temporary job coach as a reasonable accommodation. Some courts have held, however, that an employer is not required to provide a *permanent* job coach or to employ someone whose job functions are actually performed by the job coach. (*EEOC v. Dollar General*)