MANAGING EMPLOYEE STRESS IN THE WORKPLACE: EAP, FMLA AND ADA

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State Bar of Texas
31ST ANNUAL
ADVANCED GOVERNMENT LAW
July 25-26, 2019
Austin

CHAPTER 5

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MANAGING EMPLOYEE STRESS IN THE WORKPLACE: EAP, FMLA, AND ADA

The American Bar Association has defined stress as a physical, mental and emotional response to life's changes and demands.[1] Everyone experiences stress. Any number of factors may contribute to stress, including personality, physical and emotional health, personal relationships, major life changes, and social and job issues.[2]

Stress affects the body, as well as thoughts and emotions. Excessive stress can cause lawyers to experience a variety of health problems from fatigue, headaches, lower back pain, colitis, and ulcers to more serious ailments such as heart attacks and strokes. Other lawyers suffer from lack of concentration, procrastination, missed deadlines, insomnia, depression, anxiety, nervous breakdown, and attacks of rage.

For attorneys, stress is a real problem. In 2016, researchers looked at rates of substance use and other mental health concerns among attorneys.[3] Over 12,000 licensed, employed attorneys completed surveys assessing their alcohol use, drug use, and symptoms of depression, anxiety, and stress.[4] The study found that there were substantial rates of behavioral health problems, with 20.6% screening positive for hazardous, harmful, and potentially alcohol-dependent drinking.[5] Men and younger, less experienced attorneys had a higher proportion of positive screens.[6] Particularly troubling was the fact that respondents 30 years of age or younger were more likely to have higher Alcohol Use Disorders Identification Test scores.[7] Levels of depression, anxiety, and stress among attorneys were significant, with 28%, 19%, and 23% experiencing symptoms of depression, anxiety, and stress, respectively.[8]

In day-to day practice, attorneys may handle subject matter that is particularly sensitive such as prosecutors who handle criminal domestic violence and sexual offense cases, or civil litigators who handle difficult death cases. It is important to identify those areas of practice that might be particularly stressful and be ready to deal with employee health issues that might result.

This paper is going to discuss: informal strategies that an employer can use to deal with employee's health issues; an employer's obligations under the Americans with Disabilities Act (ADA and ADAAA); and an employer's obligations under the Family and Medical Leave Act (FMLA).

I. EMPLOYER STRATEGIES: DEALING WITH EMPLOYEE HEALTH ISSUES AND EMPLOYEE ASSISTANCE PROGRAMS

Employee health issues often impact an employee's attendance or performance at work. Even when an employer does not have a duty under the ADA or FMLA to accommodate an employee with physical or mental manifestations of stress, the employer has a business interest in identifying and assisting its employees get help.

Many times we see managers or HR staff hesitant to step in and provide assistance because they fear a violation of the employee's privacy or HIPAA.[9] But this is simply not a legitimate worry, especially if the employee is having complications performing their job. The employer has a right to ask questions, have those crucial conversations, and even require that the employee seek assistance as a condition of employment.

No law prohibits an employer from asking an employee who calls in sick, "what's wrong?" or even following up in a meeting with the employee to say "I've noticed" and then stating the relevant facts that are causing concern. Employers are responsible for ensuring their employee's safety and well-being and that requires communication.

A. Employee Assistance Programs

Employee assistance programs (EAPs) offer assistance to employees in the way of personal, family and psychological counseling. In their most basic form, EAPs provide referral services, typically via telephone hot lines, to put employees in contact with professionals such as family counselors, psychologists, or psychiatrists. EAPs may

[1] https://www.americanbar.org/groups/lawyer_assistance/resources/stress/
[2] *Id.*
[3] Krill, Patrick R., Johnson, Ryan, Albert, Linda. *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys.* J Addict Med. Volume 10, Number 1. January/February 2016.
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.* (The Alcohol Use Disorders Identification Test (AUDIT) (Babor et al., 2001) is a 10-item self-report instrument developed by the World Health Organization (WHO) to screen for hazardous use, harmful use, and the potential for alcohol dependence.)
[8] *Id.*
[9] Employers and Health Information in the Workplace. https://www.hhs.gov/hipaa/for-individuals/employers-health-information-workplace/index.html

be made available to employees as part of the employer's health insurance plan or at a reduced cost. Some EAPs have been expanded to include marital, legal and financial counseling as well.

Time off for EAP participation may result from an employee's serious health condition, an ADA disability or a workers' compensation injury. Any medical information an employer receives as the result of an employee's referral to the EAP must be kept confidential.

B. Mandatory EAP Referral

In some cases, employers may require participation in the EAP as a condition of employment or as a part of a Drug and Alcohol Policy. For example, in Harris County, if an employee (non-CDL) tests positive for illegal drugs or has a confirmed alcohol concentration of .02 or greater pursuant to the policy, a Department head must terminate the employee or give them a mandatory referral to EAP. An employee that displays the effects of substance abuse or exhibits violent or threatening behavior at work may also be referred to EAP.

For a mandatory EAP referral, follow these sample steps:

Sample EAP Mandatory Referral Process

1. Draft a Management Referral Letter to the employee detailing the events that led to the referral and all of the ongoing requirements, including disclosure of their attendance at appointments and agreement to the recommended treatment plan.
2. Gather information from the employee: name, date of birth, home address and phone number.
3. Call the EAP provider and ask to speak to an Employee Assistance Consultant (EAC). Explain to the EAC that you need to make a management referral.
4. Meet with the employee:
    a. Give them the mandatory referral letter.
    b. Have the employee sign the EAP Management Referral Form.
    c. Explain how the employee can access EAP and have them sign the Release of Information.
    d. Summarize for the employee your performance expectations and plan for improvement.
5. Give the employee a deadline for making the first appointment (within 24 hours, unless given on Friday afternoon) or the employee can use your phone right then to make the call.
6. Send the EAP Management Referral Form to the EAC.

A common question is whether an employer has to pay for an employee's time at activities outside of work hours such as Alcoholics Anonymous meetings that are part of the mandatory treatment plan? No. Cases suggest that if the activity is (1) required (2) solely for the benefit of the employee and (3) is not an indispensable part of the employee's primary employment activities, that the time spent attending such sessions is not compensable work within the meaning of the Fair Labor Standards Act.[10]

If you are working with an employee who has a current or former alcohol or drug addiction, remember that the condition may constitute a disability under the ADA or qualify for leave under the FMLA.

II. OVERVIEW – DEALING WITH STRESS AND MENTAL HEALTH ISSUES - EMPLOYER OBLIGATIONS AND TOOLS UNDER THE FAMILY MEDICAL LEAVE ACT AND THE AMERICANS WITH DISABILITIES ACT

While everyday stress in the workplace is common, employers and employees should be cautious when it begins to impact the ability of employees to effectively perform their job duties or to function in the workplace.

Employers sometimes mistakenly assume that mental health issues must be handled by employees on their own. But employers have legal obligations under both the FMLA and the ADA with regard to serious health conditions and disabilities. Mental health issues, like anxiety and depression, are potentially qualifying conditions in the same way that physical ailments like a heart attack or cancer are qualifying conditions.[11]

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[10] *See Gibbs v. City of New York*, 87 F. Supp. 3d 482, 493–94 (S.D.N.Y. 2015); *Todd v. Lexington Fayette Urban Cty. Gov't*, No. CIV.A.5:08-295KKC, 2009 WL 4800052, at *4 (E.D. Ky. Dec. 10, 2009)

[11] *See* EEOC Publication, *Depression, PTSD & Other Mental Health Conditions in the Workplace: Your Legal Rights;* https://www.eeoc.gov/eeoc/publications/mental_health.cfm.

When dealing with employees whose conditions may impact their ability to perform the functions of their jobs, the FMLA and ADA provide protections for the employees, allowing employees to take necessary leave or request workplace accommodations. They also provide tools for the employer when employees cannot perform their job duties or pose a risk to themselves or others because of a mental health issue, allowing the employer to require a doctor's certification to return from leave or a medical or psychological examination.

> **Practice tip:** The FMLA and the ADA frequently go hand in hand in terms of addressing an employee's mental health issues. When approved FMLA leave is exhausted, an employee may seek accommodations under the ADA. An additional period of leave may, under some circumstances, be a reasonable accommodation under the ADA. While hardship to the employer is not a consideration under the FMLA, an employer may consider undue hardship in determining whether a request for accommodation under the ADA is reasonable.

III. ASSISTANCE FOR EMPLOYEES - PROTECTED LEAVE AND ACCOMMODATIONS

Employees who experience stress that manifests as a medical or mental health issue may need leave or accommodations in order to manage their stress. The FMLA and the ADA both provide protections for workers, but differ in important ways.

A. FMLA –Continuous and Intermittent Leave

The FMLA was enacted to entitle employees to take unpaid leave for medical reasons, the birth or adoption of a child or to care for a qualifying family member with a serious health condition. With regard to an employee's own health condition, Congress recognized that there was inadequate job security for employees with conditions that would prevent them from working for temporary periods.[12]

The FMLA essentially provides an absolute right for eligible employees to take up to 12 weeks of leave if they are unable to perform their job duties due to a serious health condition.[13] To be eligible for FMLA, the employee must have worked for the employer for at least a year and must have worked a qualifying number of hours to qualify for leave.[14] The employer **may not deny the leave** based on hardship to the employer caused by the employee's absence. FMLA leave is unpaid leave. An employer may allow or require an employee to exhaust their paid leave, and then take unpaid leave while on FMLA.[15]

B. Employer must notify employee of rights under FMLA when employer is aware of potentially qualifying condition

An employee may have a serious health condition if they are admitted to a hospital or health care facility overnight; if they are absent for three days and require ongoing medical treatment; or if they have a chronic condition which requires treatment from a health care provider at least twice a year. If the employer has information that the employee needs leave that may be FMLA-qualifying, the employer is required to provide notice to the employee of their eligibility. For example, if an employee calls in and informs the employer that they were admitted for an overnight stay at the hospital, that would trigger the employer's notice obligations under the Act.[16]

C. FMLA allows for an employee to take continuous or intermittent leave

An employee who is experiencing stress that rises to the level of a serious health condition may need a period of continuous leave to seek treatment. Employees may also seek intermittent leave, which allows employees to miss work when they are experiencing episodes that make them unable to work.

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[12] *See* Family and Medical Leave Act, Findings and purposes, 29 U.S.C. § 2601(a).

[13] 29 U.S.C. § 2612.

[14] *See* U.S. Dept. of Labor, Wage and Hour Division, *FMLA Frequently Asked Questions, Hours of Service Requirment.* https://www.dol.gov/whd/fmla/fmla-faqs.htm

[15] *See* U.S. Dept. of Labor, Wage and Hour Division, *FMLA Frequently Asked Questions, Unpaid Leave*. https://www.dol.gov/whd/fmla/fmla-faqs.htm

[16] *See* U.S. Dept. of Labor, Wage and Hour Division, *Fact Sheet # 28D: Employer Notification Requirements under the Family and Medical Leave Act.* https://www.dol.gov/whd/regs/compliance/whdfs28d.pdf.

> **Practice Tip**: Intermittent leave is one of the more challenging aspects of the FMLA for an employer to manage because an employee may be absent frequently and unpredictably. The employer should provide a job description and ensure that the health care professional provides facts to show that the condition makes the employee unable to perform the essential functions of the job. The employer may periodically seek recertification within the periods allowed by the act, and may seek recertification more frequently if circumstances change, for example, if the leave the employee is taking exceeds or differs from the initial certification. The employer should ensure that all intermittent leave is accounted for and consider next steps when leave is exhausted.

D. ADA – Accommodations for stress-related disabilities

The ADA provides for reasonable accommodations for an employee with a disability.[17] A disability is a physical or mental impairment that substantially limits one or more major life activities.[18] The ADA applies to applicants and employees without a longevity requirement. The employee must be able to perform the essential functions of their job with or without a reasonable accommodation. The employer may deny a requested accommodation that presents an undue hardship to the employer.[19]

There are a variety of accommodations that can assist employees who have a stress or mental-health related disability. The Job Accommodation Network, ("JAN"), provides ideas and resources for employers seeking to accommodate disabilities in the workplace. For stress-related disabilities, JAN provides the following list of possible accommodations:

- Apps for Anxiety and Stress
- Behavior Modification Techniques
- Counseling/Therapy
- Environmental Sound Machines / Tinnitus Maskers / White Noise Machines
- Flexible Schedule
- Job Restructuring
- Marginal Functions
- Modified Break Schedule
- Supervisory Methods
- Support Animal
- Support Person[20]

E. ADA - Interactive Process

When an employee requests an accommodation for a disability, the employer must engage in the interactive process. That means gathering medical information, if necessary, and meeting with the employee to discuss the options for accommodations.

> **Practice Tip**: The employer is not required to accept the employee's suggested accommodation. For example, and employee with anxiety might request to work from home. The employer might determine that work from home would present an undue hardship for the employer, and suggest different accommodations, such as an alternate work location, or a flexible schedule that would allow the employee to avoid rush hour or be at work when the office is less busy.

The focus of the interactive process is on the essential functions of the job. The goal is to find accommodations that will allow the employee to perform those essential functions. An employer does not have to eliminate an essential function in order to accommodate the employee.

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[17] 42 U.S.C. § 12112(b).
[18] 42 U.S.C. § 12102(2).
[19] *Id.*
[20] *See* JAN *Accommodation and Compliance Series, Employees with Mental Health Impairments;* https://askjan.org/publications/Disability-Downloads.cfm?pubid=278110.

Comparison Chart

FMLA	ADA
• Applicable to employees who have worked for their employer for twelve months (and a total of 1250 hours). • Employees may take up to twelve weeks of job protected leave (paid or unpaid) in a year. • An employee's own serious health condition under FMLA is one that renders the employee unable to perform the job. • Employers cannot deny leave based on undue hardship.	• No minimum time working required – applies to new employees and even applicants. • A qualified individual with a disability is entitled to a reasonable accommodation. • To be a qualified individual, the employee must be able to perform the essential functions of the job. • Reasonable accommodation is any accommodation that does not cause the employer undue hardship.

IV. MANAGEMENT TOOLS FOR EMPLOYERS WHEN EMPLOYEES ARE UNABLE TO FUNCTION OR POSE A THREAT DUE TO MENTAL HEALTH ISSUES

Employees experiencing serious stress or depression may be unable to function at work or may pose a risk to themselves or others. Although the ability of an employer to inquire into an employee's health condition or disability is generally limited, there are circumstances under which an employer may require an employee to certify their fitness for duty or undergo a medical or psychological examination.

A. Fitness for Duty Certification on Return from FMLA Leave

When an employee takes continuous FMLA leave, the employer may require a "fitness-for-duty" certification from a healthcare provider before the employee is permitted to return to work. An employer may seek a fitness-for-duty certification only when it is part of a uniformly applied policy, and can seek it only with regard to the particular health condition that caused the employee's need for FMLA leave. The certification from the employee's health care provider must certify that the employee is able to resume work. The employer also may require that the certification specifically address the employee's ability to perform the essential functions of their job, so long as those functions (i.e. a job description) are included with the FMLA designation paperwork.

In order to require an employee to have a fitness-for-duty certification, the employer must provide notice of the requirement to provide a fitness-for-duty certification with the FMLA designation notice.[21] No second or third opinions may be required on a fitness-for-duty certification.[22]

B. Medical Examination under the ADA

While the ADA protects employees from disability discrimination, it also provides a tool for employers in addressing an employee's medical condition where there is evidence of a job performance problem or that the employee poses a threat to themselves or others. Under the ADA, an employer may require a medical examination if it is job-related and consistent with business necessity.[23]

The employer may seek a medical examination of an employee if the employer believes that the employee's ability to perform essential job functions will be impaired by a medical condition. The employer may seek a psychological

[21] *See* U.S. Department of Labor publication, *elaws – Family and Medical Leave Act Advisor, Employer Designation Notice – Requirements,* https://webapps.dol.gov/elaws/whd/fmla/8b5.aspx.

[22] *See* U.S. Department of Labor publication, *elaws – Family and Medical Leave Act Advisor, Fitness for Duty Certificatio,* https://webapps.dol.gov/elaws/whd/fmla/12a6.aspx.

[23] 42 U.S.C. §12112(d)(4)(A); 29 C.F.R. §1630.14(c).

examination of an employee who has an outburst at work or threatens coworkers.[24] In either circumstance, the employer must have "a reasonable belief, based on objective evidence" that the employee poses a risk.[25]

V. INTERESTING CASES – STRESS, MENTAL HEALTH AND FMLA/ADA

A. Does the stress caused by a particular job qualify as a disability?

The Court in *Adetimehin v. Healix Infusion Therapy, Inc.*, 2015 WL 1537280 (S.D. Tex. April 6, 2015) held it does not.

1. The facts:

Adetimehin was a Verification Specialist for a healthcare company. She began working for the company in 2008, and had surgery for an aneurysm in 2011. After her first FMLA leave, she complained that her supervisor harassed and bullied her. She eventually requested an accommodation of four weeks part-time status as an accommodation for her disability – chronic stress.

2. The decision:

The court denied the ADA claim, finding that the inability to perform a particular job due to stress is not a disability:

> The inability to perform a single, particular job does not constitute a substantial limitation to the major life activity of working. The record abundantly reflects Ms. Adetimehin's struggles as a Healix employee, including her belief that she was being bullied by her superiors. However, her heath care provider was quite clear that these struggles were specifically related to Ms. Adetimehin's job at Healix, not her overall ability to work. Even extreme stress caused by the circumstances of a particular job – while understandably very disturbing to an employee – is not a qualifying "disability" for the purposes of the ADA.

Id. at *5.

B. Should an employer fire an employee while on medical leave convalescing from a suicide attempt?

The Court in *Chandler v. Specialty Tires of America, (Tennessee), Inc.*, 283 F.3d 818 (6th Cir. 2002) upheld the jury's verdict in favor of the employee.

1. The facts:

Chandler was employed by Specialty Tires of America as personnel assistant. Chandler took an overdose of pills, but was found and taken to the emergency room, then transferred to another hospital where she was under the care of a psychiatrist. She advised her plant manager that she needed time off for medical treatment and was placed on leave. After approximately a week, Chandler felt better and was planning to return to work.

The personnel manager, Robert Beck, determined that Chandler's behavior in overdosing demonstrated a lack of responsibility and that he could no longer trust her to do her job. He testified at trial that he had no knowledge of any diagnosis of illness, but knew that she had been granted medical leave.

2. The decision:

The jury found in favor of Chandler on her FMLA interference claim, and the verdict was upheld on appeal. The Sixth Circuit held that there was sufficient evidence that Beck fired Chandler because she exercised her rights under the FMLA:

> Beck insists that he took no account of whether Chandler was on leave in his decision to terminate her. The jury did not believe him. There was no special verdict, so we cannot determine what specific facts the jury found compelling. However, these facts were known to the jury: Beck knew that Chandler was on medical leave. He knew that she had been hospitalized for a suicide attempt. He decided to terminate her employment shortly after finding out she was hospitalized. The timing of her termination coincided with the end of her period of leave. He did not think that she was qualified for leave under the FMLA. In addition, Beck admitted

[24] *See Enforcement Guidance: Disability Relating Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act.* EEOC No. 915.002 dated 7/27/2000, https://www.eeoc.gov/policy/docs/guidance-inquiries.html#N_12_.

[25] *Id.*

> that, prior to her termination, Chandler had been an excellent employee; her periodic reviews, admitted into evidence, were exemplary.

Id. at 826.

C. Should an employer fire a police officer who attempted suicide?

The court in *Richard v. City of Bryant, Ark.*, 2006 WL 751296 (ED. Ark., March 21, 2006), upheld the termination decision.

1. The facts:

Richard, a police officer, called a friend and fellow officer threatening suicide. He was found at home in his shower with a gun to his head. He received medical care and was treated for depression, and placed on sick leave. He was terminated by the City on the basis that his suicide attempt created heightened liability for the City and that he posed a risk to himself and the general public.

2. The decision:

The court, relying on *Spades v. City of Walnut, Ark.*, 186 F.3d 897, *2-3 (8th Cir. 1999), held that there is a legitimate non-discriminatory basis for terminating an officer who attempts suicide because a suicide attempt by a gun-bearing police officer increases the city's potential liability.

D. Should supervisors joke or complain about employee's protected absences, and should an employee refuse to participate in the interactive process?

The court in *Arroyo v. Volvo Group North America, LLC*, 805 F.3d 278 (7th Cir. 2015) held that the evidence was sufficient to find a discriminatory motive, but rejected the failure to accommodate claim.

1. The facts:

Arroyo, an Army reservist and veteran who had been deployed to Iraq and Kuwait during her employment, took leave for PTSD. Volvo terminated her for being late to work several times after returning from leave. Arroyo sued Volvo for discrimination and failure to accommodate under the ADA. Trial court granted summary judgment in favor of employer. Arroyo appealed.

2. The decision:

The court noted that despite the more rigorous "but for" cause requirement for ADA liability, district court erred in granting summary judgment to employer on ADA claim:

> [W]e think the evidence is sufficient to convince a reasonable jury that Arroyo was the victim of disability discrimination. Internal emails indicate that Volvo management considered disciplining Arroyo for her absences while she was in the hospital in December 2010, even though she emailed Schroeder to tell him about her condition. Another one of her supervisors, Sherrie Jankowski, joked about arroyo's absence, writing that she heard rumors Arroyo was actually vacationing in Hawaii. A few weeks earlier, Jankowski had complained to Schroeder that Arroyo was "really becoming a pain with all of this." This is enough for a jury to find a discriminatory motive.

Id. at 288.

The court, however, rejected Arroyo's failure to accommodate claim, noting that the company was in the process of considering Arroyo's accommodation requests through the interactive process, "[b]ut Arroyo was less than cooperative, for example, she refused to meet with the HR representative assigned to her case." *Id.* at 288-89.

E. Is an unpredictable start time to accommodate an employee's stress a reasonable accommodation?

The court in *Jackson v. City of Birmingham*, 364 F.Supp.3d 1310 (N.D. Ala. 2019), held that it was not.

1. The facts:

Jackson, a City parking enforcement officer, was also an army reservist who suffered from PTSD. Mr. Jackson said that his PTSD made it difficult to report to work on time or complete full shifts. He was disciplined and ultimately terminated.

2. The decision:

The court concluded that summary judgment was proper on Jackson's claim for failure to accommodate under the ADA because Jackson's requested accommodation of a modified work schedule was not a reasonable accommodation. Jackson asked to arrive at work when he wished, with no predictability in his schedule:

> Concerning his request for a flexible start time, Mr. Jackson testified: "I couldn't pin down the time where I know I could be in the office," and "all I could said is leeway. It's kind of open – it's nothing that can be predicted." Given the unpredictable nature of Mr. Jackson's request for a flexible start time, Mr. Jackson has not demonstrated that his request for a flexible start time constitutes a reasonable accommodation.

Id. at 1325.

F. Can an employer require an employee to undergo psychological examination after employee exhibits threating behavior in a meeting?

The court in *Owusu-Ansah v. Coca-Cola Co.,* 715 F.3d 1306 (11th Cir. 2013), held that requiring the employee to take a personality test before returning to work did not violate the ADA.

1. The facts:

Owusu-Ansah, a call center employee who worked from home but came to the office periodically for meetings, behaved erratically at a performance review meeting. He complained of past discrimination, banged his hand on the desk and said that someone would pay. Coca-Cola asked him to speak to a company doctor who described him as a "very stressed and agitated individual" and recommend that he be placed on leave for further evaluation. Owusu-Ansah was required to take a psychological exam before returning to work. Owusu-Ansah sued under the ADA.

2. The decision:

The court concluded that requiring the employee to undergo the psychological examination did not violate the ADA because it was job-related and consistent with business necessity.[26] The exam was job-related "because an 'employee's ability to handle reasonably necessary stress and work reasonably well with others are essential functions of any position.'" *Id.* at 1311 (citing *Williams v. Motorola, Inc.*, 303 F.3d 1284, 1290 (11th Cir.2002)). It was consistent with business necessity because "in our view an employer can lawfully require a psychiatric/psychological fitness-for-duty evaluation under 12112(d)(4)(A) if it has information that an employee is unstable and may pose a danger to others." *Id.* at 1312.

[26] 12112(d)(4)(A).