



Interaction Between Mental Illness/ The ADA/ FMLA Internal Investigations: What to Do, What Not to Do

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Mental Illness: The Interaction of The ADA and FMLA



ADA:

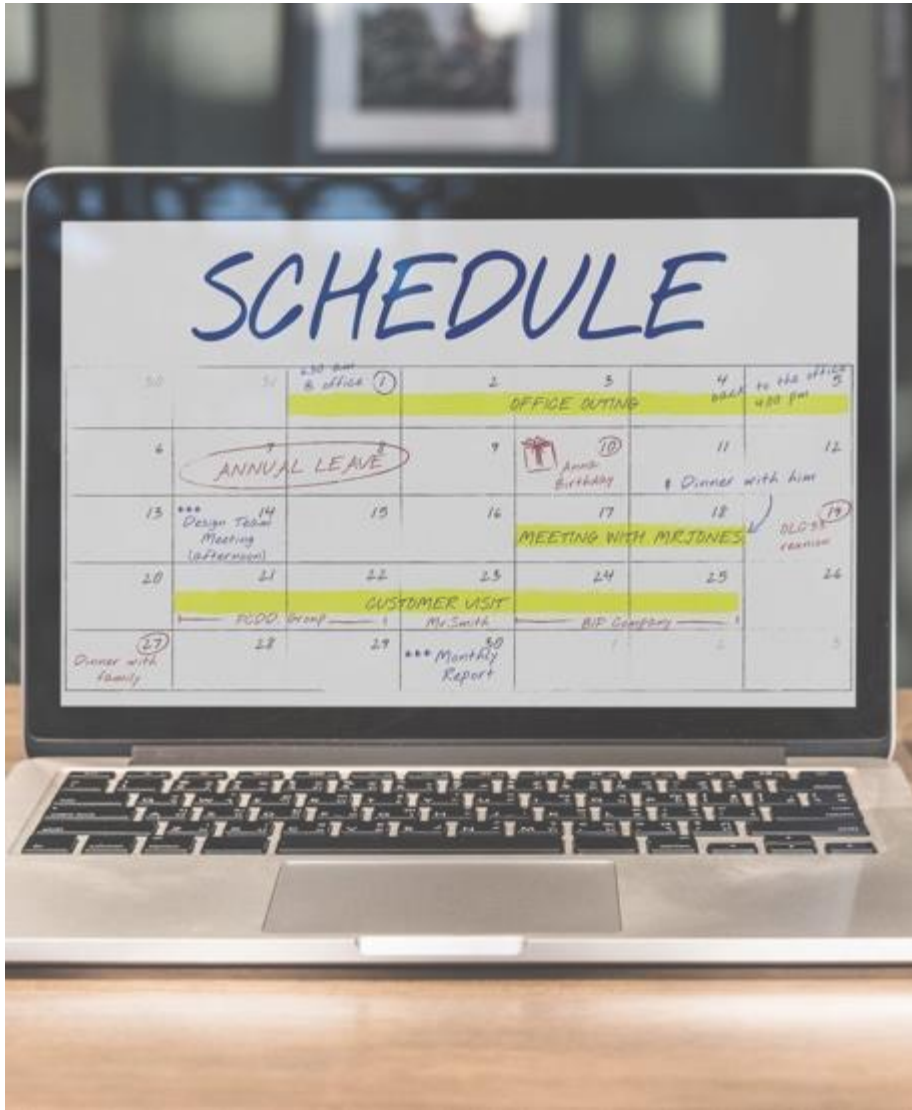
- Mental illness can be a disability under the ADA
- Requires “reasonable accommodation”

FMLA:

- Mental illness can also trigger the FMLA
- Requires protected leave

Americans with Disability Act- Overview

- Federal Law- Enforced by EEOC and state/local FEP Agencies
- Prohibits discrimination based upon disability or “regarded as” disabled (includes mental illness)
- Employers must engage in [interactive process](#) and provide reasonable accommodation
- Applies to those with 15 or more employees
 - State/local statutes apply to employers with fewer employees
- No required time worked- triggered during interview process



Americans with Disability Act

- Reasonable accommodations required to assist employee to preform essential function of job. This can include- time off, alternate work schedules, intermittent leave, and job restructuring

Family and Medical Leave Act- Overview

- Federal Law 50 or more employees in a 75 mile radius
- Employee must have worked one year and 1250 hours
- Required to provide 12 weeks of leave to employees who have a serious health condition (mental illness)
- State Family/Medical Leave Laws – Be Aware
- DCFMLA- 16 weeks medical and 16 weeks family leave

ADA- Mental Illness

- EEOC Guidelines state:

“If you have depression, post- traumatic stress disorder (PTSD), or another mental health condition, you are protected against discrimination and harassment at work because of your condition, you have workplace privacy rights, and you may have a legal right to get reasonable job accommodations that can help you perform and keep your job.”

ADA- Qualified Individual with a Disability

- An individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires (Sec.101 (8))
- “An individual is not otherwise qualified if [s]he poses a direct threat.” 42 U.S.C. 12113(b)
- The Equal Employment Opportunity Commission (EEOC) regulations implementing the ADA provide that a “direct threat” is “*a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.*”

ADA- Qualified Individual with a Disability

- According to the EEOC, an employer's determination of whether an individual with a disability poses a direct threat to health and safety should be based on an evaluation of the individual's present ability to safely perform the job and a consideration of the following four factors: (i) the duration of the risk; (ii) the nature and severity of the potential harm; (iii) the likelihood that the potential harm will occur; and (iv) the imminence of the potential harm.



Disability Under the ADA

- The term “disability” as used within the ADA, means:
 - A physical or mental impairment that substantially limits one or more of the major life activities of such individual (Amendments lowered threshold for “major life activities” – now includes “major bodily functions”)
 - A record of such impairment (doctors records)
 - Being considered as having an impairment:
 - “Regarded As”

Amendments to the ADA (ADAAA)

- The Amendments emphasize that the definition of disability should be construed in favor of broad coverage of individuals to the maximum extent permitted by the terms of the ADA and generally shall not require extensive analysis (Everything is a disability).
- Makes it easier for an individual seeking protection under the ADA to establish that he or she has a disability within the meaning of the ADA.

Amendments to the ADA (ADAAA)

- Clarifies that an **impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active-mitigating measures are not considered.**
- Does not include temporary, non-chronic impairments of short duration with little or no residual effects that usually will not substantially limit a major life activity (such as seasonal allergies).

ADA- Interactive Process (Employers' Obligations)

- Once an employer is on notice of a disability, employer must engage in interactive process.- “There are no magic words to trigger notice”
- Must exchange information.
- Work together to determine what reasonable accommodation(s) can be made to allow the employee to perform the essential elements.
- EEOC is enforcing claims of discrimination based on failure to engage in the “interactive process.”

ADA and Mental Illness

- The following mental health impairments will almost always be considered disabilities under the ADA:
 - Major depressive disorder, bipolar disorder, post- traumatic stress disorder, obsessive compulsive disorder, schizophrenia
- Mental Health Issues:
 - As a general rule, employers should not be asking employees about their health, medical, or mental condition.
 - That said, if a manager sees something is going on with an employee, the manager can ask if anything is wrong. (ADA Interactive Process)

Reasonable Accommodations: What are they?

(Employers Obligations)

- May include such things as:
 - Making existing facilities accessible (also governed by Title III);
 - Job restructuring, part-time or modified work schedules;
 - Intermittent Leave
 - Reassignment to a vacant position
 - Telework (Permanent and/or intermittent)
 - Service and/or emotional support animals



Undue Hardship Defense to Reasonable Accommodation

- An action requiring significant difficulty or expense, when considered in light of the following factors (Sec. 101(10)):
 - Nature & cost of the accommodation;
 - Overall financial resources of the facility involved, number of persons employed at such facility and the effect on expenses and resources;
 - Unlikely to apply with mental health issues

Leave as an Accommodation

- “Indefinite leave accommodation” is generally not reasonable.
- While the EEOC and a minority of courts have focused on extended or indefinite leave as a possible reasonable accommodation, almost all Circuit Courts have instead held that indefinite leave is not a reasonable accommodation.



OUT OF
OFFICE

Intermittent Leave

- Is it Leave Under FMLA or Reasonable Accommodation Under ADA?
 - Can be both!
 - Leave for doctors appointment more likely FMLA
 - Break during work day more likely reasonable accommodation but could also be FMLA- Fact Dependent

Can An Employer Force An Employee To Take Leave?

- Employers have a lot more leeway if someone poses a “direct threat.”
- A direct threat is a significant risk of substantial harm to the health or safety of that employee or others, which cannot be eliminated or reduced by a reasonable accommodation depending on circumstances.
- Paid or unpaid leave of absence can be a reasonable accommodation. (Paid Admin Leave= No Adverse Action)
- If the employee fails to accept the leave, he/ she can be terminated for threats of violence.

Can An Employer Force An Employee To Take Leave?

- In deciding whether a direct threat exists, an employer should consider:
 - the duration of the risk;
 - the nature and severity of the potential harm; (to persons and business)
 - how likely it is that the potential harm will occur; and,
 - how imminent the potential harm is.
- Liability considerations for failure to act if something happens

Special Considerations For Attorneys:

Malpractice/ Ethical Obligations

“If a lawyers’ mental impairment is known to partners in a law firm or a lawyer having direct supervisory authority over the impaired lawyer, steps must be taken that are designed to give **reasonable assurance** that such impairment will not result in breaches of the Model Rules. If the mental impairment of a lawyer has resulted in a violation of the Model Rules, an obligation may exist to report the violation of the appropriate professional authority...”

ABA Formal Opinion 03-429 June 11, 2003

“Reasonable Assurance”

- Could include requiring attorney to take leave (FLMA, administrative, paid)
- Obtain clearance from doctor to return to work
- Very fact specific



Medical Leave:

As a Reasonable Accommodation

- Attend regular treatment or appointment via altered work schedule
- Leave (Short term/long term)
- Episodic leave requests
- Arriving late, leaving early due to medical condition or treatment (Could also be FMLA)



Can An Employer Force An Employee To Take Leave?

- If ADA Triggered (Almost Always):
 - Engage in interactive process- “Can you perform essential functions of job with or without accommodations?”
 - Other reasonable accommodations- altered work schedule, job location, telework, LWOP (Ex. Unscheduled, intermittent late arrival)
 - Consider if requested accommodations are acceptable or undue hardship
- Consider ethical, liability, and safety concerns

Retaliation- Timing is Important

- Don't make a weak discrimination case a strong retaliation case.
- Before making any type of employment decision make sure there are no retaliation concerns such as:
 - Disciplining an employee after:
 - The employee requested leave or reasonable accommodations; or
 - The employee has taken protected leave.
 - Employee has mental health event at work.

Best Practices For Mental Health Issues

- Mental health issue- must consider both ADA and FMLA
- Follow ADA and FMLA Policies- Both could be triggered
- If FMLA leave is triggered require FMLA forms to be completed and procedures followed:
- Doctor certification to return to work
 - Track and exhaust protected leave to give more employer more options
- If ADA triggered, engage in interactive process to determine reasonable accommodation
- Once Leave is exhausted (FMLA and/or paid leave) additional leave might be required as ADA reasonable accommodation

Internal Investigations: What to Do/ What Not to Do



Law 360:
*“Effective Employee Reporting Systems After
Weinstein Verdict”*

- “News reports to indicate that over 80 women have complained that Weinstein harassed or assaulted them. Consider what might have happened if the second or the third woman who experienced Weinstein’s harassment had an internal process to effectively investigate her complaints and hold Weinstein accountable. We cannot know what Weinstein or The Weinstein Company’s board of directors would have done.”

Law 360:

“Effective Employee Reporting Systems After Weinstein Verdict”

“All types of workplace complaints are on the rise. Some believe that investigations were on the rise after the 2016 presidential race and continued to rise after the Weinstein accusations began. This trend may also be affected by the strong economy, as workers are more likely to complain when they are less worried about finding a new job if they are fired for speaking out.”



Law 360:

“Effective Employee Reporting Systems After Weinstein Verdict”

- “The Weinstein case illustrates the vital need for a structure for harassed employees to have their complaints addressed in a safe and effective matter. Employers need an internal process that gives employees an avenue to report harassment without having to go through their chain of command when that chain includes the alleged harasser.”

Take Any and All Complaints or Concerns Seriously

- Ignorance is not bliss- nor is it a defense for most claims
 - Remember-the best defense is a good offense



Informal Complaints DO NOT EXIST

- “It was not an official complaint”- Not according to the judge and jury!!
- “It wasn’t in writing”- So what, it’s still a complaint
- “Please don’t tell anyone”- Too Late
- “I don’t’ want you to do anything, I just want it to stop”

Informal Complaints DO NOT EXIST

- Employees cannot elect to raise concerns but request that no investigation be performed
- All complaints or concerns should be investigated promptly and as thoroughly as the facts require



Benefits of Conducting Investigations

- EEOC/State/Local FEP Agencies will be looking for an investigation into complaints- Best Practices
- May significantly limit potential liability not only for this complaint but for others
- Demonstrates commitment to policies prohibiting discrimination and harassment
- Positive impact on workplace productivity and morale
- Opportunity to address any potential violations of workplace policies
- Investigations can be used to reduce surprises, allow for correction of problems and preserve legal defenses

How To Conduct Investigation



How To Conduct an Investigation:

Step One

- Document the complaint and determine the potential scope of investigation
 - Gather and protect any relevant documents
 - Determine the approximate number of witnesses that may need to be interviewed
 - Consider whether former employees or third parties would need to be contacted

How To Conduct an Investigation:

Step One

- Make a preliminary assessment as to potential validity/risk/exposure given to known facts
- Is any immediate action required to protect employees?
- Should the accused be put on paid administrative leave pending the outcome of the investigation



How To Conduct an Investigation:

Step Two

- If an internal investigation is conducted
 - Consider whether outside counsel should be contacted first, and whether the investigation can or should be conducted “under the advice of counsel” so as to possibly protect the investigation and results from discovery
 - Consider whether a third party investigator should be retained to conduct the investigation. Might be advisable when high level partners, owners, or employees are implicated. Other factors to consider include:
 - Impact on clients/business
 - PR/ News worthy? (“Me Too” claims)
 - Involves clients
 - Ethical/ Criminal concerns

How To Conduct an Investigation:

Step Two

- Two people should be involved in all aspects of the investigation to avoid any discrepancy as to what was said by witnesses
- Diversity of investigators depending on nature of complaint (race, gender, age, religion)

How To Conduct an Investigation:

All Witnesses Should be Read the Same Introductory Statement:

1. This is an investigation of X- General Statement
2. Witnesses, including the complaining party and the accused, should be informed that the Company will undertake efforts to protect confidentiality, but that in order to conduct a fair and thorough investigation it may be necessary to share some of the information that is reported or shared
 - NLRA prohibits requiring non-supervisory level employees from maintaining confidentiality, but it can be requested

How To Conduct an Investigation:

All Witnesses Should be Read the Same Introductory Statement:

3. All relevant documents should be reviewed and preserved
4. Prohibition against any retaliation should be emphasized during all witness interviews: State Firm Policy of Anti- Retaliation
5. If witness remembers anything after the interview or wants to provide additional information, they should feel free to contact the investigators

How To Conduct an Investigation:

All Witnesses Should be Read the Same Introductory Statement:

- Open ended questions should be asked in most situations
- The investigation should be consistent in process and breadth to the extent possible with any prior investigations
- All witness interviews should be conducted in the same manner, with as much similarity in questions as possible

How To Conduct an Investigation:

All Witnesses Should be Read the Same Introductory Statement:

- If any witness is uncooperative, that fact should be documented.
- Adverse action should be avoided in most cases
- Remember that any notes that are taken may be discoverable
 - Keep it to facts learned- avoid personal opinions
 - Important to document everything

How To Conduct an Investigation:

All Witnesses Should be Read the Same Introductory Statement:

- Given the nature of the complaint consider obtaining signed written witness statement or affidavits
 - Remember that witnesses may no longer be employed by the time the matter goes to hearing or trial
 - Any signed statements or affidavits may be discoverable

How To Conduct an Investigation:

Expect The Unexpected

- Witness attempts to openly/ surreptitiously record the interview
 - Know your state's laws (one or two party consent needed to record)
 - Virginia is a “one party” consent state
 - Make a statement at beginning of interview that it is not being recorded and Investigators do not consent to any recording of the interview

How To Conduct an Investigation:

Expect The Unexpected

- Witness shows up at the interview with a representative (attorney or co-worker/friend)
 - Be aware of NLRA Rulings
 - Exclude Attorney and others



How To Conduct an Investigation:

Expect The Unexpected

- Witness raises new claims during the interview
 - Potentially trigger new or additional investigation
- Witness becomes disruptive, hostile or threatening during the interview
 - End the interview and reschedule
- Avoid claim of duress or confusion

After the Investigation is Concluded

- Should a report be generated documenting the information discovered and the results of the investigation?
 - Would the report be beneficial? Yes, in almost all situations
 - Is the information protected by attorney- client privilege? If so, remember that disclosure will likely destroy the privilege

After the Investigation is Concluded

- What should go in a report?
 - Statement of claim being investigated
 - How investigation conducted
 - List of documents received and reviewed
 - List of witnesses interviewed and summary of what relevant information was learned
 - If asked to reach a conclusion- Summary of findings and support for findings

After the Investigation is Concluded

- Is any corrective action warranted?
 - Remember that the accused has rights too
- Should any other action be taken?
 - Separation of accused and accuser?
- Is additional training warranted?
 - For one or for all?
- Are there any changes to policies or reporting structures warranted?



After the Investigation is Concluded

- When an investigation is complete, the employer should notify the complaining employee and the accused of the result
- While the employer does not have to discuss what specific disciplinary actions were taken, if any, the Company should inform the employee who raised concerns that it has taken steps to ensure that there will be no discrimination or retaliation going forward
- Privacy rights of all involved, including the accused, must be taken into consideration

After the Investigation is Concluded

- The employee who raised concerns should also be given a direct avenue to come forward with any future complaints including retaliation
- Regardless of whether disciplinary action is taken against the accused, the accused party should be reminded about the Company's prohibition against retaliation of any kind
- What other employees should be told depends on the facts and circumstances.

After the Investigation is Concluded

- In some circumstances, it may be appropriate to send all employees a reminder of the Company's commitment to preventing discrimination/ harassment of any kind.
- Watch out for possible retaliatory action- claims of retaliation are often much harder to defend against than the underlying claim of discrimination

Goal of Investigation

In general the standard is whether:

- 1) The employer conducted an unbiased reasonable, prompt, and good faith investigation
- 2) Took prompt and effective remedial action



Special Considerations When the Investigation Involves Persons with Known or Possible Mental Illness

- Those who are responsible for conducting investigations must be given relevant information about how any employee's mental illness and related accommodation may play a role in the issue being investigated
- It is also important to remember that just because someone has a mental illness does not mean that his or her misconduct is a symptom of it.
- Even if behavior is a symptom of mental illness, employers do not have to accept all behavior. The question is whether, with reasonable accommodations, the employee can perform the essential elements of the job
- The safety and well being of other employees is also important

Special Considerations When the Investigation Involves Persons with Known or Possible Mental Illness

- If the complaint is against an employee with known mental illness, is the behavior associated with the mental illness?
 - Is accommodation necessary?
 - What can be disclosed to other employees?
- Does the Employer need to inquire about possible mental illness?
 - For example, asking “Is there any explanation or reason you acted this way?”

Questions?





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