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ACT NOW ADVISORY

With Charges of Discrimination Based on Mental Health Conditions on the Rise, EEOC Releases New Guidance on Employees' ADA Rights

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On December 12, 2016, the Equal Employment Opportunity Commission ("EEOC") issued a new resource document emphasizing that, under the Americans with Disabilities Act of 1990 ("ADA"), job applicants and employees with mental health conditions are protected from discrimination and harassment based on their conditions and may also have a right to reasonable accommodations. The resource document, Depression, PTSD, & Other Mental Health Conditions in the Workplace: Your Legal Rights, answers questions about how to get an accommodation, some types of reasonable accommodations, restrictions on employer access to medical information, confidentiality, and the role of the EEOC in enforcing the rights of people with disabilities.

According to an EEOC press release, charges of discrimination based on mental health conditions are distinctly on the rise. In fiscal year 2016, the EEOC resolved approximately 5,000 charges of discrimination based on mental health conditions and obtained about $20 million in awards for individuals who were allegedly unlawfully denied employment and reasonable accommodations.

Mental health data suggests that employers should expect the trend of more mental health charges to continue. As the Department of Veterans Affairs ("VA") states on its website, approximately 8 percent of the U.S. population will have post-traumatic stress disorder ("PTSD") at some point in their lives. Understandably, the numbers are even higher for veterans. The VA also notes that "between 11-20%" of veterans who served in Operations Iraqi Freedom and Enduring Freedom have PTSD in a given year.

Also relevant is the report of the Substance Abuse and Mental Health Services Administration (known as "SAMHSA") that nearly one in five Americans suffers from some mental illness each year, including longer-term conditions such as depression, bipolar disorder, and schizophrenia.

Privacy

The resource document addresses the issue of privacy for applicants and employees. In most situations, employees and applicants are able to keep their conditions private. Employers are only allowed to ask medical questions (including questions about mental health) in four situations:

- when an applicant or employee asks for a reasonable accommodation;
- after an employer has made a job offer, but before employment begins, as long as everyone entering the same job category is asked the same questions;
- when an employer is engaging in affirmative action for people with disabilities (such as an employer tracking the disability status of its applicant pool in order to assess its recruitment and hiring efforts as a government contractor, or a public-sector employer considering whether special hiring rules may apply), in which case applicants and employees may choose whether to respond; and
- on the job, when there is objective evidence that an employee may be unable to do his or her job or that he or she may pose a direct threat or safety risk because of his or her condition.

Applicants and employees also may need to discuss their conditions to establish eligibility for benefits under other laws, such as the Family and Medical Leave Act. When applicants and employees do talk about their conditions, employers are prohibited from discriminating against the applicant or employee and must keep the information confidential, even from coworkers.

Reasonable Accommodations

The EEOC has also issued a companion document, The Mental Health Provider's Role in a Client's Request for a Reasonable Accommodation at Work, which gives several examples of possible common reasonable accommodations for employees with mental health conditions, subject to a fact-specific analysis. These examples include:

- altered break and work schedules (e.g., scheduling work around medical appointments or allowing a later workday);
- time off for treatment;
- changes in supervisory methods (e.g., providing written instructions or breaking tasks into smaller parts);
- eliminating a *non*-essential (or marginal) job function that cannot be performed because of a disability; and

- telework.

The EEOC notes that "where an employee has been working successfully in a job but can no longer do so because of a disability, the ADA also may require reassignment to a vacant position that the employee can perform."

What Employers Should Do Now

- Train supervisors on the broad coverage of the ADA (including mental health conditions) and require them to enlist the assistance of human resources in the "interactive process" to determine whether a reasonable accommodation can be made. The training should also sensitize supervisors to recognize accommodation requests if the applicant or employee is not extremely literate or crystal clear in making a request.

- Always engage in the interactive process when there is an accommodation request and fully document your organization's efforts in the interactive process. Try to secure the employee's signature on a document memorializing any agreements reached in the process. If the employee should refuse to sign, make sure that your participants in the process do sign and note, if true, that the employee did not dispute the content of the memo but simply refused to sign it.

- Review language in any policies and employee handbooks to ensure that it is consistent with the ADA.

- Review any screening tools/protocols that might tend to screen out individuals with mental health disabilities and, if they do, assess whether they are justified by business necessity.

- Contemporaneously document all employment actions, decisions, and corrective action involving an employee who is an individual with a disability or has a record of a disability.

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