

A LITTLER PRESENTATION

Wintertime Blues: Working with Mental Health Issues

ACC South Carolina

Littler[®]



Presented By



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Agenda

- What is Mental Health?
- Why is it Important?
- Mental Health and Employment
 - The ADA
 - The PDA
 - The FMLA
- Mental Health in the Legal Profession

What is Mental Health?

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What is Mental Health?

IMPACTS WELL BEING

- Emotional, Psychological, and Social

COMMON EFFECTS

- Effects 1 out of 5 adults
- Effects more than 1 out of 5 youth
- 1 out of 25 adults suffer serious mental illness

COMMON CAUSES

- Experiences
- Biology
- Drug and alcohol use
- Isolation/loneliness



Depression and Anxiety

- **Depression**

- Being overly critical of self
- Feeling tired often
- Trouble paying attention
- Sadness or irritability
- Eating too much or too little
- Socially isolating

- **Anxiety**

- Being overly critical of self
- Picking at skin / nail biting
- Fatigue
- Frequent stomach aches
- Socially isolating
- Panic attacks or anxiety attacks

What is Neurodiversity?

“Neurodiversity is the idea that neurological differences like autism and ADHD are the result of normal, natural variation in the human genome. . .indeed, many individuals who embrace the concept of neurodiversity believe that people with differences do not need to be cured; they need help and accommodation instead”

John Elder Robison, Co-chair of the Neurodiversity Working Group at the College of William & Mary and member of the Interagency Autism Coordinating Committee of the U.S. Department of Health and Human Services

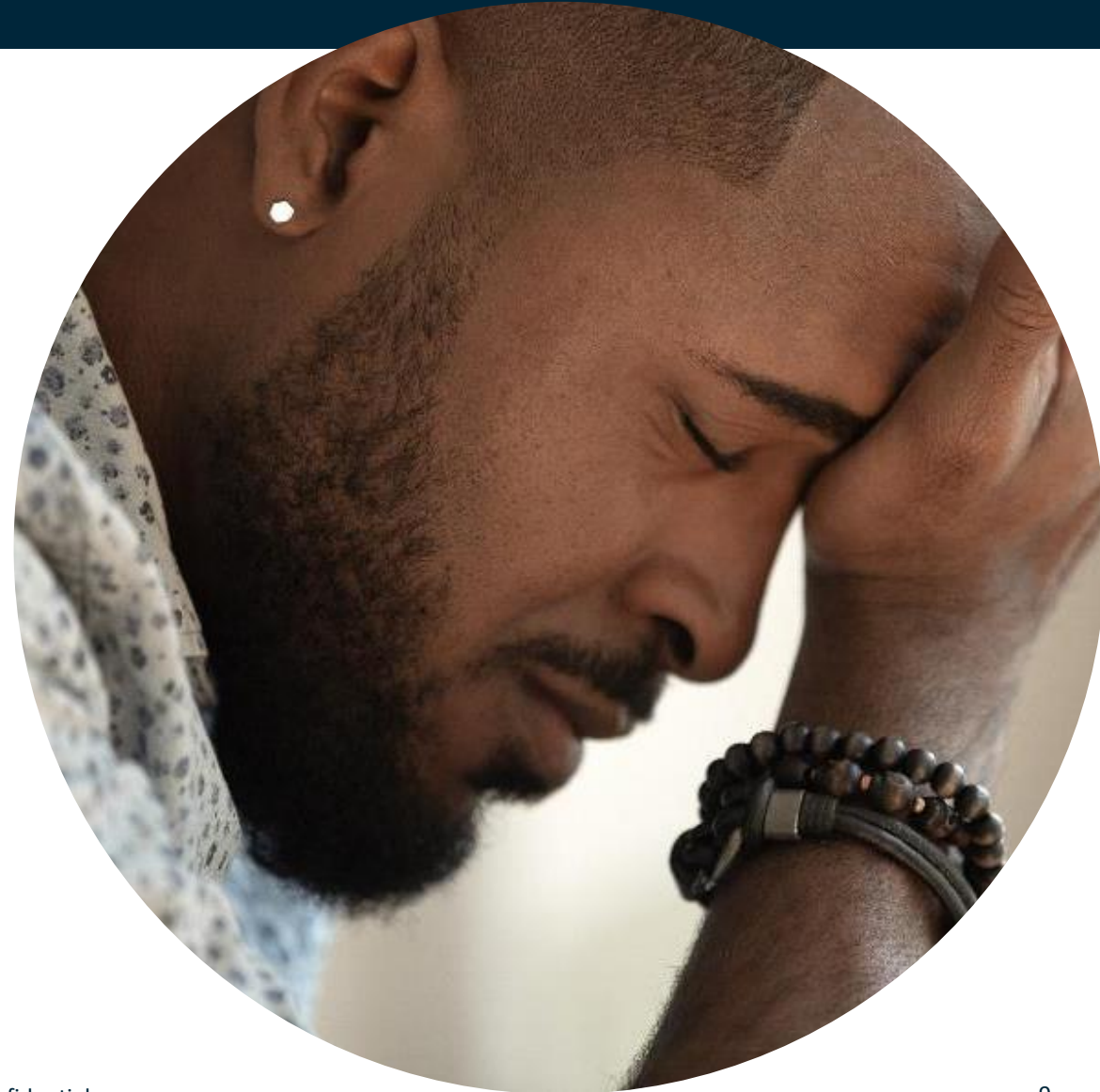
Common Neuro-diverse Conditions

- Autism Spectrum Disorder (ASD)
 - Asperger Syndrome
- ADHD
- Dyslexia
- Depression
- Anxiety



Myths About Mental Health Issues

- It's rare
- It's always obvious
- It's not really a problem
- It's nowhere near me
- There's not much you can do
- Mental health and workplace violence



More Recent Statistics Nationwide

According to a recent survey of 1,000 American workers:

- 80% would consider quitting for job focused more on employees' mental health
- 75% have struggled at work due to anxiety caused by pandemic and world events
- 4 out of 5 find it hard to “shut off” in the evenings
- 50%+ have taken “mental health day” due to pandemic
- 97% say vacation days while working from home are important for “recharging”
- 50% say sleep patterns have been interrupted due to COVID-19
- 45% say they feel less healthy mentally while working from home

What Does This Mean in the Legal World?

- Increased EEOC charges and litigation stemming from mental health issues
- EEOC Charge data: In FY 2021, nearly 30% of ADA charges alleging discrimination based on mental health impairments

ADA CHARGE DATA by IMPAIRMENTS/BASES - MERIT FACTOR RESOLUTIONS (Charges filed with EEOC) FY 1997 - FY 2021

The data are compiled by the Office of Enterprise Data and Analytics from data reported via the quarterly reconciled Data Summary Reports and compiled from EEOC's Charge Data System and, from FY 2004 forward, EEOC's Integrated Mission System.

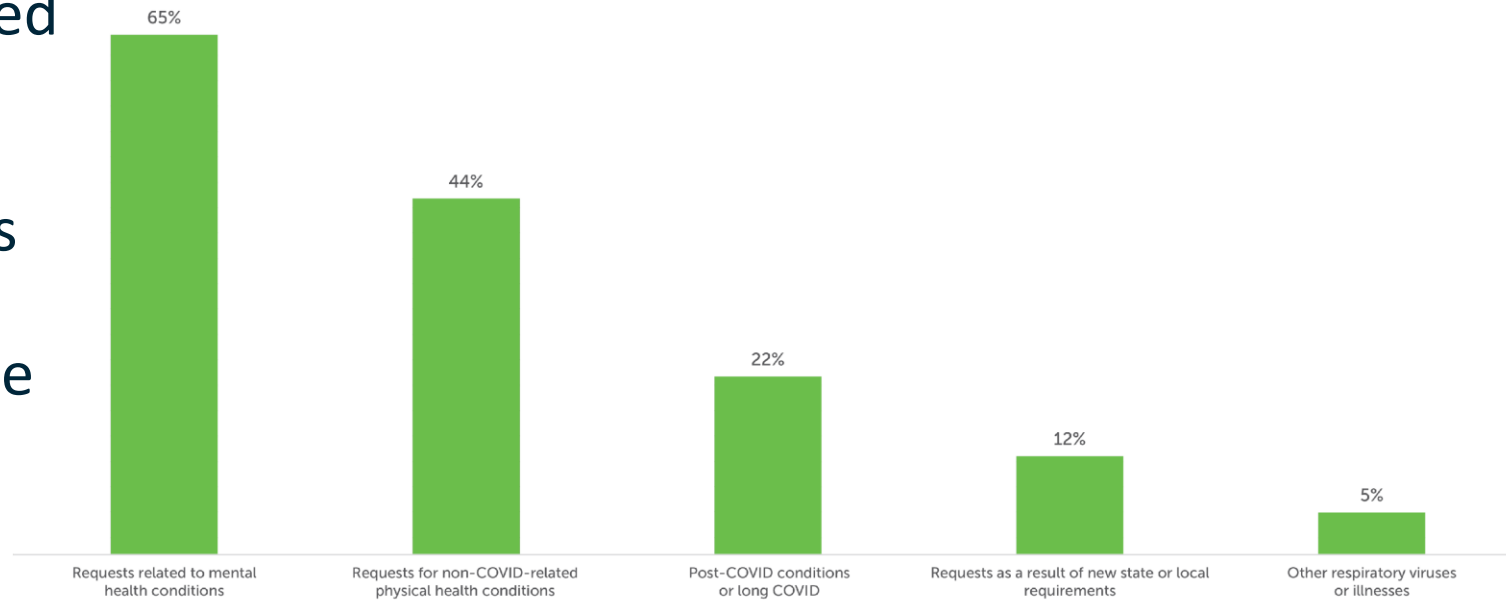
This does not include charges filed with state or local Fair Employment Practices Agencies.

FY 2015		FY 2016		FY 2017		FY 2018		FY 2019		FY 2020		FY 2021		IMPAIRMENT BASIS*
#	%	#	%	#	%	#	%	#	%	#	%	#	%	
31	0.5%	27	0.5%	36	0.5%	36	0.7%	22	0.4%	28	0.6%	24	0.5%	ALCOHOLISM
29	0.5%	20	0.4%	35	0.5%	26	0.5%	32	0.6%	34	0.7%	30	0.6%	ALLERGIES
0	0.0%	1	0.0%	1	0.0%	0	0.0%	0	0.0%	1	0.0%	1	0.0%	ALZHEIMERS
350	5.8%	383	6.7%	426	6.4%	419	7.7%	371	7.4%	441	9.0%	467	9.7%	ANXIETY DISORDER
78	1.3%	83	1.5%	73	1.1%	68	1.3%	57	1.1%	85	1.7%	146	3.0%	ASTHMA
14	0.2%	20	0.4%	31	0.5%	26	0.5%	25	0.5%	32	0.7%	39	0.8%	AUTISM
0	0.0%	0	0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	BRAIN-HEAD IMPAIRMENT
														BRAIN-HEAD INJURY - TRAUMATIC
77	1.3%	58	1.0%	49	0.7%	59	1.1%	56	1.1%	60	1.2%	50	1.0%	CANCER
249	4.1%	241	4.2%	219	3.3%	219	4.0%	203	4.1%	174	3.5%	187	3.9%	CEREBRAL PALSY
23	0.4%	15	0.3%	12	0.2%	17	0.3%	18	0.4%	12	0.2%	12	0.2%	CHEMICAL SENSITIVITY
12	0.2%	8	0.1%	7	0.1%	9	0.2%	12	0.2%	16	0.3%	13	0.3%	CUMULATIVE TRAUMA DISORDER
4	0.1%	4	0.1%	7	0.1%	6	0.1%	4	0.1%	3	0.1%	2	0.0%	CYSTIC FIBROSIS
2	0.0%	3	0.1%	5	0.1%	1	0.0%	2	0.0%	4	0.1%	0	0.0%	

The Littler Annual Employer Survey Report - 2023

- In which of the following areas has your organization received increased requests for disability accommodations and/or leaves of absence since the start of 2022? (Select all that apply)

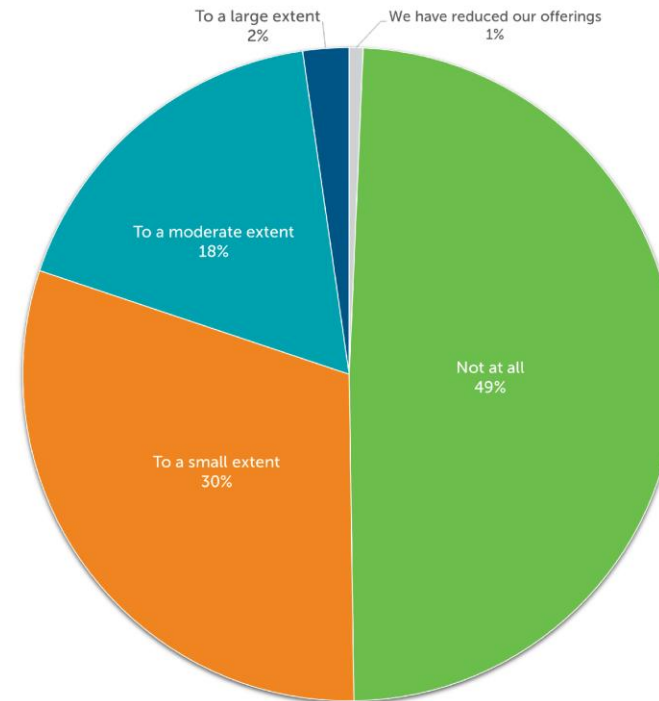
In which of the following areas has your organization received increased requests for disability accommodations and/or leaves of absence since the start of 2022? (Select all that apply)



The Littler Annual Employer Survey Report - 2023

- To what extent has your organization expanded its policies for disability accommodations and/or employee leaves of absence since the start of the pandemic?

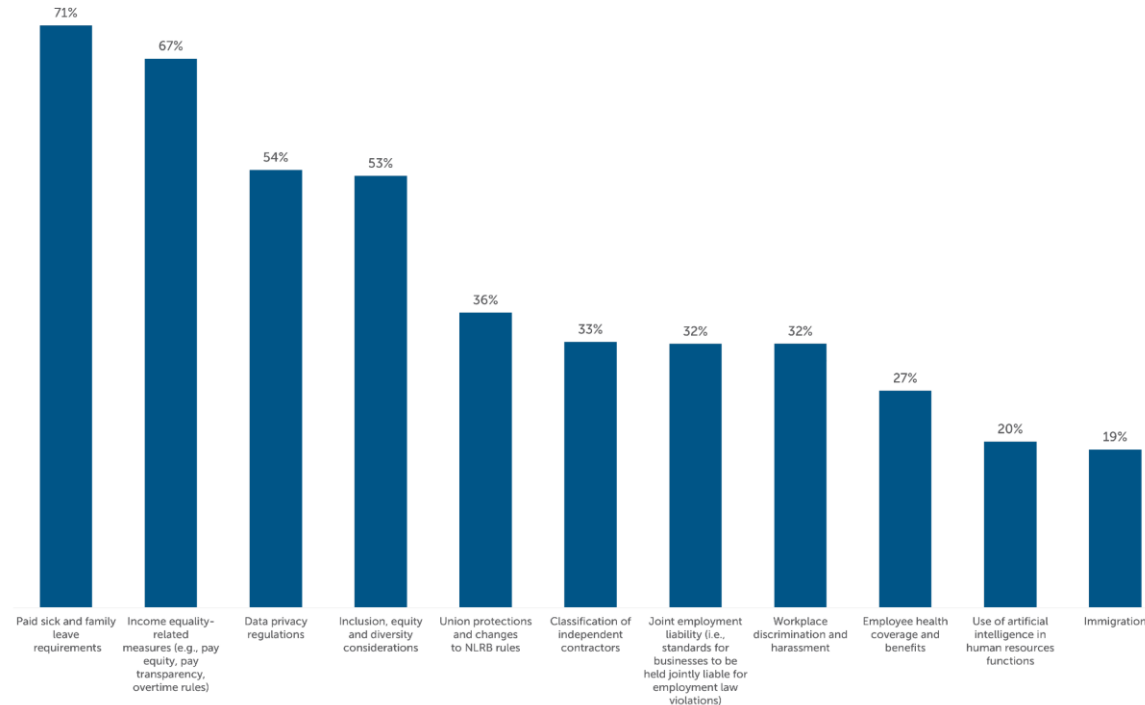
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- In which of the following areas do you expect employment law-related changes that will impact your business over the next 12 months? (Select all that apply)

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Mental Health and Employment



Mental Health, Disability Accommodations, and Pregnancy



Disability and Accommodations

- The ADA

- The term ‘disability means, with respect to an individual – a physical or mental impairment that substantially limits one or more major life activities of such individual.’ ”42 U.S.C. § 12102(1)(A). “For purposes of paragraph (1), major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.” *Id.* § 12102(2)(A).

Proper Focus in ADA Not on “Disability”

- When an applicant or employee requests an accommodation, “the primary focus” should be on the interactive process and identifying a reasonable accommodation, not on “whether the individual meets the definition of disability” – that should be left to the legal department
 - EEOC specifically says that focus should be on whether the company: (1) has fulfilled its obligation to provide a reasonable accommodation and (2) met its responsibilities with respect to the “interactive process”



Obligation to Make Reasonable Accommodation

- An employer must make reasonable accommodations to a qualified employee or applicant with a disability:
 - To enable the disabled employee or applicant to perform the essential functions of the job.
 - To enjoy equal benefits and privileges of employment.
- Analysis must be individualized and flexible – it is difficult to defend absolute rules that X is reasonable and Y is not in every circumstance.
- Unless doing so would cause an undue hardship.

What is a “Reasonable Accommodation”?

- “Any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities.”
- A reasonable accommodation “**removes workplace barriers** for individuals with disabilities”
 - Examples of barriers disabled individuals face:
 - **Physical obstacles**, such as inaccessible equipment and job location
 - **Modes of communication**, such as instructions in only written or oral form
 - **Procedures or rules** about how to perform work
- A modification or adjustment to the work environment satisfies the reasonable accommodation requirement so long as it is effective.
- When there are multiple effective accommodations, the **employer** may choose the accommodation it prefers.

Consider: Undue Hardship

- Undue hardship - “an action requiring significant difficulty or expense” by the employer – i.e., unduly costly, extensive, substantial, disruptive, or would fundamentally change nature or operation.
 - Often very difficult for an employer of significant size or scale to establish, and inconvenience lands far from meeting this standard.
- Factors in determining include:
 - Nature and cost of the accommodation (note cost is hard to rely on for large organizations)
 - Overall financial resources
 - The effect on the employer’s expenses and resources, or other operational impact
 - The type of business, including the composition, structure and functions of the workforce

Fact Gathering– Medical Examination

- ADA Rules Regarding Medical Examinations or Inquiries:
 - For current employees, any mental health examination or inquiry must be both job-related and consistent with business necessity.
 - What’s “job-related and consistent with business necessity”?
 - When an employer has a reasonable belief, based on objective evidence, that: (1) an employee’s ability to perform essential job functions will be impaired by a medical condition; or (2) an employee will pose a direct threat due to a medical condition.

Fact Gathering– Requesting Documentation

- Employer may require documentation from the employee’s healthcare provider about the accommodation request if:
 - The disability or need for accommodation is not obvious
 - The information provided is not sufficient to show the individual has a disability and needs a reasonable accommodation
 - The employer has “reasonable concerns” employee is not fit to perform essential functions
- Limited to (i) ability to perform job; or (ii) ability to work without posing a direct threat



The Interactive Process

So, what do we do? ENGAGE!

- Once employee asks for a reasonable accommodation, or employer recognizes employee needs an accommodation but is unable to request one, employer is obligated to initiate an interactive process.
- Aimed at determining employee's limitations and ways of accommodating them.
- INTERACTIVE is the key – dialogue and exchange of ideas/proposals where possible.
- Documentation of the process is critical – (sometimes more than outcome).
- Bad faith/examples that could be found unlawful:
 - Unreasonable delay
 - “Take it or leave it”
 - Stonewalling
 - Not considering a proposed accommodation or exploring alternatives
 - No individualized inquiry/hard and fast rules

Drawing the Line Again – Reasonable or Not?

Typically Reasonable

- Job restructuring/part-time or modified work schedules
- Making existing facilities accessible or acquiring or modifying equipment
- Providing qualified readers or interpreters
- Leaves of absence
- Reassignment to a vacant position/transfer

Typically Not Reasonable

- Indefinite leave
- A job with less stress
- Immunizing from criticism
- Providing new manager or creating new job
- Bump another employee from their position
- Reduce conduct or performance expectations when the employee is at work
- Excuse misconduct, even if caused by the disability (check with legal counsel on individualized basis on this issue)
- Reassign/eliminate essential job duties or retaining pay for different job position

The “New Reasonable” in a Post-Pandemic World

- With the changing work environment following the pandemic, we now might need to consider:
 - Altered work breaks & schedules.
 - Quiet office space or devices that create a quiet work environment.
 - Changes in methods of supervision (e.g., form of communication, additional training, more/better feedback and guidance).
 - Specific shift assignments.
 - Work from home.
 - Changes to workplace policies, procedures, or practices.
 - Providing additional time off or leave for rest or treatment.
 - Physical changes to the workplace or equipment.

Responding to Mental Health Accommodation Requests

- Every “request” for an accommodation based on medical conditions must be taken seriously
- Supervisors should never accept or reject an accommodation request
 - Supervisors should partner with Human Resources, who will engage in the “interactive” process
 - Identify essential duties
 - Brainstorm solutions and alternatives
- Do not express displeasure with an accommodation request
 - What seems “out of the picture” today will seem routine tomorrow
 - No formal request or magic words needed

What You *Cannot* Say to Other Employees

- **Do not tell other employees:**
 - About an employee's disability or
 - That an employee is being accommodated

....Even if the disabled employee tells others about his/her disability



What You Can Say to Other Employees

- Employer can respond to questions from coworkers with general policy statements like:
 - “Our company has a policy of assisting any employee who encounters difficulties in the workplace”

Mental Health and Pregnancy

- Pregnancy is not, but can be, a disability
- Still requires own accommodation analysis.
- Can follow same process as ADA
- Separately required to accommodate those who are similarly unable to work.
- Post-partum depression/anxiety

FMLA Implications

- “An eligible employee may take FMLA leave for their own serious health condition, or to care for a spouse, child, or parent because of a serious health condition. ***A serious health condition can include a mental health condition.***”
- A serious health condition includes one requiring continuous treatment – i.e. inpatient treatment or chronic conditions
- Duty to notify employee of FMLA rights when employer knows of need for qualifying leave.

Question for the Audience

- An employee is disciplined for poor performance. In response, he says “it’s because I have depression and I can’t concentrate with all these distractions.”
 - Is this an accommodation request?

Question for the Audience

- Under which of the following scenarios can you require the employee to undergo a fitness for duty examination?
 - During her job interview, you provide Ann with the essential functions of the job, including the requirement that employees work mandatory overtime. Ann tells you that she can perform those functions without issue. You hire Ann. During her second week on the job, Ann presents you with a doctor's note indicating that, due to her depression, she cannot work overtime.
 - Paul has just returned from medical leave following back surgery. His healthcare provider released him without any restrictions. Paul's job requires that he regularly and repeatedly lift boxes weighing anywhere from 10 to 50 pounds. Paul's supervisor notices that he is unable to lift the boxes and has asked his co-workers to do so. Paul insists he is fine and that he does not need any accommodations.
 - Peter is a long-tenured employee with no prior performance or disciplinary issues. Over the past two weeks, a three employees report to you that Peter is acting "weird". He claims that he is having difficulty sleeping, that people are spying on him on his way to work and that he thinks his manager is "out to get him."

Case Study #1

- District manager of fast-food chain has severe stress and anxiety
- Physician-ordered Restrictions: 40-hour workweek; no weekend work
- Normally, managers are expected to work 40+ hours/week, the time needed to get the job done
 - **What issue(s) are presented here?**
 - **How do we respond?**

Case Study #2

- Sam has worked for the company as an administrative assistant to Joe, the leader, for 17 years. Last year, Joe retired. Sam began reporting to a new leader. The new leader has much higher expectations for his employees than Joe had.
- Sam notifies you that he suffers from depression which has been aggravated by repeated criticisms from his new leader. He requests a leave of absence, which is granted.
- Upon his return, he requests an accommodation of no contact whatsoever with the new leader
 - **Do we need to accommodate Sam?**
 - **Other options/discussions with Sam?**

Case Study #3

- Johnny, a retail associate with a checkered performance history, calls off a lot on Mondays and Fridays, and in conjunction with regular days off
- He recently came to his manager asking for a reduced schedule to come in late because of ongoing sleep issues. Often has trouble getting to work on time as a result.
- He wants to work an adjusted schedule
 - **Do we need to accommodate Johnny?**

KEY TAKEAWAYS



If You Remember Anything

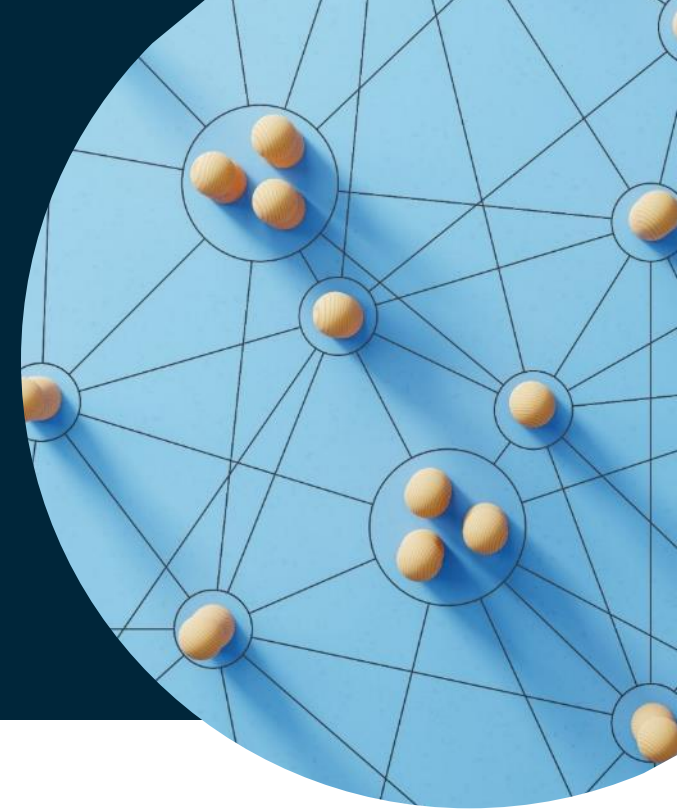
- Mental health issues are major challenge for employers in ADA compliance and accommodation.
- Need to be flexible and consider new ways of accommodation.
- Be careful of unlawful perceptions, and look at objective, reliable evidence.
- Interactive dialogue and process is at a premium.
- Compliance success and focusing on work environment that addresses mental health concerns pays retention and other benefits.



Questions?

This information provided by Littler is not a substitute for experienced legal counsel and does not provide legal advice or attempt to address the numerous factual issues that inevitably arise in any employment-related dispute. Although this information attempts to cover some major recent developments, it is not all-inclusive, and the current status of any decision or principle of law should be verified by counsel.

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