

Wellness Meets Workplace

Preserving Productivity While Supporting Employees

June 20, 2024

Disclaimer

This presentation has been provided for informational purposes only and is not intended and should not be construed to constitute legal advice.

Please consult your attorneys in connection with any fact-specific situation under federal, state, and/or local laws that may impose additional obligations on you and your company.

Attorney Advertising.

Presented by



Shira M. Blank

Member of the Firm
Epstein Becker Green

sblank@ebglaw.com



Peter A. Steinmeyer

Member of the Firm
Epstein Becker Green

psteinmeyer@ebglaw.com



David Susler

Associate General Counsel
National Material L.P.

dsusler@nmlp.com

Agenda

01

**The Obligation
to Provide
Reasonable
Accommodations**



02

**Assessing Mental
Health in the
Interactive
Process**



03

**Managing Stress
and Burnout in
the Workplace**



Mental Health

Addressing mental health in the workplace may look different for many

Mental health may include our emotional, psychological, and social well-being.
The following disorders are typically reported in the workplace:



Anxiety



Depression



ADHD/ADD



**Post-traumatic stress
disorder (PTSD)**

Mental Health

Rise in mental health employment bias claims



Mental health discrimination accounted for about 30 percent of Americans with Disabilities Act (ADA)-related charges in fiscal year (FY) 2022, according to statistics from the EEOC.



In FY 2022, the number of mental health discrimination charges continued to be filed at a similar pace, slightly increasing when compared to FY 2021.



The leading conditions contributing to that trend in FY 2022 (accounting for approximately 25 percent of all ADA charges in 2022) were:

- ✓ Anxiety (12.3 percent)
- ✓ Depression (8 percent)
- ✓ PTSD (6.4 percent)

The Obligation to Provide Reasonable Accommodations

Bases for Leaves/Accommodations

Which laws make available leaves of absence or other accommodations?



Americans with Disabilities Act:

accommodations
(which may include leave)



Family and Medical Leave Act:

leaves of absence



Title VII of the Civil Rights Act of 1964:

accommodations
(which may include leave)



Pregnant Workers Fairness Act:

accommodations
(which may include leave)



State and local disability laws:

accommodations
(which may include leave)



State and local family and medical leave laws:

leaves of absence

Disability Accommodation

Overview of the ADA

- ✓ **Title I: Private Employers**
 - Covers employers with 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year
- ✓ **Title II: Public Entities**
- ✓ **Title III: Places of Public Accommodation**
- ✓ For all three titles, “disability” is defined as:
 - (a) a physical or mental **impairment that substantially limits one or more major life activities**,
 - (b) a **record of** such impairment, or
 - (c) being **regarded as** having an impairment.
- ✓ In 2008, the U.S. Congress passed the ADA Amendments Act (ADAAA), shifting the focus of ADA analysis from whether a person has a disability to whether there was an interactive process to identify/provide a reasonable accommodation modification.

Disability Accommodation

What is an “impairment”?



Broadly defined to include a variety of disorders or conditions affecting numerous systems, including the following:

- Neurological or musculoskeletal systems
- Special sense organs
- Respiratory systems
- Cardiovascular systems
- Reproductive systems
- Digestive systems
- Genito-urinary systems
- Hemic systems
- Lymphatic systems
- Endocrine systems
- Skin
- Mental retardation
- Organic brain syndrome
- Emotional or mental illness
- Certain learning disorders



Bottom line: Any disorder is probably an impairment.

Disability Accommodation

State and local laws

New York State Human Rights Laws (NYSHRL)

- Disability” is defined more broadly under the NYSHRL than under the ADA:
 - “(a) a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques or (b) a record of such an impairment or (c) a condition regarded by others as such an impairment.”
 - Disability is not restricted to impairments that substantially limit a major life activity.

New York City Human Rights Law (NYCHRL)

- Disability” is defined even more broadly under the NYCHRL:
 - “any physical, medical, mental or psychological impairment, or a history or record of such impairment.”
 - The burden is on the employer to establish that a reasonable accommodation (even indefinite leave) is an undue burden.
- Employers must engage in a “cooperative dialogue” and provide employees with a written final determination identifying any accommodations granted or denied.

DC Human Rights Act

- A “disability” is defined as a physical or mental impairment that substantially limits one or more major life activities.

Illinois Human Relations Act (IHRA)

- “Disability” focuses on the definition of what kinds of support the individual requires to compensate for the condition: “‘Disability’ means a determinable physical or mental characteristic of a person, including, but not limited to, a determinable physical characteristic which necessitates the persons’ use of a guide, hearing or support dog, the history of such characteristic, or the perception of such characteristic by the person complained against, which may result from disease, injury, congenital condition of birth or functional disorder and which is . . . unrelated to the person’s ability to perform the duties of a particular job or position.”
- Use of illegal drugs or alcohol is expressly excluded from the definition of disability.

California Fair Employment and Housing Act (FEHA)

- FEHA only requires that the disability limits a major life activity. It does not have to be a “substantial limitation” as required under the ADA.
- Working is a major life activity regardless of whether the actual or perceived working limitations implicate a specific position or broad class of employment, whereas, under the ADA, the mental or physical disability must affect a person’s ability to obtain a broad class of employment.
- Failing to engage in the interactive process can be a separate cause of action under FEHA.

New Jersey Law Against Discrimination (LAD)

- Disability” is defined more broadly under the LAD than under the ADA:
 - a physical disability, infirmity, malformation, or disfigurement that is caused by bodily injury, birth defect, or illness, or any mental, psychological, or developmental disability, resulting from anatomical, psychological, physiological, or neurological conditions, which prevents the normal exercise of any bodily or mental functions or is demonstrable, medically or psychologically, by accepted clinical or laboratory diagnostic techniques.
 - Disability is not restricted to impairments that substantially limit a major life activity.

Legal Obligation

Failing to accommodate

March 2023



Massachusetts jury awards \$24 million for failure to accommodate.



The plaintiff disclosed that she had an anxiety disorder after being informed that her job duties would expand to include additional social interactions, presentations, and visits with clients.



The plaintiff went on approved medical leave and was terminated after eight months of leave.



The employer engaged in the interactive process and granted a reasonable accommodation for two out of the five requested categories. It reasoned that it would be unreasonable to eliminate the core requirements of in-person meetings.



The jury awarded the plaintiff \$24 million in damages after determining that the employer had discriminated against her for failing to provide a reasonable accommodation and subjected her to an adverse employment action.

EPSTEIN
BECKER
GREEN

Assessing Mental Health in the Interactive Process

How do you approach the interactive process?



Is the request credible?



Mental health support has transitioned from a pleasant perk to a business necessity, given the heightened awareness of workplace factors that could contribute to mental health concerns. Employers must gauge the integrity and legitimacy of employee requests for mental health accommodations to ensure productivity.

Reasonable Accommodations

The ADA



Prohibits employers from discriminating against qualified individuals with a disability in regard to employment (applicants and employees)



Requires employers to provide reasonable accommodation to qualified individuals with disabilities who can perform the essential functions of their jobs with or without accommodation, unless doing so would constitute “undue hardship”



The ADA always requires an individualized inquiry into the ability of a particular person to meet the requirements of a particular position that is context-specific



The March 2011 EEOC ADAAA regulations direct employers to focus their efforts on reasonably accommodating employees with disabilities so long as the worker can perform the essential functions of the job

Reasonable Accommodations

Qualified individual

August 2023



The Court held that Plaintiff was not a qualified individual.



Plaintiff worked at a hospital supervising a radiology department and acting as a liaison. Given the COVID-19 concerns, the hospital required masks, which Plaintiff refused to wear, citing anxiety.



For four months, Plaintiff worked behind closed doors without a mask. She then took FMLA leave and resigned without further communication.



Plaintiff obtained a doctor's note recommending she work entirely from home due to anxiety over wearing a mask. The hospital asked if a face shield could work instead, but it received no response.



Plaintiff sued the hospital for disability discrimination, but lost at the district court level. On appeal, the court held that no reasonable juror could find that [Plaintiff] could perform certain essential functions of her job without being present in the radiology department that she oversaw."

Impact of COVID

Pre-COVID-19

Modified work schedules

Changes to work environment

Modified job duties

Providing technology aid

Service animals

Post-COVID-19

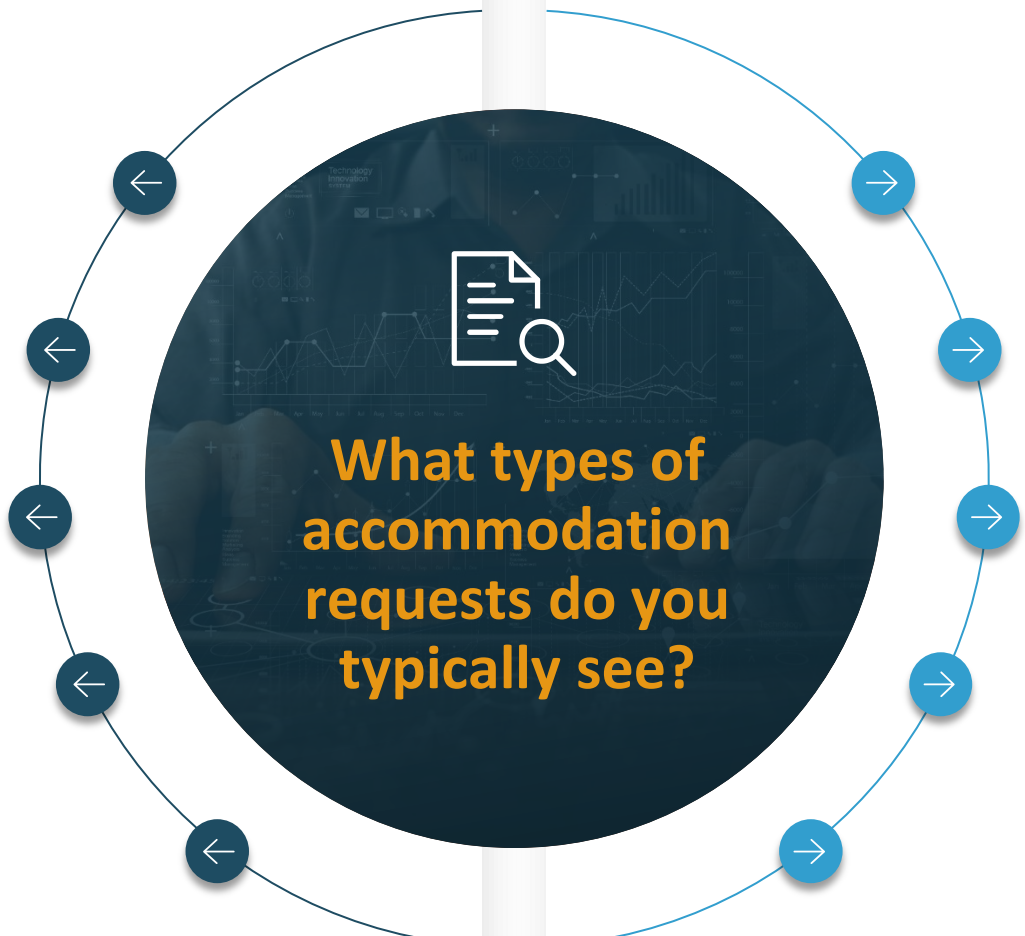
Permanent remote work

Hybrid work schedules

Mental health leave of absence

Increased access to employee assistance programs

Intermittent leave/part-time schedules



What types of accommodation requests do you typically see?

Remote Work

The elephant in the room



Highly divisive topic

- Job-specific inquiry
- Focus on collaboration

Important to understand the specific underlying need/limitation

- Being around crowds
- Stress/anxiety around commuting
- Sensitivity to lighting, noise, or smells

*Consider **alternative accommodations** that address the limitation—be creative and flexible*

- Changing the days the employee works in the office
- Changing working hours outside of peak commuting hours
- Paying for parking
- Changing seating to a less crowded area of the office

EPSTEIN
BECKER
GREEN

Managing Stress and Burnout in the Workplace

Supporting Mental Health Concerns

61 percent of U.S. professionals feel like they are burning out, which has resulted in a demand for mental health support.



Employers responded by offering Employee Assistance Programs (EAP):

- Assessments
- Short-term counseling
- Management consultation
- Coaching services to employees



Alternative/flexible work schedules

- The Four-Day Workweek Trial
- 95 percent of employees want to continue their four-day week
- 69 percent of employees experienced reductions in burnout
- Anxiety reduced for 39 percent of the sample
- 63 percent of businesses determined it more feasible to attract and retain employees

Thank You!

