

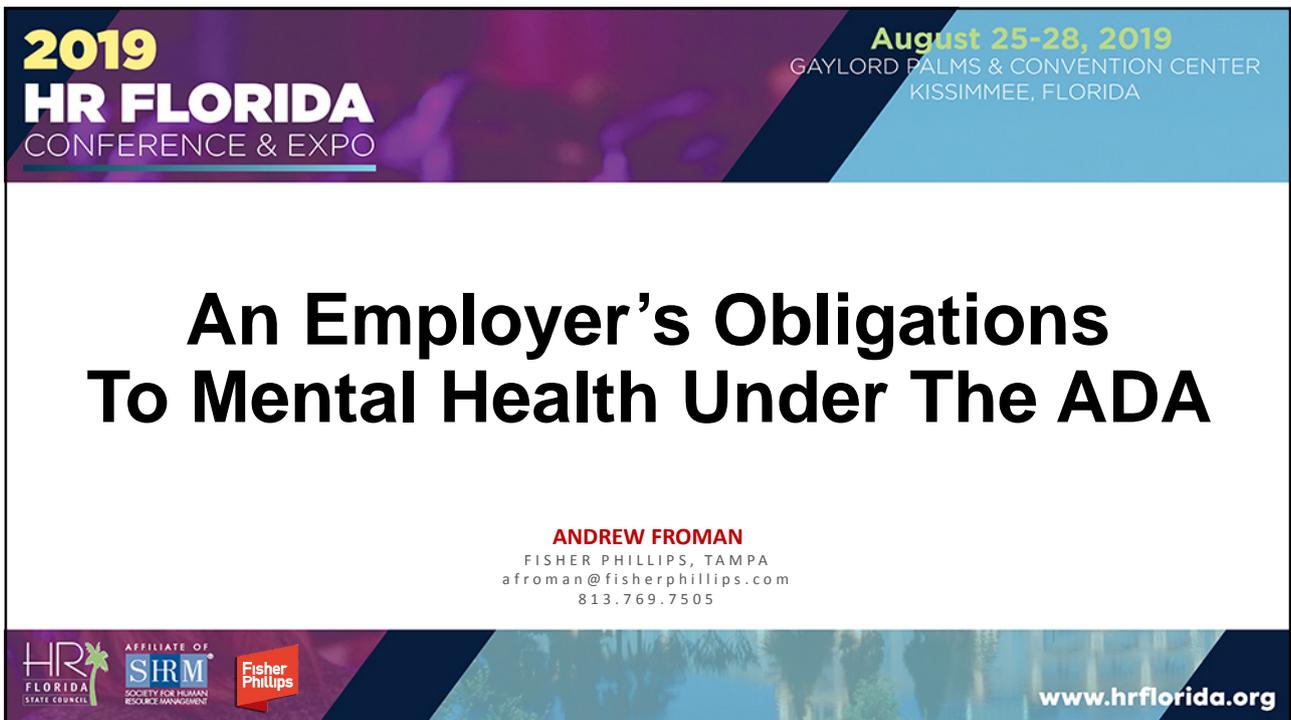


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2019
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August 25-28, 2019
GAYLORD PALMS & CONVENTION CENTER
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**An Employer's Obligations
To Mental Health Under The ADA**

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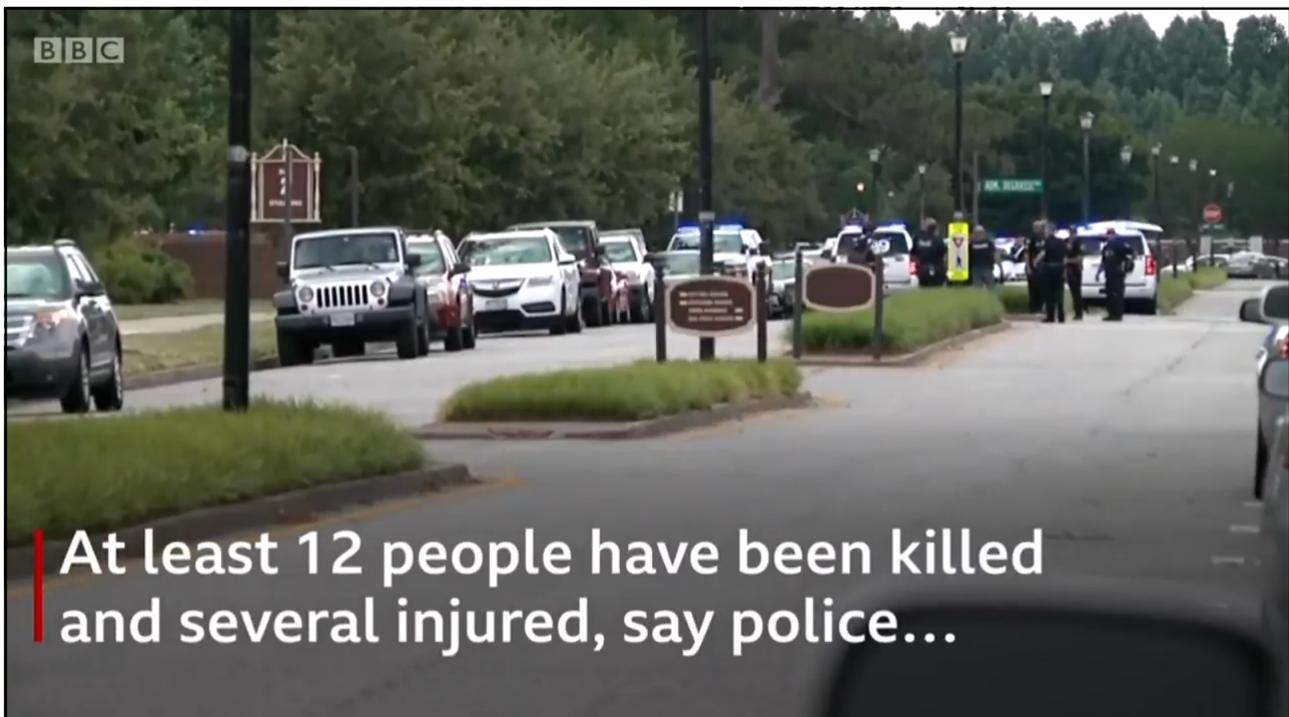
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**At least 12 people have been killed
and several injured, say police...**

Overview

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- ADA mental health
- FMLA implications
- Recent cases
- Best practices
- Workplace safety
- Substance Abuse Issues

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Statistics

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- According to one recent survey, half of all workers have experienced a mental health problem in their current job.
- According to the World Health Organization, 300 million people worldwide suffer from depression and mental health issues cost the global economy \$1 trillion in lost productivity.

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Important Considerations

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- Health and welfare of the employee
- Impact on productivity/morale of co-workers
- Maintenance of a safe work environment (workplace violence issues)
- Protection of confidential medical information

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Challenges Unique to Mental Health Conditions

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- Stigma
- Avoidance of treatment/mitigating measures
- Not obvious
- Different people, different experiences
- Lack of front-line training

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Common Scenarios

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- Long-term employee, dependable performer, exhibits unusual behavior
- New hire tells supervisor she suffers from anxiety and depression
- Poor performer raises condition for first time when counseled for performance issues

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Issues Employers (and Courts) Struggle With

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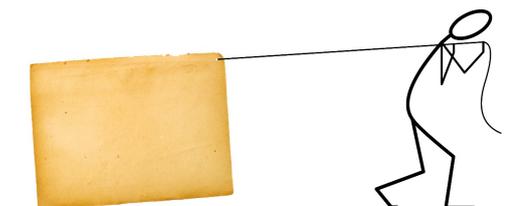
- Is the employee “disabled”?
- When is the interactive process obligation triggered?
- What are the “essential” job functions?
- Can we discipline/terminate an employee with a known mental disability?

ADA EEO
FMLA HUMAN OSHA
RESOURCES
Best Practices Workers Com
Hiring/Firing FLSA
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Mental Impairment

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- A mental illness severe enough to warrant hospitalization is virtually always a **serious health condition** under FMLA. Many mental illnesses that do not require hospitalization are serious health conditions.
- Any physiological or mental disorder, including intellectual, emotional, and learning disabilities



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Rachel suffers from schizophrenia, but her condition is controlled by medication so her co-workers have no idea. On occasion, her symptoms recur and she has to take time off.

Is Rachel “disabled”?

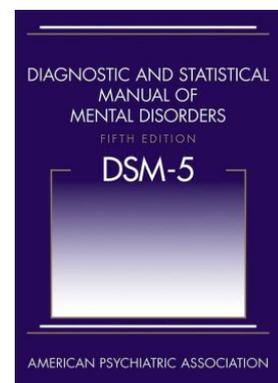
Does she qualify for FMLA leave?

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Defining Mental Health Issues DSM-5: What Is It?

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- Used by psychiatrists, psychologists and other mental health professionals worldwide to diagnose mental illness
- Inclusion of a diagnosis in the DSM is often required for treatment to be covered by health insurance



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DSM-5 And The ADA

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- Must a mental “impairment” be listed in DSM-5 in order to qualify under the ADA?
- Legislative history of the ADA suggests that it must
- EEOC’s position is that inclusion in the DSM is “relevant” for determining whether a mental disorder is covered by the ADA
- If it’s in DSM-5 it will likely qualify, except...

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What is Covered?

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- Traits and Behaviors vs. Impairments
- “Traits or behaviors are not, in themselves, mental impairments. For example, stress, in itself, is not automatically a mental impairment. Stress, however, may be shown to be related to a mental or physical impairment. Similarly, traits like irritability, chronic lateness, and poor judgment are not, in themselves, mental impairments, although they may be linked to mental impairments.”
 - EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities

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DSM-5 and The ADA

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- Some mental disorders are not covered by the ADA even though they are in DSM-5:
 - Exhibitionism
 - Voyeurism
 - Pedophilia
 - Transvestism
 - Pyromania
 - Kleptomania
 - Compulsive gambling

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DSM-5 and The ADA

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- What types of mental disorders are likely to be presented in the workplace:
 - Narcissistic Personality Disorder
 - Depression
 - Bipolar Disorder
 - Substance Use Disorder
 - Anxiety Disorder
 - Post-traumatic Stress Disorder
 - Obsessive-Compulsive Disorder
 - Panic Disorder
 - Asperger's Syndrome

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ADA Definition of “Qualified”

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- Education/experience/skills standards
- Able to perform essential functions
- With or without reasonable “accommodation”

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What Are “Essential Functions”?

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- Fundamental to the position:
 - Not marginal
- How about:
 - Attendance?
 - Ability to work in stressful environment?
 - Ability to work peacefully with co-workers?
 - Punctuality?
- Essential Functions v. Qualifications

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The Basic Rule

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- You must **reasonably accommodate** a **disabled** employee or applicant unless doing so is an **undue hardship** or creates a **direct threat** to health or safety.



Don't Forget About the FMLA

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- Unusual behavior may be (and probably is) sufficient notice of a potential “serious health condition”
- Err on the side of caution:
 - Provide FMLA notices
 - Ask “How can I help?”

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Reasonable Accommodations

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- Provide equal opportunity for individual to be considered for the job he or she **holds** or **desires**
- Enable employee to perform essential functions of job employee holds or desires
- Provide equal opportunity for individual to enjoy equivalent benefits and privileges
- Focus on the job restrictions, not on the diagnosis
- Not every diagnosis will impact an employee's ability to work
- If limitations on employee's ability to work are not clear, obtain medical certification
- Never assume that an employee's problems are the product of a mental condition

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The Interactive Process

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- A timely good-faith exchange of information between employer and a disabled employee or applicant to explore both:
 - Necessity for accommodation
 - Accommodation options

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When To Start The Interactive Process

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- Initiate the interactive process when the employee's disability is **known** or **apparent**. For example, when:
 - Employee requests an accommodation
 - Employee presents doctor's note with work restrictions
 - Employee exhausts FMLA leave
 - Employer otherwise becomes aware of need for accommodation through third party or observation

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Requesting Medical Information

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- Employers are entitled to know:
 - Healthcare provider's qualifications
 - Nature and duration of restrictions but not necessarily entitled to know diagnosis
 - Employee's limitations
 - Need for reasonable accommodation
 - Suggested accommodation(s)
- May request medical documentation and information
- Be clear on what you are seeking so that employee and physician know the request is narrowly tailored to the restriction or concern at issue
- Use ADA questionnaire or letter to healthcare provider
- If information is unclear, consider requiring Independent Medical Examination (IME)

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Requesting Medical Information

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- If medical information provided still unclear, may require Independent Medical Examination (IME):
 - Inquiries must be limited to employee's limitations that require accommodation
 - Employer pays cost of the examination

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Documentation

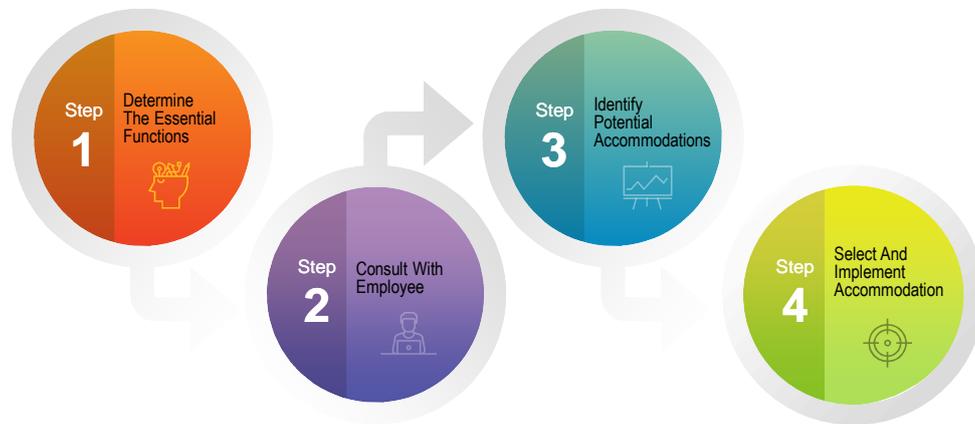
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- You must thoroughly document:
 - All meetings and communications with the employee
 - All accommodations considered
 - Search for alternate positions
 - Employee's failure to cooperate

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Interactive Process

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- Determine the “essential functions” of the position:
 - Position exists to perform function
 - Time spent performing
 - Job description
- Obtain employee’s agreement regarding essential job functions:
 - Review list of essential job functions at first meeting
 - Have the employee sign job description or a statement of essential job functions

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Step
2Consult With
Employee

- Consult with disabled employee regarding limitations:
 - Ascertain job-related limitations
 - Determine impact of limitations on ability to perform essential functions
 - Discuss how limitations can be overcome

Step
3Identify
Potential
Accommodations

- Identify potential accommodations:
 - Ask employee and/or healthcare provider for proposed accommodations
 - Determine if other reasonable accommodations exist
 - Assess the effectiveness of proposed accommodations
 - If no accommodation possible in position held, are any vacant positions available?
 - Is employee qualified for position?



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Step
4
Select And
Implement
Accommodation

- Select and implement accommodation that enables employee to perform essential job functions:
 - Employee's preference does not control
 - Provide written explanation as to why employer selected a different accommodation

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What If It Doesn't Work?



- Interactive process extends beyond the first attempt
- Determine whether other reasonable accommodations are available
- Document reason first accommodation failed (*i.e.*, employee unable to do job)

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When Are You Done?

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- Accommodation no longer needed
- Accommodation successful
- No reasonable accommodation exists
- Employee fails to cooperate
- Accommodation is an undue hardship
- Direct threat with or without accommodation

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Accommodations Might Include...

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- Job restructuring
- Work at home
- Modification of work policies
- Transfer to a vacant position
- Leave of absence

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Accommodations That Are Not Reasonable

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- Lowering a quality or quantity standard
- Eliminate essential job function
- Excusing misconduct
- Creating new job
- Giving a new supervisor
- Indefinite leave

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Fitness For Duty/Direct Threat

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- CDC – 25% of American adults suffering from a mental illness
- ***Vast majority of people who are violent do not suffer from a mental illness*** (American Psychiatric Association)
- No shortage of workplace violence:
 - Germanwings co-pilot intentionally crashed a plane
 - Workplace shootings
- Weigh risks of ADA claim with catastrophic loss
- Consider whether a reasonable accommodation will permit the employee to perform the essential functions, and do so without posing a direct threat to safety

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Workplace Violence Considerations

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Common High Risk Behaviors

- Has a fascination with weapons
- Past history of violence, trouble with the law, alcoholism, substance abuse
- Files multiple unreasonable grievances, openly voices threats
- Carries a grudge, a belief that revenge is justified
- History of antisocial behavior
- Blames others for own problems
- The general tendency to react angrily to most situations, (versus a temporary emotional state)

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Direct Threat

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- A significant risk of substantial harm to the health or safety of that employee or others, which cannot be eliminated by reasonable accommodation
- An individual is not qualified if they constitute a direct threat
- Factors to consider:
 - Nature of risk
 - Duration of risk
 - Severity of potential harm
 - How imminent is the harm

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Fitness for Duty

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- Focus on performance
- What's causing the performance issue?
- Do not ask questions about health condition.
- Only if the employee volunteers medical issue is it appropriate to make fitness for duty inquiry
- Fitness for Duty inquiry:
 - Reasonable belief
 - Objective evidence
 - Employee's ability to perform essential function is impaired by psychiatric condition

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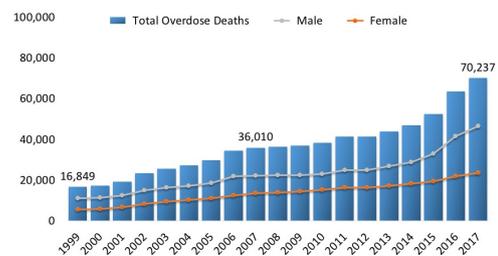
SUBSTANCE ABUSE

The Opioid Crisis

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- In 2016, 11.8 million people (aged 12 or older) used heroin or misused prescription opioid pain relievers.
- Drug overdose is the leading cause of accidental death in the US:
 - More than car crashes and gun homicides combined

Figure 1. National Drug Overdose Deaths Number Among All Ages, by Gender, 1999-2017



Source: Centers for Disease Control and Prevention, National Center for Health Statistics, Multiple Cause of Death 1999-2017 on CDC WONDER Online Database, released December, 2018

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Alcohol Abuse

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- A hospital emergency room study showed that 35% of patients with an occupational injury were at-risk drinkers.
- Large federal surveys show that 24% of workers admit to drinking in the workplace at least once in the past year.

Source: National Council on Alcoholism and Drug
Dependence <https://ncadd.org/learn-about-alcohol/workplace>

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The Americans with Disabilities Act (ADA)

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- A rehabilitated and/or rehabilitating drug or alcohol addict is protected under the ADA
- Leave of absence for rehabilitation may be considered a reasonable accommodation (before violation of policy):
 - Must engage in **“interactive process”**
- **Current illegal use of drugs** is **not** protected under the ADA

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ADA Issues – “Current Use”

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- The EEOC has stated that “current” means “recently enough” to justify the employer’s reasonable belief that drug use is an ongoing problem.
- Courts have indicated that “currently engaging” is not limited to “the day of” or even within a matter of days or even weeks before the employment act (i.e. workplace accident) took place.
- It is intended to apply to the illegal use of drugs that has occurred recently enough to indicate that the individual **is actively engaged in illegal drug use.**

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Family and Medical Leave Act (FMLA)

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- The FMLA provides twelve weeks of unpaid leave and reinstatement for an employee with a “serious health condition”
- In most cases, drug or alcohol addiction will be considered a “serious health condition”
- An employee’s time off for entering/participating in a substance abuse program will count as FMLA leave:
 - But not to recover from the side effects of substance abuse (such as a hangover or drug-induced incapacity)
- Check state law requirements

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Drug-Free Policies

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- No one-size-fits-all
- Key components:
 - Written policy
 - **Effective** and accurate drug testing
 - Employee education
 - Supervisor training
 - Employee assistance program

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The Legal Landscape is Evolving

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- Pay attention to changes in the law
- Legal Alerts
- Adjust policies, procedures, and employment actions accordingly
- Seek legal counsel as needed

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Employee Fails to Take Meds

- Employee with bipolar disorder fails to take her medication at times
- Coworkers and her supervisor have complained

Can we require her to take her medication?

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The “Bulletproof” Employee

For weeks, you have been telling Fred that his attendance needs to improve. You’ve finally done a write-up and presented it to Fred. He says that he is really sorry but his anxiety has been flaring up and he has been afraid to leave his house in the morning.

Can you still give Fred the write-up?

Do you need to do anything else?

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The Employer's Challenge

How do I accommodate...

The socially awkward employee with Social (Pragmatic) Communication Disorder?



The Employer's Challenge

How do I accommodate...

The dishonest employee with Antisocial Personality Disorder?





Hypothetical

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- Lindsay has been employed for four months. Her co-workers have been reporting strange behavior by her in the workplace. For example, she was observed practicing penalty kicks in the conference room and talking and wildly gesturing while alone in the break room. Her behavior makes them nervous.
- You pull Lindsay's production numbers and see no issues with her productivity or attendance.

What, if anything, do you do?

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Hypothetical

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- You met with Lindsay and she disclosed that she struggles with some mental health related problems. She said that she feels like they are getting worse and she wants to take a leave of absence for a couple months in order to seek intensive treatment.
- Her supervisor believes Lindsay is a disruption in the workplace and a liability. He also says that his department has already laid off two people in the last two years so he can't do without Lindsay's position for any extended period of time.

How do you handle Lindsay's request?

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Best Practices

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- Regularly update job descriptions
- Implement/review policies/process for handling accommodation requests
- Train your front line***
 - “How can I help?” v. “You seemed depressed.”
- Be alert to signals for accommodation need
- Gather necessary information
- Keep medical information confidential
- Don’t pretend to be a doctor
- Be the last man standing in the interactive process

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Best Practices

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- Make decisions based on facts, not stereotypes
- Assess each request for accommodation individually
- Implement a return-to-work plan
- Introduce a dedicated counselling service or helpline for mental health issues
- Train on mental health issues including mental health first aid
- Use positive language – avoid stigmatizing
- Foster a culture of support and openness so that those needing help feel reassured to seek help without any stigma being attached to them

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