



Updated Psychiatric Manual May Pose New Challenges for Employers

Insights

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Suppose a shy and awkward employee who just performed badly in a customer presentation brings a note from his doctor diagnosing “Social (Pragmatic) Communication Disorder” and asks not to have to meet with customers again as a reasonable accommodation.

Or an older employee who is about to be given a final warning for making critical mistakes in her work brings a note from her doctor stating that she has “Mild Neurocognitive Disorder” and requesting that her job be restructured to help her deal with her short-term memory loss.

Or an employee fails to return to work after taking the company’s standard bereavement leave for the death of a close relative. Eventually his doctor faxes a note stating that the employee has major depression and needs leave until further notice to deal with his loss.

Each of these scenarios is made possible by the American Psychiatric Association’s release in May of a new edition of its *Diagnostic and Statistical Manual of Mental Disorders*, known as “DSM-5.” This manual is primarily used by psychiatrists and other mental health professionals in diagnosing patients, but its addition of new diagnoses and expansion of others is likely to impact employers as well.

More Diagnoses

Experience with previous editions of the DSM indicates that when new diagnoses are added to the manual, a substantial number of people are diagnosed with that condition. DSM-5 adds several new diagnoses that employers may encounter. “Social (Pragmatic) Communication Disorder” describes persons whose communication skills are impaired but who do not qualify for an autism diagnosis. It applies to persons with “persistent difficulties in the social use of verbal and nonverbal communications” that limit social relationships or occupational performance. While typically diagnosed in childhood it can continue into adulthood. Employees previously thought to be merely shy or socially awkward may qualify for this new diagnosis.

“Mild Neurocognitive Disorder” describes a modest decline in learning, attention, or memory not associated with another mental disorder that does not interfere with the person’s ability to live independently but which may require “greater effort, compensatory strategies, or accommodation.” This condition could likely be diagnosed in many people over the age of 50.

While accommodations for the effects of aging is not required under the Age Discrimination in Employment Act, this new diagnosis may lead to requests for accommodation under the ADA by older workers for whom the ordinary effects of aging make their work more difficult.

DSM-5 also makes it easier to qualify for some diagnoses. For example, the “bereavement exclusion” has been removed from the definition of Major Depressive Disorder. Under earlier editions of the DSM, major depression could not be diagnosed for ordinary bereavement symptoms lasting no more than two months.

Under DSM-5, a person having symptoms of depression for longer than two weeks may qualify for a diagnosis of major depression even if those symptoms are the result of bereavement. Employees, therefore, might seek more lengthy bereavement leaves than are currently available following the death of a family member or close friend.

DSM-5 additionally broadens the diagnostic criteria for Posttraumatic Stress Disorder in two key ways. One, it permits a PTSD diagnosis where the person merely learns about a traumatic event, versus the prior requirement that the event actually be witnessed or experienced. Two, it eliminates the prior requirement that the person experience fear, helplessness, or horror at the time of the traumatic event. These changes may increase the number of employees who will qualify for a PTSD diagnosis.

Also, DSM-5 does not treat personality disorders separately from other mental disorders as did its predecessors. These long-term conditions include antisocial, borderline, and narcissistic varieties, in which a person exhibits disruptive behavior and often has extreme difficulty relating to others. They were not previously much of a focus of diagnosis and treatment but DSM-5’s including them among other mental disorders will likely increase the frequency of their diagnosis.

Antisocial personality disorder is characterized by manipulateness, deceitfulness, lack of empathy, and irresponsibility. Borderline personality disorder is marked by severe emotional instability and impulsive behavior. Narcissistic personality disorder is characterized by excessive need for approval, grandiosity, a sense of entitlement and lack of empathy.

More Disabilities To Accommodate?

The new and expanded diagnoses in DSM-5 are likely to increase the number of conditions covered by the Americans with Disabilities Act. Although DSM-5 cautions that the assignment of a diagnosis does not imply a specific level of impairment or disability, this distinction has little practical meaning given the enactment of the ADA Amendments Act in 2008 in which Congress decreed that the definition of “disability” for purposes of the ADA is to be construed broadly in favor of coverage.

The EEOC’s regulations issued under the ADA even decreed that certain psychiatric disorders, including Posttraumatic Stress Disorder, Major Depressive Disorder and Bipolar Disorder, will almost always qualify as disabilities.

But the mere inclusion of new diagnoses in DSM-5 does not necessarily mean that employees with those diagnoses are entitled to accommodations. If a diagnosis does not restrict the employee's ability to work in some way, it is not likely to require an accommodation. Moreover, there are limits to what must be done as an accommodation.

First, an essential function of a job need never be eliminated as an accommodation. If a job's essential elements include meeting with customers or performing calculations accurately, an employer need not eliminate these functions for employees who cannot perform them on account of a mental disorder.

Second, employers are not required to provide indefinite leaves of absence, nor must they tolerate erratic attendance as a reasonable accommodation.

Third, accommodations are only required to the extent that they will enable the employee to perform the job. Accommodations such as job restructuring, working at home and the like, need not be provided merely to make work more convenient or agreeable.

Fourth, disruptive or dangerous employee misconduct typically need not be accommodated. Even in the U.S. Courts of Appeals for the 9th and 10th Circuits, which require employers to accommodate misconduct in some instances, violent or threatening conduct is never protected.

More Lawsuits?

DSM-5's impact on employers is not all negative. Two of its changes may actually be beneficial to employers facing claims for mental damages in employment litigation.

First, earlier editions of the DSM utilized a "Global Assessment of Functioning" (GAF) scored on a 0-100 scale. The GAF was often misused in expert testimony in employment lawsuits, as a mental health expert would testify that before being fired the employee had a GAF of 90 (blissfully happy) and after being fired his GAF plummeted to somewhere around 40 (barely functioning). Most experts just assigned a GAF score arbitrarily, but juries sometimes found it a meaningful measure of how badly an employee "suffered" at the hands of the employer. DSM-5 eliminates the GAF, so this sort of testimony will no longer be possible.

Second, DSM-5 tightens up the definition of PTSD a bit in a way that is helpful to employers. It requires that the traumatic event involve exposure to "actual or threatened death, serious injury, *or sexual violence*" versus "actual or threatened death or serious injury, *or a threat to the physical integrity of self or others*" as required in the previous DSM. The latter definition led to attempts by employees to attribute PTSD to sexual harassment, job loss, discrimination, and common workplace conflicts.

Now, except where a physical or sexual assault occurs, a PTSD diagnosis cannot validly be given under DSM-5 for unpleasant events occurring at work. In fact, DSM-5 places such phenomena as sexual harassment, unemployment, job stress, and conflicts with bosses or coworkers in a category

sexual harassment, unemployment, job stress, and conflicts with bosses or coworkers in a category called “Occupational Problems” which may cause a person to seek counseling or therapy but which do not warrant a diagnosis of a mental disorder.

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