



Mental health matters: Key issues for US employers

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The impacts of COVID-19, continuing economic uncertainty, and other developments at home and around the world are exacerbating mental health challenges globally. Now, more than ever, it is critical for businesses to create an environment for employees to seek and receive support, build resilience, and thrive.

Below, we identify key issues for US employers to consider as they evaluate their mental health strategies and health plan coverage, communicate with employees, and manage compliance with obligations under the Americans with Disabilities Act (ADA) and other federal, state, and local laws that may require or permit leave and/or other accommodations based on mental health conditions.



Mental health issues are on the rise

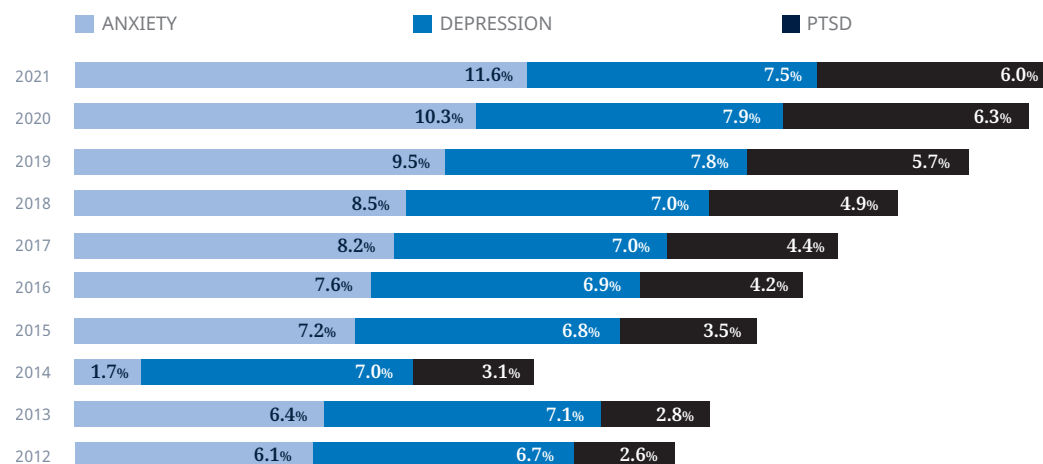
Mental health issues are more prevalent than ever. Approximately one in five adults in the US, or 57.8 million people, experienced mental illness in 2021, according to data from the National Institute of Mental Health. Yet many businesses are not prepared to address mental health issues at work, which can lead to lower employee productivity, absenteeism, and attrition.

The Centers for Disease Control and Prevention (CDC) estimates that employee depression accounts for 200 million lost workdays each year and costs US employers \$17 billion to \$44 billion. According to the World Health Organization, depression and anxiety cost the global economy approximately \$1 trillion each year in lost productivity.

Legal risks can also be significant. Litigation and federal agency enforcement actions and initiatives related to mental health issues in the workplace are growing:

- In FY 2022, almost 40 percent of discrimination charges filed with the Equal Employment Opportunity Commission (EEOC) included disability-related claims under the ADA, with an increasing percentage of those alleging mental health conditions.
- From 2010 to 2021, the percentage of EEOC claims involving a mental impairment increased from 10 percent to almost 30 percent. ADA charges related to an anxiety disorder nearly doubled during this period.
- Accommodation cases filed in federal courts increased almost 20 percent over the last two years and are ticking up in 2023.
- The Department of Labor (DOL), Department of Health and Human Services, and Department of the Treasury are prioritizing enforcement of mental health parity requirements. In FY2021, the DOL's Employee Benefits Security Administration undertook more mental health parity investigations than ever before.
- Insured and self-funded employers are seeing more individual and class-based ERISA claims targeting the scope of coverage of mental health benefits.
- The Occupational Safety and Health Administration (OSHA) recently launched an updated website on workplace stress to help employers and workers manage workplace stress and maintain mental health amid a shifting work climate.
- In May, the Department of Labor [launched an initiative](#) to help employers talk with workers about workplace stress, mental health, and substance use.

MENTAL HEALTH DISCRIMINATION CHARGES ARE INCREASING



Actions for employers

Employers can positively impact the mental health and wellbeing of their employees, reduce compliance risk, and enable employees living with mental health conditions to thrive at work by taking a few key steps. Below are actions for employers to consider.

Upskill your leaders

Businesses can support their wellbeing strategies by ensuring leaders are equipped to support their teams, discuss mental health issues in an appropriate and lawful manner, and direct employees to available resources. Tips to consider:

- **Build a culture of wellness.** Encourage leaders to make time to connect regularly with their team, model self-care and wellness, and share information about company mental health and wellness resources. Employers should be mindful of the possibility of perceived disability claims when communicating with employees about available resources. Communications to the entire workforce can remind employees how to get help while minimizing legal risks.
- **Raise awareness of diversity, inclusion, and belonging issues.** Embracing and fostering diversity and inclusion can help all employees, including members of underrepresented groups, to feel included and to see their organization as a place where they can be authentic, grow, and succeed.
- **Designate experienced human resources (HR) professionals.** Designating experienced HR professional(s) to handle employee issues and facilitate leave and accommodation requests can help to ensure they are handled in a prompt, consistent, and compliant manner.
- **Train managers and supervisors on their legal obligations** under the ADA and other federal, state, and local laws and how and when to involve HR.

Prepare for more accommodation requests

Given the increasing prevalence of mental health issues, it is critical for employees to know how they can ask for help, and for supervisors and managers to know how to respond. Tips to consider:

- **Remind employees how to make a request.** Having an accommodation policy and process in place will help to protect employees' rights and ensure designated HR representatives promptly receive notice of requests.
- **Train managers and supervisors to recognize a request.** Even if the employer has a policy, employee requests may be informal and arise during regular conversations or in response to performance management discussions. Similarly, employees might not mention the ADA, the phrase "reasonable accommodation," or other legal jargon. If an employee raises a connection between a work challenge and a medical condition, the ADA's requirement to engage in an interactive process may be triggered. Employers are encouraged to train managers and supervisors to err on the side of caution, to promptly contact HR, and not to evaluate or respond to accommodation requests. If a manager or supervisor says no to a request, they may inadvertently shut down the interactive process. If the manager or supervisor agrees to a request which eliminates an essential job function, it could both make it difficult for the employer to argue that the function is essential and create the risk of differential treatment.
- **Be mindful of ADA medical inquiry rules.** Asking an employee who has not raised an issue whether they need an accommodation may violate ADA rules regarding medical inquiries. Similarly, proactively



mentioning disability or accommodation could suggest a manager regards an employee as disabled. Managers and supervisors can manage these issues by focusing on performance, avoiding comments that suggest they believe an employee has a physical or mental condition, and asking neutral questions (eg, “How are you doing? Is there anything I can do to help?”).

- **Determine if there is a direct threat.** Employers do not need to provide an accommodation to an employee who poses a direct threat to the health or safety of the employee or others in the workplace. Managers should immediately engage with HR and/or local law enforcement or other appropriate authorities if they believe an employee poses a serious danger to themselves or others.

Focus on building an effective interactive accommodation process

The ADA requires employers to provide reasonable accommodations to individuals with disabilities unless doing so would cause an undue hardship, ie, significant difficulty or expense. This requires the employer to engage in a flexible, cooperative interactive process to determine if there is a reasonable accommodation that will allow the employee to perform the essential functions of their job. Tips to consider:

- **Review essential job functions.** An employer is not required to remove an essential function of a job to accommodate an individual's disability, so determining which duties are essential is key. Relevant factors can include:
 - The reason for the position
 - The amount of time spent on the job performing the function
- **The consequences of not requiring the employee to perform the function**
- **The work experience of past incumbents in the job and those in similar jobs**
- **Ensure fair and accurate job descriptions.** While the ADA does not require an employer to develop or maintain job descriptions, a written job description prepared before posting or interviewing applicants will be considered in determining essential functions. Identifying truly essential physical, mental, and environmental requirements – and periodically revisiting them to ensure they remain accurate – can help to set expectations and to identify specific tasks that may be modified as part of an accommodation solution.
- **Be creative and thorough in considering accommodation requests.** Once an employee has requested an accommodation for a mental health disability, employers should engage in an interactive process with the employee to determine whether it can provide any accommodations without undue burden. This is a highly individualized, fact-specific determination. Potential reasonable accommodations for individuals with mental health disabilities can include:
 - **A flexible workplace:** telecommuting and/or working from home
 - **Scheduling adjustments:** part-time work hours, job sharing, adjustments in the start or end of work hours, compensation time and/or “make-up” of missed time
 - **Leave:** sick leave for reasons related to mental health, flexible use of vacation time, additional unpaid or administrative leave for treatment



or recovery, leaves of absence, and/or use of occasional leave (a few hours at a time) for therapy and other related appointments

- **Breaks:** breaks according to individual needs rather than a fixed schedule, more frequent breaks and/or greater flexibility in scheduling breaks, provision of backup coverage during breaks, and/or telephone breaks during work hours to call professionals and others needed for support
- **Adjustments to other policies:** beverages and/or food permitted at workstations, if necessary, to mitigate the side effects of medications and/or onsite job coaches
- **Modifications to workspaces:** reduction and/or removal of distractions in the work area, reduction of workplace noise that can be adjusted or allowing employee to wear headphones to block out noise, and/or increased natural lighting or full spectrum lighting
- **Equipment/technology modifications:** providing tape recorders for recording/reviewing meetings and training sessions, allowing use of “white noise” or environmental sound machines, and/or installation of software that minimizes computerized distractions such as pop-up screens
- **Confirm communication with the employee is prompt, effective, and documented.** Employers should document any communication with employees

relating to requests for accommodation and the interactive process. Employers should also respond promptly to any accommodation requests and ensure employees know who to reach out to with any follow-up requests or concerns.

- **Keep confidentiality concerns in mind.** Employers should be mindful that the Family and Medical Leave Act (FMLA) and ADA require employers to keep employee medical records confidential and maintain them separately from personnel files. The basic rule is that, with limited exceptions, employers must keep confidential any medical information they learn about an applicant or employee. Information can be confidential even if it contains no medical diagnosis or treatment course and even if it is not generated by a healthcare professional. For example, an employee’s request for a reasonable accommodation would be considered medical information subject to the ADA’s confidentiality requirements. However, supervisor and managers may be informed of an employee’s need to be away from work, or if an employee needs work duty restrictions or accommodations.

Carefully evaluate remote work requests

In the wake of the pandemic and largest-ever “work from home” experiment, more employees may request remote work as a reasonable accommodation. While the basic principles of the ADA remain the same – the

employer is not required to grant the employee's requested or preferred accommodation or eliminate an essential job function – employers are encouraged to carefully review these requests based on evolving guidance and court decisions. Tips to consider:

- **Assess the feasibility of remote work.** While remote work can present unique challenges and may not be desirable or feasible based on the circumstances, evidence from the pandemic suggests that flexible work can create more opportunities for disabled individuals. According to the EEOC, factors the employer should consider include:
 - Whether consistent and predictable in-person attendance is an essential job function
 - Whether the employee can be supervised adequately
 - Whether any duties require use of certain equipment or tools that cannot be replicated at home
 - The need for face-to-face interaction and coordination with other employees, and
 - The necessity of in-person interaction with outside colleagues, clients, or customers.
- **Review any track record of remote work.** While the usual ADA rules apply, guidance issued by the EEOC during the pandemic opined that that “the temporary telework experience could be relevant” to considering a renewed request for telework: “[T]he period of providing telework because of the COVID-19 pandemic could serve as a trial period that showed whether or not this employee with a disability could satisfactorily perform all essential functions while working remotely, and the employer should consider any new requests in light of this information.”
- **Focus on the interactive process** and monitor litigation and court decisions, which may be instructive. For example, the Eighth Circuit recently affirmed summary judgment on a plaintiff's failure to accommodate claim based on the denial of his blanket request to work from home during MS flare-ups, holding that the plaintiff could not show that his employer failed to engage in the interactive process insofar as it allowed him to work from home on a case-by-case basis and only denied one of his requests (and, on that day, he used paid time

off). Notably, the Eighth Circuit disagreed with the district court's holding that the plaintiff failed to demonstrate that he could perform his essential job functions. According to the Eighth Circuit, by allowing plaintiff to consistently work remotely aside from his medical condition, his employer “implicitly demonstrated a belief that he could perform his essential job functions without being in the office all the time.”

- **Consider a trial period.** A trial period may determine whether a particular accommodation is working well for both sides.

Consider whether other laws may apply

Navigating mental health claims can be challenging for employers, as they must consider several different potentially applicable intersecting laws, including federal statutes such as the ADA and FMLA, applicable state or local law equivalent statutes, and state workers' compensation laws. Tips to consider:

- **Assess obligations under various laws, which can differ.** For example, the FMLA's definition of a serious health condition can be broader than the definition of a disability and encompass many illnesses, injuries, and physical or mental conditions that require multiple treatments and intermittent absences. State leave and disability laws can provide greater amounts of leave and/or benefits to employees, including those who may not be covered by the ADA or FMLA.
- **Assess whether requested leave is an entitlement or an accommodation.** If an employee requests leave relating to a mental health condition, assess whether the employee is eligible for leave under the FMLA or applicable state law, or whether leave should be granted as a reasonable accommodation pursuant to the ADA. If more than one law applies, employers must provide leave under whichever law provides the employee greater protections.
- **Determine which laws may apply to the employee's circumstances.** Relevant questions include:
 - Is the injury work related and/or covered by workers' compensation?
 - Does the employee have a serious health condition under the FMLA or corollary state law?

- Is the employee eligible for FMLA leave or protected medical or family leave under state law?
- Does the employee's condition meet the definition of disability under the ADA or similar state law?
- If the employee is working remotely from another location, does that jurisdiction's law apply?

The EEOC and DOL have provided guidance on common questions raised by the intersection of these laws, which is equally applicable to mental health conditions.

Review insurance plan coverage of mental health issues

The national mental health crisis is putting a spotlight on access to quality mental healthcare, and health plans are subject to new requirements. Tips to consider:

- **Review health plan terms** and ensure compliance with the Mental Health Parity and Addiction Equity Act (MHPAEA). Consolidated Appropriations Act changes in 2021 clarified the requirements for health plans and insurers to demonstrate compliance with the MHPAEA by conducting a comparative analysis that shows that the nonquantitative treatment limitations applied to mental health and substance abuse benefits under a plan are no more restrictive than those applied to medical and surgical benefits.

- **Consider access to virtual mental healthcare options.** Measures to combat the spread of COVID-19 have fueled a rise in telehealth. While there is significant variation in demand, consumer acceptance, and market adoption of telehealth services – as well as the laws and regulations governing telehealth – many plan sponsors are adopting this option as a way to improve access to mental healthcare.

Investing in employee mental health benefits everyone

Employers have an important role to play in addressing the national mental health crisis – work is where many people spend most of their waking hours, and research has shown that employee engagement can have an extremely positive impact on mental health.

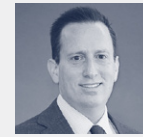
Improving employee mental health can also deliver other benefits. Research from the National Safety Council found that employers that support mental health see a \$4 return for every dollar invested. By implementing mental wellness initiatives and raising awareness of mental health issues, rights, and responsibilities, employers can boost employee mental health and enable employees to do their best work.

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