

Bowles Rice

I Need A Mental Health Day! Handling ADA Accommodation Requests for Stress, Anxiety, & Mental Health

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Look Around

You are NOT
ALONE

Millions of people are affected by mental illness each year. Across the country, many people just like you work, perform, create, compete, laugh, love and inspire every day.



1 in 5 U.S. adults
experience
mental illness

1 in 20

1 in 20 U.S. adults
experience serious
mental illness

17%

of youth (6-17 years)
experience a mental
health disorder

Source: National Alliance on Mental Illness

Causes: We Tend to Make This Hard

- 1) Limited *meaningful* employee paid sick leave
- 2) Of leave that IS available, stigma surrounding use of it for mental health reasons

*2022 : 63% of workers report taking at least 1 'mental health' day; Almost 1/2 of them lied about the reason to their boss**

* Spring 2022 survey by Breeze of 1500 employed adults

Causes: Are Things Getting Worse?



COVID-19 Impacts



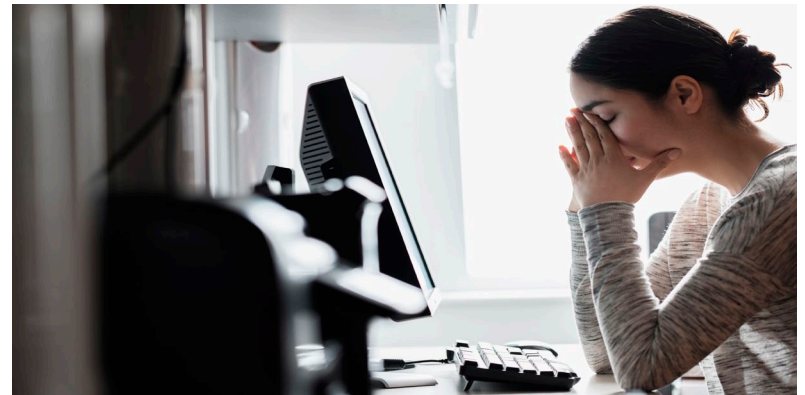
Financial



Personal



Societal/Political



“Mental health is the workplace crisis of our time”: NerdWallet CPO

2023 SHRM Foundation Survey

33% - Job had negative impact on my health in last 6 months

30% - Job makes me feel overwhelmed

29% - Job makes me feel anxious at least once a week



Workload, pay, staffing, management, lack of advancement all play roles

Why Is This Important?

LEGAL

Examples of lawsuits just within the last year:

- Morgan Stanley employee with fear of flying as well as post-COVID anxiety disorder requested accommodations, but instead was terminated, sued for in excess of \$4 million
- EEOC sued on behalf of a veteran w/PTSD got offer conditioned on drug screen. After employee advised of medication for condition in advance & tested “non-negative,” employer revoked the offer
- EEOC sued on behalf of a CFO who had severe/recurring depression that affected his ability to work and concentrate & was given weeks off to deal with the symptoms, but terminated upon his return

Why Is This Important?

PRACTICAL

- Significant factor in employee turnover / retention
 - * SHRM Foundation Survey: Nearly 50% of your employees are more likely to actively search for a job when they feel their existing one has a negative impact on their mental health
- Employee motivation / productivity
- Better attendance and lower insurance costs
- “Human” in HR

ROADMAP

- ADA Principles
 - Disability
 - Reasonable Accommodation / Interactive Process
 - Special Concepts
 - Accommodation Limitations
 - Mental Health Examples / Hot Spots / Resources
- Mental Health Interactive Accommodation Scenarios (application)
- Compliance Tips/Takeaways



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ADA PRINCIPLES

ADA Principles

- Employers w/15 or more workers: No discrimination against otherwise qualified employees or applicants with “disability” in compensation, employment decisions, or other terms/conditions
- “Disability”:
 - * Physical/mental impairment substantially limiting major life activity
 - * Having record of such an impairment
 - * Being “regarded as” having such an impairment
- “Qualified Employee”: Can perform essential functions of the position with or without reasonable accommodation

ADA Principles

- Covered employers are obligated to provide a “reasonable accommodation” to an employee w/disability who is otherwise qualified when requested (or obvious)
- Interactive Process: Having an interactive, back-and-forth, good-faith exchange to determine whether a reasonable accommodation exists
 - * Medical Information/review
 - * Analysis of essential job functions
 - * Employee input/discussion

ADA Principles

Special Concepts

- *Undue Hardship:*

- * Requires significant difficulty or expense

- *Direct Threat:*

- * Requires significant risk of substantial harm to health or safety of employee or others that cannot be eliminated or reduced by reasonable accommodation

ADA Principles

Accommodation Limitations

What you AREN'T obligated to do:

- Change/alter essential job functions
- Grant preferred/requested obligation
- Create new position for the employee
- Violate CBA/seniority/other rules



Mental Health Disability Examples

- Major Depression
- Bipolar Disorder
- Obsessive-Compulsive Disorder
- PTSD
- Borderline Personality Disorder
- Seasonal Affective Disorder
- Panic Attacks

Mental Health Accommodation

Hot Spots

- Recognizing when you have an employee that may need an accommodation for a mental health condition
- Being careful not to stereotype or assume an employee has a mental health condition or poses a direct threat
- Questions & communications with/employee & health care providers
- Requiring examinations/evaluations



Legal Authority/Resources on Mental Health

EEOC Enforcement Guidance on ADA/Psychiatric Disabilities ('97):

https://www.dni.gov/ncsc/Mental-Wellness/resources/Part%201_EEOC%20Enforcement%20Guidance%20on%20the%20ADA.pdf

EEOC Technical Assistance Document on Depression, PTSD & Other Mental Health Conditions ('16):

<https://www.eeoc.gov/laws/guidance/depression-ptsd-other-mental-health-conditions-workplace-your-legal-rights>

DOL Office of Disability Employment Policy:

* Job Accommodation Network (JAN):

<https://askjan.org/disabilities/Mental-Health-Conditions.cfm>

* Employer Assistance and Resource Network (EARN):

<https://askearn.org/page/about-earn>

MENTAL HEALTH INTERACTIVE ACCOMMODATION SCENARIOS

When It All Falls Apart

Luigi is from the sandwich generation. Besides the fact that he loves Italian hoagies, he has two school-aged children as well as an ailing mother and is the primary caregiver for them all. He serves as your IT Director and you recently had a security breach. He comes to you and says that he is going to have a nervous breakdown as a result of being under so much stress and needs to take the next week off for his mental health. The problem is, you are hosting a major conference next week and need him to be present to make sure everything goes smoothly.

When It All Falls Apart

1. Has Luigi requested an accommodation?
2. Luigi says his doctor would likely agree and that he would get a note to excuse him. He needs to leave for the conference tonight to get there in time. Can you terminate him if he refuses to go to the conference?
3. If Luigi was able to see his doctor via a telehealth visit that night and his doctor agrees that Luigi is suffering from anxiety, do you have to give him the week off?

Overworked and Unmedicated

As a result of the “great resignation” and your leadership’s decision to fully return to in-person work, your human resources team is overworked and short-staffed (probably underpaid, too). Sandra, your recruiter, has been making a lot of mistakes recently – including sending offers to the wrong candidates. You confront her and say, “you used to be so diligent about making sure your offer letters were perfect, what happened?” She tells you that she suffers from ADHD with anxiety and, due to a medication shortage, has been unable to obtain the medication she needs to regulate her symptoms – one of which is forgetfulness. When you mention you may have to take corrective action, she insists that you cannot discipline her for this because she is disabled and goes on to ask for someone else to check her work as an accommodation.

Overworked and Unmedicated

1. Can you fire Sandra without risk?
2. Should you ask her for medical documentation before making any disciplinary decisions?
3. Is Sandra's requested accommodation reasonable and if not, what other accommodations might be?

Trauma Transfer

Kevin is a nurse. He was an essential worker during COVID and, besides developing a real fear of exposure, he saw patients die alone and scared. The entire experience caused him a significant amount of trauma. After COVID was declared a public health emergency no longer and the hospital's COVID screening and protective measures were loosened, Kevin brings in a doctor's note that says that he has PTSD and cannot work. His doctor says Kevin needs to be transferred to a position that would let him work from home. You have a vacant quality position that would enable Kevin to do that, though it pays less than Kevin's current RN position, and you have an applicant that is equally as qualified as Kevin for the role.

Trauma Transfer

1. Should you require Kevin to undergo an IME?
2. Do you have to give Kevin the quality position or can you just tell him that it is ok for him to continue to follow COVID precautionary measures?
3. If you offered Kevin the quality position, would you have to make sure the pay is equivalent?

Drunk, Upset, and Afraid

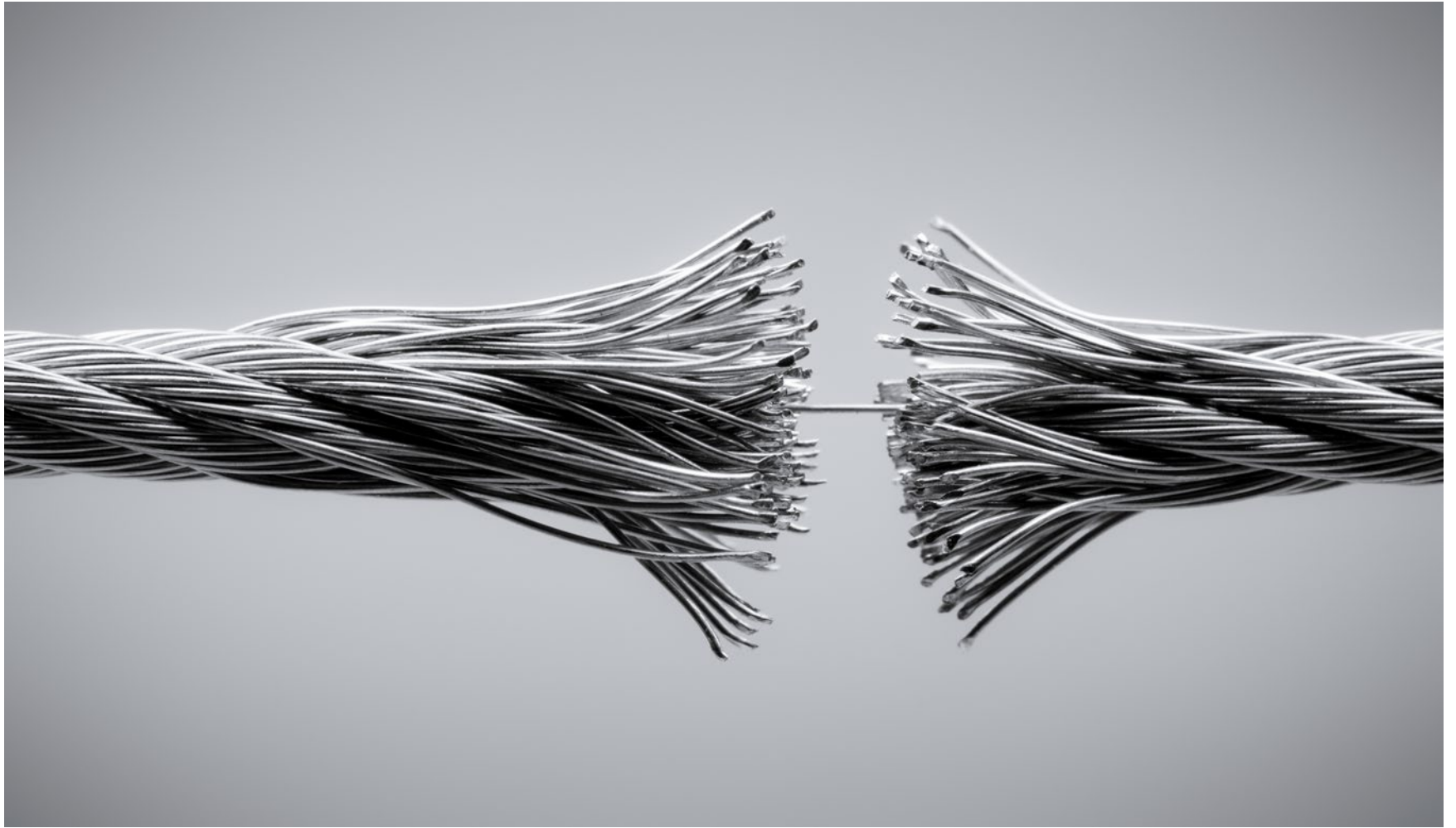
Kendra is a ride operator for an amusement park. Due to stay home orders, she was laid off for a significant amount of time during COVID. This caused her to be depressed, and having her kids home doing Zoom school sent her over the edge. Like many others trying to cope, Kendra began to consume more alcohol in an attempt to numb her feelings. When Kendra returned to work, she told her coworker, Jennifer, that she is still very depressed, drinks every night, and thinks everything may be too much to handle. Kendra confessed to Jennifer that she wasn't sure how much longer she could battle her demons and that she was worried she might just take a bunch of pills to make everything go away. Jennifer reports this to you, confidentially.

Drunk, Upset, and Afraid

1. Are you obligated to send Kendra for an IME?
2. Either way, should you confront Kendra about Jennifer's report of off-duty suicidal ideations?
3. If Kendra admits she is suffering from alcoholism and extreme depression, do you have to grant her an unpaid leave of absence as an accommodation?







COMPLIANCE TIPS/TAKEAWAYS

COMPLIANCE TIPS / TAKEAWAYS

1. Core ADA/accommodation principles remain the same, as do the consideration steps.
2. Have a specific accommodation policy (covering how to ask for one) and request form. Train employees on the policy.
3. Train supervisors to forward all requests to HR, to forward all concerns about direct threats to HR, and how to spot if an employee may need an accommodation

COMPLIANCE TIPS / TAKEAWAYS

4. Document the interactive process and don't be the one holding the bag
5. Job descriptions should be up-to-date and include essential functions. Samples:
[O*NET OnLine \(onetonline.org\)](http://onetonline.org)
6. EEOC is watching for situations where employers are denying requests for accommodations for mental health, especially denials of remote work – carefully consider whether in-person work is an essential function.

COMPLIANCE TIPS / TAKEAWAYS

7. You are not a medical professional: Do NOT make assumptions or diagnose employees
8. Don't forget about FMLA and workers' compensation impacts/overlaps
9. Be open-minded and do not downplay the employee's situation

COMPLIANCE TIPS / TAKEAWAYS

10. Consider alternative accommodations.
Some resources:

- [AskEARN | Including Neurodivergent Workers: Workspace, Work Schedules and Other Accommodations](#)

<https://www.dol.gov/agencies/odep/program-areas/mental-health/maximizing-productivity-accommodations-for-employees-with-psychiatric-disabilities>

COMPLIANCE TIPS / TAKEAWAYS

Examples of Alternative Accommodations

- Scheduling and breaks (more often/flexibility)
- Light/Sound/Spacing modifications
- Organizing and recording tools (e.g., to-do lists, checklists, timers, color-coding, technology use)
- Adjustments in supervision or structure (style, meetings, reminders, communication)
- Job coaches/mentors

COMPLIANCE TIPS / TAKEAWAYS

May 2023 Survey by JAN of 700+ employers on accommodation costs

- Nearly 50% reported accommodations cost *nothing*
- Another 43% said median expenditure was \$300

THANK YOU!

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