

Mental Health Issues:

Mental illness has been stigmatized in society. Until recently, and to avoid being singled out, judged or marginalized, individuals seldomly sought help in addressing these kinds of issues. The reality is that many Americans suffer silently and lose life potential due to mental health issues.

Unsurprisingly, the restaurant industry, one of the country's largest industries, has been severely affected by the mental health crisis. In fact, a large percentage of the restaurant industry's workforce suffers from sometimes multiple mental health conditions, disorders, or illnesses, such as anxiety, depression, and substance abuse. In addition, suicide rates have been rapidly climbing as a result of stress and depression. The unwillingness to openly discuss and address mental health issues further exacerbates the severity of these issues.

This Industry Insight addresses some of the legal issues implicated by mental health and illnesses in the workplace. Specifically, it is designed to provide a brief overview of the protections that the law provides to employees suffering with mental illnesses, as well as employers' obligations to those same employees. This Industry Insight concludes by offering some solutions and recommendations for employers in handling mental health issues in the workplace.

The Legal Landscape

Mental Health is a Disability

While mental health may give rise to a broad range of legal issues, the most prevalent issue deals with an employer's duty to provide reasonable accommodations to employees with disabilities. Although mental health illnesses do not always present physical symptoms, they are nonetheless protected under the Americans with Disabilities Act ("ADA") on a federal level, as well as the Fair Employment and Housing Act ("FEHA") in California.

Defining Disability

It is important for employers to first understand how the law defines disability. While the ADA does not list provide a list of covered disabilities, it defines a disability as a physical or mental impairment that substantially limits one or more life activities.

However, the FEHA's definition of "disability" is broader and more expansive in that it requires a limitation on a major life activity rather than the ADA's substantial limitation definition. Under FEHA, a "mental disability" includes mental disorders, psychological disorders, or psychological conditions, such as an intellectual disability, organic brain syndrome, and emotional or mental illness.

Employee Rights and Employer Obligations

Unlike *physical* disabilities, mental disabilities such as anxiety disorders, depression, bipolar disorders, post-traumatic stress disorder (PTSD, etc.,) may be harder to identify. In the eyes of the law, however, physical, and mental disabilities are treated the same. Employers must be mindful of this and realize that a mental illness symptom may be broader, more encompassing, and more difficult to identify than physical ones. The issues then becomes: When does an employer's obligations arise? How does an employer become privy to an employee's disability?

Identifying a Mental Health Issue

An employer's obligations are triggered when either an employee discloses that he or she suffers from a mental disability (i.e., the employer knows of the disability) or when the employer learns, becomes aware, or should have known of the mental disability (e.g., by observing the employee's behavior, overhearing third parties discussing the disability, or when an employee has exhausted leave benefits but still requires accommodations). Once a mental health issue is established and the employer is aware of it, the mentally impaired employee has a right to privacy and a reasonable accommodation.

Privacy Rights

Applicants and employees have a right to *privacy*. Employees are the ones who decide whether to disclose their mental illness to their employers.

As mentioned above, an applicant or employee is protected under the law only if the employer knows or should have known of the disability. However, it is unlawful for employers to ask an applicant or employee whether he or she is disabled, the nature or severity of a disability, or any other type of question that is likely to reveal information about a disability. This often leaves employers in difficult positions in determining next steps.

Reasonable Accommodations

When an applicant or employee decides to disclose the existence of a disability or when the disability is apparent (i.e., blindness), the employee does not need

to provide evidence of a disability. It is recommended that employers simply accommodate the applicant/employee's need without requiring further proof.

An employer's ability to inquire as to the disability or request supporting documentation is finite. For purposes of identifying reasonable accommodations, an employer may ask the employee for reasonable medical documentation, which is limited to a doctor's note or medical documents showing that the applicant or employee in fact has a disability. An employer cannot require an employee to produce his or her entire medical or mental health file. Simply put, all that the employee may need to provide is enough information to show that he or she suffers from a disability.

The employer has a legal duty to provide reasonable accommodations to those applicants and employees who, due to the disability, cannot perform the essential job functions. An employer must satisfy this duty unless providing the accommodation would result in an undue hardship to the employer's business operations. Undue hardship not only refers to financial difficulty, but also to reasonable accommodations that unduly extensive, substantial, disruptive, or that would fundamentally change the nature and operation of the business. The level of hardship and reasonableness should be analyzed on a case-by-case basis.

An employee's limitations due to his or her disability will vary among employees. In fact, not all employees with mental health disabilities will need accommodations to perform the essential functions of their jobs. Given that multiple or different accommodations may be provided, California law requires employers to engage in what is known as the "interactive process." At its core, the interactive process requires the employer to engage in meaningful and individualized discussions with the employee to ascertain the essential job functions, the employee's precise job-related limitations, the ways in which they can be overcome through a reasonable accommodation and the potential accommodation and its effectiveness. The employer must engage in the interactive process in a timely and good-faith manner.

Once the employer and the employee have engaged in the interactive process and a reasonable accommodation has been identified, the employer must then provide the reasonable accommodation to the employee. Although required by law, the accommodation implemented or

provided should be one that is appropriate for both the employer and the employee. In other words, the accommodation need not be the most expensive or most preferable to the employee. Once again, if the accommodation would result in undue hardship or if the employee cannot perform the job's essential duties (with or without the accommodation), then an employer is not required to provide it to the employee. Employers should approach the "undue hardship" safe harbor cautiously and consult with their legal counsel to assess the applicability of this rule.

Examples of the most common types of reasonable accommodations with respect to mental disabilities include:

- Flexible work schedules.
- Providing private spaces or areas for resting, taking medication, etc.
- Reassigning employees to different positions or a change in job duties.
- Assigning as a support person in the company to whom employees may reach out and engage in discussions with.
- Leaves of absence for therapy or other type of mental health treatment.

Alcohol and Substance Abuse

Substance abuse has undoubtedly become a prominent issue in the workplace. Even though it is beyond the scope of this Industry Insight, alcoholism and drug abuse may be considered protected disabilities under the law. Employees suffering from alcoholism and drug abuse are generally entitled to the same protections under the law.

Even though employers may need to provide reasonable accommodations, such as leave of absence for treatment purposes, employers may still enforce rules concerning alcohol and drug use in the workplace. This includes prohibiting use or being under the influence of drugs and/or alcohol while on-duty.

Hostile Work Environment

Mental illnesses in the workplace may create a fertile ground for a hostile work environment. Fostering a hostile work environment is a type of unlawful harassment that involves inappropriate behavior either severe or pervasive enough as to create an abusive work atmosphere for one or more employees.

Given the stigma surrounding mental illness, employees who decide to open up about their mental health issues and seek accommodations may be more likely to experience workplace harassment. An employee's disclosure or admission of having a mental illness or health issues may lead to judgments, fear, and avoidance among co-workers or supervisors. It may also subject the employee to ridicule or jest.

In California, employers have a legal duty to prevent harassment. Hence, it is imperative that employers continue to ensure the existence of a respectful and effective workplace for all their employees.

Recommendations for Addressing Mental Health Issues in the Workplace

Below are ways management can address mental health issues in the workplace and avoid conflict. Employers recognize that early detection and treatment of mental illness can often prevent crises and reduce employers' healthcare costs down the road. Employers are consistently developing programs and plans to provide more support for their employees with psychiatric disorders like the ones they provide to those with physical injuries or ailments.

Management Training

Employers should take positive steps towards supporting employees suffering with mental conditions in the workplace. This includes fostering an open and welcoming work environment. Employers should aim to be proactive rather than reactive when addressing mental health issues.

Adopting, disseminating, and enforcing mental health related policies and standards in the workplace can go a long way in preventing claims against employers. Employers should take steps to make employees aware of such policies at the start of their employment.

Educating management and supervisory staff on what a mental disability is, how to identify it and how to address mental health issues with employees is also vitally important. For example, a supervisor who can recognize the signs and symptoms of stress and depression in employees will be in a much better position to facilitate communications between the

employee and the company. This will not only result in compliance with the law but will also cultivate a collaborative atmosphere within the company.

A work culture that treats and addresses mental illnesses in the exact same way as any other physical impairment will effectively lead to a higher morale, and, in turn higher employee retention and satisfaction.

Educating Employers on Mental Illness

Educating employees will improve understanding and empathy within the company and enable employees to better understand their co-workers struggling with mental health issues. To support employees with mental illnesses, the National Mental Health Association and the National Council for Behavioral Health recommend the following actions:

- Educate employees about the signs and symptoms of mental health disorders.
- Encourage employees to talk about stress, workload, family commitments and other issues.
- Communicate that mental illnesses are real, common and treatable.
- Discourage stigmatizing language, including hurtful labels such as “crazy,” “loony” or “nuts.”
- Invest in mental health benefits.
- Help employees transition back to work after they take leave.
- Consult with your employee assistance program.

Workplace Wellness Programs

To the extent possible, employers should consider developing and offering some type of wellness program

to their employees. Although they can vary in services and activities, the purpose of implementing a workplace wellness program is to provide support to employees struggling with stress, substance abuse, depression, anxiety, etc.

An example of a unique type of workplace wellness program is Sacramento restaurateurs Patrick and Bobbin Mulvaney’s “I Got Your Back” program. This system asks employees to drop a color-coded card into an anonymous box when they clock in for a shift. In effect, this provides employees with a safe place to express their state of mind and allows management to know how the employees are feeling. By implementing communication tools, the company can be more vigilant in identifying which employees may need help. The “I Got Your Back” program provides the employer with an opportunity to check in and offer support to its employees. For more information about the program, visit the ***I Got Your Back website.***¹

Overall, the goal is to identify those at risk, connect them to treatment, and create the necessary support to reduce and manage mental health issues.

Conclusion

As people become more accepting and decide to openly talk about mental illnesses, the workforce across all industries must address solutions to these issues. From providing a reasonable accommodation to ensuring a safe and healthy work environment, employers must be mindful of the legal requirements that arise out of employing individuals with mental disabilities.

Still have questions?

CRA Members have exclusive access to legal help. Members get one call (not to exceed 15 minutes) of legal advice every month.

To set up a call with one of our legal partners, please call **800.765.4842** ext. 2743 or email helpline@calrest.org

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¹I Got Your Back, The Pantry, available at <https://igotyourback.info/#project>, last visited on February 12, 2021.