

The Mental Health Crisis in the Restaurant Industry:

Assessing Its Legal Implications, Employer Obligations and Recommendations

Mental illness has long carried an inherent stigma 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. This is a struggle that a large portion of the U.S. population faces on a daily basis.

Unsurprisingly, the restaurant industry—one of the country’s largest industries—has not been unaffected 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. Additionally, suicide rates have also been rapidly climbing as a byproduct of stress and depression. Poor mental health has a direct and substantial impact in the workplace, from affecting employees’ job performance and productivity to the creation of a hostile work environment. And, of course, employees’ unwillingness to openly discuss and address mental health 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, this Industry Insight 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 in the workplace.

The Legal Landscape

Mental Health is a Disability Under the Law

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.

Mental health conditions are covered under federal law through the Americans with Disabilities Act (ADA) and

California law through the Fair Employment and Housing Act (FEHA).

Defining Disability

It is important for employers to first understand how the law defines disability.

While the ADA does not list which conditions constitute a disability, it defines it as a physical or mental impairment that substantially limits one or more life activities.

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

Employee Rights and Employer Obligations

It should be noted that, unlike physical disabilities, mental disabilities—such as anxiety disorders, depression, bipolar disorders, post-traumatic stress disorder (PTSD) etc.—may be harder to identify. Under the law, however, physical and mental disabilities are no different. Employers must be mindful of this and realize that a mental illness may be broader, more encompassing and more subtle to identify than a physical one. The issue then becomes: When does an employer's obligations arise? How does an employer become privy to an employee's disability?

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 it has been established that an employee has a mental disability and the employer is aware of it, the law affords two main rights to such employees: privacy and a reasonable accommodation.

Privacy Rights

First, applicants and employees have a right to privacy. Employees are the ones who decide whether to disclose

their mental illness to their employers. As briefly discussed above, an applicant or employee is protected under the law only if the employer knows or should have known of the disability. Yet, it is unlawful for employers to ask an applicant or employee whether he or she is disabled, about the nature or severity of a disability or any other type of question that is likely to reveal information about a disability.

Employers may wonder: How can I provide an accommodation if I cannot ask what it is?

This question is not too problematic when an applicant or employee decides to disclose the existence of a disability or when the disability is apparent (such as blindness or being in a wheelchair). In those instances, an applicant or employee may not need to provide any proof or documentation to the employer. When the disability is obvious or when the employer knows of the disability, it is recommended that employers simply accommodate the applicant's or employee's need without requiring further proof (see Reasonable Accommodations, below).

Even when an applicant or employee does not outright disclose the existence of a disability or when the disability is not obvious, an employer's ability to inquire as to the disability or request supporting documentation is finite. Under such circumstances, and only for the purpose of identifying reasonable accommodations, an employer may ask 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. Indeed, all that the employee may need to provide is enough information to show that he or she suffers from a disability.

Reasonable Accommodations

Second, the employer has a legally imposed duty to provide a reasonable accommodation 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.

Logically, 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 one to the employee. Employers should approach the “undue hardship” safe-harbor cautiously. Employers should consult with their legal counsel to assess the applicability of this safe-harbor.

Examples of the most common types of reasonable accommodations, especially 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 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

Alcoholism 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. Consequently, 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. Hostile work environment is a type of unlawful harassment that involves inappropriate behavior in the workplace that is either severe or pervasive enough as to create an abusive work atmosphere for one or more employees.

Given the stigmatization of mental illnesses, employees who decide to open up about their mental health issues and seek accommodations may be more likely to experience workplace harassment. After all, 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 any and all of their employees.

Recommendations for Employers in Addressing Mental Health in the Workplace

Be Proactive

Employers should take positive steps towards supporting employees suffering with mental conditions in the workplace. Being reactive, rather than proactive, is beneficial to neither the employer nor the employee.

Adopting, disseminating and enforcing policies (such as an open-door policy) and work standards in the workplace that address mental health can go a long way. This is particularly effective when employees are cognizant of those policies and standards from the very

beginning of their employment. 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, which in turn will result in higher employee retention.

Management Training

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 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 across the company.

Create Workplace Wellness Programs

Lastly, and to the extent possible, employers should consider developing and offering some type of wellness programs to their employees. Although they can vary in services and activities, the purpose of implementing a workplace wellness program is to provide confidential support to employees dealing or suffering 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. With various types of communication tools, the company can be more alert 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 this program, please visit: igotyourback.info.

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

Conclusion

Society's perceptions and attitudes toward mental illnesses are changing. As people become more accepting and decide to openly talk about mental illnesses, the workforce across all industries will have to assess how to best address these issues. From providing a reasonable accommodation to ensuring a safe and healthy work environment to all of their employees, employers must be alert of all of the legal requirements that may arise from 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.