



Mental Health in the 2021 Workplace

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Today's Agenda

- Remote work and burnout: supporting your employees during a pandemic
- The intersection of mental health, performance issues, and workplace misconduct
- Mental health and the workers' comp/OSHA overlap
- Intermittent leave and accommodation issues
- Your questions

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Mental Health: Legal Overview

State and federal disability laws

- Mental health conditions typically qualify as “disabilities”
- Two obligations: (1) to accommodate; (2) not to discriminate

State and federal leave laws

- Mental health conditions typically qualify as “serious health conditions”
- Two obligations: (1) to provide leave; (2) not to discriminate

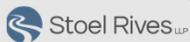
State and federal workplace safety laws

- Two obligations: (1) to provide a safe workplace; (2) to provide workers' compensation benefits

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Remote Work and Burnout



Employee Burnout Is Bad ... and It's Getting Worse

- In a 2020 survey conducted by Robert Half, 34% of employees reported that they were more burned out in 2020 than they were in 2019
- Robert Half conducted the same survey in 2021 and 44% of employees reported they are more burned out now than they were in 2020
- Why the change?

COVID

- COVID, COVID, COVID
- Pre-COVID working from home was seen as a perk
- No longer the case after 16 months of stay-at-home orders
 - Lack of work/home boundary
 - Always “logged-in”
 - Increased expectations
- Can lead to mental illness, anxiety, and other serious health conditions like heart disease
- Decreased productivity
- Decreased job satisfaction
- Increased absenteeism

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Legal Consequences

- Employee burnout implicates both state and federal law
 - FMLA
 - ADA
- Adverse employment actions
- Employees who are burned out will cause extra burdens to your HR staff in terms of processing increased employee complaints and increased employee discipline, including termination
- ALL OF THIS CAN LEAD TO LITIGATION

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How to Address

- Encourage employees to use paid time off
- Monitor scheduling
 - Enforce breaks (meal and rest)
 - Monitor overtime
 - Make sure you are capturing all of your employees' time
- Train your managers
 - Realistic expectations
 - Communicate with employees
 - Limit “after hours” communication

Mental Health, Job Performance, and Misconduct

Job Performance and Workplace Misconduct

- Ninth Circuit adheres to the minority rule: Conduct resulting from a disability is part of the disability and cannot be a separate basis for termination
- Ninth Circuit position even more stringent than the EEOC, which says you can discipline an employee for a conduct violation

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Job Performance and Workplace Misconduct

- *Gambini*
 - EE takes leave for bipolar disorder
 - EE placed on PIP upon return to work
 - EE terminated following “temper tantrum” at PIP meeting
- *Mayo*
 - EE has major depressive disorder
 - EE has issues with “bullying” supervisor
 - EE terminated following threats to kill supervisor

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Job Performance and Workplace Misconduct

When can you send an employee for an eval?

- When evaluation is “job-related and consistent with business necessity”
- Must have a reasonable belief, based on objective evidence, that:
 - 1) the employee’s ability to perform the essential function is impaired by a medical condition, or
 - 2) the employee may pose a direct threat to self or others

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Job Performance and Workplace Misconduct

Reasonable accommodation options

- **Physical changes** (e.g., soundproofing or moving to a quieter or less distracting place)
- **Modifying the job** (e.g., removing marginal functions, such as contact with public to accommodate anxiety)
- **Allowing work from home** (e.g., allowing work from home to accommodate OCD)
- **Modified schedule** (e.g., allowing late arrival/early departure if essential functions can still be met)
- **Intermittent or extended leave of absence**
- **Reassignment** (“accommodation of last resort”)

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Mental Health, Workers' Compensation, and OSHA



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Mental Health and Workers' Comp

- State-specific
- Work-related
- Common limitations
 - Physical injury
 - Sudden, unusual, or extraordinary occurrence
 - Medical or psychiatric evidence
- Employee bears burden of proof

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Mental Health and Workers' Comp

- Generally does not include
 - Exposure to repeated stress
 - Adverse employment actions
 - Discrimination/harassment
 - Unfair labor practices
 - Personal conflicts
 - Workload pressures

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Mental Health and OSHA

- When to record
 - New case
 - Work-related
 - Recording criteria
- Mental illness not recorded unless
 - Employee volunteers
 - Medical information
 - Work-related

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Mental Health and OSHA

- OSHA 300 log and privacy
 - Mental health
- How to record
 - Do not include employee's name
 - Document "Privacy Case"
 - Separate, confidential log with names

Intermittent Leave and Accommodation Issues

Employee Entitlements

- To take (intermittent) leave for the employee's or a family member's serious health condition
- To obtain reasonable accommodations that will allow them to perform the essential functions of their job
- To have mental health-related absences be "protected" if requirements are met
- To be treated the same as an employee with another, more obvious serious health condition or disability

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Employer Rights

- To obtain information from a health care provider
- To designate leave
- To seek recertification or ask for additional or updated information
- To notify the provider re: a leave usage pattern
- To get a second opinion
- To place the employee on leave
- To get a fit-for-duty exam

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Thorny Issues

- Employees who are gone all the time with little to no advance notice
- Employees who are asking to be excused from the essential functions of their job
- Employees who have trouble getting to and from work
- Employees who want to work from home when everyone else has gone back to the worksite

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Thorny Issues

- Employees who are vague about the reasons for an absence
- Employees who are stressed but it's not clear whether there is an actual diagnosis or need for protected leave
- Employees who want a stress-free work environment
- Employees who are brand new

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Questions



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