

# Mental Health Discrimination And Protections At Work: Part 1

By **Jennifer Mathis, Lewis Bossing and Sara Frank** (September 29, 2021, 6:19 PM EDT)

This two-part article addresses issues relating to individuals with mental health disabilities in the workplace and best practices for recruiting, hiring and retaining individuals with disabilities. It provides guidance on employing people with psychiatric disabilities and describes key legal requirements for employers, including the Americans with Disabilities Act, the Rehabilitation Act of 1973 and the Family and Medical Leave Act.

This article also examines recent U.S. Equal Employment Opportunity Commission litigation on behalf of individuals with psychiatric disabilities and describes the process for filing EEOC charges.

It provides insight on how supported employment can be used to expand employment opportunities for people with psychiatric disabilities. And it explains how supported employment is an important tool to help federal agencies and federal contractors meet affirmative action mandates.

Part one provides guidance on the following key issues concerning mental health in the workplace:

- Prevalent mental health disabilities;
- Workplace discrimination against people with psychiatric disabilities; and
- Key workplace legal protections for people with psychiatric disabilities.

Part two of this article will address the following issues concerning mental health in the workplace:

- EEOC lawsuits enforcing the ADA and the Rehabilitation Act on behalf of individuals with psychiatric disabilities;
- Filing an EEOC discrimination charge;
- Best practices to ensure equitable recruitment, hiring and retention of individuals with psychiatric disabilities; and
- COVID-19 and mental health in the workplace.[1]

## Prevalent Mental Health Disabilities

In 2019, the National Institute of Mental Health found that 51.5 million U.S. adults over the age of 18 — 20.6% of U.S. adults — live with a mental illness, defined as a mental, behavioral or emotional disorder varying in impact and impairment.[2] Additionally, 13.1 million adults — 5.2% of U.S. adults — live with serious mental illness, defined as a mental, behavioral or emotional disorder that results in serious functional impairment.[3]



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Psychiatric disabilities may include:

- Anxiety disorder;
- Depression;
- Bipolar disorder;
- Schizophrenia;
- Obsessive-compulsive disorder;
- Post-traumatic stress disorder; and
- Attention deficit hyperactivity disorder, among others.[4]

### **Workplace Discrimination Against People with Psychiatric Disabilities**

Individuals with psychiatric disabilities are "less likely to be working and more likely to be unemployed, out of the labor force, or underemployed than those without such disorders," according to Judith Cook's paper on employment barriers for persons with psychiatric disabilities.[5]

The pervasive prejudice attached to mental illness has led to widespread employment discrimination; employers have more negative attitudes about hiring people with mental illness than about almost any other group.[6] As the U.S. Court of Appeals for the Seventh Circuit held in 2005:

Americans with disabilities often faced barriers to joining and succeeding in the workforce ... includ[ing] attitudinal barriers resulting from unfounded stereotypes and prejudice. People with psychiatric disabilities have suffered as a result of such attitudinal barriers, with an employment rate dramatically lower than people without disabilities and far lower than people with other types of disabilities.[7]

A 2019 American Psychiatric Association national poll found that due to workplace discrimination, only one in five employees was completely comfortable discussing mental health with coworkers and supervisors.[8]

Approximately 80% of people in the U.S. living with serious mental illness are unemployed.[9] Only about 10% have full-time employment.[10] In a national probability sample, approximately one-third of individuals with psychiatric disabilities reported being "fired, laid off, or told to resign from a job or they had been refused employment, a promotion, a transfer, or an opportunity for training." [11]

Discrimination on the basis of psychiatric disability appears to be rising. During the fiscal year 2016, the EEOC "resolved almost 5,000 charges of discrimination based on mental health conditions, obtaining approximately \$20 million for individuals with mental health conditions who were unlawfully denied employment and reasonable accommodations." [12]

This was a significant increase from about 2,700 such charges filed in fiscal year 1996.[13] The increase in discrimination charges has occurred against the backdrop of increased news media coverage of mental illness emphasizing interpersonal violence highly disproportionate to actual rates of violence among people with psychiatric disabilities.[14] Such coverage contributes to prejudice and discrimination against people with psychiatric disabilities.

### **Key Workplace Legal Protections for People with Psychiatric Disabilities**

Individuals with mental illness are protected from employment discrimination primarily by two federal laws: the Americans with Disabilities Act[15] and the Rehabilitation Act of 1973.[16] Among the most significant protections of these laws are requirements concerning disability-related inquiries and reasonable accommodations.

#### ***Overview of the Americans With Disabilities Act's Employment Provisions***

Congress enacted the ADA in 1990 to "assure equality of opportunity, full participation, independent living, and economic self-sufficiency" for individuals with disabilities.[17] Congress found that individuals with disabilities experience discrimination in areas such as employment, and receive fewer employment and other opportunities than people without disabilities.[18] Title I of the ADA contains provisions relating to employment discrimination.

The ADA protects qualified individuals with a disability, defined as a physical or mental impairment that substantially limits one or more life activities, a record of such an impairment, or being regarded as having such an impairment.[19] To be qualified, an employee or applicant must be able to perform the essential job functions of the employment position with or without reasonable accommodations.[20]

#### ***Prohibited Discrimination***

Title I of the ADA bars covered employers from discriminating against a qualified individual with a disability on the basis of that disability in the job application process, hiring, advancement, or discharge of employees as well as

job training, compensation, or other terms of employment.[21] Title I covers employers with 15 or more employees as well as employment agencies, labor organizations and joint labor-management committees.[22]

Discrimination against a qualified individual with a disability may include, among other things:

- Segregating or classifying job applicants or employees with disabilities in ways that limit their opportunities;
- Participating in discriminatory contracts or other employment arrangements;
- Using criteria or methods of administration that have the effect of discriminating or perpetuate the discrimination of others;
- Discriminating based on someone's association with a person with a disability;
- Not providing reasonable accommodations to job applicants or employees with disabilities;
- Using qualification standards, tests or other employment criteria that tend to screen out people with disabilities and that are not job-related and consistent with business necessity; and
- Failing to use employment tests in the most effective manner to ensure that the tests reflect the skills the tests are supposed to measure rather than reflecting an individual's disability.[23]

#### *Medical Examinations and Inquiries*

Employers may not discriminate regarding medical examinations and inquiries.[24]

- Preemployment — Covered employers may not conduct medical examinations or inquiries likely to elicit information about whether a job applicant has a disability or the severity of a disability prior to giving an applicant a conditional job offer. The employer may inquire, however, as to whether the job applicant is able to perform job-related functions.
- Employment entrance examination — Employers may require a medical examination or make medical inquiries after a conditional job offer has been made and before the employment duties start if all incoming employees are subject to the examination or inquiries and the information is treated separately and as a confidential medical record, unless specified otherwise in the statute.
- Inquiries of employees — Employers may conduct medical examinations of employees or make inquiries likely to elicit information about a disability only if the examinations or inquiries are job-related and consistent with business necessity.
- Exceptions for affirmative action programs and voluntary employee health programs — Employers may invite applicants to voluntarily self-identify as having a disability if part of a bona fide affirmative action program. Employers may also conduct voluntary medical examinations of employees as part of a voluntary workplace employee health program.[25]

#### ***Overview of the Employment Discrimination and Affirmative Action Provisions of the Rehabilitation Act of 1973***

The Rehabilitation Act of 1973 contains several provisions that prohibit disability-based discrimination in

employment: Section 501, Section 503 and Section 504.[26]

- Section 501 prohibits discrimination on the basis of disability in federal employment. Section 501 also requires federal agencies to serve as model employers of people with disabilities and to implement affirmative action program plans for the hiring, placement, and advancement of qualified individuals with disabilities.[27]
- Section 503 prohibits workplace discrimination on the basis of disability by federal contractors and requires contractors and subcontractors who have contracted with the federal government for \$10,000 or more to take affirmative action to employ and advance the employment of qualified individuals with disabilities.[28]
- Section 504 prohibits recipients of federal financial assistance from discriminating against qualified individuals on the basis of disability for programs or activities in employment.[29] Section 504 uses the same standards as applied under Title I of the ADA for employment discrimination claims.[30]

### ***Key Protections of the ADA and the Rehabilitation Act for Employees and Job Applicants with Psychiatric Disabilities***

This section addresses key legal protections for applicants and workers with psychiatric disabilities.

#### *Preemployment Inquiries and Inquiries of Employees*

The protections of the ADA and the Rehabilitation Act concerning disclosure of disability-related information are particularly important in light of the pervasive workplace discrimination that individuals with psychiatric disabilities experience.[31]

The employer's ability to ask disability-related questions and perform medical examinations differs depending on the stage of employment: pre-job offer, post-job offer and during employment.[32] Employers must keep information from applicants and employees about a medical condition or history confidential.[33]

During the pre-job offer stage, consider the following issues:

- Medical history — Employers may not ask questions on a job application about the applicant's history of treatment for mental illness, hospitalization, or the existence of mental illness.
- Mental illness questions — Employers may not ask questions that are likely to elicit information about mental illness before making a job offer.
- Disability-related questions — An employer may ask disability-related questions concerning the need for an accommodation before making an offer if the applicant asks for reasonable accommodation for the hiring process.
- Reasonable accommodation — An employer may not ask if the applicant will need reasonable accommodation for the job unless the employer reasonably believes, before making the offer, that the applicant will need accommodation to perform the job functions.
  - Nonvisible versus visible disability — For an individual with a nonvisible disability, this may happen if the individual voluntarily discloses the disability or need for reasonable accommodation. For an individual with a visible disability, the employer may ask about accommodations if the need for accommodation is obvious.[34]
- Job functions — The employer may ask about the applicant's ability to perform certain job functions, request the applicant to describe or demonstrate how they perform job tasks or outcomes, and ask about an applicant's skills and qualifications such as education, experience, and required certifications.[35]

- Exception for affirmative action programs — If doing so for affirmative action purposes, the employer may invite applicants to voluntarily self-identify as an individual with a disability before a conditional job offer is made, provided that it is clearly stated in writing that disclosure is voluntary and that the information will be used solely with an affirmative action program. The information must be used to benefit individuals with disabilities and must be kept confidential.[36]

During the post-job offer stage, consider the following issues:

- Medical examinations — Employers may require a post-offer, preemployment medical examination or inquiry. [37]
  - Mental health examinations and questions — Employers may also require a psychiatric examination or questions about mental illness.[38]
- Federal contractors — If the employer is a federal contractor with affirmative obligations under Section 503, then the employer must invite applicants to voluntarily self-identify post-offer as an individual with a disability by using a voluntary self-identification form.[39] The responses to the form are only to be shared with the human resources offices — not with officials who conduct the interviewing, testing or hiring.[40]

During employment, consider the following issues regarding inquiries of employees.

- Disability-related inquiry — An employer may make a disability-related inquiry or medical examination of an employee when the employer has a reasonable belief based on objective evidence that the employee will pose a direct threat to the employee or others due to a medical condition, or that an employee's impairment will preclude the employee's ability from performing essential job functions. In these situations, the inquiries or examinations must not exceed the scope of the specific medical condition and its effect on the employee's ability to perform essential job functions or work without posing a direct threat.[41]
- Exception for voluntary employee health programs — Employers may conduct voluntary medical examinations or make voluntary disability-related inquiries of employees as part of a voluntary employee health program at the worksite.[42] Participation and any disclosure of medical information must be voluntary and cannot be coerced through substantial incentives.[43]

### ***Reasonable Accommodations***

The ADA and the Rehabilitation Act require covered employers to provide reasonable accommodations to afford equal opportunity.[44]

Reasonable accommodations are modifications or adjustments employers make to allow a qualified job applicant or employee with a disability to go through the application process, perform essential job functions in the work environment, and assure equal benefits and privileges of employment to qualified employees with a disability.[45]

Reasonable accommodations are required absent an undue hardship, meaning a significant difficulty or expense incurred by the covered entity.[46]

### ***Types of Reasonable Accommodations***

Employers must determine reasonable accommodations on a case-by-case basis. The ADA provides a nonexhaustive list of reasonable accommodations that may be relevant to an employee with a psychiatric disability.[47] These accommodations include:

- Making facilities more accessible to and usable by individuals with disabilities;
- Job restructuring;

- Work schedule flexibility, such as part-time or modified schedules;
- Reassignment to vacant position;
- Acquisition or modifications of equipment or devices; and
- Adjustments of training, examinations, policies or materials.

The Job Accommodation Network provides additional information on accommodations by limitation and by work-related function.[48] For example, JAN recommends accommodations in the form of products, services and strategies for an individual with strong anger and emotional responses.

Types of accommodations may include:

- Apps for mental health;
- Simulated skylights and windows;
- Flexible scheduling;
- Counseling;
- Job coaches;
- Behavior modification techniques;
- Positive feedback;
- Support animals; or
- Support persons.[49]

In addition, JAN also lists a number of accommodation ideas for employees who have limitations in attentiveness/concentration, decreased stamina/fatigue, executive functioning deficits, challenges with managing time, memory loss, issues with organizing/planning/prioritizing, concerns with sleeping or staying awake, and low stress tolerance.[50]

Mental health professionals may be able to make suggestions about particular accommodations and assist the employer and employee in communicating about the accommodation.[51]

### ***Requesting Reasonable Accommodations***

The following may assist employers and employees when individuals make requests for reasonable accommodations:

- Who can make a request for reasonable accommodation — The employee, family member, friend, health professional or other representative may request reasonable accommodation on behalf of an individual with a psychiatric disability.
- Oral or in writing — Requests can be made orally or in writing, and can be made in plain English without using the specific words "reasonable accommodation."
- Related to medical condition — Requests must let the employer know that for a reason related to a medical condition, including a mental health condition, the employee needs an adjustment or change at work.
- Timing — Requests can be made at any time during employment.
- Documentation — The employer may ask for reasonable documentation about the employee's disability.

- Interactive process — The request for accommodation is usually the first step in an interactive process between the individual and the employer to determine whether a reasonable accommodation can be provided.
- Employer responsibility — Ordinarily the person must request an accommodation, but the employer must initiate the interactive process without such a request where the employer:
  - Knows that the employee has a disability;
  - Knows or should know that the employee is experiencing workplace programs due to the disability; and
  - Knows or should know that the disability prevents the person from requesting an accommodation.
- Requirements of Section 501 — Federal agencies, as part of affirmative action efforts, are required to adopt and make available to all job applicants and employees and on its website detailed written reasonable accommodation procedures that explain the process of requesting, identifying and granting reasonable accommodations.[52]

### ***Family and Medical Leave Act***

In addition to the right to reasonable accommodation under the ADA and the Rehabilitation Act, including work-leave, the Family and Medical Leave Act,[53] may provide additional protections if a person needs to take time off from work due to a psychiatric disability — for example, due to a medication adjustment or following a crisis episode.

The FMLA, enforced by the U.S. Department of Labor, permits certain employees to take up to 12 weeks of unpaid leave in any 12 months. The leave is job-protected and requires that group health benefits continue to be administered during the leave.[54]

#### *Employee Eligibility and Requirements*

The FMLA allows employees to take medical leave when the employee cannot work due to a serious health condition as well as when an employee must care for an immediate family member with a serious health condition.

A serious health condition is defined as an "illness, injury, impairment, or physical or mental condition" involving inpatient care or continuing treatment by a health care provider.[55] Individuals with psychiatric disabilities may qualify for leave under the FMLA.[56] The FMLA does not apply to routine medical examinations or ordinary health conditions such as the common cold, upset stomach, or headaches unless complications arise.[57]

To be eligible for the FMLA, employees generally must have worked at least 12 months for the same employer.[58]

#### *Certification of Serious Health Condition*

Employers may require the employee to submit a medical certification generally within 15 days of their request. The certification's purpose is to support the employee's need for FMLA leave to care for their own serious health condition or leave to care for a covered family member with a serious health condition.

The employee is responsible for paying for the cost of the certification and providing it to the employer. If the certification is incomplete, the employer must give the employee written notice stating what additional information is required to make the certification complete or sufficient.[59]

#### *Employer Eligibility and Requirements*

The FMLA applies to all public agencies, public and private elementary and secondary schools, and companies with more than 50 employees within 75 miles.[60]

To meet the FMLA's requirements, the employer must display a poster prepared by the DOL summarizing the FMLA and telling employees how to file a complaint. Posters are available on the website of the DOL.[61] The employer

also must provide employees with specific notices about the FMLA, including a general notice about FMLA and eligibility and rights.[62]

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[1] For more information on the ADA, see Americans with Disabilities Act: Guidance for Employers and Disability Law Resource Kit. For more information on state laws prohibiting disability discrimination and/or requiring reasonable accommodations, see Discrimination, Harassment, and Retaliation State Practice Notes Chart. For model non-jurisdictional and state disability accommodations policies, see the Attendance Policy and Disability Accommodation column of Attendance, Leaves, and Disabilities State Expert Forms Chart.

[2] NIMH: Mental Illness.

[3] Id.

[4] ADA National Network.

[5] Judith Cook: Employment Barriers for Persons with Psychiatric Disabilities.

[6] Id.

[7] *Karraker v. Rent-A-Center, Inc.*, 411 F.3d 831, 834 (7th Cir. 2005).

[8] Stigma, Prejudice and Discrimination Against People with Mental Illness.

[9] NAMI: Road to Recovery: Employment and Mental Illness.

[10] Bazelon Center: Getting to Work.

[11] Disability Watch.



[12] EEOC Issues Publication on the Rights of Job Applicants and Employees with Mental Health Conditions.

[13] See *Is the ADA Accommodating All?*

[14] Trends in News Media Coverage of Mental Illness in the United States: 1995–2014. For more information on discrimination, harassment, and retaliation, see *Discrimination, Harassment, and Retaliation* practice notes page.

[15] Pub. L. No. 101-336, 104 Stat. 327 (July 26, 1990).

[16] Pub. L. No. 93-112, 87 Stat. 355 (Sept. 26, 1973).

[17] 42 U.S.C. § 12101(a)(7).

[18] 42 U.S.C. § 12101(a)(3), (5).

[19] 42 U.S.C. § 12102.

[20] 42 U.S.C. § 12111(8).

[21] 42 U.S.C. § 12112(a).

[22] 42 U.S.C. § 12111(2), (5).

[23] See 42 U.S.C. § 12112(b). For information on the definition of disability, see *ADAAA Definition of Disability Chart*.

[24] 42 U.S.C. § 12112(d).

[25] EEOC: Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the ADA. For more information, see *Permissible Disability-Related Inquiries, Medical Exams, and Certifications: Key Considerations*.

[26] Pub. L. No. 93-112; ODEP: Employment Rights: Who has Them and Who Enforces Them.

[27] 29 U.S.C. § 791.

[28] 29 U.S.C. § 793.

[29] 29 U.S.C. § 794.

[30] 29 U.S.C. § 794(d). See DOL: Section 504.

[31] EEOC Enforcement Guidance on the ADA and Psychiatric Disabilities (EEOC Psychiatric Disability Guidance); 29 C.F.R. § 1630.14.

[32] See Permissible Disability-Related Inquiries, Medical Exams, and Certifications: Key Considerations and Interview Questions Checklist: Permissible and Impermissible Inquiries to Job Applicants. See also JAN: Pre-Offer, Disability-Related Questions: Dos and Don'ts.

[33] 29 C.F.R. § 1630.14.

[34] See Permissible Disability-Related Inquiries, Medical Exams, and Certifications: Key Considerations. See also EEOC Psychiatric Disability Guidance.

[35] See Screening, Recruiting, Interviewing, Hiring, and Onboarding Procedures Checklist. See also EEOC: Recruiting, Hiring, Retaining, and Promoting People with Disabilities.

[36] See EEOC: Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations.

[37] See Permissible Disability-Related Inquiries, Medical Exams, and Certifications: Key Considerations.

[38] See EEOC Psychiatric Disability Guidance.

[39]

[https://www.dol.gov/sites/dolgov/files/OFCCP/regs/compliance/sec503/Self\\_ID\\_Forms/503Self-IDForm.pdf](https://www.dol.gov/sites/dolgov/files/OFCCP/regs/compliance/sec503/Self_ID_Forms/503Self-IDForm.pdf).

[40] See DOL: Section 503 Regulations FAQ and EEOC: Recruiting, Hiring, Retaining, and Promoting People with Disabilities.

[41] See Permissible Disability-Related Inquiries, Medical Exams, and Certifications: Key Considerations. See also EEOC Psychiatric Disability Guidance.

[42] 42 U.S.C. § 12112(d)(4)(B).

[43] See EEOC: What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws.

[44] 29 C.F.R. § 1630.1; 29 C.F.R. § 1630.2.

[45] 29 C.F.R. § 1630.2(o).

[46] 29 C.F.R. § 1630.2(p). For more information on accommodating a disability, see Accommodating a Disability under the Americans with Disabilities Act Checklist and Americans with Disabilities Act: Guidance for Employers. For disability accommodation forms, see Disability Accommodations Policy (with Acknowledgment), Disability Accommodation Request (ADA), Disability Accommodation Request Resolution (ADA), and ADA Reasonable Accommodation Letter and Questionnaire to Healthcare Provider (with HIPAA Authorization).

[47] 29 C.F.R. § 1630.2(o).

[48] See Accommodation and Compliance: Mental Health Conditions.

[49] See JAN: Control of Anger/Emotions Solutions.

[50] See Accommodation and Compliance: Mental Health Conditions.

[51] See EEOC Psychiatric Disability Guidance.

[52] See Americans with Disabilities Act: Guidance for Employers, EEOC Psychiatric Disability Guidance; EEOC Reasonable Accommodation Guidance, and 29 C.F.R. § 1614.203(d)(3). For disability accommodation request forms, see Disability Accommodation Request (ADA) and Disability Accommodation Request Resolution (ADA).

[53] 29 U.S.C. § 2601 et seq.

[54] 29 C.F.R. § 825.100. For more information on the FMLA, see FMLA Leave: Guidance for Employers and Employees.

[55] 29 U.S.C. § 2611(11).

[56] See EEOC: Depression, PTSD, & Other Mental Health Conditions in the Workplace: Your Legal Rights.

[57] 29 C.F.R. § 825.113.

[58] 29 C.F.R. § 825.102. For more information, see FMLA Leave: Guidance for Employers and Employees — FMLA Leave: Employer Coverage, Employee Eligibility, and Qualifying Bases

[59] See FMLA Leave: Guidance for Employers and Employees. See also Fact Sheet #28G: Certification of a Serious Health Condition under the FMLA. For a link to an annotated FMLA certification of healthcare provider for employee's serious health condition, see FMLA Certification of Health Care Provider for Employee's Serious Health Condition (Form WH-380-E) and FMLA Certification of Health Care Provider for Family Member's Serious Health Condition (Form WH-380-F). For other key FMLA notices, see FMLA Notice of Eligibility and Rights & Responsibilities (Form WH-381) and FMLA Designation Notice (Form WH-382). For more information, see Family and Medical Leave Act Administration and Audit Checklist.

[60] See DOL: Family and Medical Leave (FMLA).

[61] See FMLA Poster.

[62] See FMLA: Forms; see also Fact Sheet #28D: Employer Notification Requirements under FMLA. For more information, see FMLA Leave: Guidance for Employers and Employees — FMLA Leave: Employer Coverage, Employee Eligibility, and Qualifying Bases.

## Mental Health Discrimination And Protections At Work: Part 2

By **Jennifer Mathis, Lewis Bossing and Sara Frank** (September 30, 2021, 5:11 PM EDT)

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### **EEOC Lawsuits Enforcing the ADA and the Rehabilitation Act**

The ADA and Rehabilitation Act prohibit discrimination in aspects of employment such as hiring, firing, and other terms or conditions of employment.

Employers do not have to hire or keep an employee in a job position where they cannot perform the job duties, but to show that the employee is not qualified, the employer must have objective evidence that the person is unable to perform essential job functions or that the person would create a direct threat to safety even with a reasonable accommodation.[2]

The following are examples of lawsuits the EEOC filed charging workplace discrimination on the basis of psychiatric disability:

#### ***EEOC v. G&A Outsourcing Inc.***

In 2019, the EEOC filed a lawsuit charging G&A Outsourcing, a Houston based company that provides human resources services to corporate clients, for violating the ADA by firing a new employee the day after the employee disclosed that she had mental health impairments.

Specifically, the employee disclosed that she had major depressive disorder and attention deficit hyperactivity disorder to her supervisor on her first day of employment and was fired the following morning due to those conditions.[3]

#### ***EEOC v. Interconnect Cable Technology Corp.***

In 2020, the EEOC filed a lawsuit against Interconnect Cable Technology Corp. for demoting and then discharging an employee of 20 years after the employee was hospitalized for mental illness.

The employee had previously been promoted several times within the company. Soon after being hospitalized and diagnosed with major depressive disorder, her job duties were reduced. She was subsequently demoted and faced a cut in pay, then later fired. ICTC agreed to pay \$35,000 and provide other relief to settle the lawsuit.[4]

#### **Filing an EEOC Discrimination Charge**

If an applicant or employee believes their rights were violated, the person should contact the EEOC.

Title I of the ADA requires that a person file a charge with the EEOC before later filing suit. If the person decides to file a charge, then the EEOC can investigate. A charge must be filed within 180 days of the alleged violation or 300 days if a state or local agency enforces a state or local employment discrimination law that also covers the employer.

Employers may not retaliate against the person for contacting the EEOC or filing a charge of discrimination.[5]

#### **Hiring Best Practices**

This section addresses best practices for employers in interacting with individuals with mental health

issues.

### ***Recruitment Efforts***

While the law generally does not allow employers to solicit information about mental health conditions before making a job offer, there are ways to recruit without asking people to disclose a disability pre-offer, such as including mental health service systems — such as state or local mental health agencies or community-based service providers — and others among partners who collaborate in recruitment efforts.

Employers should ensure they recruit individuals with psychiatric disabilities by prioritizing hiring people with disabilities and by working with partners who can connect qualified applicants.[6]

Employers should understand what they may and may not ask about an applicant's disability during the pre-job offer, post-job offer and during employment. Employers should create lists of questions that are permissible under the ADA.[7]

Federal agencies and federal contractors should understand their affirmative action obligations under Sections 501 and 503 of the Rehabilitation Act and properly invite applicants to self-identify.[8]

Employers should ensure that online application systems such as those with preemployment tests do not discriminate against candidates with disabilities. Employers should establish selection procedures that are job-related and are facilitated by managers who are knowledgeable about the procedures and employment discrimination laws.[9]

### ***Resources to Help Employers Hire People With Disabilities***

The U.S. Department of Labor's Office of Disability Employment Policy supports initiatives[10] to assist employers in hiring individuals with disabilities. These initiatives are discussed below.

#### *The Employer Assistance and Resource Network on Disability Inclusion*

EARN[11] is a free resource to assist employers with education and strategies on recruiting, hiring and advancement of people with disabilities. EARN provides resources including a list of websites for employers searching for candidates with disabilities and for job candidates with disabilities.[12]

EARN also suggests that employers contact state, local and community-based organizations such as American Jobs Centers, Centers for Independent Living, the Disability and Veterans Community Resources Directory, Employment Networks, the Council of State Administrators of Vocational Rehabilitation / National Employment Team and Vocational Rehabilitation agencies to help find qualified workers with disabilities.[13]

#### *Workforce Recruitment Program for College Students With Disabilities*

This program connects private businesses and federal agencies with qualified job applicants with disabilities.[14]

#### *Job Accommodation Network*

This network[15] provides expert guidance on job accommodations and issues in disability employment through free one-on-one guidance and technical assistance.[16]

### ***Avoiding Discriminatory Screening Processes***

To screen applicants for hire and employees being considered for promotion, employers frequently use employment tests and selection procedures such as cognitive tests, personality tests, medical examinations, credit checks and criminal background checks.[17]

Frequently, these tools may screen out and thus discriminate against people with mental illness.[18]

The ADA prohibits the use of employment tests or selection criteria that screen out or tends to screen out people with disabilities unless the test is job-related and consistent with business necessity.[19]

The EEOC differentiates between medical examinations, which the ADA does not allow before an applicant has received a conditional job offer, and other types of tests and procedures.

While a medical examination seeks information about an individual's physical or mental impairments or health and can include psychological tests that are designed to identify a mental disorder or impairment, psychological tests that measure personality traits such as honesty, preferences and habits are generally not considered medical examinations.[20]

The EEOC lists employer best practices for testing and selection procedures such as ensuring tests are properly validated for the positions and purposes for which they are used and determining whether there is an equally effective alternative selection procedure that has a less adverse impact if the test screens out a protected group.[21]

### ***Retaining and Promoting Employees With Psychiatric Disabilities***

Employers should keep in the mind the following best practices in connection to retaining and promoting employees with psychiatric disabilities:

*Focus on employee needs and flexibility.*

Employers should create orientation programs, career development and mentoring programs as well as employee resource groups, also known as affinity groups, to focus on the needs of employees with psychiatric disabilities.[22]

Managers should receive disability awareness training to help increase inclusivity in the workplace and creating an accepting culture. Businesses should implement workplace flexibility programs to allow for more flexible work arrangements.[23]

*Discuss reasonable accommodations.*

Employers should ask an individual with a known disability about the types of accommodations the person needs. Employers should understand common accommodation requests and how to implement these requests such as modified work schedules and workplace rules, work-leave and telework.[24]

Employers should prepare how to positively approach job accommodations by reviewing scenarios and stories that illustrate how to address job accommodations for employees with mental health conditions.[25]

By implementing these recommendations, employers will be better prepared to promote the employment of individuals with psychiatric disabilities and to prevent discrimination in the workplace based on mental health conditions.

### ***Supported Employment***

Supported employment is a particularly important tool to assist employers in recruiting, hiring, retaining and promoting people with psychiatric disabilities, and has proven highly effective in meeting employers' needs.[26] Supported employment services include services such as:



- Identifying individuals' skills, interests and career goals to help match the person with a suitable job;
- Helping individuals to conduct an individualized job search;
- Providing on-the-job assistance (e.g., counseling and interpersonal skills training) on a continuing basis to help people succeed in their jobs;
- Working with individuals and their employers to identify needed accommodations;
- Developing relationships with employers to understand their business needs and match individuals with jobs;
- Working with employers and individuals to identify ways in which jobs might be restructured or duties "carved" to facilitate employment of people with psychiatric disabilities while at the same time meeting employers' needs; and
- Providing benefits counseling to help individuals understand the impact of work on their public benefits and services, and ensure that individuals continue to have the health care coverage they need while working.

The most effective approach to supported employment for individuals with serious mental illness is known as Individual Placement and Support.[27] Supported employment services are typically paid for through federal and state programs, including the Medicaid program, state vocational rehabilitation agencies and other state dollars. Employers do not have to pay for these services but benefit from them.

Through supported employment programs, individuals with disabilities can contact their state mental health authority and local vocational rehabilitation office for resources to assist them in securing employment.[28] Also, the Council of State Administrators of Vocational Rehabilitation created the National Employment Team[29] to connect businesses with qualified applicants in their local area. [30]

Federal agencies and federal contractors subject to affirmative action requirements under Sections 501 and 503 of the Rehabilitation Act are encouraged to hire individuals with disabilities who require supported employment.[31]

### **COVID-19 and Mental Health in the Workplace**

The COVID-19 pandemic has changed the workplace in many ways that affect the mental health of workers.

Social distancing policies, mandatory lockdowns, periods of isolation after possible exposure, anxiety about getting sick, losing one's job and income and fear of what may happen in the future can all affect the mental health of workers.

Job insecurity, long periods of isolation, and professional and personal uncertainty often have an adverse effect on mental health, especially in younger people and those with a higher educational background.[32]

Mental health issues related to or exacerbated by the pandemic, such as anxiety, depression, posttraumatic stress disorder and sleep disorders are more likely to affect health care workers — especially those on the frontline, migrant workers and workers who have significant contact with the public.

Anyone with depression or a mood disorder may struggle with the social isolation from staying at home, however. Additionally, some individuals with phobias or obsessive-compulsive disorder may have increased symptoms related to the fear of contracting COVID-19.[33]

### ***Applicable Laws and Agency Guidance***

The ADA, the Rehabilitation Act, and the FMLA continue to apply during the COVID-19 pandemic.[34]

### ***Medical Exams and Disability-Related Inquiries***

In particular, the ADA's and Rehabilitation Act's restrictions on medical examinations and disability-related inquiries still apply. Prior to making a conditional job offer, generally an employer cannot require an applicant to take a medical examination or answer disability-related questions.

After an employee is hired, any disability-related inquiry or medical examination must be job-related and consistent with business necessity.

During the pandemic, an employer may ask workers if they have COVID-19, if they have been tested for COVID-19, if they are vaccinated, and if are experiencing symptoms associated with COVID-19, such as fever, chills, cough, shortness of breath or sore throat.[35]

An employer can also require a worker to take a COVID-19 test — but not a COVID-19 antibody test — to determine whether the worker may pose a direct threat to other workers.[36] The EEOC has said that, in general, employers may follow recommendations from the federal Centers for Disease Control and Prevention or other public health authorities regarding whether, when and for whom testing or other screening is appropriate.[37]

### ***Reasonable Accommodations Including Telecommuting***

Employers also still have to make reasonable accommodations for employees with disabilities.

The availability of vaccinations has diminished the number of requests for telework as reasonable accommodation by employees with underlying health conditions associated with heightened vulnerability to COVID-19. Nevertheless, many individuals seek to continue working remotely for a variety of reasons related to COVID-19.

Although an employer's agreement to remote telework during pandemic-related lockdowns does not mean that remote work will be a reasonable accommodation in all cases, the widespread use of telework during the pandemic suggests that telework may well be a reasonable accommodation in many circumstances.

An employee's successful performance of the essential functions of the employee's job remotely during the pandemic suggests that allowing the employee to continue working remotely when in-person work resumes would be a reasonable accommodation if needed due to the employee's disability.

Where remote work is not a reasonable accommodation, an employer may still have to provide other accommodations. For example, an employer may have to shift an employee's location or install barriers, like plexiglass, to ensure distance from other individuals and/or a quiet space for work or reassign the employee to a vacant position for which the employee is qualified.[38]

The EEOC has recognized that workers with certain psychiatric disabilities, such as anxiety disorder, obsessive-compulsive disorder or post-traumatic stress disorder, may have more difficulty with COVID-19-related disruptions to daily life.[39]

These workers may be entitled to a reasonable accommodation, like telework or a flexible work

schedule. As with any accommodations request, employers may ask questions to determine whether the condition is a disability, discuss with the employee how the requested accommodation would assist them and request reasonable medical documentation if needed.

### *FMLA Leave*

An employee who is eligible for leave under the FMLA and is sick with COVID-19-related symptoms or who is caring for a family member who is sick with COVID-19 symptoms, may be entitled to leave under the FMLA.

The Department of Labor, which enforces the FMLA, has encouraged employers to provide flexible leave policies for their employees who are ill with COVID-19 or who have family members with COVID-19, so that they can stay home and minimize the spread of the pandemic.[40]

Workers with psychiatric disabilities that are related to or exacerbated by the pandemic, or who have family members with such disabilities, may be entitled to the FMLA's 12 weeks of annual, unpaid job-protected leave.

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[1] For more information on the ADA, see Americans with Disabilities Act: Guidance for Employers and Disability Law Resource Kit. For more information on state laws prohibiting disability discrimination and/or requiring reasonable accommodations, see Discrimination, Harassment, and Retaliation State Practice Notes Chart. For model non-jurisdictional and state disability accommodations policies, see the Attendance Policy and Disability Accommodation column of Attendance, Leaves, and Disabilities State Expert Forms Chart.

- [2] See EEOC: Depression, PTSD, & Other Mental Health Conditions in the Workplace: Your Legal Rights.
- [3] See G&A Partners Sued by EEOC for Disability Discrimination.
- [4] See Interconnect Cable Technology Corporation Sued by EEOC for Disability Discrimination; EEOC: Interconnect Cable Technologies to Pay \$35,000 to Settle EEOC Disability Discrimination Suit. For additional EEOC lawsuits and settlements involving workers with psychiatric disabilities, see Health Delivery, Inc. To Pay \$45,000 To Settle EEOC Disability Discrimination Suit and EEOC Settles Psychiatric Disability Bias Suit for Worker with Bipolar Disorder.
- [5] See Filing an EEOC Charge Checklist. See also EEOC: Depression, PTSD, & Other Mental Health Conditions in the Workplace: Your Legal Rights; EEOC: Time Limits for Filing A Charge. For additional information on EEOC practice, see EEOC Enforcement of Anti-discrimination Laws: Key Considerations. For a video on drafting an EEOC position statement, see EEOC Position Statement Video.
- [6] See EEOC: Recruiting, Hiring, Retaining, and Promoting People with Disabilities.
- [7] See Permissible Disability-Related Inquiries, Medical Exams, and Certifications: Key Considerations, Interview Questions Checklist: Permissible and Impermissible Inquiries to Job Applicants, and JAN: Pre-Offer, Disability-Related Questions: Dos and Don'ts.
- [8] See JAN: Disability Disclosure and Employment.

[9] See EEOC Employment Tests and Selection Procedures. For more information on screening and hiring, see Screening and Hiring Resource Kit.

[10] <https://www.dol.gov/general/topic/disability/hiring>.

[11] <https://askearn.org/>.

[12] Job posting websites and recruitment resources listed include: AAPD Career Center; abilityJOBS; Ability JobFair; AbilityLinks.org; Association of University Centers on Disabilities; Bender Consulting ServicesInc.; Disabled PersonInc.; Diversity Jobs; Getting Hired; National Business & Disability Councilat The Viscardi Center's Disability Employment Service; OurAbility Connect, RecruitDisability.org; and WRP.gov. For the full list and description of each website, see EARN: Finding Candidates with Disabilities.

[13] See EARN: Finding Job Candidates with Disabilities.

[14] <https://www.wrp.gov/wrp>.

[15] <https://askjan.org/about-us/index.cfm>.

[16] See DOL: Hiring People with Disabilities (listing these initiatives and additional resources). For information on ways to ensure people with disabilities are included in recruitment efforts such as by conducting targeted outreach, creating community linkages, posting job announcements in targeted places, and establishing an internship program, see EEOC: Recruiting, Hiring, Retaining, and Promoting People

with Disabilities.

[17] EEOC: Employment Tests and Selection Procedures.

[18] See Personality and Integrity Tests for Hiring and Promoting Employees. See also Alan M. Goldstein & Shoshanah D. Epstein, Personality Testing in Employment: Useful Business Tool or Civil Rights Violation, 24 Labor Lawyer 243 (2008); Julie Furr Youngman, The Use and Abuse of Pre-employment Personality Tests, 60 Business Horizons 261 (2017).

[19] 42 U.S.C. § 12112(b)(6), (b)(5), (b)(7).

[20] See EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examination of Employees under the ADA. See also *Karraker v. Rent-A-Center, Inc.*, 411 F.3d 831 (7th Cir. 2005) (finding the employer's use of the Minnesota Multiphasic Personality Inventory (MMPI) test violated the ADA because it could be used to diagnose certain psychiatric disorders and therefore was a medical examination).

[21] See EEOC Employment Tests and Selection Procedures.

For additional information on disability-related questions, see Permissible Disability-Related Inquiries, Medical Exams, and Certifications: Key Considerations, Interview Questions Checklist: Permissible and Impermissible Inquiries to Job Applicants, and EEOC Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations.

[22] See [Affinity Groups in the Workplace: Managing the Legal Risks](#).

[23] See [EEOC: Recruiting, Hiring, Retaining, and Promoting People with Disabilities](#).

[24] See [Accommodating a Disability under the Americans with Disabilities Act Checklist](#). See also [EEOC: Recruiting, Hiring, Retaining, and Promoting People with Disabilities](#).

[25] See [Facts Sheets and Scenarios for Employers: Job Accommodations for Employees with Mental Health Conditions](#).

[26] See [Bazon: Advances in Employment Policy](#).

[27] See [Bazon: Getting to Work](#).

[28] [SAMHSA: Directory of State Mental Health Authorities](#); [JAN: State Vocational Rehabilitation Agencies](#).

[29] <https://www.csavr.org/the-net>.

[30] See [EEOC: Recruiting, Hiring, Retaining, and Promoting People with Disabilities](#).

[31] See [Q&A: The EEOC's Final Rule on Affirmative Action for People with Disabilities in Federal Employment](#).

For additional information on supported employment, see [SAMHSA Supported](#)

Employment: Training Frontline Staff.

[32] COVID-19-Related Mental Health Effects in the Workplace: A Narrative Review.

[33] JAN: Coronavirus (COVID-19), Stress, and Mental Health Conditions.

[34] See EEOC: What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws; COVID-19 and the Family and Medical Leave Act: Questions and Answers.

[35] See Pandemic Flu/Influenza/Coronavirus (COVID-19): Key Employment Law Issues, Prevention, and Response. See also EEOC: What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws.

[36] See Pandemic Flu/Influenza/Coronavirus (COVID-19): Key Employment Law Issues, Prevention, and Response.

[37] EEOC: What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws; CDC: Testing in Non-Healthcare Workplaces.

[38] See Pandemic Flu/Influenza/Coronavirus (COVID-19): Key Employment Law Issues, Prevention, and Response; see also EEOC: What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws.

[39] EEOC: What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws.



## [40] COVID-19 and the Family and Medical Leave Act: Questions and Answers.

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