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ADA, FMLA and DSM-5: Where They Intersect and What it Means to You

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Agenda

• ADA and FMLA coverage of mental health conditions  
• New DSM-5 classifications  
• Intersection between ADA/FMLA coverage and new classifications  
• Practical advice to navigate the intersection
ADA Coverage Generally

• An employee is protected under the ADA, as broadened substantially by the ADA Amendments Act of 2008 (“ADAAA”), if he or she has a “disability,” defined as follows:
  • A physical or mental impairment that substantially limits one or more major life activities
  • Conditions affecting the operation of major bodily functions

ADA Coverage- Mental Health

• “Mental impairment” includes:
  – “Any mental or psychological disorder, such as an intellectual disability (formerly termed ‘mental retardation’), organic brain syndrome, emotional or mental illness, and specific learning disabilities.”
• “Disability” includes: mental health conditions that substantially limit an individual’s ability to learn, concentrate, think, and communicate
ADA- Substantially Limits

• “Substantially limits”
  – Construed broadly in favor of expansive coverage (not meant to be demanding standard)
  – Compared to most people in general population
  – Need not prevent or significantly or severely restrict performance of major life activity
  – “[S]hould not demand extensive analysis.”
  – “Nonetheless, not every impairment will constitute a disability.”

“Substantially Limits”

• Regulatory examples of conditions that “substantially limit brain function”:
  – major depressive disorder
  – bipolar disorder
  – post-traumatic stress disorder
  – obsessive compulsive disorder
  – schizophrenia
ADA Coverage-“Record of Impairment”

ADA also prohibits discrimination against an individual:

• Who has a “record” of having a disability such as:
  – A past diagnosis of mental illness which is in remission at the time of assessment, or
  – Past participation in a drug abuse treatment program

ADA Coverage-”Regarded As”

• Individuals “regarded as” disabled are protected from discrimination

• A perceived impairment does not have to (be perceived to) limit a major life activity (i.e., be a “qualified ADA disability”) to invoke “regarded as” protection

• Rather, the ADAAA broadened coverage to include:
  – Individuals who can argue that they were perceived or treated as potentially having, for example, a mental impairment that is less limiting than that which would be considered to be a “disability” under the law
ADA Coverage—”Regarded As”

• “Regarded as” coverage extends to employees who are regarded as having an impairment that is not both “transitory and minor.”
  – “Transitory” means with an actual or expected duration of six months or less
  – “Minor” appears to mean not “substantially limiting”

• Employer has burden of proving that condition was, objectively (not subjectively), “transitory and minor”

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ADA Coverage—”Regarded As”

• Employers are NOT required to provide reasonable accommodations to employees who meet only the “regarded as” definition.
FMLA Coverage Generally

• “Serious health condition”
  – Definition applies for purposes of leave for employee’s own SHC or
  – SHC of employee’s spouse, parent, son or daughter
• Example conditions not specified in definition

“Serious Health Condition”

• “Serious health condition” means illness, injury, impairment, or physical or mental condition that involves incapacity and:
  – inpatient care, or
  – continuing treatment by a health care provider (“HCP”)
• There are six categories of covered “continuing treatment” in 2013 regulations
“Incapacity”

- Incapacity means inability to work, attend school or perform other regular daily activities due to the serious health condition, and related examination, treatment or recovery.
- A regimen of continuing treatment includes, for example, a course of prescription medication (e.g., an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition (e.g., oxygen).
- Ordinarily, unless complications arise, common cold, flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc., are not SHCs.
- Mental illness or allergies may be SHCs if regulatory conditions are met.

“Continuing Treatment by HCP”

- Continuing treatment by a HCP means any one of the following:
  - (1) Incapacity and treatment. A period of incapacity of more than three consecutive, full calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:
  - (i) Treatment two or more times, within 30 days of the first day of incapacity, unless extenuating circumstances exist, by a HCP; or
  - (ii) Treatment by HCP on at least one occasion, which results in a regimen of continuing treatment under the supervision of HCP.
“Continuing Treatment by HCP”

• Treatment by HCP means an in-person visit to a health care provider

• First in-person treatment visit must take place within 7 days of first day of incapacity

“Continuing Treatment by HCP” (continued)

• (2) Pregnancy or prenatal care. Any period of incapacity due to pregnancy, or for prenatal care
“Continuing Treatment by HCP” (continued)

• (3) Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which:

  – (i) Requires periodic visits (defined as at least twice a year) for treatment by a health care provider, or by a nurse under direct supervision of a health care provider;

  – (ii) Continues over an extended period of time (including recurring episodes of a single underlying condition); and

  – (iii) May cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.)

“Continuing Treatment by HCP” (continued)

• (4) A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective

• Employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider

• Examples include Alzheimer's, a severe stroke, or the terminal stages of a disease
“Continuing Treatment by HCP” (continued)

• (5) Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider for:
  
  – (i) Restorative surgery after an accident or other injury; or
  
  – (ii) A condition that would likely result in a period of incapacity of more than three consecutive full calendar days in the absence of medical intervention or treatment
  
  – Examples: cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), kidney disease (dialysis)

“Continuing Treatment by HCP” (continued)

• (6) Absences attributable to incapacity due to pregnancy or chronic health conditions qualify for FMLA leave even though employee or the covered family member does not receive treatment from HCP during the absence, and even if the absence does not last more than three consecutive full calendar days
  
  • Examples:
    
    – employee with asthma may be unable to report for work due to the onset of an asthma attack or because the employee's health care provider has advised the employee to stay home when the pollen count exceeds a certain level
    
    – An employee who is pregnant may be unable to report to work because of severe morning sickness
Military Caregiver Serious Injury or Illness

• Applies to covered veterans and current servicemembers
• Up to 26 weeks in 12-month period for providing care during periods of incapacity
• Physical conditions and mental health conditions (e.g., PTSD, TBI) covered

DSM-5

• *Diagnostic and Statistical Manual of Mental Disorders* 5 ("DSM-5")
• Released May, 2013 by American Psychiatric Association to replace DSM-IV-TR (2000)
DSM-IV

- DSM-IV was widely viewed as authoritative by:
  - Courts, and
  - EEOC
    - 1997 EEOC Enforcement Guidance on ADA and Psychiatric Disabilities:
      - DSM-IV is “relevant” for identifying covered emotional or mental illnesses
      - Some DSM-IV-listed disorders are explicitly not covered by ADA (e.g., drug addiction)
      - Some DSM-IV-discussed conditions are not “disorders”, so not impairments

DSM-5 More Controversial

- DSM-5 is currently more controversial
- National Institute of Mental Health (major funding agency for mental health research) withdrew support for DSM-5
  - NIMH cited “lack of validity” for changes
  - NIMH still views DSM-IV as authoritative
DSM-5 More Controversial

- See “Bad Behavior Isn’t an Illness”
  [http://www.latimes.com/opinion/commentary/la-oe-dalrymple-dsm-diseases-20131105,0,2754859.story#axzz2jzfBtG2o](http://www.latimes.com/opinion/commentary/la-oe-dalrymple-dsm-diseases-20131105,0,2754859.story#axzz2jzfBtG2o)
- See “Shrink Revolt”
- See “It’s Not Too Late to Save ‘Normal’”

Quote from ONE EEOC Attorney

Per “New Mental Disorders Mean ADA Headaches for Employers,” (May 21, 2013),
[http://www.law360.com/articles/442737/new-mental-disorders-mean-ada-headaches-for-employers](http://www.law360.com/articles/442737/new-mental-disorders-mean-ada-headaches-for-employers), Chris Kuczynski, Acting Associate Legal Counsel at EEOC, said:

- “The DSM is relevant to us in determining whether someone has an impairment, but it’s not necessarily dispositive, because there are some things in the DSM-4 and maybe the DSM-5 that aren’t even considered impairments, and there are some impairments that wouldn’t be recognized as a disorder under the ADA.”
ADA Specific Exclusions

• Disability for ADA purposes does not include:
  – Current illegal use of drugs
  – “[t]ransvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders”
  – compulsive gambling, kleptomania, or pyromania
  – psychoactive substance use disorders resulting from current illegal use of drugs

EEOC Mental Health Provider Role Guidance

• [http://www.eeoc.gov/eeoc/publications/ada_mental_health_provider.cfm](http://www.eeoc.gov/eeoc/publications/ada_mental_health_provider.cfm)

• Guides mental health providers, very solicitously, as to how to document mental disabilities and accommodation requests
DSM-5/ADA Interaction

• Except for specifically-excluded disorders, ADA status of DSM-5-recognized disorders will depend on application of current ADA definitions and individual employee’s level of impairment/limitation

DSM-5 Changes

• For detailed comparison of DSM-5 with DSM-IV-TR, from APA’s perspective, see:
• [http://www.dsm5.org/Documents/changes%20from%20dsms-iv-tr%20to%20dsm-5.pdf](http://www.dsm5.org/Documents/changes%20from%20dsms-iv-tr%20to%20dsm-5.pdf)
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  - obsessive compulsive disorder
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DSM-5 Disorders of Interest

Mild Neurocognitive Disorder (cause unspecified)

• “Evidence of modest cognitive decline from a previous level of performance in one or more cognitive domains”
  – i.e., complex attention, executive function, learning and memory, language, perceptual motor, or social cognition

• Does not interfere with capacity for independence in everyday activities (e.g., paying bills), but greater effort, compensatory strategies or accommodation may be required
DSM-5 Disorders of Interest

Social (Pragmatic) Communication Disorder

• “Deficits in using communication for social purposes, such as greeting and sharing information, in a manner that is appropriate for the social context.”
• Impairment of ability to change communication to match context
• Difficulties in following rules for conversation and storytelling, such as taking turns in conversation

• Difficulties understanding what is not explicitly stated (e.g., making inferences) and nonliteral or ambiguous meanings of language (e.g., idioms, humor, metaphors, multiple meanings that depend on context for interpretation)
• Result in functional limitations in, e.g., effective communication, social participation, occupational performance
• Not due to autism spectrum disorder or other specified mental disorder
DSM-5 Disorders of Interest

Hoarding Disorder
• Persistent difficulty parting with possessions, regardless of their actual value
• Due to perceived need to save items and distress associated with discarding them
• Results in accumulation of possessions that congest and clutter active living areas and substantially compromises their intended use
• Causes clinically significant distress or impairment in social, occupational or other areas
• Not caused by other mental disorder

DSM-5 Disorders of Interest

Binge Eating Disorder
• Recurrent episodes of binge eating, i.e., eating in a discrete period of time “an amount of food that is definitely larger than what most people would eat in a similar period of time under similar circumstances”
• Sense of lack of control over the binge eating
• Marked distress regarding binge eating
• At least once per week for 3 months
DSM-5 Disorders of Interest

Premenstrual Dysphoric Disorder

- Marked affective lability (e.g., mood swings, sad/tearful, increased sensitivity to rejection)
- Marked irritability or anger, interpersonal conflicts
- Marked depressive mood, hopelessness
- Marked anxiety, tension, feelings of being keyed up or on edge

PLUS (see next slide)

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DSM-5 Disorders of Interest

Premenstrual Dysphoric Disorder

- Four criteria on previous slide
- PLUS one or more of following:
  - Decreased interest in usual activities (e.g., work, friends)
  - Subjective difficulty in concentration
  - Lethargy, marked lack of energy
  - Feeling overwhelmed

WHERE symptoms are associated with clinically significant distress or interference with, e.g., work, usual social activities, relationships with others, decreased productivity and efficiency at work
DSM-5 Disorders of Interest

Gambling Disorder

• Persistent and recurrent problematic gambling behavior leading to clinically significant impairment or distress exhibiting four or more of following in 12-month period:
  – Needs to gamble with more $, restless if trying to cut back, has made unsuccessful efforts to stop, preoccupied with gambling, gambles when distressed, lies to conceal extent of gambling,
  – Has jeopardized or lost significant relationship (e.g., a job) due to gambling
  – Relies on others to provide money to relieve related financial stress

DSM-5 Disorders of Interest

• Bereavement-related Major Depression
• DSM-5 eliminates “bereavement exclusion” used in DSM-IV-TR
• Per DSM-5, major depressive episodes may be triggered by bereavement, if other diagnostic features for major depression are present
Navigating the DSM-5/ADA Intersection

• Train supervisors to avoid “regarded as” claims
• Be prepared to engage in accommodation dialogue more often
• Focus on essential functions and essential behavioral requirements

Navigating the DSM-5/ADA Intersection

• Be more nuanced about what accommodations can be provided
  — Employers must provide “reasonable accommodations,” not necessarily the accommodations requested by employee or HCP
• Recognize that employers still do not have to “accommodate” bad behavior
  — First Circuit: can focus on behavior alone
  — Second Circuit: should show not otherwise qualified, cannot reasonably accommodate behavior
FMLA “Serious Health Condition”

• “Serious health condition” means illness, injury, impairment, or physical or mental condition that involves:
  – inpatient care, or
  – continuing treatment by a health care provider (“HCP”)

  • Remember six categories of covered “continuing treatment” in 2013 regulations

• FMLA does not have categorical exclusions like ADA

“Incacity”

• Incapacity means inability to work, attend school or perform other regular daily activities due to the serious health condition, and related examination, treatment or recovery

• Ordinarily, unless complications arise, common cold, flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc., are not SHCs

• Mental illness may be SHC if regulatory conditions are met
Navigating DSM-5/FMLA Intersection

- Train supervisors and HR professionals to recognize potential issues created by new disorders
- Consider using further inquiry and second/third opinion options more often
  - Further inquiry: HR may seek clarification from HCP of incomplete, insufficient documentation if not cured upon request of employee
  - Second opinion: may obtain second opinion if reason to doubt validity of HCP’s certification
  - Third opinion: binding on employer if HCP/second HCP disagree

Navigating DSM-5/FMLA Intersection

- Track all covered leave scrupulously and apply toward allotment
- Avoid retaliation associated with leave taken for new disorders
  - do training of supervisors
  - scrutinize decisions
  - take related complaints seriously
Questions?

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