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Reasonable Accommodations for Mental Health in the Time of COVID

BY ROBIN H. GISE

The rise in diagnoses of mental health disorders during the last two years has been called a “second pandemic.” Just over half of adults aged 18 to 44 have reported symptoms of anxiety and depression, as well as 38% of adults living with children. At the same time, for many office workers, the last two years have been an unprecedented experiment in remote work. Fifty-seven percent of remote employees reported that they never or rarely worked from home before the pandemic. Although more employees are going back in the office, working five days a week in the office is no longer the norm for many companies and industries. Understanding how these two trends intersect in the context of employees seeking accommodations for mental health disorders is critical for employers navigating the path to the new normal.

1. Rise in Diagnoses of Mental Health Disorders During the Pandemic

The social isolation, stress, anxiety, illness and loss of loved ones resulting from the pandemic have exacerbated and accentuated mental health issues. In addition, following the murder of George Floyd and the increase in anti-Asian hate crimes, more people of color are seeking mental health treatment. Numerous studies have shown that diagnoses of mental health disorders have increased, especially anxiety and depression. This includes people who did not suffer from mental health conditions before the pandemic as well as people whose conditions have worsened. It’s also notable that people react differently to similar kinds of stress. While one person may have weathered the stress and isolation with resilience, another may have developed debilitating anxiety or depression.



2. Extended Period of Remote Work: Positive and Negative Impacts

While the pandemic produced increased social isolation, stress and anxiety, the ability of many white-collar employees to work remotely while their offices were closed was an unexpected benefit. Indeed, as more offices are reopening, many employees still prefer to work from home. According to data from Pew Research Center, 61% of U.S. workers who have been working remotely and could now return to an office are choosing to continue

working from home. For many employees, particularly women, the ability to work from home has been a silver lining of the pandemic. For some, especially parents of young children, working from home makes work-life balance eminently more achievable. For others, who may feel marginalized by or uncomfortable with office culture, working from home enables them to focus on their jobs without social pressures.

However, remote work is not ideal for everyone. As a mediator who primarily handles employment-related disputes, I have observed the negative impacts of remote work. In particular, some employees have reported feeling isolated, depressed and disconnected, and in some cases, their performance suffered. In addition, many employees have started new jobs as remote workers during the pandemic, which can present many challenges, from effective onboarding to making connections with colleagues and managers.

3. Requests to Continue Remote Work as an Accommodation for Mental Health Conditions

The changed landscape and increase in people suffering from mental health disorders

have created new challenges for employers. Employers that are planning to bring employees back to the office will have to evaluate requests from employees who wish to continue working from home. There may be a business case for either permitting or denying a request; a hybrid arrangement may be a good compromise. But some employees may request working from home as an accommodation for their mental health issues.

The legal basis for evaluating requests for accommodations for mental health conditions has not changed. According to the Americans with Disabilities Act (ADA), “An employer must provide a reasonable accommodation to the known physical or mental limitations of a qualified individual with a disability unless it can show that the accommodation would impose an undue hardship.” State and local laws may provide less stringent requirements for what constitutes a disability than the ADA as well as increased burdens for employers. Once an employer is on notice of the accommodation request, there is an obligation to engage in an interactive process with the employee to determine whether a reasonable accommodation is available. What is reasonable is

determined on a case-by-case basis.

However, while the legal standard is the same, the increase in diagnoses of mental health disorders after an extended period of remote work has resulted in new complications and potential for litigation. For example, let’s say that an employee has been working remotely for a year and was recently diagnosed with anxiety. Upon being asked to return to the office, she fears that working in person will exacerbate her condition. In the past, an employer may not have considered remote work to be a reasonable accommodation for anxiety because it would have been an undue burden on the employer’s business. While this does not mean such accommodation must be granted for an indefinite period, requests to work from home as an accommodation for mental health reasons must be viewed differently in light of the past two years.

4. Requests for Leave or Time off as an Accommodation for Mental Health Conditions

In addition to continued remote work, mental health conditions can be accommodated in many other ways, including requests for time off or intermittent leave. Unfortunately, there is still a stigma

associated with requesting accommodations for mental health. A May 2021 study by the American Psychiatric Association found that while 54% of employees reported that their employers had become more accommodating to employees' mental health needs since the start of the pandemic, 4 in 10 employees feared retaliation for taking time off for mental health or seeking mental health accommodations. Requesting accommodations for mental health can be more difficult than requesting accommodations for a physical impairment, such as a broken leg, because a mental health issue may not be readily visible. Employees may feel embarrassed or ashamed that they need help.

5. Navigating Requests for Mental Health Accommodations in the New Normal

An openness and willingness to address employee mental health concerns is critical. For an employee who may have an entitlement to accommodation, it is vital to engage in an effective interactive process and be proactive in identifying reasonable accommodations that will enable that employee to succeed at work without imposing an undue burden on the

employer. Acknowledging that the past two years have created unprecedented challenges is key to avoiding litigation over a failure to accommodate.

Being proactive about addressing employee mental health concerns will also help avoid the perception of a stigma for those seeking accommodations. Every employee with a mental health concern may not be legally entitled to an accommodation. But given the prevalence of mental health concerns arising from the pandemic, it would make business sense to pragmatically address concerns about returning to the office in order to avoid turnover or even litigation.

For employers that want their employees to return to the office, this is an opportunity to think critically about which employees absolutely must be in the office and whether requests to continue remote work could be accommodated through hybrid schedules or other arrangements even where there may not be a legal requirement to do so. Things are not going to return to the way they were before the pandemic. Even though we are hopefully approaching a time where COVID's impact on our lives recedes, the mental health effects and trauma of the pandemic will persist for a long time.

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NOTE: This author presented on this topic as a panelist at the New York City Bar Association's Employment Law Institute in March 2022 in a program titled "Navigating the Path of Reasonable Accommodations." She acknowledges and thanks to the panel leader, Tanya Bocker, Esq., and co-panelists Paul Keefe, Esq.; Ivie Serieux, Esq.; and Evan Spelgogel for many thoughtful discussions and insights in preparing for the program, which helped inspire this article.

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