



Employment & Labor Client Alert



Effect of COVID-19 on Mental Health: Employer Legal Obligations

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As employers strive to do their part to slow the spread and protect employees from *physical* impairments or even death caused by the coronavirus, lengthy lockdowns, social-distancing, and severe economic uncertainty are causing or aggravating serious *mental* impairments. A national poll by the Kaiser Family Foundation found that nearly half of adults—45%—report that the pandemic has affected their mental health. The [Mental Health Association of Oklahoma](#) and the [Healthy Minds Policy Initiative](#) warn that an estimated 92,000 more Oklahomans may experience suicidal thoughts in the wake of the pandemic with 13,000 likely to develop substance use disorders.

Faced with these facts, employers must be prepared to effectively and compassionately manage the mental health effects some employees are experiencing. In response to the alarming but understandable explosion of reported mental health disorders, this Client Alert highlights some legal issues under the Americans with Disabilities Act and the Family and Medical Leave Act that employers should prepare to manage well. We will also cover these issues in depth in an upcoming employment webinar—stay tuned for details.

Tomorrow at 6:00 p.m., the *Tulsa World* will be posting a “[Let’s Talk](#)” virtual town hall meeting at its website, focusing on mental health issues. The talk will feature [Mike Brose](#) of Mental Health Oklahoma and [Dr. Sara Coffey](#) of OSU’s Health Sciences Center.

Disability Accommodation Obligations

The ADA and similar state laws, like the Oklahoma Antidiscrimination Act (OADA), prohibit employers from discriminating against the disabled. Covered disabilities include mental impairments that substantially limit one or more major life activities and mental impairments that are regarded as being substantially limiting. Employers must provide reasonable accommodations that will enable disabled employees to safely and successfully perform essential job functions.

Mental disabilities often pose unique challenges to employers. While they can be just as debilitating as physical disabilities, they may be less noticeable. They also may carry social stigmas that make it less likely for an affected employee to self-report. Common examples include anxiety disorders or panic attacks, post-traumatic stress disorder, substance abuse, depression, bipolar disorder, schizophrenia, and obsessive-compulsive disorder.

If an employee makes a work-related request due to a mental impairment, such as a request to continue working from home when shelter-in-place orders are lifted or to take leave for counseling, therapy, or rehab, employers must thoughtfully engage in the interactive accommodation evaluation process. The purpose of the process is to determine if (1) the employee has a covered disability and, if so, (2) whether one or more reasonable accommodations exist that can be granted to the employee. GableGotwal’s employment webinar will address each of the critical steps in the interactive accommodation evaluation process.

According to the Equal Employment Opportunity Commission, potential reasonable accommodations for mental disabilities include examples such as:

- Altered work or break schedules (e.g., to accommodate counseling or therapy appointments)
- Secluded or quiet office spaces or using a device that creates a quiet work environment
- Changes in supervisory methods
- Permission to work from home, if possible
- Support animals
- Leaves of absence

As with physical disabilities, employers should maintain an affected employee's privacy rights and ensure the employee does not suffer any harassment as a result of the disability or accommodation. Should an employee complain of discrimination or harassment because of the disability, employers must respond promptly to address the situation but must not take or tolerate any retaliatory action.

The Family Medical Leave Act (“FMLA”)

Some mental health impairments may qualify as serious health conditions covered by the FMLA, entitling eligible employee to take up to 12 weeks of FMLA leave in a 12-month period. The FMLA imposes a complex set of compliance requirements with strict deadlines governing various stages of the process. It prohibits employers from interfering with, restraining, or coercing employees in the exercise of their FMLA rights. And a simple act of interference that may be due to mere ignorance or neglect of FMLA duties can result not only in costly corporate liability, but also personal liability for supervisors or managers.

One particularly problematic FMLA compliance challenge for employers in the wake of the pandemic is obtaining timely medical certifications from health care providers. The FMLA affords employees grace when “extenuating circumstances” impede their ability to timely provide medical certifications, and employers should exercise caution when enforcing an employee's FMLA responsibilities. Our employment webinar will highlight critical FMLA-compliance issues that supervisors and managers should be aware of.

Employee Assistance Programs

Employers may wish to offer or require employees struggling with mental health issues to participate in employee assistance programs (“EAPs”), which may include counseling or other forms of mental health assistance. Employers should exercise [C.A.R.E.](#) when doing so to avoid creating risk of “regarding” an employee as disabled when the employee may not have a covered disability.

The ADA not only prohibits discriminating against an employee who suffers from an actual disability, it also bars discrimination against employees whom the employer has “regarded as” disabled. Whether an employer regards an employee as disabled is determined on a case-by-case basis. In some instances, an employer referring an employee to EAP can serve as evidence that the employer regards the employee as disabled. If this is considered along with other evidence (such as discussing the employee's mental health during meetings or repeatedly asking the employee whether he or she is having issues), employers may violate the ADA by taking an adverse action against an employee who is regarded as being disabled due to a mental health impairment. When offering or requiring the use of EAP for mental health issues, be careful to emphasize and document that you have not concluded the employee has a disability and are not regarding the employee as disabled.

GableGotwals remains on the cutting edge of COVID-19-related legal developments. Our [Employment & Labor team](#) is committed to helping employers navigate the nuances of the changing legal landscape and address emerging issues that accompany COVID-19 in the workplace. Please contact any member of the team for further assistance.



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