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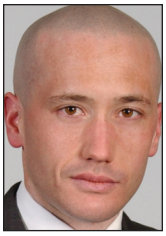
Employing individuals with mental health issues

What are the pitfalls for health care employers?



By Matthew C. Moschella, Esq.

Individuals with unresolved mental health issues often seek employment in the health care industry in an attempt to work out their own problems.

Rather than assist with the healing process, however, exposure to patients with similar issues and vulnerable populations in general may further exacerbate the employee's symptoms, possibly resulting in violence or other dangerous conduct.

This situation creates a dilemma for health care employers. On one hand, an employer can be responsible under certain circumstances for the dangerous conduct of its employees, including if, for example, the issues could have been discovered through a routine background check during the interview process. On the other hand, employers cannot treat employees with psychological disabilities differently than other employees without potentially violating federal and state anti-discrimination laws.

By understanding their legal obligations, health care employers can work toward striking the appropriate balance between ensuring that employees with such issues are treated fairly and within the confines of law, while also ensuring a safe workplace and productive medical practices and hospitals.

What the law requires

The laws protecting private sector employees who have mental health disabilities are well established.

Numerous types of disabilities trigger protection, including depression, bipolar disorder, anxiety disorders, obsessive compulsive disorders, post-traumatic stress disorder, schizophrenia and personality disorders.

Identifying and understanding the workplace implications of these mental health conditions is a difficult task given that employees manifest these disabilities in different ways.

The federal Americans with Disabilities Act and Massachusetts law both prohibit employers from – because of a disability – refusing to hire any applicant or taking adverse action against any employee: (1) that the employer knows to have a mental health issue that substantially limits the ability of the applicant or employee to perform the essential functions of the job, with or without a reasonable accommodation; (2) that has a record of such a disability; or (3) that the employer regards as having such a disability.

The ADA and state law also require employers to engage employees that have such disabilities in an interactive dialogue to determine if a reasonable accommodation exists that could permit the employee to perform the essential functions of his or her job.

To qualify for protection, the employee must be otherwise qualified for the job, meaning that he or she has the education level, work experience, skills, training and licenses or certifications required for the position. Additionally, the employee must be able to perform the essential functions of the job, with or without a reasonable accommodation by the employer.

An employer's judgment as to what job duties are essential is one factor, but not determinative. Job duties that may constitute essential functions include regular attendance, punctuality, the ability to work full time, the ability to interact with others and the ability to perform in stressful situations.

Proactive approach

Health care employers should take a proactive approach to ensure that they comply with the applicable laws.

Such steps may include evaluating existing hiring policies and practices to make certain that employees or applicants are not asked to disclose impermissible information. For example, an employer cannot affirmatively ask a candidate whether he or she has a disability, or about the nature or severity of a disability.

Employers must also make sure that candidates are not inadvertently screened out of the application process due to disabilities by, for example, imposing requirements that are not related to the position or cannot be performed by employees with certain disabilities under any circumstances.

Once an employee is on the job, health care employers should identify and address as early as possible performance issues linked to mental health disabilities.

After such issues are identified, the first step is to engage the employee in a dialogue to determine if a reasonable accommodation exists that could permit the employee to perform the essential functions of the job. Employees' requests for accommodations do not need to be in writing or formally mention the relevant law.

Persons other than the employee (such as a relative, mental health professional or other representative) may request an accommodation on an employee's behalf. However, employers do not have to provide accommodations for disabilities that they are not aware of or have no reason to know about.

There are numerous steps employers can take to reasonably accommodate employees with mental health conditions, such as allowing part-time or flexible hours, reassigning to a vacant position or granting time off for treatment. The employer does not have to provide the exact accommodation an employee requests if another accommodation is sufficient to address the situation.

Employers are not conclusively barred from disciplining employees with disabilities for misconduct, even if the misconduct relates to a disability. An employer can discipline a protected employee if the conduct at issue is job-related and consistent with business necessity, and if the employer would impose the same discipline on non-disabled workers.

For example, employers can discipline employees who make the workplace unsafe or who steal or destroy property. When faced with such a situation, however, it is critical that the employer focus on the *conduct* at issue, not the source of the misconduct (i.e., a mental health disability).

By considering the possibility that mental health issues are the root of an employees' difficulties at work, health care employers can ensure that these employees receive the protection and workplace assistance they need and are entitled to, while maintaining strong health care practices and protecting employees' interests.

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