Mental Health Wellness in the Workplace

Session #4

1. We have job descriptions but they refer to the physical requirements – what are some examples of mental standards to include?

    - Problem-solving
    - Decision-making
    - Interpreting Data
    - Organization
    - Reading/Writing

2. What if an existing employee is terminated for poor work performance and later claims to have a mental health condition that contributed to the decline in work performance - If the employer was initially unaware of this condition are they required to accommodate once they become aware (after termination)?

    - If the termination decision was made only for poor work performance and the employer had no knowledge, whatsoever, about any disability or mental health condition that contributed to the decline in work performance, then there would be no legal obligation to re-hire the employee and accommodate the employee after termination if the employer learns of the condition after termination.

3. Does how ADA applies vary by employer size?

    - Title I of the Americans with Disabilities Act of 1990 prohibits private employers, state and local governments, employment agencies and labor unions from discriminating against qualified individuals with disabilities in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions, and privileges of employment. The ADA covers employers with 15 or more employees, including state and local governments. It also applies to employment agencies and to labor organizations. The ADA's nondiscrimination standards also apply to federal sector employees under section 501 of the Rehabilitation Act, as amended, and its implementing rules. Please note, however, that the Massachusetts equivalent of the ADA – M.G.L. c. 151B – also prohibits disability discrimination and applies to employers with 6 or more employees.

4. Can you clarify what you meant about how it (ADA) applies differently to an active drug user versus one in recovery?

    - The ADA provides that any employee or job applicant who is "currently engaging" in the illegal use of drugs is not a "qualified individual with a disability." Therefore, an employee who illegally uses drugs—whether the employee is a casual user or an addict—is not protected by the ADA if the employer acts on the basis of the illegal drug use. As a result, an employer does not violate the ADA by uniformly enforcing its rules prohibiting employees from illegally using drugs. However, "qualified individuals" under the ADA include those individuals: (a) who have been successfully rehabilitated and who are no longer engaged in the illegal use of drugs; (b) who are currently participating in a rehabilitation program and are no longer engaging in the illegal use of drugs; and (c) who are regarded, erroneously, as illegally using drugs. A former drug addict may be protected under the ADA because the addiction may be considered a substantially limiting impairment. However, according to the EEOC Technical Assistance Manual on the ADA, a former casual drug user is not protected: "[A] person who casually used drugs illegally in the past, but did not become

addicted is not an individual with a disability based on the past drug use." In order for a person to be "substantially limited" because of drug use, s/he must be addicted to the drug.

5. We have an employee that has been absent from work and we suspect may be dealing with depression. It is at the point it is affecting their work quality as well as the team. How do we approach this situation? Do we do standard discussion on work performance with agreed action plan to improve and not address the potential depression until later if no improvement?

    - If an employer has no knowledge of an employee's depression and the employee has not identified a disability, then an employer who is dissatisfied with an employee's performance, including excessive absenteeism, should discipline the employee in the same way as it would any employee with an absenteeism issue without making reference to any suspicion about depression. The ADA protects applicants and workers with disabilities who, "with or without reasonable accommodation, can perform the essential functions" of the job. While the ADA requires that employers accommodate workers with disabilities, essential functions do not have to be removed. Therefore, courts have held that an employee whose disability prevents her/him from coming to work regularly cannot perform the essential functions of her job. It is important, however, for employers to list timely and regular attendance as essential functions of the job on job descriptions.

6. Can an employee's medical record – including COVID-19 test results – be kept in their employee file or does it need to be kept separately?

    - The ADA requires that all medical information about an employee must be stored separately from the employee's personnel file, thus limiting access to this confidential information. An employer may store all medical information related to COVID-19 in existing medical files. This includes an employee's statement that s/he has the disease or suspects s/he has the disease, or the employer's notes or other documentation from questioning an employee about symptoms.

7. With smaller organizations, even without naming the individual, it may be easy for others to determine who an employer is referencing. Any extra steps a smaller organization should take to protect an individual's identity?

    - For smaller employers, while the identity of a co-worker with COVID-19 may be obvious to co-workers, employers still cannot share the name of the infected employee. Communications with co-workers exposed because of contact with an employee who tests positive or is displaying symptoms should be sufficient to indicate to the exposed co-workers the heightened risk, without violating confidentiality and without divulging the name of the person who tested positive.

8. With summer arriving, many employees will be taking time off. Do you recommend that an employer release a notice to employees requiring them to advise the employer of any travel to high risk areas?

    - Yes. It would be helpful for Massachusetts employers to notify employees that all individuals entering Massachusetts after 12:01 a.m. on August 1, 2020, must quarantine for 14 days from the date of arrival in Massachusetts unless the individual meets one of the exceptions under Massachusetts law, which includes travel to/from one of the following currently low-risk states: Connecticut; Hawaii; Maine; New Hampshire; New Jersey; New York; Rhode Island; and Vermont.

9. If the employee indicates he/she will be traveling to a high risk area and the employer then directs him/her to remain out of work for 14 days upon return, does the employer have to pay the employee if remote work is not an option?

    - No.

10. Our business is not subject to FMLA. Can you clarify how much time off from work we have to allow parents or caregivers to care for a sick family member or children who have been dismissed from school? Is it FFCRA first then sick time and, if exhausted, PTO?

    - Under the FFCRA an eligible employee gets a total of 12 weeks in the aggregate. An employer may not require employees to use other paid leave before they use EPSLA leave. The first two weeks (usually 10 days) of leave are unpaid. The FFCRA also includes EPSLA leave (for school and childcare closures) that covers the same event, which would cover the first two weeks unless the employee's EPSLA leave has been exhausted for other reasons. The EPSLA provides for leave in a much wider array of scenarios related to COVID-19 than the EFMLEA does, so it could be exhausted before an employee seeks EFMLEA leave. Alternatively, the employee has the ability to substitute any other form of available paid leave he or she may have during the first 10 days. After the first two weeks of EFMLEA, the EFMLEA offers paid leave for up to another 10 weeks (depending upon need). During the last 10 weeks of leave, an employer must pay the employee two-thirds of the employee's average rate of pay (i.e., total compensation other than discretionary bonuses) over the past six months, subject to a statutory cap of $200 per day and $10,000 total. An employer may choose to pay more, but tax credits will be limited to the amount required.

11. May an employer require an employee with COVID-19 to use vacation time/PTO?

    - Yes, subject to the provisions of the employer's current vacation time, paid time off (PTO), and other applicable policies. However, please note the answer to the previous question – including the fact that employers with fewer than 500 employees must comply with the FFCRA, which prohibits employers from requiring employees to use vacation or other paid time off before using the additional paid sick leave benefits afforded by the FFCRA.

12. Can we require an employee to stay home if he/she has no symptoms but has been in close contact with someone with COVID-19? This person cannot do remote work so do we have to pay him/her?

    - Yes, employers may be justified requiring an employee to stay home from work when the asymptomatic employee fits within certain exposure risk categories established by the CDC's Public Health Recommendations for Community-Related Exposure. The CDC guidance applies in the following circumstances: (a) the individual had "close contact (<6 feet) for a prolonged period of time" with a symptomatic person with COVID-19; (b) the individual is a household member of a symptomatic person with COVID-19; (c) the individual is an intimate partner of a symptomatic person with COVID-19; or (d) the individual "provides care in a household without using recommended infection control precautions" to a symptomatic person with COVID-19. Depending upon the circumstances, there may be an obligation to continue paying such an employee for a period of time under EPSLA.

13. We have an employee that can't come to work because they have to take care of a sick family member. May we lay them off?

    - Employers are prohibited from firing, disciplining, or refusing to reinstate employees because they took expanded sick leave or family and medical leave due to COVID-19. However, employees returning from such leave are not protected from employer actions (such as layoffs or furloughs) that are unrelated to the employee(s) taking leave.

14. We are starting to call our workforce back. Because of the favorable unemployment additional payments, we are finding reluctance of some to return. Can we consider their unwillingness to return quitting their job? What communication should we do with the employee and unemployment?

    - The answer to this question will depend upon the reasons why the employee is refusing to return. If there is a protected reason (e.g., disability that requires an accommodation, a family member with COVID-19, childcare/school issues) then the employer cannot automatically consider the refusal to return to work as a voluntary quit. However, if there is no protected reason and the employee simply wants to stay on unemployment, then the employer may be justified in considering the employee as a voluntary quit.

15. Do employers have to pay employees their same hourly rate or salary if they work from home due to COVID-19?

    - If telework is being provided as a reasonable accommodation for a qualified individual with a disability, or if required by a union or employment contract, then employers must pay the same hourly rate or salary. If this is not the case and there is no union contract or other employment contracts, under the FLSA employers generally have to pay employees only for the hours they actually work, whether at home or at the employer's office. However, the FLSA requires employers to pay non-exempt workers at least the minimum wage for all hours worked, and at least time and one half the regular rate of pay for hours worked in excess of 40 in a workweek. Salaried exempt employees generally must receive their full salary in any week in which they perform any work, subject to certain very limited exceptions.

16. Can we change our paid sick leave policy as employees are using it at a higher rate and it is challenging to cover the expense of overtime costs to cover their absence?

    - While Massachusetts employers are able to change their paid sick leave policies, any change must still comply with the Massachusetts Paid Sick Leave Law that entitles Massachusetts employees to earn up to 40 hours per year of sick leave to address certain personal and family needs. The number of hours to which an employee is entitled is related to the number of hours worked. An employee would be entitled to 40 hours of sick leave per year if the employee worked enough hours to earn 40 hours of earned sick time. All employers must provide earned sick time, but only employers of 11 or more employees must provide earned sick time that is paid. Smaller employers must also provide earned sick time, but it may be unpaid.

17. Can we require an employee who is out sick with COVID-19 to provide a doctor's note, submit to a medical exam, or remain symptom-free for a specified period of time before returning to work?

    - Yes. Such inquiries are permitted under the ADA either because they would not be disability-related or, if the pandemic influenza were truly severe, they would be justified under the ADA standards for disability-related inquiries of employees. Also, Massachusetts employers may have to comply with certain mandatory safety standards, some of which relate to this issue. For a current list of applicable safety standards, please see: https://www.mass.gov/info-details/reopening-mandatory-safety-standards-for-workplaces