



# Accommodations for Mental Health Conditions Require Discretion, Flexibility

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**B**ecause mental health conditions often manifest themselves in sudden and unique ways, employees can't always give employers sufficient notice that they need accommodation—and the kinds of accommodations they may need vary widely. Complicating an already-challenging situation: Employers and co-workers may be doubtful that employees need accommodation at all.

Guidance from the Equal Employment Opportunity Commission (EEOC) issued in December 2016 can help employers identify possible accommodations under the Americans with Disabilities Act (ADA) for people with mental health conditions

([https://www.eeoc.gov/eeoc/publications/mental\\_health.cfm?](https://www.eeoc.gov/eeoc/publications/mental_health.cfm?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=)

[utm\\_content=&utm\\_medium=email&utm\\_name=&utm\\_source=govdelivery&utm\\_term=](https://www.eeoc.gov/eeoc/publications/mental_health.cfm?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=)). Tamping down the skepticism, though, may be harder.

*[SHRM members-only toolkit: Accommodating Employees' Disabilities ([www.shrm.org/resourcesandtools/tools-and-samples/toolkits/pages/accommodatingdisabilities.aspx](http://www.shrm.org/resourcesandtools/tools-and-samples/toolkits/pages/accommodatingdisabilities.aspx))]*

"Employees sometimes use their mental [health] conditions as a basis for not performing or for not accepting constructive criticism," said Joan Casciari, an attorney with Seyfarth Shaw in Chicago. "I have also seen employees who use intermittent FMLA [Family and Medical Leave Act time off] for mental health reasons every time there is a deadline or difficult issue, so employers become skeptical."

According to Bryan Benard, an attorney with Holland & Hart in Salt Lake City, mental health conditions are challenging for employers "because they are very unique and many times episodic. Trigger points may be unknown, and it is very difficult in many situations for an employee to give any advance warning of the situation that must be accommodated."

But, Casciari noted, employers still need to keep an open mind and work to accommodate those with mental health conditions "in the same good-faith way they work with those with physical impairments."

## Possible Accommodations

According to the EEOC guidance, ADA accommodations for people with mental disabilities may include:

- Altered break and work schedules to accommodate therapy appointments.
- Specific shift assignments.
- Permission to work from home.
- Leaves of absence.

With regard to working from home, Casciari noted that in a 2015 decision (*EEOC v. Ford Motor Company*), the 6th U.S. Circuit Court of Appeals ruled that employers can lawfully deny an employee's request to telecommute, even if the employee requested it as a reasonable accommodation, particularly if telecommuting has been tried but didn't work and if many core responsibilities cannot be performed at

home, as was the case in this decision. Still, the EEOC believes that telecommuting can be a reasonable accommodation in some circumstances.

"Obviously, not all jobs can be performed remotely," she noted. And even if it's possible to telecommute, many employers don't want to agree to long-term or indefinite telecommuting.

"Review the job description and make a determination case by case," she advised. "Then set up a trial period to see if it will work."

She also recommended that employers survey internal customers on whether they think telecommuting is a viable option.

"The idea that it 'sets a precedent' is something that concerns employers, but ADA accommodations need to be made on a case-by-case basis, so what may work for one employee may not work for another," Casciari said.

Remember, too, that reasonable accommodation may include modifying the provisions of a telecommuting policy, such as a requirement that an employee have worked one year before being eligible to work from home, noted Jonathan Mook, an attorney with DiMuroGinsberg PC in Alexandria, Va.

### **Confidentiality**

HR professionals should be careful what they share with managers during the accommodation process.

"There is a persistent view that details on a condition can be shared on a need-to-know basis, but that is not the case," Casciari cautioned.

ADA regulations allow medical information to be shared only with:

- Supervisors and managers regarding necessary restrictions and necessary accommodations (but not details on the condition).
- First-aid and safety staff if the condition may require emergency treatment.
- Government officials, such as from the EEOC or Department of Labor, investigating compliance.

"There still remains an enormous stigma if one is suffering from a mental health condition," Mook noted. Stigmatizing someone based on their disability is an act of discrimination.

That's why HR, rather than the manager, should handle the accommodation request, he said.

In addition, centralizing the process in HR, or making it the responsibility of a specific HR professional, helps employers treat accommodation requests consistently, Benard said.

### **Medical Information**

Because mental health conditions typically are not visible to others, HR often will need to spend time evaluating medical documentation supporting an accommodation request. Mook recommended that an employer consult with a psychiatrist who can:

- Advise the employer about what types of medical information to request from the employee and his or her medical professional.
- Assist the employer in evaluating the information received.
- Provide the employer with suggestions for accommodation.

### **Employee Privacy**

"If the request is granted by HR, the manager should be informed that the accommodation has been granted but not provided any particulars pertaining to the medical condition of the employee," Mook said.

Train managers on the importance of respecting employees' privacy, recommended Patti Perez, an attorney with Ogletree Deakins in San Diego. She said managers sometimes are curious about mental health conditions, particularly because such conditions typically aren't visibly apparent, leading to uncomfortable and unlawful discussions.

"For example, a manager will not typically ask an employee about the underlying issues related to a cancer diagnosis but might be interested in knowing why a person has severe anxiety or depression," Perez stated.

The ADA prohibits questions about disabilities except in limited circumstances, such as verifying that someone has a disability. HR professionals, not managers, should be the ones to ask such questions when appropriate.

### Get Creative

"Some types of mental disorders, such as manic depression, anxiety or PTSD [post-traumatic stress disorder], may result in the person behaving in a disruptive fashion with other employees, customers, clients or supervisors," Mook noted. Because it may not be apparent what is causing the inappropriate behavior, "accommodating the person with a mental disability requires creativity on the part of HR."

In its guidance, the EEOC gave two suggestions of creative accommodations, noting they might include:

- Quiet office space or devices that create a less noisy work environment.
- Changes in supervisory methods, such as written instructions from a supervisor.

The Job Accommodation Network (JAN), a service of the U.S. Department of Labor's Office of Disability Employment Policy, can help, Casciari noted. JAN can be reached at (800) 526-7234.

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