DREW | ECKL FARNHAM
ATTORNEYS AT LAW

TALKING TO EMPLOYEES ABOUT MENTAL HEALTH – CAN I? SHOULD I? MUST I?
NAVIGATING THE MEDICAL PRIVACY MAZE IN GEORGIA

Talking about mental health is difficult. Few people feel safe sharing that they are struggling with mental health issues. And few people are comfortable inquiring whether someone else may be suffering such challenges.

In the legal field, communicating about these issues seems even more frightening and complicated. Given lawyers' typical roles as counselors or advocates for others, there is a particular fear that mental health vulnerability may be perceived as professionally disqualifying. Lawyers and legal professionals feel the burden to always be "on top of their game" to serve the interests of our clients - wise, strong, and unshakeable. To admit mental health struggles simply compounds the anxiety of self-perceived failure.

Further complicating this already precarious issue are the questions that lawyers are trained to ask – is it lawful in the workplace to talk with someone else about their mental health? There are few areas of employment law that are more complex, and less intuitive at times, than employees' medical issues. There is an overlapping abundance of laws that address employees' medical status and employers' related obligations. Putting aside state-specific laws, such issues are encompassed at the federal level primarily by the Americans with Disabilities Act (ADA) and Family and Medical Leave Act (FMLA), with some overlap by the Health Insurance Portability and Accountability Act (HIPAA), Genetic Information Non-Disclosure Act (GINA), and Occupational Safety and Health Act (OSHA). Collectively, these laws provide restrictions and confidentiality requirements at all stages of employment, from the application process through an employee's work for the employer.

So, where and how to start? When can an employer talk to an employee about mental health? This paper generally outlines the laws applicable to employee medical privacy issues in Georgia in order to provide a broad sense of the legal landscape. Unfortunately, a review of the laws makes it clear that they proceed from the assumption that employees wish to hold employers at arms-length as it relates to their medical issues. This is understandable – we all want to have control over access to our medical information. And, at times, there will undeniably be tension between an employee's interests and the employer's interests. But this paper concludes with a discussion of the safe zones – describing the manner in which employers can lawfully communicate regarding employee mental health issues and provide support and assistance where it may be needed.

Pre-Employment Communications Regarding Mental Health Issues

The ADA restricts inquiries about mental health before the employment relationship begins. It forbids in most instances any inquiry about medical issues until after the employer has made a

"conditional offer of employment." This means that an employer cannot ask for medical information in the job application or in a job interview. Medical information includes information regarding existing or past physical or mental health conditions or substance addictions. While an employer can ask at any time whether a candidate is able to perform the essential functions of the job, with or without reasonable accommodation, inquiries specifically directed to a candidate's past or present health status are generally forbidden in the earliest stages of the hiring process.

The ADA does create a time-limited "safe harbor" for medical inquiries, however. To trigger the safe harbor, the employer must first make a conditional offer of employment. Following such an offer, the employer can ask for medical information that relates to a candidate's ability to perform the essential functions of the job and any accommodations that may be necessary to enable the candidate to do so. Such inquiries must meet certain requirements, as follows:

- The inquiry can only occur after the conditional job offer has been made and before the candidate has begun to perform the job;
- Medical inquiries must be "job-related," *i.e.* relevant to the essential functions of the job;
- The inquiries must be consistently and uniformly directed to all candidates for similar positions; and
- Any medical information obtained as a result must be treated and maintained confidentially.

If an employer meets these conditions, it may ask for information regarding a candidate's mental health status, including issues regarding substance abuse or addiction.[1] However, the ADA also provides detailed guidance on how an employer can lawfully use such information.

The ADA's Required Interactive Dialogue with Candidates or Employees about Disabilities and Accommodations

If the employer has complied with the requirements outlined above, it is lawful to communicate about relevant medical issues. At this point, the process for such communications is the same for candidates and for existing employees.

An employer may ask a candidate about health issues that might affect the ability to perform the essential functions of the job. Some employers do so through a written "post-offer medical questionnaire," which, again, must be tailored to job-specific requirements.

For existing employees, an employer can make a medical inquiry when the employer has a reasonable belief, based on objective evidence, that an employee may have an impairment that adversely affects the employee's ability to do the job. Such a belief may be based on information provided by the employee, observation of the employee's performance, or information from sources that have some indicia of reliability. The employer may request medical information about the employee when there is basis for a reasonable belief that: (1) the employee cannot perform the

[1] A pre-employment drug test for illegal drug usage as contemplated by the Georgia Drug Free Workplace Act is not considered a medical inquiry or medical test and is not subject to ADA limitations. Addiction to illegal drugs or alcoholism are considered covered disabilities, but current illegal drug use or use of alcohol while at work are not protected under the ADA.

essential functions of the job; (2) the employee may require an accommodation; or (3) the employee cannot perform the job without a risk of harm to the employee or others.

In general terms, the ADA makes it unlawful for an employer to form a judgment about a person's ability to perform a job due to any medical impairment without qualified medical guidance. The ADA prohibits discrimination against persons with disabilities, persons with a history of disability, or persons "regarded as" having a disability. It also creates an affirmative obligation for an employer to provide "reasonable accommodations" if needed to enable a person to perform the essential functions of the job.

In plain terms, an employer may only reject a candidate or take action against an existing employee due to a mental disability if the individual is not able to safely perform the essential functions of the job with or without a reasonable accommodation. The test is much easier to articulate than to apply, however. This is particularly true when considering what constitute the "essential functions" of the job of a lawyer.

Some circumstances are relatively straightforward to assess. An employer should not disqualify a candidate or take action against an employee who has a past record of mental health issues or substance abuse, but no indication of current impairment. This would constitute discrimination on the basis of the individual's "record of impairment." Similarly, an attorney whose current mental health disability or addiction are effectively controlled by ongoing treatment or prescribed medication cannot be disqualified on that basis (though the employer may inquire whether the treatment requires any accommodation). If the candidate/employee can perform the essential functions of the job, it would be unlawful to take adverse action because he or she is "regarded as" disabled.

Much more complicated is the situation where an individual suffers some level of current impairment due to mental health issues or addiction. In such circumstances, the starting place for any conversation must begin with the employer's identification of the essential functions of the position. There is no "one size fits all" list of essential functions for a lawyer because there is a wide variance of job responsibilities in different legal positions. A good starting place, however, is identifying what the lawyer must be able to do in order to fulfill fiduciary duties to the client. Is the lawyer responsible for meeting strict deadlines, which would create negative consequences for the client if missed? Must the lawyer be able to effectively communicate in writing or verbally under pressure? Is the lawyer relied upon to provide sound judgment and guidance? It is a best practice to reflect those essential functions in a written job description before recruiting to fill the position.

If medical information regarding an attorney's mental health status creates a basis for reasonable concern about whether the individual can perform the job, the employer is obligated to engage in an "interactive dialogue" with the individual to determine whether her or she can perform the essential functions and whether reasonable accommodations may be necessary to enable the individual to do so. Critically, an employer cannot simply make a unilateral decision that a candidate's past or present mental health issues render them unable to perform the job, without first giving the employee an opportunity to provide further medical information concerning that issue. If the employer has reasonable concerns, they may request that (1) the candidate provide medical certification of the ability to safely perform the essential functions; and (2) identify any requested accommodations that may be necessary to enable the candidate to do so.

If an employer requests that the employee provide medical documentation of the existence of a disability and its potential impact on the ability to perform the essential functions of the job, it is a best practice to make such request in writing, and to provide the employee with a job description describing the essential functions, which can be provided to the health care provider. The employee can obtain medical certification from any licensed health care professional, including doctors, psychiatrists, psychologists, or counselors.[2] The certification should confirm the existence of a disability, whether the individual can safely perform the essential functions of the job, and what, if any, accommodations are requested. The ADA does not specify any time period for a candidate/employee to return medical certification, but many lawyers recommend using the same time frame as applies for medical certification for FMLA leave, which is fifteen days.

While the employer has the obligation to begin an interactive dialogue upon becoming aware of potential impairment, it is the candidate's obligation, not the employer's, to identify any requested accommodations. If the candidate requests any accommodation, the employer should continue the dialogue to assess whether the accommodation is reasonable or, alternatively, whether it would impose an "undue hardship." Employers must provide reasonable accommodations but are not required to take steps that would result in undue hardship.

Once again, this is not a "one size fits all" inquiry. A specific accommodation may be reasonable for one employer and be an undue hardship for another. According to the U.S. Equal Opportunity Commission's Enforcement Guidance, "'undue hardship' means significant difficulty or expense and focuses on the resources and circumstances of the particular employer in relationship to the cost or difficulty of providing a specific accommodation. Undue hardship refers not only to financial difficulty, but to reasonable accommodations that are unduly extensive, substantial, or disruptive, or those that would fundamentally alter the nature or operation of the business." EEOC *Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA*, October 17, 2002.

There is no exhaustive list of potential accommodations for mental disabilities, but common possibilities include:

- Part-time or modified work schedules;
- Flexible work space or ability to work remotely;
- Environmental adjustments, such as white noise machines, music, or changes to lighting;
- Break times provided to take needed medications or therapies;
- Job restructuring;
- Availability of employee assistance or support resources;
- Use of emotional support aids, including emotional support animals;
- Availability of privacy space or wellness room for employee use.

After the individual has provided medical information regarding the existence of a disability, and identified any requested accommodation, the employer should assess whether the information adequately establishes the existence of a disability and describes any requested accommodation. The

[2] An employer may require that the candidate/employee be assessed by a healthcare professional of the employer's choice, but the EEOC discourages discounting an opinion from the employee's own healthcare professional.

employer has the right to seek clarification or additional information as is reasonably necessary to assess the certification or accommodation request. The ADA does not favor direct communication between the employer and a candidate/employee's health care professional. Instead, it recommends identifying any areas of uncertainty or deficiency and allowing the individual to obtain supplemental information. If the employer wishes to communicate with the healthcare professional, it must obtain the employee's consent in advance.

In its request for medical information, the employer may also specifically request medical certification concerning whether the employee can safely perform the job without a direct threat of harm to the employee or others. Again, any such request should be reasonably based upon reliable evidence. Where the employer is concerned about mental health issues, the employer may rely upon direct observation of an employee's behavior or performance or reports from credible co-workers or third parties.

Like other medical issues, an employer must seek information from healthcare professionals regarding psychiatric or mental health concerns. Employers should not take employment actions based upon their own presumptions or conclusions regarding an employee's mental health status. In practice, however, this precaution can be more difficult to follow since mental health concerns may manifest themselves through erratic behavior or job performance. While disabilities are protected under the ADA and must be reasonably accommodated, the employer always has the right to require an employee to comport with reasonable rules of conduct and to perform the essential functions of the job. Here again, there is no universally applicable standard other than reasonableness – some behavioral health manifestations may give rise to an interactive dialogue regarding accommodations, others may be grounds for disciplinary action or termination. When in doubt, consultation with an experienced employment law attorney is highly recommended.

Mental Health and the Family Medical Leave Act

Eligible employees may also have rights related to mental health conditions under the FMLA. Unlike the ADA, which focuses on disabilities, the FMLA relates to an employee's "serious health condition," which is defined more broadly than "disability." Like the ADA, however, it is clear that mental health conditions may trigger rights under FMLA. If an employee is eligible for FMLA, the employee is entitled to job protection, which prevents an employer's discrimination against the employee due to his or her serious health condition.

Private employers with fifty or more employees and all public agencies are covered by FMLA. Employees are eligible for FMLA leave if they: (1) work for a covered employer; (2) have worked for the employer for at least twelve months; (3) worked at least 1,250 hours in the immediately preceding twelve months; and (4) work at a location where the employer has at least fifty employees within a seventy-five mile radius.

There are several circumstances which may trigger FMLA leave rights, but this discussion will focus on rights created due to an employee's own "serious health condition." An employee has a serious health condition when the employee is "unable to perform the functions of the position" due to a physical or mental health condition that causes a period of incapacity of more than three consecutive calendar days or continuing/intermittent incapacity. An employee is also covered by FMLA for a "regiment of continuing treatment" by healthcare professionals

or a course of prescription medications. This definition highlights a fundamental difference between the ADA and FMLA - where the ADA requires that an employee be able to perform the essential functions of the job with our without accommodations, the FMLA applies when the employee is unable to perform the essential functions of the job for some period of time.

Importantly, an employee need not specifically request FMLA leave in order to be protected so long as the employer has been provided information that places it on reasonable notice of circumstances that might qualify. If an employee advises a covered employer of a mental health condition that may constitute a "serious health condition," the employer is required to notify the employee of potential FMLA rights. The U.S. Department of Labor has created a Notice of Eligibility & Rights and Responsibilities under the Family and Medical Leave Act, available on its website, which an employer can use to inform an employee of rights under FMLA: FMLA: Forms | U.S. Department of Labor (dol.gov). It also has a Certification of Health Care Provider for Employee's Serious Health Condition under the Family and Medical Leave Act that the employer can provide to the employee to obtain medical certification regarding the existence of a serious health condition and an explanation of the leave that will be required. An employee has fifteen days to provide certification after requested by the employer.

FMLA leave may take several different forms. Depending on the nature of the condition and form of treatment, the law entitles an employee to take:

- continuous leave for a period of time up to twelve weeks in a twelve month period;
- intermittent leave when the employee may need to be absent from work periodically due to the health condition or treatment; or
- reduced schedule leave when the employee needs to work fewer than the normally scheduled hours for a period of time due to the health condition or treatment.

An employee who is taking, or has taken, FMLA leave is protected from any adverse employment action related to the FMLA rights. Unlike the ADA, a covered employer is not able to avoid providing FMLA leave due to undue hardship. However, an employee who is taking intermittent leave or reduced schedule leave may be reassigned, or converted to an hourly status, during the duration of the leave. if the employee is able to resume work by the end of the maximum leave period, the employer must restore the employee to the previous position or a substantially equivalent position. Generally, this means that an employee cannot be demoted, assigned less favorable job responsibilities, or suffer any reduction in pay, benefits, or job conditions due to having exercised FMLA rights.

In summary, a covered employer must advise an eligible employee who is incapacitated due to a serious mental health condition of the right to take up to twelve weeks of continuous, intermittent, or reduced schedule leave under FMLA with job protection.

Medical Privacy Rights in the Workplace

As discussed above, both the ADA and FMLA place obligations on employers to communicate with employees about medical issues under certain circumstances. Both laws, as well as others noted above, also create obligations for employers to afford privacy to employees' medical information.

First, where possible, any communications regarding an employee's medical condition should be conducted through personnel other than the employee's supervisors and managers. For employers who are large enough to have dedicated human resources personnel, such personnel should handle any communications with employees regarding medical issues that might trigger ADA or FMLA rights.

Federal law also requires that employers keep employees' medical information separate from general personnel files. The ADA requires that medical information be maintained in "separate medical files and treated as a confidential medical record." 42 U.S.C. 12112(d)(3)(B). The EEOC's Technical Assistance Manual on the Employment Provisions of the ADA states that an employer should "take steps to guarantee the security of the medical information," including keeping the information in a "medical file in a separate, locked cabinet, apart from the location of personnel files."

Access to such medical files or information must be restricted to specific persons whose job responsibilities specifically include coordination of employee's medical rights. Such information cannot be shared with other employees, except that:

- Supervisors and managers may be informed regarding necessary restrictions and necessary accommodations;
- First aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and
- Government officials investigating compliance with the ADA shall be provided with relevant information upon request.

Threading the Needle – Lawfully Communicating About Employees' Mental Health Issues

Considering all of the foregoing, it's understandable to wonder whether an employer can do anything to address employees' mental health issues without running afoul of any of the overlapping laws. As noted at the outset, the federal laws build more walls than doors between employees and employers concerning medical issues. They focus on employees' rights to limit employers' access to their medical information and closely circumscribe an employer's use of such information. In an environment in which employees must be protected from discrimination based on a medical condition, the structure of the laws is clearly understandable. But what if the employer wants to help an employee deal with a mental health challenge? The following approaches are lawfully available to an employer:

Creating a Supportive Culture

There are no legal limits on an employer's ability to create an organizational culture that supports employees' mental health. An employer can communicate to all of its employees that it values their health and safety, including their mental health, and that employees should not hesitate to seek assistance if needed. In particular, employers can be extremely helpful in destigmatizing mental health challenges by acknowledging that the legal profession can be especially challenging and that it is not a sign of weakness to seek help for mental health issues or substance addiction.

Employers can explore various methods to seek feedback from employees concerning ways that their mental health and wellness can be supported in the workplace. Employee surveys may seek suggestions concerning positive steps that the employer can take to

provide a supportive environment. Many employers have formed mental health and wellness advisory committees, which can provide ideas and proposals to firm leadership to support mental health.

If it is clear to employees that their organizational culture recognizes, values, and wants to support their mental health, it may lessen incipient stressors that can contribute to mental health challenges and make employees feel safer about seeking help if they do experience such challenges.

Inquiring About Well-Being

As a supervisor or manager, it may feel perilous to broach a conversation that might lead to the subject of an employee's medical condition. However, it is not unlawful to inquire about an employee's well-being. If an employee's mood, demeanor, or performance have notably changed, it is ok to ask if the employee is ok or could use any help. If the conversation does turn to the employee's medical or mental health status, it is recommended to advise the employee that they are not required to discuss their medical issues with you, and that if they prefer, you can direct them to others inside or outside your organization if they feel more comfortable. However, the law does not require that you evade or terminate a discussion if an employee or co-worker confides in you that they are suffering a mental health challenge. It is lawful to listen, to provide empathy, and to assist an employee in finding resources, support, and treatment for mental health challenges.

Providing Help

If an employee voluntarily confides information to you that causes you to be concerned about their health or safety, it is lawful for you to try to guide the employee to help. It is also lawful for you to advise HR personnel of such concerns so that they can intervene to provide assistance. As discussed above, HR personnel have broader legal latitude to discuss employees' medical status and make health and safety inquiries.

Of course, it always permissible to educate an employee about the resources that may be available to help them with mental health challenges. In the legal industry, the following resources may be available to employees:

- **Employee Assistance Programs** - An employee assistance program is an employee benefit program that assists employees with personal problems and/or work-related problems that may impact their job performance, health, mental and emotional well-being. EAPs generally offer free and confidential assessments, short-term counseling, referrals, and follow-up services for employees.
- **Group Health Insurance Mental Health Treatment** – Of course, employer-sponsored group medical plans vary, but federal law requires that such plans provide coverage for mental health, behavioral health, and substance addiction that is comparable with coverage for physical health conditions. Employees may not be aware of such coverage.
- **Lawyer Assistance Program** – Lawyers in the state of Georgia are entitled to six prepaid clinical personal counseling sessions per calendar year through the Lawyer Assistance Program of the State Bar of Georgia. Bar members may contact the Bar's assistance program confidential hotline at 800-327-9631. #UseYour6.

- **Georgia Bar SOLACE program** – SOLACE is a program of the State Bar of Georgia designed to assist those in the legal community who have experienced a significant, potentially life-changing event. Anyone who may need help can request it through the SOLACE program by email to SOLACE@gabar.org. If the SOLACE committee finds that the needs fit within the parameters of the program, it will coordinate assistance through members of the State Bar. Needs addressed by the SOLACE committee have ranged from unique medical conditions requiring specialized referrals, to fire losses requiring help with food or housing, rare blood type donations, assistance with transportation to medical treatment, among other projects.
- **National Suicide Prevention Lifeline** – Anyone who is experiencing suicidal ideation or self-harm can obtain immediate assistance through the National Suicide Prevention Lifeline at 1-800-273-TALK (8255).

Joseph Chancey
Managing Partner
(404) 885-6222
ChanceyJ@DEFLaw.com