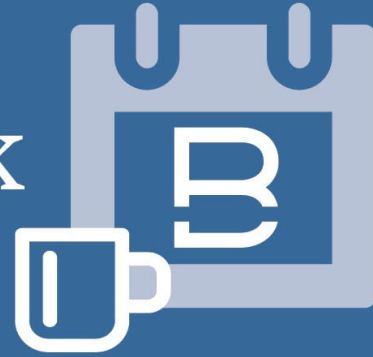


# The Work Week

Bassford Remele Employment Practice Group



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Welcome to another edition of *The Work Week with Bassford Remele*. Each Monday morning, we will publish and send a new article to your inbox to hopefully assist you in jumpstarting your work week.

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## Addressing Employees' Mental-Health Concerns

[Gillian L. Gilbert](#)

Employers are paying more attention than ever to the mental health of their employees. As of 2020, nearly half of all employers had trained their managers to recognize declining mental health in employees.<sup>1</sup> Mental health can be of particular concern in winter months as employees battle seasonal depression. As we close out January, this week we provide guidance to employers on legal issues to take into consideration when employees are faced with mental-health challenges.

### Mental Health and the ADA

As of 2022, an estimated 59.3 million adults, or 23.1% of the adults in the United States, have a mental illness according to the Substance Abuse and Mental Health Services Administration.<sup>2</sup> Under the Americans with Disabilities Act ("ADA"), these individuals may have increased legal protections in the workplace. This is because the ADA defines a "disability" as "a physical or mental impairment that substantially limits one or more major life activities." 42 U.S.C. § 12102(1)(A). This has been further defined to include "emotional or mental illness" on the basis that "interacting with others" is a "major life activity" which can be substantially affected by emotional and mental illnesses like anxiety and depression. 29 C.F.R. § 1630.2. The EEOC has even called out specific mental-health concerns like major-depressive disorder, post-traumatic-stress disorder, and obsessive-compulsive disorder as mental illnesses which will almost always meet the definition of disability under the ADA.

### When does an Employee's Mental Health become Substantially Limiting?

An employee's mental health becomes substantially limiting when it lasts for several months and significantly restricts the performance of at least one major life activity during that time. 29 C.F.R.

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<sup>1</sup> <https://www.apa.org/monitor/2021/01/trends-employers-support#:~:text=Nearly%20half%20of%20large%20employers,mental%20health%20visits%20in%202021.>

<sup>2</sup> <https://www.samhsa.gov/data/sites/default/files/reports/rpt42731/2022-nsduh-main-highlights.pdf>.

§ 1630.2. Mitigating measures, like medication, are not to be taken into account when determining if a mental illness is substantially limiting. *Id.*

### **When can an Employer ask about an Employee’s Mental Health?**

Only when the inquiry is “job related and consistent with business necessity.” In other words, if an employer has objective evidence that an employee’s mental health is impairing their ability to perform essential job functions, or is a threat to the safety of others, then the employer can inquire as to their employee’s mental health.

### **How can an Employer accommodate Mental Health concerns?**

If an employee requests an accommodation relating to their mental-health condition, an employer might consider granting a leave of absence. *See Brannon v. Luco Mop Co.*, 521 F.3d 843, 849 (8th Cir. 2008). Indefinite or open-ended leaves, however, are not considered reasonable. *Id.* Alternatively, an employer can alter the employee’s schedule or alter the employee’s physical workspace. For example, if an employee takes medication to mitigate mental-health concerns but it makes them tired, the employer may schedule the employee a different shift. Or, if an employee has attention-deficit disorder, an employer may provide soundproofing headphones to help accommodate the employee.

It is worth noting, that an employee stating that they are “stressed” or feeling “anxious” doesn’t necessarily trigger the requirement to engage in the interactive process, or to create reasonable accommodations. Such a statement, in and of itself, does not amount to a request for accommodation. Instead, employers should analyze whether the employee has indicated that they cannot perform their essential job function.

### **Mental Health and FMLA**

An employer’s obligations are not just limited to the ADA. If an employee meets the definition of disability under the ADA for their mental health condition, they may also qualify for leave under the Family and Medical Leave Act (“FMLA”). 29 C.F.R. § 825.123. Additionally, if an employee has a family member who has a serious health condition – including mental health conditions – then the employee may also be entitled to take FMLA leave.

The [employment team](#) at Bassford Remele is available to help employers navigate their requirements under the ADA and other state and local legislation – particularly as it relates to addressing mental health in the workplace.

