

# Health Promotion Program Legal Updates (March 9, 2022)

Barbara Zabawa, JD, MPH, • Attorney & President  
Center for Health and Wellness Law, LLC



March 9, 2022

## Health Promotion Program Legal Updates

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Workplace Wellness and

## Mental Wellness

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## Legal Help Desk

[welcoa.org/legal-help-desk-intake-form/](http://welcoa.org/legal-help-desk-intake-form/)

The Center for Health and Wellness Law, LLC has partnered with WELCOA to offer this new, member-exclusive legal help desk service.

\*Please note, WELCOA's help desk is meant for questions or issues that can be addressed in about 10 minutes or less. If your need is more involved, such as reviewing or drafting an agreement or conducting significant legal research, you should retain legal counsel to assist you with those types of projects. The WELCOA compliance help desk is not meant to replace legal advice or consulting or retaining your own legal counsel.

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## Agenda

- Stress in the Workplace Statistics
- Potential Sources of Legal Claims
  - Workers Compensation Cases
  - OSHA
  - ADA
  - Other Civil Rights Laws
  - MHPAEA
- How to use MHPAEA as tool for wellness design
- Health Coaching issues
- Q&A with Attendees

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## World Health Organization

- Workers who are stressed are more likely to be:
  - Unhealthy
  - Poorly motivated
  - Less productive
  - Less safe at work
  - At risk for depression and anxiety disorders
- The organization is less likely to be successful



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## Cost of Workplace Stress

- Mental health disorders cost US employers \$317.5B/yr
  - vs. \$310B spent/yr on occupational injury and illness generally.
    - From Jonathan Dopkeen and Renee Dubois, Stress in the Workplace: A Policy Synthesis on its Dimensions and Prevalence (U. of Illinois at Chicago Center for Employee Health Studies, March 2014).
- Most cost is indirect, such as:
  - Workers' compensation
  - STD, LTD
  - Presenteeism
  - Absenteeism



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## Mental Illness Taking Toll

- 40% employees feel
  - Hopeless
  - Burned Out
  - Exhausted
- 40% US adults report anxiety/depression since pandemic
  - 10% pre-pandemic

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## Mental Illness Taking Toll

- Tight job market
  - 86% employers identify mental health, stress and burnout as top priority
  - Yet 49% do not have formal strategy to improve employee well-being

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## Cause of Work Stress

- Most causes relate to:
  - Work design
    - Scheduling (shift work, long hours)
    - Physical demands
    - Hazardous chemical exposure
    - Noise
    - Heat
    - Cold
    - Little access to healthy food
  - Organizational management
    - Excessive pressure
    - Lack of knowledge or ability to do job
    - Lack of control

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## Law Can Help Reduce Mental Illness at Work

- Workers' Compensation Laws
- OSHA
- ADA
- Other Civil Rights
- MHPAEA

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## Workers' Compensation

- State-based laws
- "No-fault" insurance
  - Employees unable to sue for work-related injury
  - Pays for lost wages during period of disability and medical/rehabilitation costs
- Cases usually determine whether injury caused by work, including work-induced stress
  - Did work cause a "psychological injury?"

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## Workers' Compensation

- *Harper v. Banks, Finley, White & Co. of Mississippi*
  - Milton Harper was managing partner and president of accounting firm of Banks, Finley, White & Co. who suffered a severe stroke on August 3, 2000 and died after suffering another stroke on July 10, 2001. Mr. Harper's wife and daughter sought WC benefits, describing Mr. Harper as a "workaholic." Before he died, Mr. Harper stated he was getting behind at work and having problems balancing out-of-town audits and managing the office. Mr. Harper pushed himself to receive bonuses. Over the years, his work stress began to take a toll on him, but he refused to cut back so he could "go make a dollar."

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## Workers' Compensation

- *Harper v. Banks, Finley, White & Co. of Mississippi*
  - WC Commission found that Mr. Harper's hypertension was caused by stresses of work and that hypertension caused his stroke on August 3, 2000 and death on July 10, 2001. Commission found Mr. Harper's stress was more than the usual and everyday work stress, including:
    - Working long hours, 7 days/week
    - Partners feuding over profit sharing
    - New computer software problems
    - Juggling office management while performing standard accounting work

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## Workers' Compensation

- *Dietz v. Workers' Compensation Appeal Board*
  - Robert Dietz worked a field maintenance worker for Lower Bucks County Joint Municipal Authority for 20 years. His job involved hard physical labor, such as jackhammering roads, repairing water main breaks and cutting tree roots out of the sewer system. He frequently worked more than 40 hours/week and was always on call. On November 7, 2007, Mr. Dietz left the house at 6 am, as usual, and began work at 7 am. At 9:35 pm, he called his wife to tell her that he was still working but that the job would be finished soon. He told his wife he had been jackhammering for four hours and that he was tired because they had been at the job site for a long time. An hour later, his wife learned her husband died of a heart attack at age 48 after collapsing on the job.

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## Workers' Compensation

- *Dietz v. Workers' Compensation Appeal Board*
- Workers' compensation judge found that physical exertion from Mr. Dietz's regular work activities over a 14-hour workday caused his heart attack and that his wife was eligible for workers' compensation benefits. This finding was despite the fact that:
  - Dietz smoked a pack of cigarettes/day
  - Was taking medication to treat high cholesterol (but no diagnosis of heart disease)

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## Workers' Compensation

- *Hynes v. Good Samaritan Hospital*
  - Kim Hynes worked as an RN in the mental health unit of Good Samaritan Hospital in Kearney, Nebraska. On April 16, 2008, a patient "Whipped" Ms. Hynes several times with a large vacuum cleaner cord and punched her in the jaw, causing bruising and substantial pain. Ms. Hynes sought medical treatment and discussed the assault with an EAP counselor. She reported not feeling safe returning to the adolescent unit and had trouble eating and sleeping. Nevertheless, Ms. Hynes returned to the adolescent unit. Ms. Hynes experienced two more assaults at work, but did not seek medical treatment for these other assaults. Ultimately Ms. Hynes was admitted to an inpatient psychiatric facility for major depressive disorder and PTSD.

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## Workers' Compensation

- WC court found Ms. Hynes's injuries resulted from initial assault and the two subsequent assaults aggravated the injury. The court awarded her WC benefits.

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## Workers' Compensation

- Lessons learned:
  - Job design and work environment play crucial role in whether employee experiences excessive stress;
    - Mr. Harper's work environment and culture (i.e., compensation structure) likely added undue pressure.
    - Mr. Dietz's employer could have alternated heavy workload days with lighter office duty days or shorter work days.
    - Ms. Hynes' employer could have offered her more control over her work . EAP was not enough to prevent further assaults and need for treatment.

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## OSHA

- Purpose: To assure safe and healthful working conditions for working men and women. P.L. No. 91-596.
- Applies to U.S. private employers.
- General duty clause, OSHA s. 5(a)(1):
  - Requires employers to provide a place of employment free from recognizable hazards that cause or likely to cause death or serious harm to employees.
  - Supports implementation of comprehensive workplace wellness program

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## OSHA

- Workplace violence is preventable hazard
  - Includes workplace assaults.
  - Assaults occur in:
    - Health care
    - Social services
    - Retail
    - Taxi/for-hire drivers
  - Assaults occur from:
    - Patients
    - Clients
    - Residents
    - Hynes' workers' compensation case

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## OSHA

- The federal agency administering OSHA (“OSHA”), has **guidebooks** addressing workplace violence in:
  - Health care
  - Retail
  - Social services
  - For-hire drivers
- Wellness professionals should incorporate these guidelines to prevent workplace injury.

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## OSHA

- Example:
  - Healthcare and social service guidelines:
    - Incorporate written program for workplace violence prevention into an organization’s overall safety and health program.
    - Include:
      - Management commitment
      - Employee participation
      - Worksite analysis
      - Safety & health training
      - Recordkeeping
      - Program evaluation
    - (Overlap with developing effective workplace wellness program)

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## OSHA

- Wellness professionals who work for smaller employers may want to use OSHA's
- FREE
- ONSITE
- SAFETY & HEALTH CONSULTATION SERVICES!!!
  - Do not result in penalties or citations
  - Can identify hazards, provide advice on OSHA compliance and assist in establishing safety and health management programs.

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## ADA

- Prohibits employers from discriminating against individuals who have, had ***or perceived to have*** a disability as to terms, conditions, privileges of employment.
- “Terms, conditions, privileges” can include wellness program participation.

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## ADA

- Disability is a physical or mental impairment that substantially limits one or more major life activities:
  - Caring for oneself
  - Performing manual tasks
  - Seeing
  - Hearing
  - Eating
  - Sleeping
  - Walking
  - Standing
  - Lifting
  - Bending
  - Speaking
  - Breathing
  - Learning
  - Reading
  - Concentrating
  - Thinking
  - Communicating
  - Working

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## ADA

- Disabilities can include:
  - Depression
  - Anxiety
  - PTSD
  - Panic attacks

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## ADA

- Workplace stress can affect one's ability to participate in major life activities.
  - Workplace stress could cause disability
  - Triggers reasonable accommodation requirement for employer
- Reasonable accommodations include:
  - Work environment modifications/adjustments
- Use ADA requirements to proactively design wellness programs that reduce stress

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## Case Scenario

- Ellen is a pharmacist at ABC Hospital. She suffers from pre-existing depression, insomnia and migraines. She complains that her work environment at the hospital has poor air quality, high levels of noise and an overly cool work environment. Basically, she is not physically comfortable at work and she argues that the conditions intensify her pre-existing conditions. Ellen has difficulty concentrating and therefore commits a lot of errors at work. ABC Hospital fires Ellen for poor job performance. Ellen sues ABC for disability discrimination.
  - Does Ellen have a valid ADA claim? What other concerns should ABC have?
  - *Gaube v. Day Kimball Hosp*, 2015 WL 1347000, at 2 (D. Conn. 2015).

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## Answer

- ADA prohibits discrimination on the basis of disability or perceived disability. It depends on whether the employer knew of Ellen's pre-existing conditions or perceived her as disabled and terminated her at least in part on that basis. If Ellen was complaining to her supervisors about the uncomfortable work environment, the employer should have looked into how it could improve working conditions to reduce the possibility of employee errors or complaints. Even though Ellen may have lost her ADA claim against the employer, the employer had to spend a lot of resources in fighting the claim. If the employer had used the ADA's reasonable accommodation requirement to make organizational improvements in workplace wellness and safety, Ellen may not have committed errors and therefore may not have sued.

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## Other Civil Rights Laws

- Prohibit discrimination in employment of "protected classes."
- Title VII
  - Gender
  - Race
  - Ethnicity
  - National Origin
  - Religion
- ADEA
  - Age 40+

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## Other Civil Rights Laws

- Use these laws to minimize stress-related hazards such as:
  - Workplace bullying
  - Workplace harassment
- Conduct training on these pervasive workplace stressors.
- According to 2007 survey:
  - 37% of workers have been bullied
  - When bullying based on race color, religion, sex (including pregnancy), national origin, age, disability:
    - Illegal harassment under Title VII, ADEA, ADA

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## Other Civil Rights Laws

- Harassment is unlawful when:
  - Enduring offensive conduct becomes condition of employment; or
  - Conduct severe or pervasive enough to create a work environment that reasonable person would consider intimidating, hostile or abusive.
- Offensive conduct may be:
  - Offensive jokes
  - Slurs
  - Name calling
  - Physical assaults or threats
  - Intimidation
  - Ridicule/mockery
  - Insults
  - Offensive objects/pictures
  - Interference with work performance

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## Other Civil Rights Laws

- Harassment can:
  - Be victim' supervisor, supervisor in another area, agent of employer, coworker, nonemployee
  - Be anyone affected by offensive conduct (not necessarily the person harassed)
  - Occur without economic injury to or discharge of the victim.

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## Other Civil Rights Laws

- To help employer avoid liability from civil rights laws, workplace wellness programs should include workplace bullying and harassment training.
  - Fosters a "No-Tolerance" culture
  - Prevents harassment from occurring
  - Reduces risk of civil rights claims and stress-related hazard

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## MHPAEA Compliance

- Promotes equal access to treatment for MH/SUD
  - Prohibits coverage limitations when compared to med/surg benefits
  - QTLs
  - NQTLs
- Applies to Group Health Plans
  - Exemptions include EAPs that meet certain requirements

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## MHPAEA Compliance

- If employer offers MH/SUD benefits in one of the following classifications, must offer MH/SUD benefits in all classifications in which employer offers med/surg benefits:
  - Inpatient, in-network
  - Inpatient, out-of-network
  - Outpatient, in-network
  - Outpatient, out-of-network
  - Emergency care
  - Prescription drugs
- Don't need to cover every MH condition.

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## Using MHPAEA as a Tool

- Purpose of MHPAEA
  - Fairness
- Legally required for GHP wellness programs?
  - If GHP provides benefits for anxiety/depression, must provide in every class med/surg benefits provided
  - Reward tied to biometric screening equivalent to outpatient, in-network med/surg benefits?
    - Should then include mental health screening option to earn reward.

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## 2021 Study

- Offering holistic screenings, including screening for anxiety and depression, helps better identify health risks for workers.
- MH disorders are most common diagnoses for worker disability claims.
- Of 344 employees taking part in annual health/wellness fair, 236 (68%) completed the health questionnaire that included questions about anxiety/depression.

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## 2021 Study

- Younger workers may be more likely to engage in screening and educational opportunities for MH in workplace setting rather than with healthcare provider.
- MH screening can assist with early identification and intervention.
  - Beyond Biometrics, K. Haughtigan et al., J. of Psychological Nursing, Vol 59, No. 10 (2021).

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## Health Coaching Issues

- Many wellness programs tie health questionnaires to follow-up meetings with health coach
- Coaches ≠ Mental Health Therapists
- Be mindful of scope of practice and state unlicensed practice issues

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## Q&A

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WELCOA Members should retain legal counsel to obtain definitive answers.

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## Questions?

- For more information, contact:  
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