Because Legal Practice Isn’t Always a Day at the Movies: Health, Wellness, and a Welcoming Workplace for Lawyers and their Clients

COURSE CLASSIFICATION: INTERMEDIATE LEVEL

June 14, 2018
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Asset Protection in Florida
FIFTH EDITION © 2017

Asset Protection in Florida covers all facets of asset preservation for Florida residents. The manual provides comprehensive analysis of the many steps available to protect assets from creditors’ claims, both pre- and post-mortem.

Among the many topics covered are homestead, trusts (both domestic and offshore), business planning, planning for dissolution of marriage, protection of retirement and education accounts, and the ethical aspects of advising clients on asset protection issues. Bankruptcy issues and tax planning are prominently featured throughout the text. Highlights of the Fifth Edition include new discussion of:

- Revocable trusts
- LLC membership interests
- Beneficiaries of annuities

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TWELFTH EDITION © 2017

Florida Civil Practice Before Trial walks you through the procedural steps necessary to prepare a case for trial. The popular reference includes recent significant changes made by case law, statutes, and rules amendments. Highlights of the Twelfth Edition include updated discussion of:

- Delayed discovery and due diligence
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- Default judgments

Florida Civil Practice Before Trial is also the perfect complement to another Florida Bar title, Florida Civil Trial Practice.

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Written by skilled probate attorneys, Practice Under Florida Probate Code provides comprehensive analysis of all the steps you need to take to administer an estate in Florida. Forms, sample accountings, and charts for basic probate practice enhance the book’s practical utility. Includes discussion of new revised statutory provisions and rules related to:

- Florida Electronic Wills Act
- Florida Fiduciary Access to Digital Assets Act
- Elective share laws
- Apportionment of estate taxes
- Duty of the personal representative to resign
- Extension of deadline for objections to validity of will, venue, or jurisdiction

New case law discussions relate to:

- Ethical resolution when client designates drafting attorney as personal representative
- Disgorgement and surcharge against attorneys and personal representatives
- How to effect spouse’s valid waiver of homestead rights
- Dependent relative revocation
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This title is an authoritative collection of instructions for virtually every criminal offense. It features the latest significant amendments and new instructions including:

- 2.1(d) Insanity—Psychotropic Medication
- 8.23 Extortion
- 8.25 Violation of a Condition of Pretrial Release from a Domestic Violence Charge
- 11.20 Transmission of Child Pornography by Electronic Device or Equipment
- 11.21 Transmission of Material Harmful to Minors by Electronic Device or Equipment
- 15.5 Resisting Recovery of Stolen Property
- 29.15(a) Unlawful Protests

The 2017 update includes the changes and additions to the Instructions published through April 27, 2017.

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eISBN 9781632822727

Florida Standard Jury Instructions in Civil Cases with 2017 Supplement
THIRD EDITION © 2015

The 2017 Supplement offers current revisions to the massive update of the instructions. The handy loose-leaf includes:

- The reorganization and renumbering of the substantive areas into separate sections that incorporate pertinent standard instructions tailored to that specific area of the law
- Implementation of “plain English” terminology to improve juror understanding
- Reordering of the timing and sequencing of instructions during the trial process to improve communication to the jurors
- Revision of the Notes on Use to improve currency, eliminate outdated references, clarify the points being made, and point out areas where the committee has not taken a position

The 2017 Supplement updates the instructions, incorporating the revisions and corrections that have been made through 2017, including the addition of a new section 417, Unlawful Discrimination.

$167
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<td>9781522139553</td>
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<td>Adoption, Paternity, and Other Florida Family Practice, 12th Ed. (2017)</td>
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<td>9781522136491</td>
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<td><strong>JURY INSTRUCTIONS</strong></td>
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<td><strong>REAL PROPERTY LAW</strong></td>
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Common Questions About CLER

1. What is CLER?
   CLER, or Continuing Legal Education Requirement, was adopted by the Supreme Court of Florida in 1988 and requires all members of The Florida Bar to continue their legal education.

2. What is the requirement?
   Over a 3 year period, each member must complete 33 hours, 5 of which are in the area of ethics, professionalism, substance abuse, or mental illness awareness, and 3 hours in technology.

3. Where may I find information on CLER?
   Rule 6-10 of the Rules Regulating The Florida Bar sets out the requirement. All the rules may be found at www.floridabar.org/rules.

4. Who administers the CLER program?
   Day-to-day administration is the responsibility of the Legal Specialization and Education Department of The Florida Bar. The program is directly supervised by the Board of Legal Specialization and Education (BLSE) and all policy decisions must ultimately be approved by the Board of Governors.

5. How often and by when do I need to report compliance?
   Members are required to report CLE hours earned every three years. Each member is assigned a three year reporting cycle. You may find your reporting date by logging in to your member portal at member.floridabar.org.

6. Will I receive notice advising me that my reporting period is upcoming?
   Four months prior to the end of your reporting cycle, you will receive a CLER Reporting Affidavit, if you still lack hours.

7. What happens if I am late or do not complete the required hours?
   You run the risk of being deemed a delinquent member which prohibits you from engaging in the practice of Florida law.

8. Will I receive any other information about my reporting cycle?
   Yes, you will receive reminders prior to the end of your reporting cycle, if you have not yet completed your hours.

9. Are there any exemptions from CLER?
   Rule 6-10.3(c) lists all valid exemptions. They are:
   1) Active military service
   2) Undue hardship (upon approval by the BLSE)
   3) Nonresident membership (see rule for details)
   4) Full-time federal judiciary
   5) Justices of the Supreme Court of Florida and judges of district, circuit and county courts
   6) Inactive members of The Florida Bar
10. Other than attending approved CLE courses, how may I earn credit hours?  
Credit may be earned by:
  1) Lecturing at an approved CLE program
  2) Serving as a workshop leader or panel member
  3) Writing and publishing in a professional publication or journal
  4) Teaching (graduate law or law school courses)
  5) University attendance (graduate law or law school courses)

11. How do I submit various activities for credit evaluation?  
Applications for credit may be found on our website, www.floridabar.org.

12. How are attendance hours posted on my CLER record?  
You must post your credits online by logging in to your member portal at member.floridabar.org.

13. How long does it take for hours to be posted to my CLER record?  
When you post your CLE credit online, your record will be automatically updated and you will be able to see your current CLE hours and reporting period.

14. How may I find information on programs sponsored by The Florida Bar?  
You may wish to visit our website, www.floridabar.org/cle, or refer to The Florida Bar News. You may also call CLE Registrations at 850/561-5831.

15. If I accumulate more than 30 hours, may I use the excess for my next reporting cycle?  
Excess hours may not be carried forward. The standing policies of the BLSE, as approved by the Supreme Court of Florida specifically state in 6.03(b):
  ... CLER credit may not be counted for more than one reporting period and may not be carried forward to subsequent reporting periods.

16. Will out-of-state CLE hours count toward CLER?  
Courses approved by other state bars are generally acceptable for use toward satisfying CLER.

17. If I have questions, whom do I call?  
You may call the Legal Specialization and Education Department of The Florida Bar at 850/561-5842.

While online checking your CLER, don’t forget to check your Basic Skills Course Requirement status.
PREFACE

The course materials in this booklet were prepared for use by the registrants attending our Continuing Legal Education course during the lectures and later in their offices.

The Florida Bar is indebted to the members of the Steering Committee, the lecturers and authors for their donations of time and talent but does not have an official view of their work products.

**CLER CREDIT**
(Maximum 3.0 hours)

General ............................................. 3.0 hours  Mental Illness ................................. 0.5 hour

**CERTIFICATION CREDIT**
(Maximum 3.0 hours)

Labor & Employment Law ................................................................. 3.0 hours

Seminar credit may be applied to satisfy both CLER and Board Certification requirements in the amounts specified above, not to exceed the maximum credit. Refer to Chapter 6, Rules Regulating The Florida Bar, see the CLE link at www.floridabar.org for more information about the CLER and Certification Requirements.

Prior to your CLER reporting date you will be sent a Reporting Affidavit (must be returned by your CLER reporting date). You are encouraged to maintain records of your CLE hours.

**CLE CREDIT IS NOT AWARDED FOR THE PURCHASE OF THE COURSE BOOK ONLY.**

**CLE COMMITTEE MISSION STATEMENT**

The mission of the Continuing Legal Education Committee is to assist the members of The Florida Bar in their continuing legal education and to facilitate the production and delivery of quality CLE programs and publications for the benefit of Bar members in coordination with the Sections, Committees and Staff of The Florida Bar and others who participate in the CLE process.

**COURSE CLASSIFICATION**

The Steering Committee for this course has determined its content to be INTERMEDIATE.
LABOR & EMPLOYMENT LAW SECTION

Zascha Blanco Abbott — Chair
Cathleen Scott — Chair-elect
David W. Adams – Legal Education Director

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Zascha Blanco Abbott
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Judge Stephanie Ray
Jill S. Schwartz
Cathleen Scott
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CLE COMMITTEE

Jenifer S. McCaffrey Lehner, Tampa — Chair
Terry L. Hill — Director, Programs Division

For a complete list of Member Services visit our web site at www.floridabar.org.
2:15 p.m. – 2:45 p.m.  
**Home Alone:** Flexibility, nondiscrimination, and work-life balance when employing remote workers; remote access as an accommodation under the ADA; flex time, what it means, how it works; avoiding wage and hour pitfalls.  
**Moderators:**  
The Honorable Alan Forst, Fourth District Court of Appeal, West Palm Beach  
The Honorable Stephanie Ray, First District Court of Appeal, Tallahassee  
**Speaker:**  
Cathleen Scott, Scott Wagner & Associates, P.A., Jupiter

2:45 p.m. – 3:05 p.m.  
**Remember the Titans:** Diversity programs, EEO reporting requirements, and the realities of today’s workforce.  
**Moderators:**  
The Honorable Alan Forst, Fourth District Court of Appeal, West Palm Beach  
The Honorable Stephanie Ray, First District Court of Appeal, Tallahassee  
**Speaker:**  
Gregory A. Hearing, Thompson, Sizemore, Gonzalez & Hearing, P.A., Tampa

3:05 p.m. – 3:15 p.m.  
**Break**

3:15 p.m. – 3:45 p.m.  
**Horrible Bosses:** Best practices for preventing and addressing harassment, in all its forms, in the workplace. Topics to be addressed include features of a non-harassment policy, the law regarding sexual favoritism (Can the boss promote his or her partner over more qualified candidates?), monitoring digital platforms for harassment, and the interplay between harassment and negligent hiring/supervision/retention.  
**Moderators:**  
The Honorable Alan Forst, Fourth District Court of Appeal, West Palm Beach  
The Honorable Stephanie Ray, First District Court of Appeal, Tallahassee  
**Speaker:**  
Zascha B. Abbott, Liebler, Gonzalez & Portuondo, Miami
Lecture Program (cont.)

3:45 p.m. – 4:05 p.m.  
The Intern: Encouraging a healthy relationship between Millennials and Baby Boomers and avoiding age discrimination claims.  
Moderators:  
The Honorable Alan Forst, Fourth District Court of Appeal, West Palm Beach  
The Honorable Stephanie Ray, First District Court of Appeal, Tallahassee  
Speaker:  
Robert S. Turk, Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A., Miami

4:05 p.m. – 4:15 p.m.  
Break

4:15 p.m. – 4:45 p.m.  
One Flew Over the Cuckoo’s Nest: Evaluating and accommodating mental health and mental disabilities in the workplace under the Americans With Disabilities Act; preventing and reacting to workplace violence (i.e., maintaining a safe workplace).  
Moderators:  
The Honorable Alan Forst, Fourth District Court of Appeal, West Palm Beach  
The Honorable Stephanie Ray, First District Court of Appeal, Tallahassee  
Speaker:  
David W. Adams, Bennett, Jacobs & Adams, P.A., Tampa

4:45 p.m. – 5:05 p.m.  
Wonder Woman and Superman: A healthy balance of work, exercise, and engagement in outside activities are the makings of an invincible super-hero. The do’s and don’ts involved with the creation and implementation of health and wellness programs (e.g., you can’t require employees to take an exercise class off the clock).  
Moderators:  
The Honorable Alan Forst, Fourth District Court of Appeal, West Palm Beach  
The Honorable Stephanie Ray, First District Court of Appeal, Tallahassee  
Speaker:  
Question and Answer Period

Moderators:
The Honorable Alan Forst, Fourth District Court of Appeal, West Palm Beach
The Honorable Stephanie Ray, First District Court of Appeal, Tallahassee
## TABLE OF CONTENTS

HOME ALONE: FLEXIBILITY, NONDISCRIMINATION, AND WORK-LIFE BALANCE WHEN EMPLOYING REMOTE WORKERS; REMOTE ACCESS AS AN ACCOMMODATION UNDER THE ADA; FLEX TIME, WHAT IT MEANS, HOW IT WORKS; AVOIDING WAGE AND HOUR PITFALLS.

Moderators:
The Honorable Alan Forst, Fourth District Court of Appeal, West Palm Beach
The Honorable Stephanie Ray, First District Court of Appeal, Tallahassee

Speaker:
Cathleen Scott, Scott Wagner & Associates, P.A., Jupiter

I. Work Life Balance.................................................................................................................1.1
II. Remote Access as an Accommodation Under the Americans with Disabilities Act............1.1
III. Family and Medical Leave Act (FMLA) and Remote Workers ............................................1.4
IV. Flex Time and Telecommuting: What it Means, How it works, Avoiding Wage and Hour Pitfall......................................................................................................................................1.5
V. Practical Points and Additional Considerations with Remote Workforce.............................1.6

REMEMBER THE TITANS: DIVERSITY PROGRAMS, EEO REPORTING REQUIREMENTS, AND THE REALITIES OF TODAY’S WORKFORCE.

Moderators:
The Honorable Alan Forst, Fourth District Court of Appeal, West Palm Beach
The Honorable Stephanie Ray, First District Court of Appeal, Tallahassee

Speaker:
Gregory A. Hearing, Thompson, Sizemore, Gonzalez & Hearing, P.A., Tampa

I. Diversity Programs, EEO Reporting and the Real World – Overview....................................2.1

HORRIBLE BOSSES: BEST PRACTICES FOR PREVENTING AND ADDRESSING HARASSMENT, IN ALL ITS FORMS, IN THE WORKPLACE. TOPICS TO BE ADDRESSED INCLUDE FEATURES OF A NON-HARASSMENT POLICY, THE LAW REGARDING SEXUAL FAVORITISM (CAN THE BOSS PROMOTE HIS OR HER PARTNER OVER MORE QUALIFIED CANDIDATES?), MONITORING DIGITAL PLATFORMS FOR HARASSMENT, AND THE INTERPLAY BETWEEN HARASSMENT AND NEGLIGENT HIRING/SUPERVISION/RETENTION.

Moderators:
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(No Materials)
THE INTERN: ENCOURAGING A HEALTHY RELATIONSHIP BETWEEN MILLENNIALS AND BABY BOOMERS AND AVOIDING AGE DISCRIMINATION CLAIMS.
Moderators:
The Honorable Alan Forst, Fourth District Court of Appeal, West Palm Beach
The Honorable Stephanie Ray, First District Court of Appeal, Tallahassee
Speaker:
Robert S. Turk, Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A., Miami

I. Federal Law ...............................................................................................................................4.1
II. Florida Law ..............................................................................................................................4.1
III. The Landscape .....................................................................................................................4.1
IV. Recommendations ................................................................................................................4.3

ONE FLEW OVER THE CUCKOO’S NEST: EVALUATING AND ACCOMMODATING MENTAL HEALTH AND MENTAL DISABILITIES IN THE WORKPLACE UNDER THE AMERICANS WITH DISABILITIES ACT; PREVENTING AND REACTING TO WORKPLACE VIOLENCE (I.E., MAINTAINING A SAFE WORKPLACE).
Moderators:
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The Honorable Stephanie Ray, First District Court of Appeal, Tallahassee
Speaker:
David W. Adams, Bennett, Jacobs & Adams, P.A., Tampa

I. One Flew Over the Cuckoo’s Nest – Overview......................................................................5.1

Moderators:
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Speaker:

I. Importance of Work/Life Balance in Creating a Superhero..................................................6.2
II. Rise of Health & Wellness Program....................................................................................6.2
III. Do’s and Don’ts of Health and Wellness Program ............................................................6.3
IV. Sources ..................................................................................................................................6.7
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HOME ALONE

By

Moderators:
The Honorable Alan Forst, Fourth District Court of Appeal, West Palm Beach
The Honorable Stephanie Ray, First District Court of Appeal, Tallahassee

Speaker:
Cathleen Scott, Scott Wagner & Associates, P.A., Jupiter
Home Alone: Remote Workers/Telecommute and Employment and Labor Considerations

Cathleen Scott, Scott Wagner & Associates, P.A., Jupiter

The gig economy is on the rise and moving quickly to even affect the world’s largest organizations – it’s the state of our current market. If you have not been impacted by the gig economy as an employee (or employee client), it is likely that your company/firm or clients have been. With the dawning of the gig economy comes another consideration: telecommute/remote workers.

But what is a gig economy and why does this matter for remote workers? The “gig economy” is a reference to workers and market preference of abandoning a traditional 9 to 5 job in favor of freelance, independent, and task based work. Basically, it is a trend towards independent contractors and remote workers. In staying current with the times, it is important that employers are mindful of the laws this new market challenges as well as implications for employment and labor issues.

I. Work Life Balance

First, remote and telecommute is not just for independent contractors or freelancers – but is increasingly available to full time employees or part of lenient work-from-home policies. Multiple news organizations like Inc.com and Forbes Magazine report that employers who offer work-from-home policies increase employee satisfaction.

Additionally, flexible work schedules (and work from home policies) could also be key to closing the gender gap, as according to the New York Times, which reports that when educated mothers leave their jobs, it’s often because they feel pushed out by inflexible employers. But, there’s more. As reported by Slate.com, “research has shown that flexible work reduces work-life conflict, improves worker health, and increases work commitment and productivity, while improving job performance.”

Whatever the reason for implementing work-from-home, telecommute, or remote policies in the workplace, both employees and employers need to be mindful of the laws that come with those policies.

II. Remote Access as an Accommodation under the Americans with Disabilities Act

Remote/telecommute work can utilized by full-time employees and, under certain circumstances, may even be provided by way of a reasonable accommodation under the Americans with Disabilities Act (or Florida Civil Rights Act).

Reasonable Accommodations under the Americans With Disabilities Act: Eleventh Circuit

As held by the Eleventh Circuit, to establish a prima facie case of discrimination under the ADA, a plaintiff must show: (1) she is disabled; (2) she is a qualified individual; and (3) she was subjected to unlawful discrimination because of her disability.” Garrison v. City of Tallahassee, 664 Fed. Appx. 823, 825–26 (11th Cir. 2016)(unpublished).
Typically, when dealing with questions about reasonable accommodations and telecommuting under ADA, the focus is on the second factor – a “qualified individual” – who is someone who can perform the essential functions of her job, with or without reasonable accommodation. 42 U.S.C. § 12111(8).

The Eleventh Circuit recognizes that the essential functions of a position “are the fundamental job duties of a position that an individual with a disability is actually required to perform” and determined on a case-by-case-basis. Garrison, 664 Fed. Appx. 823, 825–26 (11th Cir. 2016)(unpublished).

In determining whether a function is “essential,” the district court must consider the employer’s judgment about the essential functions of a position and any written descriptions the employer prepared before advertising or interviewing applicants for the position. 42 U.S.C. § 12111(8). “[A]lthough the employer’s view is entitled to substantial weight in the calculus, this factor alone may not be conclusive.” Garrison, 664 Fed. Appx. 823, 825–26 (11th Cir. 2016)(unpublished). In deciding what functions are essential, the ADA says “consideration shall be given to the employer’s judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.” 42 U.S.C. § 12111(8); see 29 C.F.R. § 1630.2(n)(3)(i).

That being said, an employer’s judgment is not “conclusive,” because “then an employer that did not wish to be inconvenienced by making a reasonable accommodation could, simply by asserting that the function is ‘essential,’ avoid the clear congressional mandate.” Holly v. Clairson Industries, L.L.C., 492 F.3d 1247, 1258 (11th Cir. 2007). The Eleventh Circuit considers a number of other nonexclusive factors in considering whether a particular function is essential:

(1) the amount of time spent on the job performing the function, (2) the consequences of not requiring the incumbent to perform the function, (3) the terms of the collective bargaining agreement, (4) the work experience of past incumbents in the job, and (5) the current work experience of incumbents in similar jobs.


**Case Law: Qualified Individuals**

Regarded as the groundbreaking case on remote work as an accommodation, we first examine E.E.O.C. v. Ford Motor Co., 752 F.3d 634 (6th Cir. 2014), reh’g en banc granted, opinion vacated (Aug. 29, 2014), on reh’g en banc, 782 F.3d 753 (6th Cir. 2015).

In *Ford*, the Sixth Circuit issued an en banc decision concluding that, when asserting telecommuting should be a reasonable accommodation under the ADA, the employee has the burden to show the regular attendance in the workplace (face to face communication with coworkers) is not an
essential element of the employee’s position. There, the court concluded that the employee’s up-to-four-day telecommuting proposal was unreasonable because regularly attending work in-person was an essential function of her job.

➢ Eleventh Circuit Practice Pointer: Our Eleventh Circuit has followed similar reasoning in Garrison when it upheld the district court’s conclusion that an employee was unable to establish she was qualified for the position when she could not be physically present in the workplace. Garrison, 664 Fed. Appx. 823, 825–26 (11th Cir. 2016)(unpublished).

  ➢ (See also Abram v. Fulton County Govt., 598 Fed. Appx. 672, 677 (11th Cir. 2015)(unpublished); (See also Carlson v. Liberty Mut. Ins. Co., 237 Fed. Appx. 446, 450 (11th Cir. 2007)(unpublished).

➢ Eleventh Circuit Practice Pointer: In Everett v. Grady Meml. Hosp., Eleventh Circuit rejected working from home as reasonable accommodation when employee asserted that other employees could have covered her for duties that had to take place at the hospital, concluding “[C]ourts have universally found that employers are not required to assign existing employees or hire new employees to perform certain functions or duties of a disabled employee’s job which the employee cannot perform by virtue of his disability.”). Everett v. Grady Meml. Hosp. Corp., 1:15-CV-173-SCJ, 2016 WL 9651268, at *33 (N.D. Ga. May 12, 2016), aff’d, 703 Fed. Appx. 938 (11th Cir. 2017)(unpublished)

When Working From Home Can Be Reasonable Accommodation: More recently in February of this year (2018), the Sixth Circuit, while recognizing its holding in Ford, reached a different decision in Mosby-Meachem, on an appeal from a judgment as a matter of law. Mosby-Meachem v. Memphis Light, Gas & Water Div., 883 F.3d 595, 604 (6th Cir. 2018). In Mosby-Meachem, the Sixth Circuit gave dereference to the jury verdict and concluded that Mosby-Meachem presented sufficient evidence supporting a finding that she could perform all the essential functions of her job remotely for ten weeks. The Sixth Circuit concluded that “Mosby-Meachem proffered other evidence at trial, including testimony from coworkers, from which a jury could reasonably conclude that she was otherwise qualified to perform her job from home for ten weeks without being physically present in the office.” Id. The court also concluded that there was evidence the employer failed to engage in the interactive process noting “the ADA Committee understood its orders as “staying firm on the telecommuting mandate from [MLG&W president] Jerry Collins” that “nobody can telecommute ... no matter what the circumstances.” Given this evidence, the jury could have reasonably concluded that MLG&W did not actually engage in an interactive process.” Id.

- Takeaways: The takeaways from this case are that telecommuting can be a reasonable accommodation under certain circumstances and that the interactive process should be followed before an employer can grant or deny a leave request.

Practical Pointers for Accommodations: Regardless of the reasons for telecommuting, the option to telecommute can benefit both the employer as well as the employee.
The EEOC provides helpful guidance when analyzing the work-from-home as a reasonable accommodation:

Several factors should be considered in determining the feasibility of working at home, including the employer's ability to supervise the employee adequately and whether any duties require use of certain equipment or tools that cannot be replicated at home. Other critical considerations include whether there is a need for face-to-face interaction and coordination of work with other employees; whether in-person interaction with outside colleagues, clients, or customers is necessary; and whether the position in question requires the employee to have immediate access to documents or other information located only in the workplace. An employer should not, however, deny a request to work at home as a reasonable accommodation solely because a job involves some contact and coordination with other employees. Frequently, meetings can be conducted effectively by telephone and information can be exchanged quickly through e-mail.

If the employer determines that some job duties must be performed in the workplace, then the employer and employee need to decide whether working part-time at home and part-time in the workplace will meet both of their needs. For example, an employee may need to meet face-to-face with clients as part of a job, but other tasks may involve reviewing documents and writing reports. Clearly, the meetings must be done in the workplace, but the employee may be able to review documents and write reports from home.

Also, as recommended by the EEOC, the government-funded Job Accommodation Network (JAN) is a free service that offers employers and individuals ideas about effective accommodations. The counselors perform individualized searches for workplace accommodations based on a job's functional requirements, the functional limitations of the individual, environmental factors, and other pertinent information. JAN can be reached at 1-800-526-7234 (voice or TDD); or at www.jan.wvu.edu/soar

III. Family and Medical Leave Act (FMLA) and Remote Workers

The most frequently litigated issue involving FMLA and remote workers is the determination of the employee's worksite for purposes of their FMLA eligibility (and the 50 employees within a 75 mile radius threshold).

The Department of Labor defines worksite as:

For employees with no fixed worksite, e.g., construction workers, transportation workers (e.g., truck drivers, seamen, pilots), salespersons, etc., the worksite is the site to which they are assigned as their home base, from which their work is assigned, or to which they report ... An employee's personal residence is not a worksite in the case of employees, such as salespersons, who travel a sales territory and who generally leave to work and return from work to their personal residence, or employees who work at home, as under the concept of flexiplace or telecommuting. Rather, their worksite is the office to which they report and from which assignments are made.
In *Donahoe*, the Eastern District of Louisiana Court concluded an employee could surmount a Motion to Dismiss converted to Summary Judgment on the issue of whether she qualified for FMLA coverage when she alleged in her Complaint she worked offsite and from home through telecommunication and reported to a Tampa, Florida office (which had 50-employees).

Thus, if an employer has 45 employees at the physical worksite, but 6 employees working off-site and reporting to the office, there may be a chance that the employer meets the 50 employee threshold for employees, including all the remote work staff.

If the employees are working out of state (out of Florida), the employer should also ensure compliance with any state-FMLA laws, such as those in CA, CT, DC, HI, IA, LA, MA, MN, MT, NJ, OH, RI, SC, TN, VT, and WI. Some states provide for a lower threshold of number of employees for state-FMLA qualification.

**IV. Flex Time and Telecommuting: What it Means, How it Works, Avoiding Wage and Hour Pitfall**

A remote workforce raises multiple wage and hour implications. With flex time policies, employers may offer alternative work schedules, like alternating between a four-day week and then a five-day week (allowing a traditional two day weekend and then a three-day weekend), or even four, ten-hour days every week with three consecutive days off, for example. With these flex schedules and nontraditional working hours, employers may also consider the option of telecommute or work-from-home options – a favored approach for smaller offices which may not have the workspace capacity to house its workforce.

Either way, it is important that employers implement tracking systems or working hour reporting systems which can be accessed remotely in order to record the employees’ hours. Consider: how can employees clock in and out? When are they required to do so? What constitutes “hours worked?” When and how is overtime permitted – do employees need manager consent/approval? These considerations are key to telecommute policies.

**In-State Employees**

For Florida in-state, remote or telecommute employees, an employer’s biggest challenge is typically regarding ensuring that non-exempt employees’ working hours are being properly recorded and properly being paid. This is true not only for permanently remote employees, but those with flex hours or even those who may opt to work-from-home while sick (or other reasons).

The Fair Labor Standards Act (FLSA), requires employers to pay employees for all time spent completing productive work, regardless if the employer knew that the work was being performed. If an exempt employee works remotely while sick, then the employer must pay the employee for a whole day of work, even if the employee only works for an hour or two, or otherwise potentially violate the salary basis text for the exemption. 29 C.F.R. §§ 541.212 and 541.118. However, the regulations permit an employer to make deductions for absences of a day or more attributable to
sickness or disability “if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by both sickness and disability.” 29 C.F.R. §§ 541.212 and 541.118; Furlong v. Johnson Controls World Services, Inc., 97 F. Supp. 2d 1312, 1316 (S.D. Fla. 2000).

As it relates to FMLA leave, an employer may deduct an employee's salary for hours taken as intermittent or reduced leave under the FMLA without losing the exempt status of the employee. See 29 C.F.R. § 825.206; id.

The situation is different for non-exempt employees, as if they work from home while sick, the employer must compensate the employee for the actual amount of time worked under the Fair Labor Standards Act.

**Out of State Employees**
The issue becomes more difficult for employees out-of-state. Even remote employees performing work for a company in another state may still be subject to (and employers are required to follow) their own state’s wage and hour issues (as well as antidiscrimination and harassment laws, among other local, state laws).

This includes consideration for state-specific pay issues, like the potential of mandatory rest and meal breaks applicable to some states, overtime (is overtime paid based on 40 hour workweek, or for hours worked in excess of 8 and 12 in a day, like for California employees), rest day requirements (ex: seventh day of work rules), state-specific equal pay laws (such as Massachusetts and California employees) and even paystub detail requirements (such as California, Colorado, Connecticut, Iowa, Texas, and North Carolina, by example), to name a few. Employers should also consider whether the employee’s state (or city or county) has a higher minimum wage, whether there are payday frequency requirements, or payroll deduction regulations.

V. **Practical Points and Additional Considerations with Remote Workforce**

a. **Taxes**
While not explored in detail here, employers and employees working remote (and especially in another state) should take into consideration tax implications of the remote work. Questions about taxes include income tax withholding (which state is the work performed for income tax withholding and what about when the employee works days in different locations), employer’s registration with the department of revenue in the state where the withholding is occurring.

   i. The Small Business Association provides information regarding payroll concerns for employees: https://www.sba.gov/blogs/payroll-concerns-remote-employees

b. **Workers’ Compensation**
Employers should ensure workplace safety guidelines, even for remote workers. An employee’s injury or illness could be compensable under workers’ compensation if it arises out of and in the course of employment, regardless of the location the injury occurs.
Employers may consider implementing a telecommuting policy that has safety expectations for employees working remotely, including training of how to eliminate workplace safety hazards and guidelines for home office set up.

➢ Practice Pointer: OSHA also provides guidance on handling work-from-home employees here: https://www.osha.gov/enforcement/directives/cpl-02-00-125

c. **BYOD (Bring Your Own Device) Policies**
Along with telecommuting policies, BYOD (bring your own device) policies have been regarded as one of the major trends implicating modern workplaces. For remote employees, with companies that allow employees to work from home, employers may consider BYOD policies which include which devices would be permitted for work use, acceptable use terms, privacy policies (including employer monitoring, deletion of employee devices if compromised, use of passwords), and how an employee’s personal information may be protected.

BYOD policies are especially important to protect employer’s confidential information/trade secrets and should be a top consideration when providing for telecommuting opportunities for employees.

**Additional Resources (for your reading pleasure):**

- **How to Close the Gender Gap: Let Employees Control Their Schedules**

- **Will More Flexible Work Close the Gender Gap;**
  http://www.slate.com/blogs/better_life_lab/2017/10/27/will_more_flexible_work_close_the_gender_gap.html

- **Equality in the Virtual Workplace:**
  https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1328&context=bjell

- **A Stanford Professor Says Working From Home Makes You Happier and More Efficient. There's Just 1 Catch**
  https://www.inc.com/bill-murphy-jr/people-who-work-from-home-are-happier-more-efficient-according-to-this-fascinating-study-theres-only-1-catch.html

- **Working From Home: Awesome or Awful?**
  https://www.theatlantic.com/business/archive/2015/10/is-working-from-home-working-telecommute/411805/

- **Are Remote Workers More Productive Than In-Office Workers?**
  https://www.forbes.com/sites/larryalton/2017/03/07/are-remote-workers-more-productive-than-in-office-workers/#1f6c058b31f6
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REMEMBER THE TITANS

By

Moderators:
The Honorable Alan Forst, Fourth District Court of Appeal, West Palm Beach
The Honorable Stephanie Ray, First District Court of Appeal, Tallahassee
Speaker:
Gregory A. Hearing, Thompson, Sizemore, Gonzalez & Hearing, P.A., Tampa
WHY ARE DIVERSITY PROGRAMS IMPORTANT/RELEVANT?

In the real world, employers are at risk for appearing to have discriminatory tendencies, even when such appearances are entirely inaccurate and far from the truth. Many employers, recognizing this reality, implement diversity programs in an effort to better ensure a diverse workforce. But what exactly are diversity programs and what are the legal implications associated with such programs? What benefits do law firms with diversity programs experience?
DIVERSITY PROGRAMS

- Diversity programs strive to promote diversity within a firm and better reflect the diverse world in which we live.
- Diversity programs and initiatives provide a wide array of benefits to employers who properly implement such programs.
- These benefits include a diverse workplace, fewer discrimination and harassment complaints and claims, and an increase in both productivity and profit.
- Clients are diverse and they want to retain diverse law firms.
- Diverse law firms are successful law firms.

WHAT DIVERSITY PROGRAMS ARE NOT

- Diversity programs are not the same as affirmative action plans.
- They are not a compliance tool.
- They do not eliminate merit-based decisions.
- They do not have quotas.
- They do not seek to right past or present actual or perceived discrimination.
- They do not have to be narrowly tailored.
- They are not temporary.
- They do not revolve around hiring or promoting based on protected characteristics.
WHAT DIVERSITY PROGRAMS ARE NOT

“Diversity is a big thing here. We even have one guy who shares his job!”

DIVERSITY PROGRAMS DO...
- Foster a work force that is more in tune with a firm’s clientele
- Promote greater efficiency in the workplace
- Foster an inclusive work atmosphere
- Raise employee morale
- Decrease costly litigation
- Increase productivity and profits
- Increase the size of a firm’s client base

IMPLEMENTING A DIVERSITY PROGRAM
- Many successful diversity programs start from the very top of a firm's organizational chart with the Managing Partner and/or Management Committee
  - Actively recruiting a diverse group of candidates with broad and divergent backgrounds is critical to a successful diversity program
- This strategy begins at the firm's top levels and trickles down throughout the entire organization
  - Employing such a strategy in recruiting at all levels is essential to a successful program
- Over time, highly qualified and diverse candidates will seek out a firm employing a successful diversity program
- Such results reflect when a program reaches self-perpetuating motion
IMPLEMENTING A DIVERSITY PROGRAM (CONT.)

- While the ultimate goal of a diversity program is a self-perpetuating atmosphere of diversity and inclusion which permeates all aspects of a firm, this goal may only be obtained through the implementation of successful diversity program practices, including:
  - Infusing diversity into a firm’s culture through policies aimed at promoting respect for diversity and incorporating diversity goals into strategic planning
  - Recruiting from diverse organizations
  - Community involvement in diverse communities
  - Providing career development and support in such communities

SUCCESSFUL DIVERSITY PROGRAM PRACTICES (CONT.)

- Providing ongoing diversity training and education for all firm employees, including partners/shareholders
- Programs are most effective when employees see firm leaders participating
- Promoting and hosting networking events at post-secondary schools and diverse organizations
- Implementing transparent advancement and raise policies which are well understood by all employees
- Promoting total inclusion
- Ensuring the program’s focus is very broad and all-inclusive (think any potential basis for discrimination or potential class of people)
- Avoid focusing solely on federally protected classes

*Every one of your employees is human. You have a rather awesome definition of diversity, don’t you?*
SUCCESSFUL DIVERSITY PROGRAM PRACTICES (CONT.)

• Providing career development planning and mentoring for all employees
• Promoting employee participation in diverse community and professional organizations
• Rewarding such participation
• Creating a senior management committee with the primary function of implementation and continued oversight of the firm’s diversity program
  • A firm should include both staff members and associate attorneys on such committee

LEGAL PITFALLS TO AVOID

• Firms should not make employment decisions based on a protected characteristic
  • This includes discrimination in favor of a protected characteristic
• Employment decisions should be merit-based
• Firms should not provide race specific mentoring or training programs
• Firms should avoid implementing a diversity policy which singles out and adversely impacts a single individual or group
• Firms should avoid quotas

MOST IMPORTANTLY, CREATE AN ENVIRONMENT WHERE A DIVERSE GROUP OF INDIVIDUALS WANT TO WORK
MODEL LAW FIRM DIVERSITY POLICY

The firm recognizes the significance of diversity for the long-term success of our firm. We are committed to creating an inclusive and respectful culture comprised of individuals from diverse backgrounds. Furthermore, we recognize that diversity encompasses an infinite range of individual characteristics and experiences, all of which contribute to the firm's diversity and success. The firm's goal is to create a work environment where the unique attributes, perspectives, backgrounds, skills, and abilities of each individual are valued.

We enable these contributions by maintaining a workplace environment that embraces diversity and fosters creativity and innovation. Accordingly, inclusion and equality must be defining characteristics of our workplace environment. By demanding a work environment of respect, trust, collaboration, and cooperation, the firm can provide superior service to our clients and create a workplace environment in which we can achieve the highest level of professionalism.

MODEL LAW FIRM DIVERSITY POLICY (CONT.)

The firm does not tolerate any level of discrimination or harassment toward any individual, whether same occurs within or outside of the office, including harassment by clients or third parties. The firm also does not tolerate retaliation against anyone who complains about such discrimination or harassment.

Any violations of this policy shall be reported to the Managing Partner of the firm. If the reporting party is not comfortable reporting the violation to the Managing Partner or is unable to successfully communicate with the Managing Partner, the reporting party shall report the violation to any partner he/she chooses.
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION EEO REPORTING

Likely inapplicable to most firms unless a firm employs 100 or more employees…

WHAT IS AN EEO-1 REPORT?

• An EEO-1 Report is a survey of an employer’s employment practices
• An employer must meet the statutory and regulatory requirements to qualify for mandatory reporting
• A qualifying employer is required to provide information regarding its employees, including:
  • Race/Ethnicity
  • Gender
  • Job Title
• A qualifying employer must complete an EEO-1 Report annually

WHO MUST SUBMIT EEO-1 REPORTS?

• Employers covered by the EEOC’s EEO-1 reporting requirements include:
  1. All private employers subject to Title VII with 100 or more employees
  • Excludes government employers, primary and secondary school systems, post-secondary education employers; tax exempt private membership clubs, and, Indian tribes
  2. All private employers who are subject to Title VII with fewer than 100 employees if the company is owned or affiliated with other companies, legally creating a single enterprise with an aggregate total of 100 or more employees
  3. Certain federal contractors
• Covered employers with multiple establishments (locations) must complete more than one type of EEO-1 Report
HOW DOES THE EEOC UTILIZE THE COLLECTED INFORMATION?

- The EEOC utilizes the information gathered from EEO-1 Reports in several ways, including:
  - To follow employment patterns of industries, geographical regions, and individual companies
  - To support civil rights enforcement
  - To facilitate voluntary compliance with anti-discrimination employment laws
- In litigation, the parties may use EEO-1 Reports to:
  - Show disparate treatment (although a Plaintiff must additionally show Defendant's intent)
  - Show disparate impact (prima facie case may be established by statistics)
  - Show non-discrimination

QUESTIONS?

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HORRIBLE BOSSES

(No Materials)

By

Moderators:
The Honorable Alan Forst, Fourth District Court of Appeal, West Palm Beach
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Speaker:
Zascha B. Abbott, Sioli Alexander Pino,
Miami
THE INTERN

By

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Millennials and Baby Boomers: Generational Conflict in the Law Firm

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I. Federal Law

The Age Discrimination in Employment Act (ADEA) protects individuals who are 40 years of age or older from employment discrimination based on age.

II. Florida Law

The Florida Civil Rights Act (FCRA) protects individuals against employment discrimination based on age (covers persons of all ages-those under 18 years of age understood not to be covered).

III. The Landscape


Known as the job-hopping generation, unsatisfied Millennials are more likely to leave a job than previous generations and at around 35%, they are now the largest generation in the U.S. workforce. Richard Fry, “Millennials are the Largest Generation in the U.S. Labor Force,” Pew Research Center, April 11, 2018.

But Millennials only constitute 20% of the legal workforce, the number of Millennials and their influence will grow rapidly in the next few years as they become eligible for partnership at firms. Christopher Imperiale, Attracting and Retaining the Millennial Lawyer, Law 360, Jan. 19, 2017.

Facts on Baby Boomers (Born between 1946-1964)

At an Am Law 200 firm, the average age of a partner is approximately 52 years old, “and more than half of equity and non-equity law partners are members of the baby boomer generation.” Debra Cassens Weiss, “Average Age of BigLaw Partner Is About 52; Which Firms Are Outliers?”, ABA Journal, Mar. 2, 2016

2. Reverse Age Discrimination

In 2004, the Supreme Court interpreted the ADEA’s language that prohibits discrimination “because of …age.” *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 124 S. Ct. 1236, 157 L. Ed. 2d 1094 (2004). In *General Dynamics*, employees between the ages of 40 and 49 sued their employer under the ADEA for being too young to receive benefits, when they were only given to workers age 50 or more. After discussing the legislative history and purpose of the ADEA, the court found that “age” only means protecting older workers from younger workers. Writing for the majority, Justice Souter concluded that “we see the text, structure, purpose, and history of the ADEA, along with its relationship to other federal statutes, as showing that the statute does not mean to stop an employer from favoring an older employee over a younger one.

3. Managing Millennials

In a 2007 case, *EEOC v. V&J Foods*, a 16-year-old female employee at a fast-food restaurant at her first paying job alleged that her 35-year-old General Manager engaged in serious sexual harassment against her. *E.E.O.C. v. V & J Foods, Inc.*, 507 F.3d 575, 577 (7th Cir. 2007). His advances included offering to pay her to have sexual relations with him. *Id.* The employee complained several times to her shift manager and the assistant manager, but nothing came of it. *Id.* So, the employee complained to her mother who then confronted her daughter’s managers about the harassment. As a result, the employee was fired. *Id.* The manager explained that he fired her because she “had involved her mother in the matter rather than handling it ‘like a lady’.” *Id.* The 16-year-old employee then sued for hostile work environment and retaliation under Title VII. The employer argued that the employee had not used the company procedures available to her for complaining about sexual harassment.

This *Faragher* affirmative defense failed in this case because the company’s administrative procedures for submitting harassment complaints were too confusing for an employee of any age, let alone a 16-year-old in their first job. *Faragher v. City of Boca Raton*, 524 U.S. 775, 807, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998). The court reasoned that an employer can only prevail using this affirmative defense when its complaint mechanisms are reasonable and effective. Further, because the restaurant’s business plan sought to hire part-time high school students they must tailor their complaint mechanisms to the understanding of the average high-school teen. The court clarified that this ruling did not mean that complaint procedures must be tailored to individual employees.

This case is a reminder that it may be time to re-evaluate practices and procedures as this generational shift in the workplace takes place. That 16-year-old employee in 2007 is now around 27 years old and is in the generation with the majority of workers in the economy.
4. Generational Conflict Leading to Litigation

A generational conflict can lead to messy litigation when it creates a hostile work environment. In *Bartlette v. Hyatt Regency*, 208 F. Supp. 3d 311, 322 (D.D.C. 2016), an older assistant with 20 years of experience at a hotel restaurant was ordered to train a younger supervisor. After an altercation with the younger manager, the employee was fired by Hyatt. The employee filed a hostile work environment claim, among others, under the ADEA. *Id.* at 322. The case survived the defendant’s motion for summary judgement after the former employee successfully established a prima facie case for hostile work environment because of his age. *Id.*

5. Other Generations in the Workplace

Generation X (1965-1981) –late 30’s to 50’s- a small large group.
Generation Z/Post Millennials (1995/2000-?)- a large technologically savvy group-oldest are now entering the workforce.

IV. Recommendations

Knowing that unhappy attorneys lead to high turnover and less efficiency, law firms must make workplace changes that mirror the generational changes taking place within firms.

1. **Flexibility of Work-Life Balance**- First, law firms should understand the importance of work-life balance to Millennials. While a business run on billable hours may not be the most flexible environment, law firms should accommodate younger associates who need time and space to manage their individual work-life relationships. For example, some formerly traditional law firms are offering mobility options to attorneys so that they can work from any location. “The Millennial Lawyer,” YourABA Interview, https://www.americanbar.org/news/abanews/publications/youraba/2018/june-2018/a-millennial-explains-how-law-firms-can-attract-and-keep-his-gen.html.

2. **Empower Young Associates**- In the aftermath of the Great Recession, senior associates and partners remained at law firms longer instead of retiring. This led to less opportunities for trial experience for younger associates. The disagreement here is that millennials are eager to make an impact in the workplace and they want to feel empowered. Firms should quit fighting this enthusiasm and involve young associates who are looking to make a positive difference for the firm as soon as possible. *Id.*

3. **Sincere Mentorship**- Millennials desire feedback in terms of their substantive work and guidance for their careers. Sincere mentorship programs can potentially create positive relationships between age groups in the firm while helping Millennials feel valued as they ascend the ranks of the firm. Further, law firms should improve transparency for younger attorneys by sharing the firm’s goals and pathways to leadership. Jan L. Jacobowitz, Katie M. Lachter, Gabriella Morello, “Cultural Evolution or Revolution? The Millennial’s Growing Impact on the Professionalism and the Practice of Law,” American Bar Association: Professional Lawyer, 2016.
4. **Build a Community within the Firm** - The social aspects of work are important to all employees of all generations. Positive relationships with colleagues and a collaborative culture among associates should not just be a goal for law firms, these should be tools to motivate attorneys across generational gaps. Millennials that feel disconnected to the rest of the office can lose commitment and desire to produce their best work, so firms should create opportunities to socialize and form communities within their offices. Another way to increase engagement and motivation for younger lawyers is to appeal to the goodness of the profession. It should be emphasized that helping people is the business of lawyers and that improving the community outside the firm requires teamwork inside of the firm.
ONE FLEW OVER THE CUCKOO’S NEST

By

Moderators:
The Honorable Alan Forst, Fourth District Court of Appeal, West Palm Beach
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One Flew Over the Cuckoo’s Nest

Evaluating and Accommodating Good Mental Health in the Workplace

David Adams, Partner
Bennett Jacobs Adams
Tampa, FL

Overview

- Disability and Mental Health Statistics
- Changing Attitudes about Disabilities
- Evaluating Individuals with Psychiatric Disabilities
- Health and Wellness in the Legal Profession
Disability and Mental Health Statistics

Mental Health Overview

Fact: 43.8 million adults experience mental illness in a given year.

Nearly 1 in 5 (19.6 million) adults in America live with a serious mental illness.

One half of all chronic mental illness begins by the age of 14; three quarters by the age of 24.

Source: National Alliance on Mental Illness

Mental Health Overview

Prevalence of Mental Illness by Diagnosis

- 1.1%: 1 in 100 (2.4 million) American adults live with schizophrenia.
- 2.6%: 6.1 million of American adults live with bipolar disorder.
- 6.9%: 16 million of American adults live with major depression.
- 18.1%: 48.7 million of American adults live with anxiety disorders.

Source: National Alliance on Mental Illness
Mental Health Overview

50% 50% of all lifetime cases of mental illness begin by age 14 and 75% by age 24.¹

10 yrs The average delay between onset of symptoms and intervention is 8-10 years.²

Source: National Alliance on Mental Illness

Mental Health Overview

90% 90% of those who die by suicide have an underlying mental illness. Suicide is the 16th leading cause of death in the U.S.³

3rd Suicide is the 3rd leading cause of death in youth ages 10-24.⁴

Source: National Alliance on Mental Illness

ADA Congressional Findings

• Some 43 million Americans have one or more physical or mental disabilities

• The U.S. Population in 1990 was 250 million, so 17%, or 1 in every 6 people, were found to have a mental or physical disability

• The U.S. should assure equality of opportunity and self-sufficiency for those with disabilities
Changing Attitudes about Mental Disabilities

Changing Attitudes
Belleview Hospital, NYC Patient Rooms

Changing Attitudes
1988

5/16/2018
Changing Attitudes

1990

• George H.W. Bush
• Signing the ADA

Changing Attitudes

2008

• George W. Bush
• Signing the ADAAA

Modern Culture embracing disabilities

2015 Sesame Street New Character
Evaluating Individuals With Psychiatric Disabilities

Source: Chris Kuczynski
Office of Legal Counsel, EEOC

Objectives

• Identify psychiatric disabilities
• Learn how to determine when someone with a psychiatric disability is “qualified” for a job
• Learn about some accommodations for persons with psychiatric disabilities
• Identify safety issues and properly apply the concept of “direct threat”
Definition of Disability

- An impairment that substantially limits one or more major life activities
- A record of a substantially limiting impairment
- Being regarded as having a substantially limiting impairment

Types Of Psychiatric Impairments

- Anxiety disorder
- Panic disorder
- Bi-polar disorder
- Depression
- Post-traumatic stress disorder
- Schizophrenia
- Adjustment disorder

Impairments Not Covered

- Pyromania
- Kleptomania
- Compulsive gambling
- Current illegal use of drugs
- Certain sexual disorders
Personality Traits Not Covered

• Poor judgment
• Chronic lateness
• Irritability
• Inability to get along with supervisor or co-workers

Definition of a Disability
Major Life Activities

Thinking
Concentrating
Interacting with others
Sleeping
Caring for self
Working

Definition of a Disability
Substantially Limited

• Unable to perform a major life activity; or

• Significantly restricted in the condition, manner or duration under which a major life activity can be performed as compared to the average person in the general population
Substantially Limited

- Duration – more than several months
- Severity
- Permanent or long-term impact of or resulting from the impairment

“Record Of”

- Substantially limiting in the past
- Includes individuals mischaracterized as having a disability
- May be relevant in cases where someone is using a mitigating measure to control a condition

“Regarded As” Disabled

- Impairment is not substantially limited, but individual is treated as such
- Impairment is substantially limited as the result of the attitudes of others
- No impairment, but employer treats an individual as if he or she has a substantially limiting impairment
Qualified

- Meets the basic skill, education, training, and other job-related requirements; and
- Can perform the essential (or fundamental) functions of a position with or without reasonable accommodation.

Essential Functions

- Job exists to perform the function
- Limited number of employees among whom function can be distributed
- Job is highly specialized

Essential Functions

- Evidence relevant in determining whether a function is essential includes:
  - Employer’s judgment
  - Terms of a written position description
  - Terms of a collective bargaining agreement
  - Experience of current or past employees amount of time spent performing the function
  - Consequences of not performing the function
What is Reasonable Accommodation?

• A change in the workplace or in the way things are customarily done that provides an individual with a disability with equal employment opportunities.

• Accommodations are available for the application process, to enable an individual with a disability to perform essential job functions, and to provide equal benefits and privileges of employment.

Requests for Reasonable Accommodation

• Generally, an individual with a disability must request reasonable accommodation.

• A request for reasonable accommodation is a request for some change in the workplace or in the way things are done that is needed because of a medical condition.

Requests for Reasonable Accommodation

• Requests do not have to be in writing.

• Requests do not have to use “magic words.”

• Requests may come from a third party (e.g., an employee’s family member or doctor).
Timing of Requests

• Requests for reasonable accommodation may be made at any time during the application process or during employment.

• An employee does not lose the right to request an accommodation because he did not do so during the application stage.

• Employees may make more than one request for reasonable accommodation (e.g., if the nature of a condition or the job changes).

Interactive Process

• Once a request has been made, an employer should engage in an interactive process with the individual asking for the accommodation.

• The process may involve determining whether the requester has a disability, what accommodations are possible, or both.

Documenting PSYCHIATRIC Disabilities

• An employer may obtain reasonable documentation that an employee has a mental disability and needs an accommodation.

• Employer may require that documentation of the existence of an impairment come from a health care professional.

• Health care professionals other than psychiatrists may provide documentation of the existence of an impairment.
Documenting Psychiatric Disabilities

Documentation must be **sufficient**, but the amount of documentation required must be **reasonable**

- **Sufficient**: Means that the documentation establishes the existence of an impairment and the degree to which the impairment limits major life activities
- **Reasonable**: means that the employer is entitled to no more information than is necessary to determine that the employee has a disability and needs accommodation

Choosing an Accommodation

- Primary consideration should be given to the employee’s choice
- Employer may ultimately choose from among accommodations, as long as the one provided is effective

Types of Accommodations

- Physical modifications
- Modified work schedules
- Job restructuring
- Changing supervisory methods
- Job coach
- Telework
- Leave
- Reassignment to a vacant position
Actions Not Required

- Lowering production or performance standards
- Excusing violations of conduct rules that are job-related and consistent with business necessity
- Removing an essential function
- Monitoring an employee’s use of medication
- Actions that would result in undue hardship (i.e., significant difficulty or expense)

Confidentiality

- Information about an employee’s reasonable accommodation must be kept confidential
  - **Exception:** Information may be disclosed to supervisors and managers for necessary work restrictions or reasonable accommodations
  - **Exception:** Information may be disclosed to individuals involved in making decisions about reasonable accommodations
  - **Exceptions:** Where necessary for emergency treatment; to officials investigating compliance with Rehabilitation Act; for workers’ compensation and insurance purposes

Confidentiality

- Many companies have someone other than employee’s immediate supervisor review documentation supporting accommodation request
  - Where this is done, supervisor will receive only information necessary to provide accommodation
  - Companies should be careful not to have individuals who may also be involved in any EEO complaint related to the request
Reasonable Accommodation Policies

• Executive Order 13164 requires all Federal companies to have written reasonable accommodation procedures.

• EEOC has issued guidance on EO 13164: http://www.eeoc.gov/policy/docs/accommodation_procedures.html

Going Beyond Legal Obligations

• Many companies may take actions that are not required as reasonable accommodations.

• Companies will not be deemed to have regarded an individual as disabled just because it exceeded its legal obligations.

• An agency may inform an employee that it is taking an action beyond what the Rehabilitation Act requires.

Going Beyond Legal Obligations

• Examples of situations in which any companies may exceed its obligations include:
  o Providing an assistant to help an employee perform activities of a personal nature (e.g., assistance with eating)
  o Providing a temporary measure while considering a request for reasonable accommodation
  o Accommodating a temporary, non-chronic condition of short duration or a long-term condition that is not substantially limiting
What if an Employee Will Not Accept Accommodation?

- Employer may not require someone to accept a reasonable accommodation
- Someone who does not accept an accommodation and, as a result, cannot do the job or would pose a “direct threat” will not be considered qualified

Safety Issues

- Individual with a disability may only be excluded for safety reasons if he or she poses a “direct threat”
- Direct threat means a significant risk of substantial harm to self or others that cannot be reduced or eliminated through reasonable accommodation
- Determination relies on best available objective evidence
- An individualized assessment is required

Direct Threat Factors

- Nature of the risk and severity of the potential harm
- Duration of the risk
- Likelihood that the potential harm will occur
- Imminence of the risk
- Availability of reasonable accommodation
Asking Questions About Disability

• Before a job offer is made, questions about disability and medical examinations are prohibited
  • Exception: All applicants may be asked if they will need accommodation for the application process
  • Exception: Specific applicants with obvious or known disabilities may be asked if they will need reasonable accommodation for the job if the employer has a reasonable belief that accommodation will be needed

Asking Questions About Disability

• After a job offer is made, employers may ask questions about disability and may require medical examinations if they ask such questions and/or require examinations of all entering employees in the same job category

Asking Questions About Disability

• During employment, questions about disability and/or medical examinations may be permitted if and employer has a reasonable belief based on objective evidence that a particular employee:
  • (1) will be unable to perform essential functions due to a medical condition; or
  • (2) will pose a direct threat due to a medical condition
Mental Health and Wellness in the Legal Profession

Wellness Study

- Two 2016 studies with the Betty Ford Foundation and the American Bar Association concluded that many lawyers and law students experience chronic rates of:
  - Stress
  - Depression
  - Substance abuse

Legal Profession Statistics

- 21-36% of practicing lawyers qualify as "problem drinkers"
- 28% are struggling with depression
- 19% are struggling with anxiety
- 23% are struggling with undue stress
- Common complaints include:
  - Work addiction
  - Social alienation
  - Sleep deprivation
  - Job dissatisfaction
  - Work-life conflict
  - Incivility
Legal Profession Statistics

• Younger lawyers in the first ten years of practice working at private law firms experience the highest rates of problem drinking and depression.

Law Student Mental Health

• 17% of the law students experienced some level of depression.
• 14% experienced severe anxiety.
• 23% experienced moderate to mild anxiety.
• 6% reported serious suicidal thoughts in the past year.

How to increase Lawyer Well-being

• There is too much emphasis on monetary success; life is about things other than success, money, and power.
• Law school and law practice teach us as professionals to do “critical thinking,” but those same methods do not encourage happiness, self-fulfillment, and well being.
• Lawyers need to adopt strong relational factors.
Well Being Relational Factors

• Authenticity/Autonomy/Integrity – Lawyers are more satisfied when they act with a high level of integrity
• Relatedness – Lawyers are happier when they can relate to other lawyers and client goals
• Competence – Lawyers thrive to do a good job and be recognized for their special abilities
• Internal Motivation – Daily practice must be interesting, enjoyable; work should have meaning and purpose
• Money should not drive career

Why Should Employers Care?

• Happier lawyers are more productive
• Well-balanced lawyers perform better
• Satisfied lawyers appreciate their staff more and respect their co-workers
• Personnel is your greatest asset in a professional services firm

What can you do next week?

• Increase lawyer and staff engagement
• Get out of your office and walk around
• Talk with lawyers and staff in your office
• Be less controlling and more supportive
• Listen (understand lawyer and staff challenges)
• Help staff feel competent by giving frequent feedback
• Use the 3:1 ratio during reviews
  o Identify 3 positive traits
  o For every negative trait
Recent Mental Disability Developments

• Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA)
  - Proposed guidance regarding mental health and substance use disorder parity (ACA, HHS, ERISA, IRC)

• Endrew F. v. Douglas County School District RE-1, 137 S. Ct. 988 (March 22, 2017) (changed standard for school districts to develop and implement an IEP)

WONDER WOMAN AND SUPERMAN

By

Moderators:
The Honorable Alan Forst, Fourth District Court of Appeal, West Palm Beach
The Honorable Stephanie Ray, First District Court of Appeal, Tallahassee
Speaker:
Wonder Woman and Superman: A Healthy Balance of Work, Exercise, and Engagement in Outside Activities are the Makings of an Invincible Superhero. The Do’s and Don’ts Involved with the Creation and Implementation of Health and Wellness Programs.


https://www.schwartzlawfirm.net/
I. Importance of Work/Life Balance in Creating a Superhero

- Even Superman and Wonder Woman need to balance saving the world and taking time to care for their wellbeing.

- One study has shown that only half of all lawyers are satisfied with their work.

- Lawyers are the most frequently depressed occupational group in the United States.
  - According to one study, lawyers are 3.6 times more likely to suffer from depression than non-lawyers.
  - Depression and anxiety are cited by 26% of all lawyers who seek counseling.
  - A study of 801 lawyers in the State of Washington indicates that 19% of lawyers suffer from statistically significant elevated levels of depression.
  - 1 in 4 lawyers suffer from elevated feelings of inadequacy, inferiority, social alienation, and isolation.

- In addition to mental health concerns, there are other conditions that impact lawyers given the stress they encounter and long hours they work:
  - A study published by a British medical journal found that individuals who work over 55 hours a week have a 33% higher risk of stroke, a 13% increased risk of coronary heart disease, and an increased risk of heart attacks.
  - Individuals who sit for long periods are at a higher risk of an early death.
  - Working more than 55 hours a week has also been linked to a greater risk of having sleep disturbances.
  - Other side effects of stress include anxiety, irritability, overreaction, and resentment.
  - Chronic stress is linked to heart disease, cancer, lung ailments, and increased incident of accidents, cirrhosis, and suicide.

- The importance of a work/life balance cannot be ignored.
  - It is critical to realize the link between mind and body.
  - By developing and implementing health and wellness programs, employers can attempt to counteract some of the stresses faced by their employees and improve the mental and physical health of employees and boost morale.

II. Rise of Health & Wellness Programs

- To that end, many employers are instituting health and wellness programs.
  - For example, at our firm, we pay the gym membership for employees at a nearby Community Center.
  - Also, we hold a monthly workout competition, where the top 3 employees who have worked out the most are given gift cards in $5, $10, and $15 increments.
  - As part of our program, the firm invites speakers to come and discuss various topics regarding health and wellness.
    - Examples: Discussions on meditation, fitness and nutrition.
  - The firm sponsors employees who voluntarily wish to participate in local 5K runs.
We also foster an environment where individuals can speak freely regarding the problems they are facing without fear of judgment or reprisal.

- Mindfulness: One definition of mindfulness is “paying attention in a particular way; on purpose, in the present moment, and non judgmentally.”

- Several Fortune 500 companies and other organizations are instituting mindfulness courses.
  - Examples include Humana, Aetna, Nike, and the Seattle Seahawks of the NFL.

- In addition to mindfulness courses, some companies incorporate health risk assessments and biometric testing as part of a wellness program.
- Other examples of wellness programs are nutrition courses, weight loss courses, and smoking cessation programs.
- Implementing health and wellness programs may reduce insurance premiums as well as the number of workers’ compensation claims as employees become both physically and mentally healthier.
- Health and Wellness programs have been shown to increase the productivity of employees.

### III. Do’s and Don’ts of Health & Wellness Programs

- Generally, in order to comply with the Americans with Disabilities Act (“ADA”), health and wellness programs must be open to all employees.
  - Employers must make reasonable accommodations to allow employees with disabilities to participate.
    - For example, hiring a sign language interpreter for an employee who is deaf and wants to attend a smoking cessation course.

- 2016 EEOC Guidelines Regarding Wellness Programs
  - On May 27, 2016, the EEOC issued a final rule related to wellness programs.
  - The final rule applies only to wellness programs that require employees to answer disability-related questions or to undergo medical examinations in order to earn a reward or avoid a penalty; it does not apply to programs such as those that reward individuals who walk a certain number of miles a week.
  - Generally, the ADA restricts employers from obtaining medical information from applicants and employees but, allows them to make inquiries about employees’ health or do medical examinations that are part of a voluntary employee health program.
  - The EEOC issued the final rule in an effort to provide consistency between the ADA, Health Insurance Portability and Accountability Act (“HIPAA”), and the Affordable Care Act (“ACA”).
    - HIPAA and the ACA allow wellness programs that are part of an employer-sponsored group health plan to offer incentives for “health-contingent” wellness programs (e.g., rewards for walking 10,000 steps a day or lowering blood pressure).
- The regulations implementing HIPAA do not impose any incentive limits on participatory programs (such as a smoking cessation course), as long as the programs are available to all similarly-situated employees and incentives are made available regardless of a health factor.
- HIPAA regulations apply only to wellness programs that are part of a group health plan.
  - It is important to note that the ADA has a “safe harbor” provision that applies to insurers and plan sponsors allowing them to use information to make decisions about insurability and costs of insurance. The safe harbor provision does not apply to employer wellness programs, since employers are not collecting or using information to determine insurability or to set premiums. The final rule explicitly states that the safe harbor provision does not apply to wellness programs.
    - See *Seff v. Broward County*, 691 F.3d 1221 (11th Cir. 2012), for a discussion of the safe harbor provision.
  - The final rule clarifies that a voluntary employee health program must be “reasonably designed to promote health or prevent disease.”
    - To meet this standard, a program cannot require an overly burdensome amount of time for participation, involve unreasonably intrusive procedures, require employees to incur significant costs for medical examinations, or be a subterfuge for violating the ADA or other anti-discrimination laws.
  - The EEOC has stated that a wellness program that asks employees to answer questions about their health conditions or have a biometric screening (or other medical examination that indicates health risks) meets the “reasonably designed” standard.
  - Regarding the requirement that a program be voluntary, an employer may not:
    - Require any employee to participate;
    - Deny any employee who does not participate in a wellness program access to health coverage or prohibit any employee from choosing a particular plan; and
    - Take any other adverse action or retaliate against, interfere with, coerce, intimidate, or threaten any employee who chooses not to participate or fails to achieve certain health outcomes.
  - Under the final rule, if a wellness program is open only to employees enrolled in a particular health insurance plan, the maximum allowable incentive an employer can offer is 30% of the total cost of self-only coverage of the plan.
  - When an employer offers more than one group health plan but participation in a wellness program is open to all employees regardless of whether they are enrolled in a plan, the employer may offer a maximum incentive of 30% of the lowest cost major medical self-only plan it offers.
  - If an employer does not offer health insurance but wants to offer an incentive for employees to complete a health risk assessment or to have annual tests that check their glucose and cholesterol levels, the employer could offer an incentive of up to 30% of the cost that a 40-year-old non-smoker would pay for self-only coverage under the second lowest cost Silver Plan on the state or federal health care Exchange.
Regarding smoking cessation programs, the final rule applies only if biometric testing or another medical procedure that tests for the presence of nicotine or tobacco is conducted. A wellness program that asks employees if they smoke is not a wellness program that asks disability-related questions, and an employer can offer an incentive of up to 50% of the cost of self-only coverage to non-smokers pursuant to HIPAA.

Regarding confidentiality, the final rule requires that a covered entity may only receive information collected by a wellness program in aggregate form that does not disclose, and is not reasonably likely to disclose, the identity of specific individuals except as is necessary to administer a health plan, and an employer may not require an employee to agree to the sale, exchange, sharing, transfer, or other disclosure of medical information or to waive confidentiality protections under the ADA.

The final rule also provided similar revisions to the Genetic Information Nondiscrimination Act ("GINA") related to an employer offering an employee’s spouse incentives for participating in a voluntary wellness programs.

- An employer may offer the incentive to an employee whose spouse receives health or genetic services offered by the employer and provided information about her or his current or past health status.
- The final rule regarding GINA is similar to the ADA final rule as it relates to confidentiality and incentive caps.

**Challenge to 2016 Final Rule Regarding Wellness Programs**
- **AARP v. EEOC** (District Court for D.C.).
  - The AARP contended that the 30% incentive rendered an employee’s disclosure of ADA and GINA-protected information involuntary, in that employees who could not afford to pay such amounts would effectively be forced to provide the information.
  - In August 2017, the court agreed with the AARP, holding that the EEOC’s rulemaking was arbitrary and did not offer a valid reason to justify the proposed incentive levels.
  - The court initially sent the regulations back to the EEOC for further revisions, but it did not vacate the rule because of concerns of business disruptions for employers who had developed plans for 2018.
  - In December 2017, the court reconsidered its decision not to vacate and determined that vacating the rule as of January 1, 2019, was appropriate given that there was ample time for employees to develop wellness programs for 2019 knowing that the rule would no longer be in effect.
  - The EEOC indicated that a new rule will not likely be ready until 2021.
  - It is important for employers to continue to monitor this issue.

**Incentives Under the Fair Labor Standards Act ("FLSA")**
- 29 C.F.R. section 778.200(a)(1) states that “regular rate” under the FLSA does not include “[s]ums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which
are not measured by or dependent on hours worked, production, or efficiency . . . .”

- 29 C.F.R. section 778.212(b) elaborates upon the exception and states that the “bonus must be actually a gift or in the nature of a gift.”
- Thus, an employer who provides a gift certificate for a fitness program does not run afoul of the FLSA as the payment is not geared to wages and hours.
  - Keep in mind that the payment must not be “substantial” as to have the appearance of being geared to wages and hours worked.
Sources


Seff v. Broward Cnty., 691 F.3d 1221 (11th Cir. 2012).


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