Common Sense Compliance Guidance for managers and HR when addressing mental health in the workplace

The pandemic has highlighted the need to have a work environment that promotes mental wellness and effectively responds to and accommodates employees who are experiencing challenges to their mental health. It is a laudable Human Resource goal for employers to take steps to promote mental wellness and assist employees who may be experiencing mental illness or a mental wellness challenge to help them successfully perform their essential job functions. However, it is also important for managers and Human Resources to bear in mind that efforts to address issues related to either mental wellness, on the one hand, or mental illness, on the other hand, in the workplace can raise legal and compliance challenges and issues.

Here we provide an overview of applicable laws, and also offer managers and Human Resources professionals with common sense compliance tips. **Please bear in mind that Sun Life is not providing legal advice and we encourage you to consult legal counsel when appropriate.**

The following are key laws that can be implicated when addressing mental health issues:

- Americans with Disabilities Act (ADA) and the ADA Amendments Act of 2008 (ADAAA) (and comparable state and local laws)
- Family and Medical Leave Act (and comparable state and local laws)
- Genetic Information Nondiscrimination Act (GINA)
- Laws providing the right to leave to when an employee or a family member is a victim of Domestic Violence, crime victim, victims of sexual assault
- Other antidiscrimination laws prohibiting discrimination against employees because of a legally-protected characteristic, including but not limited to, gender, race, national origin, sexual orientation, gender identity, religion.

We address each type of legal issue below.

Americans with Disabilities Act (ADA) and the ADA Amendments Act of 2008 (ADAAA) (and comparable state and local laws)

The Americans with Disabilities Act (and comparable state and local laws) is one of the most relevant laws for Human Resources and managers to be aware of when endeavoring to address mental health in the workplace. There are three types of claims that an employee can assert against an employer under the ADA or under comparable state anti-discrimination laws. These include discrimination because of a disability, failure to provide an accommodation, and engaging in inappropriate disability-related inquiries.

ADA prohibits disability-related discrimination

The ADA and comparable state laws prohibit discrimination against employees and job applicants:

- Who have a disability;
- Who have a "record" of having a disability; or
- Because the employer "regards" them as having a disability, even if the individual does not have actually have a disability; or
- Because they are "associated with" someone who has a disability (e.g. a parent, spouse or child).

Under the ADA, a disability is defined as a physical or mental impairment that substantially interferes with one or more major life activities. The ADAAA made clear that the threshold for proving disability is not high, and the Equal Employment Opportunity Commission (EEOC) directs employers to focus more on **how to**

continued

assist an employee with a medical condition than on discussing whether the condition itself qualifies as a disability. It is also important to bear in mind that temporary conditions can qualify as a disability under the ADA.

Record of a disability. Employers can also be liable if they take adverse action against someone because they have a record of a disability. This can arise when someone discloses that they had a history of mental illness or other medical condition and the employer subsequently terminates employment or takes other adverse action.

"Regarded as" or "perceived" disability. This is one of the most challenging theories of liability under the ADA for employers. An employee can assert that they do not actually have a disability but that the employer treated them as though they had a disability and it was this perception that caused the employer to take adverse action against them.

- This particular theory of liability can be triggered when managers or Human Resources focus on what they think is the underlying "cause" of performance or attendance issues or where managers change job duties or functions based on their beliefs that the employee has a medical condition.
- Claims of *perceived or regarded as disabled* can be particularly problematic for "mental illness" issues. For example, many employees struggle with performance or attendance issues. It can be legally risky for managers or Human Resources to ask employees whether these performance or attendance problems are because of an underlying mental health issue, or make suggestions that they may be.
- **It is a best practice for HR and managers to focus on the facts** – what the employee is actually doing (or not doing) that is problematic – and not to try to identify the cause of the problematic behavior, conduct or performance. To do otherwise, can expose the employer to claims of, among other things, "regarded as" discrimination. Indeed, even a simple action such as referring an employee to an Employee Assistance Program can be used as evidence that a manager perceived the employee as disabled. *(There are appropriate occasions to refer an individual employee to an EAP. However, from a compliance point of view, that conversation—when you don't know an issue exists—may be best had by the Human Resources professional and not the manager who is ultimately responsible for the rating, hiring or firing of the employee.)*

As discussed more below, employers need to bear in mind that that they can be held liable for disability discrimination even if the employer takes the position that an employee was terminated for a legitimate nondiscriminatory reason (e.g. performance or attendance). If the employee can show that the purported nondiscriminatory reason is a "pretext" then a jury is allowed to conclude that the real motivator was unlawful discrimination. Some of the factors that juries can consider include "temporal proximity" (i.e. how close in time the adverse action was to the disclosure of the disability) and whether others who do not have disabilities were treated similarly, or there was inconsistent enforcement" of performance, attendance or conduct policies.

Start the interactive process if your employee indicates a need for an accommodation

- The ADA requires employers to provide reasonable accommodations to employees to help them perform the essential functions of their jobs. Once an employee requests an accommodation, or in some states once an employer becomes aware that an employee has a disability and may need an accommodation on account of that disability to help them perform their essential job functions, the employer's duty to engage in a good faith interactive process is triggered.
- That interactive process requires a back and forth, good faith, open-mind discussion of potential accommodations. It is also important to note that under the ADA and comparable

continued

state and local laws employers are required to grant accommodation requests unless (1) they can demonstrate that the requested accommodation would cause undue hardship; (2) the requested accommodation would create a direct threat to the safety of the employee or others; or 3) the accommodation would relieve the employee from performing an essential job function. With regard to the direct threat to safety defense, employers must show objective, individualized evidence and cannot base a denial of an accommodation on a generalized fear. This is particularly relevant in situations involving concerns about workplace safety.

Do not to engage in an inappropriate disability-related inquiry

- The ADA also prohibits inappropriate disability-related inquiries. If an employer engages in an inappropriate disability-related inquiry, this can result in liability. The Equal Employment Opportunity Commission has advised that a "disability-related inquiry" is a question that is likely to elicit information about disability, such as asking employees questions about whether they have or ever had a disability or about the kinds of prescription medication they are taking.
- Inappropriate inquiries include asking an employee's co-worker, family member or doctor about the employee's disability, or discussing with other whether the employee may have a disability. While asking a question about an employee's "general well-being" is not a disability-related inquiry, it can sometimes be a "thin line" because what is meant as a general inquiry can cross the line into an inappropriate discussion.
- It's important to also consider the potential power differential – if a manager or Human Resources is asking an employee whether there is something going on in their personal life, some employees may not feel comfortable declining to answer. Employees may later contend that they felt they had no choice but to divulge information that they would have preferred to keep private. For these, and other reasons, it is best for managers and Human Resources to focus on objective, describable, performance or behavior concerns that are at issue, and not to characterize those issues as being caused by any underlying mental or emotional issues.
- Lastly, while employers can request medical documentation to support a request for an accommodation, the request must be narrowly focused to address only the issues related to the need for accommodation.

Family and Medical Leave Act (and comparable state and local laws)

Listen for verbal cues that indicate your employee may need a leave or an accommodation.

- If an employee indicates that they are having problems performing or meeting attendance expectations because of mental health (or other issue) this may be sufficient to put the manager and Human resources on notice to trigger the interactive process. Managers and/or HR may need to advise the employee of their rights to take leave under the FMLA or comparable state and local laws or of their right to an accommodation under the ADA. Sun Life has prepared a template of a memorandum that a manager or Human Resources could use for these circumstances.

Genetic Information Nondiscrimination Act (GINA)

Do not inquire about genetic information or family history. This could violate GINA.

- GINA prohibits employers from discriminating on the basis of genetic information and generally prohibits employers from acquiring or disclosing genetic information. "Genetic information" encompasses far more than the results of a genetic test. Genetic information includes family medical history, and that term is very broadly defined. Family members include: a spouse; children (natural and adopted); siblings and half-siblings; aunts, uncles, nieces and nephews; grandparents and grandchildren;

continued

great- and great-great-grandparents and grandchildren; and first cousins and first cousins once removed. Medical history includes information concerning any disease or disorder that any of these individuals has suffered — whether or not hereditary — as long as the disease or disorder has been diagnosed or the symptoms have sufficiently manifested themselves that the disease or disorder could reasonably be diagnosed.

- GINA contains an exception to its prohibition against acquiring genetic information for the "inadvertent acquisition of genetic information." According to the EEOC's regulations, managers can be empathetic. They can ask a subordinate recently diagnosed with cancer, "How are you?", and "Did they catch it early?", or if the subordinate's child is the subject of the diagnosis, "Will your daughter be OK?" However, managers need to be careful when having these conversations because they cross the line by asking, for example, "Do you have cancer in your family?", or "Are you worried that your other children might have cancer?" In other words, managers will need to distinguish between generalized questions and what the EEOC characterizes as "probing" questions to avoid GINA's prohibition against acquiring genetic information.
- The EEOC regulations also explain that managers who happen to overhear a conversation between employees about genetic information, such as a discussion about their respective families' history of cancer, does not violate GINA. However, a manager who "actively listens" to such a conversation does violate GINA. In other words, the regulations implicitly direct managers either to remove themselves from the area where the employees are engaging in the hypothetical discussion or to ask the employees to stop discussing genetic information where the manager can "actively listen" to the discussion.

Laws providing the right to leave to when an employee or a family member is a victim of Domestic Violence, crime victim, victims of sexual assault

There are circumstances when employees need a leave in order to address profound personal issues.

- When having discussions with employees about challenges in their personal lives, they may disclose information that puts a manager on notice that the employee may need leave under a state or local law related to domestic violence, crime victims, or being a victim of sexual assault. If this occurs, this may trigger a duty to provide notice of rights to take leave under state or local laws related to these issues. Many of these laws apply when both the employee and their family members have been victims.

Other antidiscrimination laws prohibiting discrimination against employees because of a legally-protected characteristic, including but not limited to, gender, race, national origin, sexual orientation, gender identity, religion.

Ensure that you are not treating employees in a legally protected category more harshly than those who are not.

- Discrimination issues can be asserted any time employers take adverse action against an employee because of conduct or performance.
- Employers can be accused of treating those in legally protected categories differently than those who are not.
- Employers can be at risk for discrimination claims if they take into account stereotypes based on race or gender, for example.

continued

What is the bottom line?

It is beneficial for managers and Human Resources to seek to create a culture of mental wellness. There are many resources to help managers create a supportive environment. Where things can get tricky is when managers or Human Resources focus on an individual employee whom they think may be having metal health challenges. This is when legal issues and challenges can arise. Moving beyond promoting general tips for wellness and into discussions of an individual employee's behavior or performance can create compliance challenges. We encourage managers to consult with Human Resources and for employment counsel to be consulted as well where appropriate.

Sun Life provides ADA accommodation services and, if your organization has purchased these services, we may be able to provide assistance to you in this complex area.

Listed below are publications by the Equal Employment Opportunity Commission on mental health issues and the workplace.

- Enforcement Guidance on the ADA & Psychiatric Disabilities
- Depression, PTSD & Other mental Health Conditions in the Workplace: Your Legal Rights
- Questions and Answers: Enforcement Guidance on Disability Related Inquiries and Medical examinations under the ADA
- Enforcement Guidance on Disability-related inquiries and medical examinations of Employees under the ADA
- Fact Sheet: Genetic Information Nondiscrimination Act
- Questions and Answers: The Application of Title VII and the ADA to Applicant and Employees who Experience Domestic or Dating Violence, Sexual Assault or Stalking
- The Mental Health Provider's Role in a Client's Request for a Reasonable Accommodation at Work

GGFL-10654-b

SLPC 31166 10/21 (exp. 10/23)