Mental Health Promotion and Suicide Prevention in the Workplace

Policy and Response Recommendations to Help Employers Positively Impact Workers and the Work Environment

A White Paper for HR Professionals and Employment Lawyers

WORKPLACE SUICIDE PREVENTION

Workplace Suicide Prevention & Postvention Committee

www.WorkplaceSuicidePrevention.com

2022

Disclaimer

The opinions and positions expressed in this white paper are those of the collaboration and are not intended to provide legal, psychological, therapeutic, counseling, or other expert advice regarding any of the subjects mentioned. This white paper is solely for informational purposes. You should consult knowledgeable legal counsel or other experts for any legal or technical questions.

Acknowledgments

This guide is part of the National Guidelines for Workplace Suicide Prevention.[1] a partnership initiative between organizations such as the American Foundation for Suicide Prevention[2] and United Suicide Survivors International.[3] The Workplace Suicide Prevention & Postvention Committee developed the HR/Employment White Paper Task Force to draft this document. Contributors include:

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Suggested Citation

Workplace Suicide Prevention & Postvention Committee (2022). Mental Health Promotion and Suicide Prevention in the Workplace: Policy and Response Recommendations to Help Employers Positively Impact Workers and the Work Environment: A White Paper for HR Professionals and Employment Lawyers. United Suicide Survivors International: Denver, CO.

American Foundation *for* Suicide Prevention

UNITED SUICIDE SURVIVORS INTERNATIONAL

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NOTE: This white paper is designed to offer gap-filling solutions to address these policy and strategy problems. It is not designed to be a crisis resource or an awareness-building educational document.

Executive Summary

In the United States, roughly 50,000 people die by suicide each year, most of whom are of working age.[4] According to the Substance Abuse and Mental Health Services Administration (SAMHSA), one in five adult Americans lives with a mental health condition every year.[5] While rates for diagnosed mental health conditions vary by demographic, conditions like anxiety, mood, and substance use disorders are quite common.[6]

Yet few workers will get the support they need to establish healthy levels of well-being. In fact, a systematic review on suicide help-seeking reported that only 40% of adults aged 18 and older sought help for their suicide thoughts or behavior. [7]

Psychologically unsafe workplaces that are not friendly to mental health contribute to the gap between the need for support and help-seeking behavior. The failure of workplaces to address psychological safety negatively impacts employees and often leads to challenges with employee engagement, absenteeism, presenteeism,[8] morale, and safety and error concerns. Of course, the worst outcomes of unaddressed workplace mental health challenges are deaths by suicide, overdoses, and the consequences of addiction.

All of these challenges lead to significant ramifications for the employer and coworkers, including turnover and increased costs. Conversely, proactive investment in mental health promotion and suicide prevention offers the employer a strong ROI (Return on Investment).[9]

Contrary to popular expectation, more than half of people who died by suicide did not have a known mental health condition. Beyond depression, anxiety, and substance use disorders, environmental contributors can also drive suicidal despair. These factors include workplace bullying and discrimination, relationships, physical health issues, and financial, legal, or housing stress. For employers, this means a broad approach to the mobilization of resources is appropriate—more than just a referral to the Employee Assistance Program (EAP).[10]

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4   National Institute of Mental Health. (2019). Suicide. Retrieved May 16, 2019, from https://www.nimh.nih.gov/health/statistics/suicide.shtml

5   SAMHSA (2021). Key Substance Use and Mental Health Indicators in the United States: Results from the 2020 National Survey on Drug Use and Health. Retrieved December 27, 2021, from https://www.samhsa.gov/data/sites/default/files/reports/rpt35325/NSDUHFFRPDFWHTMLFiles2020/2020NSDUHFFR1PDFW102121.pdf

6   American Heart Association. (n.d.) 12-Month Prevalence Estimates for Mental Health Disorders by Category. Retrieved April 16, 2022, from https://ceoroundtable.heart.org/mentalhealth/the-business-case-for-investing-in-mental-health/12-month-prevalence-estimates/

7   Hom, M.A., Stanley I.H., Joiner T.E. (2015). Evaluating factors and interventions that influence help-seeking and mental health service utilization among suicidal individuals: a review of the literature. Clinical Psychology Review, 40:28–39.

8   NOTE: The term "presenteeism" is defined as the lost productivity that occurs when employees are physically present at work but are unable to fully perform and focus on their tasks due to an illness or other medical condition.

9   American Heart Association. (n.d.) Cost of Mental Disorders. Retrieved April 16, 2022, from https://ceoroundtable.heart.org/mentalhealth/the-business-case-for-investing-in-mental-health/cost-of-mental-health-disorders/

10   Centers for Disease Control and Prevention. (2018, July 7). Suicide Rising Across the U.S. U.S. Department of Health and Human Services. https://www.cdc.gov/vitalsigns/suicide/index.html

The focus of this white paper is to help employers recognize and navigate the complex issues of how best to support employees living with mental health conditions and suicidal intensity and to understand the policy and legal precedent surrounding best practices for prevention, intervention, crisis response, and postvention.[11] It is written by practitioners and researchers who represent subject matter expertise from three different perspectives: legal, human resources, and mental health.

Employers are becoming increasingly aware of mental health and suicide concerns in their workforce, yet most have not been prepared on how to respond. Managers and HR professionals are vital gatekeepers for recognizing individuals who are at risk of suicide and aiding those who need help. Many workplaces and professional associations look to human resources and employment lawyers for guidance on prevention, intervention, crisis response; and postvention, yet these professionals are often working under misguided assumptions and outdated information.

The truth is that proactive investment in mental health promotion and suicide prevention is not only the right thing to do, but also the strategy that will result in a positive ROI for the organization and will help mitigate risk for the company.

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11   NOTE: The term "postvention" is defined as the coordinated response and support services offered to people impacted (e.g., family, friends, coworkers, responders) by a suicide death or attempt.

SECTION 1: Common Fears and Concerns and the Silent Spiral

Both employer and employee fears exist in taking on issues related to workplace mental health and suicide prevention, often presenting significant barriers to a collaborative response and positive outcome for all parties.

Common fears and concerns for employers and coworkers include:

- ✔ "If we reach out to a potentially struggling employee, we may end up triggering a legal claim against us."

- ✔ "Employees who request accommodations take up a lot of administrative and managerial time."

- ✔ "If we impose discipline on an employee we are accommodating, we may get into legal trouble."

- ✔ "If we extend accommodations to one employee, we'll have to offer the same perks to everyone else."

- ✔ "Employees in crisis often need extended leaves of absence, resulting in burdensome work disruption."

- ✔ "Senior leadership doesn't find it relevant to the company's bottom line."

- ✔ "Our HR team and managers have not been adequately trained to handle this issue."

- ✔ "Providing training or support will be a huge expense."

- ✔ "We are not sure how to start the conversation about suicide prevention."

- ✔ "It is too intensive for workplaces to take on. This is not our job."

- ✔ "We may say the wrong thing and make matters worse."

- ✔ "We are unsure if mental health conditions and suicidal thoughts may be related to workplace violence."

- ✔ "If we offer peer support and training, we may expose the organization to liability and breach confidentiality."

In one large-scale survey with a construction company, 1,200 managers rated their fears when it came to suicide prevention in the workplace. Here is what they said:[12]

MANAGERS' FEARS
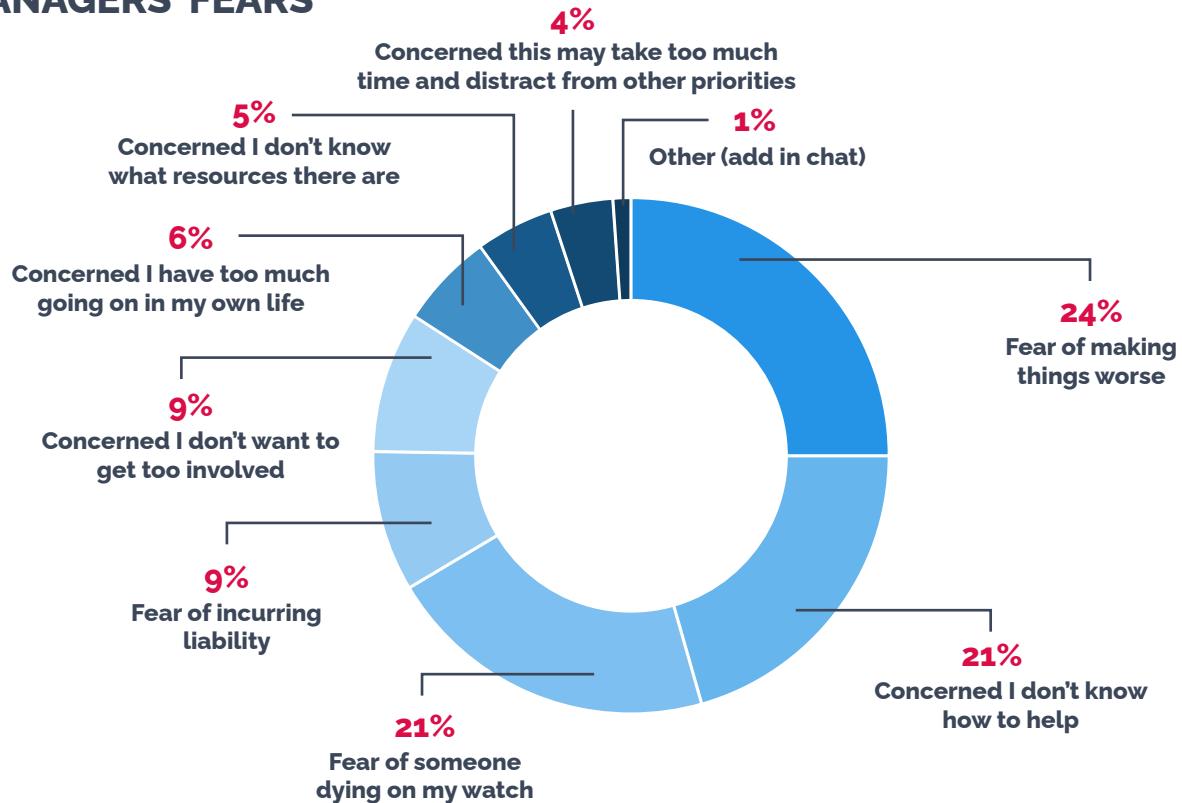
4%
Concerned this may take too much time and distract from other priorities

5%
Concerned I don't know what resources there are

1%
Other (add in chat)

6%
Concerned I have too much going on in my own life

24%
Fear of making things worse

9%
Concerned I don't want to get too involved

9%
Fear of incurring liability

21%
Concerned I don't know how to help

21%
Fear of someone dying on my watch

Common employee fears in disclosing mental health, addiction, or suicide intensity include:

✓ "If I disclose my mental health situation at work, I will receive no support and may be fired or ostracized."

✓ "If I disclose a mental health condition, my privacy will be violated and people will treat me differently."

✓ "If I miss time from work because I need to get mental health treatment, I may lose out on promotional, advancement, or continuing education opportunities."

✓ "If I disclose suicidal thoughts, someone may call first responders and I will be escorted out of my workplace in handcuffs and held involuntarily in a psych ward."

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12   Spencer-Thomas (2021). Advanced Skills for Managers Training: Evaluation Briefing.

Common employee fears in disclosing mental health, addiction, or suicide intensity include:

✓ "If I disclose suicidal thoughts, people will be afraid of me and may be concerned I might do something dangerous."

✓ "If I let people know I am struggling with my mental health, I may be seen as untrustworthy, weak, or a poor team player."

✓ "I don't want others to think I'm unstable or that I can't keep pace with the workload. I need this job to support myself and my family."

✓ "I am afraid I will lose my security clearance."

✓ "I don't want to be deemed 'unfit for duty.'"

✓ "I don't trust the employer's mental health resources."

In summary, employees don't confide in their employer and don't have a trustworthy mechanism with which to confide in employers.

The crux of this white paper is summarized by the juxtaposition of these two illustrations:

Traditional Workplace Cycle
The Silent Spiral: High Costs for All, Nobody Wins

Prevailing Approach to Mental Health Issues at Work Increases Cost & Risk

TURNOVER, LITIGATION HIGH COSTS FOR ALL

Accommodations limited, health care costs higher, disability claim

Disclosure, ADA, FMLA

MH Crisis ✖

Absenteeism, presenteeism, manager frustrated; employee isolated

More pressure, performance worsens, disclosure, delay

Employee does not seek treatment

Employee condition and performance decline

Manager sees a performance issue, not a health issue; has no idea how to help

Manager uses performance management system, avoids mental health condition

c. 2017-2021 WorkSmart Partners

In the first illustration, we see what happens when the level of psychological safety is low. Employees do not reach out for fear of punishment or humiliation and their mental health conditions often worsen. Poor mental health often reveals itself in a performance decline as unwell employees experience fatigue, distraction, conflict, absenteeism or presenteeism, and other consequences. If managers see these behaviors as just inferior performance, they are likely to only apply a "performance improvement plan." This plan often involves what employees experience as micromanagement and second-guessing. The pressure on an already compromised employee increases, and—more importantly—the relationship with the supervisor becomes strained. The confluence of these factors can result in a mental health emergency. Because of the rift in the relationship between the manager or HR and the employee, the options for accommodations are limited and turnover or litigation may result because employees feel they have been treated unfairly.

Moving to a Psychologically Safer Workplace

Culture of Total Wellness, Behavioral Health Strategy
Connect and Deploy Resources Early

NO SEPARATION NO LITIGATION

Culture is strengthened

Trust, relationship are strengthened

Employee pursues treatment; performance, productivity OK

Interactive process is proactive, collaborative

Accommodation options are robust

Engagement: employees knows how and where to get help

Cultural Context: connection with supervisor strong; resources deployed quickly

Frontline Manager: Sees a potential emotional or mental health issue. "You don't seem like yourself. How can I help and support you?"

c. 2017-2021 WorkSmartPartners

By contrast, an organization that has a strong, psychologically safe climate modifies this spiral at every turn. From the beginning, employees take more initiative in an environment where they trust they will be supported and feel confident reaching out and navigating the resources. Should their mental health condition worsen to the point where it impacts performance, managers understand the wider context for this decline and leverage their relationship to engage the employee with effective assistance. Because the relationship is collaborative and compassionate, accommodations are robust and the interactive process is responsive. Employees feel encouraged that taking steps to improve their mental health will result in a positive outcome. The organization is less likely to experience separation or litigation.

SECTION 2: Addressing Employers' Biggest Concerns – A View from the Legal, Human Resources (HR), and Mental Health Lenses

In this section we address some of the top concerns and fears HR and employment lawyers have when facing employees with mental health or suicidal challenges and offer action steps to take. While not stated as a fear or concern, one of the best ways employers can uphold a psychologically healthy and safe workforce is by driving a caring culture and modeling mentally healthy behaviors. Managers and HR should also be trained to support and model use of their Employee Assistance Program (EAP) and other support services. They can model the use of teletherapy and peer support groups, show how to utilize sick leave for "mental health days," and demonstrate self-care at work. When managers and HR lay this groundwork for integrating mental health maintenance into everyday well-being, it makes accommodation conversations smoother. Prioritizing well-being is shown as a cultural norm, not a reaction to something gone awry. Many additional actionable strategies are summarized in a CEO Roundtable report[13] by the American Heart Association.

This report was generated by workplace leaders and subject matter experts with suggestions for workplaces, regardless of size and resources.

Here are other approaches for addressing the top sources of employer concern or fears.

Fear #1: If we reach out to a struggling employee, we'll trigger an ADA[14] or FMLA[15] claim.

    <u>Proactive Strategizing.</u> With roughly 20% of the working population managing a mental health condition and turnover costs averaging 150% of annual salary, using a strategic human capital management approach to employee crises should be top of mind.

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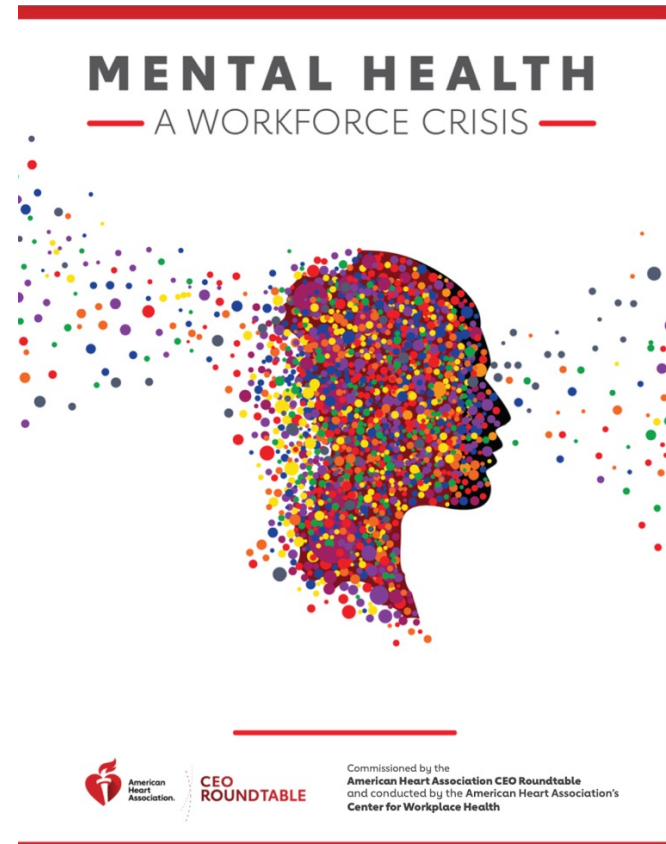
13   American Heart Association. (n.d.). Actionable Strategies for Employers. Retrieved April 16, 2022, from https://ceoroundtable.heart.org/mentalhealth/introduction/

14   Americans With Disabilities Act of 1990, 42 U.S.C. §12101 et seq. (1990). https://www.ada.gov/pubs/adastatute08.htm

15   Family and Medical Leave Act of 1993, 29 U.S.C. §2601–2654 (2006). https://www.dol.gov/agencies/whd/fmla

Untreated depression is the most expensive of all health conditions for employers, estimated to be at least $210.5 billion per year (a 21.5% increase from $173.2 billion per year in 2005 to $210.5 billion in 2010). [16]

The largest source of this cost is from "presenteeism": the lost productivity incurred when employees are not fully functioning on the job. In other words, they are physically at work but unable to do the work due to mental or emotional challenges. The average depressed worker loses the equivalent of 32 incremental workdays every year due to presenteeism alone. Of course, presenteeism doesn't just impact the worker experiencing it—it also ripples through the team and all those connected to the workflow process.

> Encouraging early help-seeking, investing in resources to support employees before and during mental health challenges, and working to intentionally maintain a strong connection are top strategies for maintaining productivity and retention, reducing turnover, and minimizing litigation risk.

Policy and Practice Pro Tip
Establish a Caring Culture.

- Develop strong mental health literacy among workers.

- Offer regular training on mental health topics to all, with more advanced skill trainings for managers.

- Have leaders model mental health self-care.

- Recognize and reward compassion.

- Make mental health resources accessible. Explicitly state that paid time off (PTO) is available for mental health care.

- Address psychosocial hazards.

Employers help the organization get ahead of these issues when they encourage employees to seek help early on, invest in resources that will support employees in turmoil, and assure employees that taking advantage of these resources is both healthy and safe. Leaders must work to shift the culture so that employees ultimately trust that the resources are there for their benefit and the employer sincerely wants this to be a better place to work.

Thus, it is a best practice from a legal and HR perspective to offer early support to struggling employees, even if it may result in disclosure of a protected condition under the ADA or FMLA. This climate of psychological safety will improve productivity, reduce turnover, and—with proper training—minimize the risk of litigation. Elevating a resilience perspective into crisis response and employee support is crucial. See sidebar for resilience principles.

16　　The Center for Workplace Mental Health. (n.d.). Quantifying the Cost of Depression. Retrieved on December 27, 2021, from https://www.workplacementalhealth.org/mental-health-topics/depression/quantifying-the-cost-of-depression

Despite the clear benefits to the employees and employer, HR and legal staff advise employers not to do so for fear of triggering the laws' protections. Unfortunately, this hesitation is harmful to the employee in need and, ultimately, the employer as well. Early support can form the basis for a faster and more successful recovery while strengthening the employee–employer relationship. Maintaining this relationship is the key to risk management. Below are essential points to consider when getting ready to implement policy and actions to support employees.

Know Worker Rights. In general, it is a violation of the ADA to ask an employee whether they have any kind of health condition. However, there are exceptions, such as when there is a direct threat to self or others, or when it is objectively clear the employee is unable to perform the essential functions of their position. In such cases, legal counsel should be consulted to make and implement a plan of action.

> **Policy and Practice Pro Tip**
> Using Resilience Principles
>
> When an employee is in a crisis, employers should focus their efforts on building resiliency through:
>
> **1.** Maximizing connection and strong relationships.
>
> **2.** Normalizing and encouraging help-seeking as a smart move, not a sign of weakness.
>
> **3.** Avoiding catastrophizing and reminding them that we all face and overcome hard times; provide hope.

Know Your Mental Health Resources. Many employers are not aware of the mental health resources available to them. If they have an Employee Assistance Program (EAP), they are not clear on what is offered, how often it is used, or whether or not employees are benefitting from the services. Other employers do not have an EAP nor a basic understanding of how to evaluate community or online resources. Those organizations who have an EAP sometimes find that employees refuse to seek out EAP services because it is an employer-sponsored benefit and they doubt its confidentiality. For these reasons, conducting a mental health resource audit for providers in your area is a key step (see Appendix A) in deepening the organizations understanding of available resources and developing a trust-enhancing tool for employees demonstrating what to expect.

Demonstrate Genuine Support. If employees do not believe that leadership takes an authentic and active interest in the health and mental well-being of its workforce, little attention will be paid to outreach, training, or other efforts. Lack of support and transparency can generate poor morale and low productivity, as well as create or exacerbate apathy and workplace culture dysfunction. Standalone web-based training often fails to shift the perception. Consider live and interactive training as part of an ongoing initiative to shift perception and foster trust. Treating employees experiencing mental health challenges or psychological emergencies with dignity and respect and providing ample support is also a profoundly powerful retention tool. Coworkers notice how their peers are treated during hard times. And, once the crisis is over, employees become walking ambassadors for the employer's culture.

By contrast, lack of support can erode trust between employee and employer. Once this trust is breached, the likelihood of litigation increases significantly.

Underscore and Uphold Confidentiality. Employers need to earn the trust of employees during these sensitive situations, and at the heart of that trust is a sense of "Can I count on you to have my interests at heart?" Psychological safety is essential, and employees need to believe that their dignity and privacy will be protected.

Sample approach: "I understand you might not want to disclose to me all that you are experiencing, and I respect that boundary. If you do choose to share with me, I want to let you know your privacy is important to me and your disclosure is safe with me. I would only need to bring others into the circle of support if you let me know you or others are in imminent danger, then—like other types of emergencies—we would need to get additional help. Do you have any questions or concerns about your privacy?"

Regardless of what the conversation reveals, employees need to be reassured that confidentiality will be respected. It can be helpful to inform the employee that EAP and healthcare utilization records are only shared with management under rare circumstances when there are safety or regulatory concerns that need to be legally addressed by the employer or if the employee signs a "Release of Information" form, indicating exactly what information they want share, with whom, and for what time frame. Health record files are maintained separately from personnel files, as required by the ADA. For public employees, health record files are not releasable under the open records statutes.

Some employees appear extremely comfortable disclosing their mental health conditions to others; however, this does not modify the duty to maintain confidentiality even when private health information is shared.

Policy and Practice Pro Tip
Train HR and Supervisors

Train HR and supervisors in the broad range of small modifications to help employees perform well through a crisis.

Make Immediate, Small Changes Prior to ADA Disclosure. If a manager believes that an employee is having difficulty performing the essential functions of the job, the manager needs to reach out to HR or the legal team promptly. Consider proactively proposing a reasonable accommodation so that the employee can perform the essential functions of the job. Even a minor modification can go a long way in reducing stress, enabling the employee to experience a sense of accomplishment and to feel that the employer cares.

Then, explore several informal options, such as:

• If concentration is an issue, offer to schedule uninterrupted work time, reduce distractions, and provide memory aids such as organizers, task lists, or reminders.

• If insomnia and chronic tardiness is an issue, offer a flexible start and stop time, if feasible.

• If being overwhelmed is an issue, offer a job coach or buddy and schedule periodic breaks for stress release and exercise.

NOTE: For a longer list of modifications, see Appendix C.

For all of the abovementioned topics, offer a formal or informal referral to the EAP so that the employee can benefit from a comprehensive assessment by a trained mental health professional and gain access to additional supports that might be needed to help with any underlying causes or exacerbating factors.

> **Sample approach:**
> After conferring with HR, the supervisor can state, "Let's have a conversation about how we can modify your work situation to help you continue to get your work done. Is there something we can help you with to be more successful in your position?"

All of these adjustments can be made without modifying deadlines or performance expectations—they should be viewed as just another tool in the managers' toolbox. We strongly recommend that supervisors schedule a follow-up meeting to review performance after an appropriate period of time has passed to allow an accommodation's progress to be measured.

Early Check-In and Bridge to Resources. Train supervisors to check in with empathy while avoiding any mention of or inquiry into any specific mental health conditions. Also, make it clear when the supervisor can approach an employee directly and when the supervisor needs to review the issue with HR prior to reaching out to the employee. Either way, the supervisor cannot simply ignore the situation.

> **Sample approach:**
> "We all go through tough times; I've certainly been through several in my life. You haven't seemed like yourself lately, and I want you to know I'm here for you. Sometimes when people don't seem like themselves, something else is going on. Please let me know how I can best support you and help you to get your work done. You don't need to tell me anything personal, of course. But I hope we can have open, ongoing dialogue about how to help you continue to thrive here. I can also share available resources with you if you are interested. For instance, we have an Employee Assistance Program that is a benefit to you. If you are open to it, we can reach out to them together now to explore what the next steps might be."

Root Cause Analysis. As previously noted, only about 50% of people who died by suicide had a known mental health condition. Often, other environmental factors exacerbate and sometimes even cause the problem. These factors include harassment, discrimination, bullying, or a toxic supervisory relationship. Employers should always assess the work environment and address internal sources of conflict or poor job design elements. Understanding the root cause of the distress may mean the intervention needs to happen at the organizational level rather than at the individual level. Employers can send "troubled workers" to counselors, but if the source of their distress is significant job strain and other workplace psychosocial hazards, the referral to therapy will not solve the matter.

Additionally, many employers do not realize that EAP services can also address several of the non-mental health drivers of suicidal intensity, such as legal and financial problems. Some EAPs offer robust services including financial coaching and legal support to employees, often covering family members.

Collaboration. Given the low rate of EAP utilization (3–5% on average[17]), most employees are probably unaware that they have access to these potential life supports. During times of employee hardship, HR or supervisors should sit with the employee, review the EAP services available, and make a referral by collaboratively activating the resource in the moment, whenever possible. That first step in help-seeking is often the most difficult, so taking it together builds the momentum. Offering choices during the referral can help employees feel a sense of ownership in the process.

Policy and Practice Pro Tip
Model Resource Engagement

Supervisors can instantly foster a culture of well-being by informing their work teams that they use it themselves for this purpose.

When managers can say, "Of course I know how the EAP works, I've benefited from it myself," they effectively eliminate most barriers and build great confidence and credibility in the process.

Of course, these communications need to be honest. If it is later found out that the supervisor lied about their service utilization, it does more harm to the trust between them.

Employers should train employees on the scope of benefits offered. It is not enough to simply include a couple of sentences during open enrollment. An effective EAP orientation training details all of the benefits, reviews the confidentiality process, encourages employee dialogue and questions, and demonstrates how offering the EAP makes the organization a better place to work. Usually, representatives from the EAP can speak to the confidentiality process.

Over time, EAP representatives can develop relationships with managers. Collaboratively, they can provide training about how to use the EAP as a referral resource and best practices to use when referring employees to services and supports.

Sample approach:
"I know making that first call to get support can feel like you are trying to lift a 500-pound phone. How do you feel about us getting it started together? I could start the call and step out of the room when you want me to. Or you can start the call. What options work best for you?"

Following up after a conversation and/or referral to the EAP is often overlooked yet critical to ensure that the referral process works and that the employee is getting the support they need. Sometimes, providers are nonresponsive or the counselor does not seem like a good fit.

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17   NOTE: Utilization rates increase when an employer has an embedded and more comprehensive EAP program.

Employers should become aware sooner rather than later when there are issues so they can help troubleshoot.

Consider a Medical Leave. Many mental health challenges are resolved when situations in the environment shift through accommodations, peer support, and outpatient counseling. In more serious situations, however, a leave of absence should be considered to give the employee time to get appropriate treatment and seek any longer-term help as needed.

This can be treated as a reasonable accommodation or, if the employer and employee are covered under the Family and Medical Leave Act, FMLA leave.[18] If covered, an employee is entitled to request up to twelve weeks of leave over a 52-week period. This does not have to be taken at one time. The employee would have to have a "serious health condition" as defined by the FMLA. When the employee eventually returns from leave, they are entitled to return to the same or a comparable position to the one held prior to FMLA leave. Some of this leave may be unpaid.

Fear #2: If the employee makes a disclosure of a mental health condition and requests an accommodation, it will become a time-consuming, burdensome process.

Here are some ways to shift this perception and see the intervention as an opportunity:
Reframe the Situation. If and when an employee does disclose a diagnosed mental health condition, this should be viewed as an opportunity, not a potential legal threat. It's usually a demonstration of trust and commitment to get better, opening up accommodation options that were previously unavailable because the employee may have been hiding their condition.

Engage HR and Legal. Should the ADA process officially be initiated, HR and legal should be consulted to oversee the formal accommodation process, which is also known as the interactive process. Supervisors should be trained to seek assistance and not try to navigate these issues on their own. Importantly, however, supervisors know what the employee and team can handle during crises and therefore should be included in the interactive process.

Act Quickly to Make Accommodations. Too often, employers are unprepared for the interactive process and make poor choices. It is important to act quickly and properly. Undue delay directly impairs the ability of the employee to perform and could cause harm to an entire department. Further, it erodes trust between employee and employer. The loss of trust dramatically increases the potential for litigation and separation of employment.

Commence Collaborative Process. The formal interactive process starts by clarifying the essential functions of the employee's position. From there, the focus should be on the specific request for reasonable accommodations and the impairments the employee needs help overcoming in order to perform the essential functions of the job. The diagnosis does not drive this conversation; the specific impairment and the requested reasonable accommodations do. We have included a list of possible accommodations for mental health conditions in Appendix C. Additional, superb resources are available at the Job Accommodation Network.[19] For this process to work well, a current and detailed job description is needed.

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18   U.S. Department of Labor Wage and Hour Div., The Employer's Guide to The Family and Medical Leave Act. To qualify for FMLA leave, the employee must have been employed for 12 months, worked 1,250 hours in the past 12 months, and must work at a location with at least 50 employees within 75 miles of the worksite.
19   Job Accommodations Network. (n.d.) About Mental Health Conditions. Retrieved on December 27, 2021, from https://askjan.org/disabilities/Mental-Health-Conditions.cfm

It is also critical that HR and higher-level managers support the use of innovative reasonable accommodations that the employee and the supervisor believe are workable. This practical, on-the-ground perspective is often lost in what can become a bureaucratic top-down process. Often, the higher-level managers may be inclined to veto an idea as setting a "dangerous precedent." This paper argues that keeping the employee in the position and performing are paramount, and if innovative solutions fulfill this goal without negatively impacting others, they should be considered.

Leverage Quality EAPs. Higher quality EAPs tend to administer more comprehensive services, provide management training, and offer workplace consulting for identifying or creating effective psychiatric ADA accommodations. EAPs can partner with HR to empower managers as they work through the process of supporting the employee, ensuring the accommodation is effective and providing empathy to the employee as they continue to work. EAPs also provide coaching to managers in how to talk to coworkers who may have questions about struggling employees. These EAPs are worth the investment because their expertise mitigates risk while maximizing human capital outcomes.

Accommodation Agreements. The interactive process should be documented in written accommodation agreements. This documentation includes the dates of meetings, requests for accommodations made by the employee, the basis for the requests, and the employer's response. If an agreement is reached, the reasonable accommodations should be documented in writing so there is no misunderstanding or barriers to compliance. Moreover, if a different supervisor works with the employee, that supervisor needs to know about the accommodation.

For example, let's say supervisor Jose is on vacation and Samantha manages Robert. If Samantha is unaware that Robert is allowed to come to work two hours later as a reasonable accommodation, she might discipline Robert for coming to work late. Documentation therefore serves to protect both the employee and the employer. The employee should be given a copy of the accommodation agreement with another copy kept in confidential employee medical records, separate from the employee personnel file. Accommodations are commonly modified over time as the employee's condition changes.

Overcoming obstacles. Common obstacles in these cases include the barriers on the following list. We have made some suggestions on how to overcome them.

Common Problems	Resolution
No HIPAA release	Get HIPAA release early
Delay or poor documentation from health care provider (HCP)	Give job description to HCP and discuss specific impairments and how to overcome them using a list of accommodations. Avoid back-and-forth documentation, which is time-consuming and unproductive. Once agreement is reached, HCP should memorialize in writing.
One side fails to participate	Oversee engagement by all parties in an interactive process. Assure both sides offer ideas and try options for successful accommodations.
One side fails to participate	Coach employee to keep and strengthen these relationships and to use EAP and other resources such as work/life and leave options when indicated. Coach supervisor on maintaining trust and support with employees and encourage use of EAP and other resources.

Fear #3: What if the employee is performing poorly and we need to impose disciplinary action—will this violate the ADA?

Sometimes, lingering concerns regarding performance complicate an employee's requested accommodation or FMLA leave. An employer can discipline an employee for inadequate performance; however, it would be prudent to proceed cautiously.

    <u>Explore Drivers of Distress and Assume Positive Intent.</u> Rarely do employees wake up one day and decide, "Today, I will aim to be the worst employee ever!" Almost always, there is an underlying reason for unsatisfactory performance, especially when work performance observably declines. Approach performance management with this in mind. Instead of moving directly to disciplinary action, establish a collaborative relationship by examining root causes. Consider augmenting a standard "performance improvement plan" by getting input from the employee as well as the supervisor.

Sample approach:

"With input from HR and possibly legal counsel, a recommended approach might be, "We've noticed some concerning changes lately in your performance, such as [LIST SPECIFIC BEHAVIORS, TIMES, & PLACES]. You don't seem like yourself lately. Sometimes, when people are not performing like they usually do, there are other issues going on. While you are not obligated to tell me what distress you might be facing, I want to let you know that if you are feeling overwhelmed, I am here to support you. Your contributions matter to many of us, and we are here to help you get back on your feet."

In other situations, an employee may already be living with an addiction, substance use/misuse challenge, or a mental health condition that is becoming more severe. As their employer, you are not responsible for "fixing" them; however, by having this conversation with them, you show compassion. Your care may not be the tipping point of change for the employee, but, if done well, your conversation might just plant a seed for them to seek help in the future even if they are not ready to act at the time of your discussion.

    <u>Revisit Accommodations.</u> If an employee who has been given reasonable accommodations underperforms, the supervisor needs to clearly document the poor performance. This lack of improvement can be treated as a performance issue. Best practice at this juncture would be to hold a meeting with the employee to determine the reason for the continued poor performance and to explore whether a different reasonable accommodation will enable the employee to perform the essential functions of the job. Should the inadequate performance continue without correction, the situation would turn into disciplinary action. Many employers are fearful of taking disciplinary action of any kind while an employee is out on leave or under medical care, fearing that the employee may file a discrimination, retaliation, or harassment claim. However, there are situations in which it is legal and appropriate to take such action. Legal advice is essential prior to determining next steps to take at this point.

Fear #4: If we make accommodations, we'll have to change the employee's job duties.

There is a common misperception among managers and some HR professionals that the ADA imposes a duty on employers to dramatically modify the job duties of employees with protected conditions. The ADA imposes no such duty and courts consistently side with employers on this issue.

🔍 **Case Highlight:**

After a jury verdict in favor of a pharmacist who feared needles and requested the removal of that function as an accommodation, a court ruled that, as a matter of law, when a job description requires pharmacists to give shots, it's an essential function of the position and the ADA does not require removal of that function as an accommodation. Stevens v Rite Aid Corp., 851 F.3d 224 (2nd Cir. 2017).

This case focuses on the element of what is an essential function. The doctor said Stevens is "needle phobic and cannot administer immunization by injection." In evaluating whether a particular job function is "essential," courts consider "the employer's judgment, written job descriptions, the amount of time spent on the job performing the function, the mention of the function in a collective bargaining agreement, the work experience of past employees in the position, and the work experience of current employees in similar positions." McMillan v. City of New York, 711 F.3d 120, 126 (2d Cir. 2013) (citing Stone v. City of Mount Vernon, 118 F.3d 92, 97 (2d Cir. 1997)). Courts must conduct "a fact-specific inquiry into both the employer's description of a job and how the job is actually performed in practice." McMillan, 711 F.3d at 126. After viewing the evidence most favorable to Stevens, they concluded he was unable to perform an essential function of his job as a pharmacist. This was the only reasonable conclusion that could be drawn, as Stevens presented no evidence of a reasonable accommodation that would have allowed him to perform immunizations. At the time of his dismissal, he was not found to have been "qualified to perform the essential functions of his job, with or without reasonable accommodation."

Employees seeking protection under the ADA must demonstrate they are able to perform the essential functions of their position, with (or without) reasonable accommodations. Once a request for a reasonable accommodation[20] is made, all discussions should be focused on helping the employee perform those essential functions, not taking those functions away.

Employers should also draft all job descriptions to clearly state the essential functions of the job. Given the ever-changing state of the workplace, it is critical that employers work to update job descriptions regularly so that when performance is being reviewed, employee work expectations are clear. Job descriptions should be reviewed with the employee on an annual basis at minimum, or when there are significant changes.

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[20]   U.S. Government Publishing Office. (2009). EQUAL OPPORTUNITY FOR INDIVIDUALS WITH DISABILITIES. https://www.govinfo.gov/content/pkg/USCODE-2009-title42/html/USCODE-2009-title42-chap126.htm

Fear #5: If I grant this accommodation now, I'll have to grant it to everyone else later.

Another common fear of employers is setting precedents that can later be used against the employer—along the lines of, "no good deed goes unpunished." This concern is best managed through transparent communication to work teams. The overriding theme for getting this issue right is trust.

Sample approach:

"As your employer, we will confidentially provide reasonable accommodations to people on this work team as needed so that you can thrive in your job despite challenges. We make these decisions based on the individual needs and job role of each person. In other words, we meet you where you are. This means not everyone will get the same accommodations. Under the ADA, we will not share these decisions with others and will maintain confidentiality. We expect everyone to look out for one another on this team with the knowledge that when it's your turn to need help, you'll get it too."

Sometimes, the reasonable accommodations cannot be "confidentially" applied depending on what the accommodation is. For example, if the employer makes an accommodation for a therapy dog—while they don't disclose the exact reasons—they can't hide the dog.

Telework (remote work). One reasonable accommodation is remote work. In certain situations, allowing an employee to work from home can enable that employee to perform the essential functions of the job.

The keys for employers are to:

- Draft job descriptions to clarify what, if any, job duties must be performed in the workplace

- Craft telework policies that establish specific, job-related criteria for teleworking

- Enforce those policies consistently

Case Highlight:

Request for unscheduled, unpredictable telework four days per week with one or two days per week of consistent, schedule telework was held to be an unreasonable accommodation. Court sought to avoid plaintiff's use of flexible work practice as a sword against the employer. EEOC v. Ford Motor Co., 782 F.3d 753 (6th Cir. 2015).

🔍 Case Highlight:

The main question in this case was whether regular and predictable on-site job attendance was an essential function (and a prerequisite to perform other essential functions) of Harris's resale buyer job. The court held it was. That general rule—that regularly attending work on-site is essential to many jobs, especially interactive ones—aligns with the text of the ADA. In most jobs, especially those involving teamwork and a prominent level of interaction, the employer will require regular and predictable on-site attendance from all employees (as evidenced by its words, policies, and practices). An employer may refuse a telecommuting request when, among other things, the job requires "face-to-face interaction and coordination of work with other employees," "in-person interaction with outside colleagues, clients, or customers," and "immediate access to documents or other information located only in the workplace."[21] [22] That is because, as the EEOC elsewhere explains, "the inquiry into essential functions is not intended to second guess an employer's business judgment with regard to production standards." 29 C.F.R. § Pt. 1630(n), App. at 395. Nor is it meant "to require employers to lower such standards." Id.

Flexible Work Schedules. The language of the ADA defines reasonable accommodations to include "job restructuring" and "part-time or modified work schedules."[23] Cases involving employers failing to offer a flexible work schedule are increasingly being sent to trial, meaning that it is far less expensive for employers to simply try them.[24] The average price tag of litigating an ADA case through discovery and motions phases is $300,000; this figure does not include trial.

Fear #6: An employee in a mental health crisis will need a lengthy leave of absence.

There are several complicating factors when considering a request for a lengthy leave of absence. For starters, an employer should consider what is provided in the employee manual and whether there is short-term or long-term disability. In addition, the leave may be caused by a work-related injury, and there may be protection offered by workers' compensation. Lastly, there may be union rights spelled out in a collective bargaining agreement.

The employer then needs to consider whether a request for an extended leave of absence would be reasonable. The employer is faced with the dilemma of either leaving a position unfilled or using a temporary employee to handle the work until the employee on leave is able to return. Dependent upon the nature of the work and the position, that may be an unreasonable burden to place on an employee.

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21   EEOC. (2005, October 27). Work at Home/Telework as a Reasonable Accommodation. http://www.eeoc.gov/facts/telework.html
22   EEOC. (2011, January 19). Employer Best Practices for Workers with Caregiving Responsibilities. http://www.eeoc.gov/policy/docs/caregiver-best-practices.html: Explains that "impromptu team meetings" are a valid factor for denying an employee the privilege to work in a flexible work schedule.
23   42 U.S.C. § 12111(9)(B)
24   Solomon v. Vilsack, 763 F.3d 1 (D.C. Cir. 2014): Depressed budget analyst who met all deadlines and was strong performer on flextime, entitled to trial on question of whether it was an essential function of position to work a regular schedule in the office. Court rejected "unthinking" assumptions about the workplace and required a "penetrating factual analysis" of how the specific job "is actually performed in practice." Flexible work arrangements as a reasonable accommodation will go to trial more often.

This issue can be viewed from another perspective involving employee well-being and retention, work team burden, morale, and legal obligation. In many instances, extended leave may NOT be in the best interest for someone experiencing a mental health condition. Connectedness with co-workers and the sense of purpose of going to work can be essential parts of recovery. For many needing medical leave, there is a psychological benefit to returning to work on a light duty or modified duty basis. Disability insurance data shows the longer an employee is absent, the lower the chances of returning to work—ever. [25]

Employees experiencing a mental health crisis (who are not in residential treatment) benefit significantly from maintaining a connection to the workplace. Therefore, whenever possible, part-time or modified work is far preferable to a lengthy leave of absence from the employee well-being perspective. Employers can work with their EAP or disability insurance provider to request employee check-ins that demonstrate to the employee that, while they are out on leave, they are not forgotten.

Employers often oppose lengthy leaves of absence due to the burden imposed on team members, its diminution of morale and employee engagement, and its interference with organization deadlines. Ultimately, if an employee is out on extended leave and the position is held open, the test should be whether this creates an unreasonable burden on the employer.

The courts typically review requests for extended leave as a reasonable accommodation on a case-by-case basis. Generally, the longer the requested leave the less likely the courts are to treat it as reasonable. Nevertheless, the employer does have the burden to demonstrate that the leave would be unreasonable and is well-advised to suggest an alternative that they believe would be reasonable.

Policy and Practice Pro Tip
Undue Hardship Analysis

Undue hardship is a "significant difficulty or expense in light of the nature and cost of the accommodation, the resources of the entity, and the type of operation of the entity." Undue hardships include those imposed on human resources, e.g., work team members.

An employer does not have to provide a reasonable accommodation that would cause an undue hardship to the employer. Generalized conclusions will not suffice to support a claim of undue hardship. Instead, undue hardship must be based on an individualized assessment of current circumstances that show that a specific reasonable accommodation would cause significant difficulty or expense.

A determination of undue hardship should be based on several factors, including the:

- ✔ Nature and cost of the needed accommodation
- ✔ Overall financial resources of the facility making the accommodation
- ✔ Number of persons employed at the facility
- ✔ Effect on facility expenses and resources
- ✔ Overall financial resources, size, number of employees, and type and location of facilities of the employer (if the facility involved in the accommodation is part of a larger entity)
- ✔ Type of employer operation, including the structure and functions of the workforce, the geographic separateness, and the administrative or fiscal relationship of the facility involved in making the accommodation
- ✔ Impact of the accommodation on facility operations

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25   National Conference of State Legislators. (2019). Workers' Compensation: Keeping Injured and Ill Workers in the Workforce. https://www.ncsl.org/research/labor-and-employment/workers-compensation-report.aspx

Employers have no duty to provide an accommodation if it poses an undue hardship—significant difficulty or expense in light of the nature and cost of the accommodation, the resources of the employer, and the type of operation of the employer.

Courts generally impose two limitations on proposed leaves of absence:

- The employee must provide an estimated date to resume their essential duties; and

- The employee must be able to return to work in the "near future," which has been construed to be less than six months.[26]

Fear #7: What do we do if an employee is having a mental health crisis but has not come forward for support? Can we legally require a fitness-for-duty or psychological evaluation?

Depending on the circumstances, it may also be permissible to require the employee to undergo a fitness-for-duty examination conducted by a doctor hired by the organization. Employers can request this examination if it is "job related and consistent with business necessity."[27] The employer must have a reasonable belief based on objective evidence that a medical condition is interfering with the employee's ability to perform the essential functions of their job or that the employee poses a direct threat to themself or others.[28]

Employers may terminate the employment of those who refuse to undergo a psychiatric or fitness-for-duty evaluation.[29] Before using any of these options, it is important to consult with legal counsel. This process should also be documented. Lastly, take steps to prevent workplace gossip, as gossip will make it exceedingly difficult for the employee to return to work.

Fear #8: What if a substance use disorder or other addictive behavior is an issue—is this a protected condition under the ADA?

This is a complex area of law implicating state laws as well as federal ADA case law and regulations; therefore, legal counsel should always be consulted. That said, there are a few points of general guidance. First, a substance use disorder can often meet the requirement of a covered disability, but it is a case specific determination (e.g., they cannot have shown up to work drunk). Second, to be entitled to the protection of the ADA, the employee's addictive behavior must not have interfered with job performance. Third, if an employee shows up for work under the influence of illicit drugs or alcohol, discipline can be imposed. And fourth, if an employee whose addictive behavior has not interfered with job performance requests leave to enter into treatment, leave will generally be considered a reasonable accommodation. However, the undue hardship analysis will still apply.

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26   See Robert v. Board of County Com'rs of Brown County, Kansas, 691 F.3d 1211, 1218 (10th Cir. 2012). Jurisdictions differ on the specifics

27   42 U.S.C. § 12112(d)(4)(A)

28   Chevron USA v. Echazabal, 536 U.S. 73, 78 (2002); Mayo v. PCC Structurals, Inc., 795 F.3d 941 (9th Cir. 2015); Cotton v. Indianapolis Fire Dept, 578 F3d 559, 565 (7th Cir. 2009): Firefighter properly subjected to psychological evaluation after acting withdrawn and hostile towards coworkers.

29   Pena v. City of Flushing, 651 Fed. Appx. 415 (6th Cir. 2016).

Drug Testing. Drug testing is another complex area of law and employer policy that differs by state. With the widespread passage of recreational marijuana laws, a nuanced decision will need to be made by employers on which drugs to include in their prohibitions and testing. The Colorado Supreme Court, for example, has approved termination of employment for testing positive on a drug test for marijuana use, notwithstanding its legality in that state. [30]

Second Chance Agreements. Second chance agreements have commonly been used to provide employees an opportunity to seek rehabilitation and return to work following a positive drug or alcohol screening. They can be modified to be a creative alternative to termination in the case of an employee whose mental health is impacting their attendance, performance, or conduct. The second chance agreement is a formal agreement that maintains proper employer–employee boundaries and sets clear expectations to make sure the employer is not set up to be abused.

🔍 Case Study Highlight

Second Chance Agreement

A long-term employee was having performance issues, including disruptive anger on the job site and absenteeism. Instead of firing him, the HR Director asked, "Is something going on?" to which the employee responded, "Yes, my personal life is a wreck. My relationship is terrible. My kids are in a bad place."

The HR Director replied, "It's not constructive for you to be here right now. You're not being a positive contributor to the team. You're not safe. You're not doing your job properly. We want to help you get through this if we can. We suggest you take six weeks off; you can use available PTO during this time and your group health benefits to get help. We're going to help you find a counselor, and you need to show us that you're attending. We don't need to know what you do."

The employee followed the recommendations exactly and, when he came back, he reported that he had asked his counselor if he could have a graduation ceremony from treatment so that his bosses could see how far he had come. Six years have passed since that second chance agreement, and he's still a phenomenal component of the team.

Fear #9: How should we handle reintegration after a leave of absence under FMLA or ADA?

After an employee exhausts FMLA, ADA, or other state-mandated leave, employers often terminate if the employee is unable to return to work "100% better." However, this is a violation of the ADA where the employee may have an ADA-covered disability and could return to work under reasonable accommodations. Employers are therefore required to notify the employee that they can return to work if they can perform the essential functions of the job, with or without a reasonable accommodation. One mistake that some employers make is messaging that the employee has exhausted FMLA, ADA, or other state-mandated leave and can return if the employee is 100% better. This notification is illegal because the employee is not being made aware of their right to return to work with a reasonable accommodation.

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30   McClatchey, Mary. (2015, June 22). Colorado High Court Okays Zero Tolerance for Pot Use. WorkSmart Partners. https://www.worksmartpartners.com/news/colorado-high-court-okays-zero-tolerance-for-pot-use/

As part of creating a work culture of health and caring, we encourage employers to develop employee leave banks where employees can donate leave and then pull from the bank when in need, especially for physical and mental health crises.

Reintegration and Return to Work Agreements. If an employee has been on leave to attend to mental health challenges, having a pathway to reintegrate back into work can help with the transition.[31] Issues to be covered in this agreement may include:
- Maintaining contact during leave
- Return to work planning
- Privacy and coworker support expectations

See Appendix D for a "Reintegration Checklist After a Well-Being Leave"

Fear #10: Will mental health or suicide prevention training be too expensive or expose us to liability?

Training on the topics of mental health, addictive behavior and suicide is critical, but may be sidestepped due to fear, cost, or implicit bias. Additionally, "nonessential" training is the first thing to be dropped when deadlines approach or there is a need to control costs. Small companies may not have the human power or resources to be able to provide effective training, much less something as sensitive and specialized as suicide prevention.

Larger organizations that may have resources, outsourcing capability, or EAPs may still struggle. The added cost to provide such training is often a deterrent. Consider partnering with community organizations to provide training when internal resources are strapped or nonexistent. Having community providers talk about mental health and suicide prevention awareness is also a fantastic way for smaller employers to introduce employees to professionals who are able to provide support should it be needed in the future.

Training as a Strategic Investment in Risk Management. Of note, frontline managers usually make or break the outcome of employment law cases. Investment in training will therefore help manage risk while promoting a culture of well-being. Expert training and policy management for HR and those with supervisory authority often provide an affirmative defense to lawsuits and can result in early dismissal of claims. Plus, training costs are typically far less than the nuisance payment to settle pending litigation.

Specialized Training. Training should be consistent with best practice training guidelines for suicide prevention. The training should use case scenarios to facilitate application of new skills and techniques in practical ways. It is important to use facts and data to debunk myths about suicide so that participants can better understand their role, response, and impact. It is also important to include relevant information on topics that may be related to suicide (at-risk factors), such as the relationship between suicide and bullying, substance use, or sexual orientation. For managers, it can be useful to offer manager-focused trainings where, in addition to providing education, you can provide managers with an open forum to share experiences, best practices, and obstacles with each other. This opportunity to talk with their peers supports managers and can foster additional learning and innovation in conjunction with training content.

Trainings can range from large, all-employee events to simple, small-group programs or brown-bag informal discussions. Trainings need not be costly to be effective. Effective trainings are highly interactive and part of regular employee offerings.

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31 Conley, G., Baynton, M.A., & Workplace Strategies team. (2021, December 8). Return to Work Response for Leaders, Workplace Strategies for Mental Health. https://www.workplacestrategiesformentalhealth.com/resources/return-to-work-response-for-leaders

Often, EAP services or health care companies provide training as part of their regular services to which the employer is already subscribed; again, employers should ensure that qualified specialists provide this training. By giving such opportunities, employers demonstrate genuine concern and support for mental health issues. For best practices in selecting a mental health promotion or suicide prevention training for your organization, review "How to Move from Awareness to Action in Suicide Prevention and Mental Health Promotion: GUIDEBOOK ON TRAINING PROGRAMS – 23 Characteristics that Make Trainings Great. [32]

Policy and Practice Pro Tip
Recommended Workplace Suicide Prevention & Mental Health Trainings Include:

Working Minds
LivingWorks's safeTALK or START
Question, Persuade, Refer
Mindshare Partners
(Workplace) Mental Health First Aid

Although we are unaware of any instances of training giving rise to employer liability, we recommend having your attorney review training materials. In addition, training should include an appropriate disclaimer that the content does not constitute legal, mental health, or any other type of professional advice. Although we are unaware of any instances of training giving rise to employer liability, we recommend having your attorney review training materials. In addition, training should include an appropriate disclaimer that the content does not constitute legal, mental health, or any other type of professional advice.

Good Samaritan Protection

Good Samaritan laws are intended to protect those that help at the scene of an accident or emergency despite less medical qualification and also encourages bystanders to intervene in emergency situations regardless of compensation.

Under HSC 1799.102, for instance, California's Good Samaritan Law protects a person a person from civil liability for any damages resulting from their emergency aid if:

They acted in good faith, and not for compensation;
They provided emergency medical or nonmedical care; and
They provided care at the scene of an emergency.

Note that "the scene of an emergency" excludes places where professional medical care is usually available, such as emergency rooms.[33]

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32   Spencer-Thomas, S. (2017). How to Move from Awareness to Action in Suicide Prevention and Mental Health Promotion: GUIDEBOOK ON TRAINING PROGRAMS – 23 Characteristics that Make Trainings Great. Retrieved December 27, 2021, from https://static1.squarespace.com/static/58b628c217bffc493333bbfd/t/59b730c8935d81a4204a385b/1505177805124/20170911+Guidebook+on+Training+Programs+%28email%29.pdf
33   Shouse Injury Law Group. (n.d.). Good Samaritan Law in California – A Quick Legal Breakdown. https://www.shouselaw.com/ca/personal-injury/good-samaritan-law/

Fear #11: How do we deal with personal or privacy concerns at work?

While it used to be a mantra to "leave your personal issues at the door" when you came into work, we now know that this idea is next to impossible. Employees have many intersecting aspects of their lives that cannot be artificially segmented. Their whole beings come to work, whether or not they outwardly show all parts of themselves. In fact, many employees seek workplaces that value rather than resist work–life integration.

When addressing mental health at work, the sensitive nature of people's lived experiences brings with it many layers that affect both the employer and employee. For employees, fear of retribution or retaliation for missing time from work, issues of shame and guilt, violation of privacy, perceived prejudice associated with mental health issues, concerns about job or wage loss, and potential loss of promotion or access to advancement may all hinder help-seeking. While none of these situations may actually be realized, the fear that they invoke is very real to the individual.

The best way to address these concerns is to follow the guidelines set forth above that establish a caring culture: provide early, dedicated support; respect confidentiality; connect the employee with robust resources; make necessary accommodations quickly; and work hard to maintain a strong connection between employees and your organization. Furthermore, vocal leadership support and stories of lived experience validate and normalize these deeply human challenges. Embed mental health as a topic in anti-discrimination and anti-harassment trainings, making it clear that discrimination, harassment, or bullying on the basis of a coworker's mental health will not be tolerated.

Coworkers may worry about how to talk to someone who has struggled with suicide or unintentional overdose loss, or someone who has lived through a suicide attempt or near miss. Coworkers may be uncomfortable with the expression of emotion or feelings on their part or others.
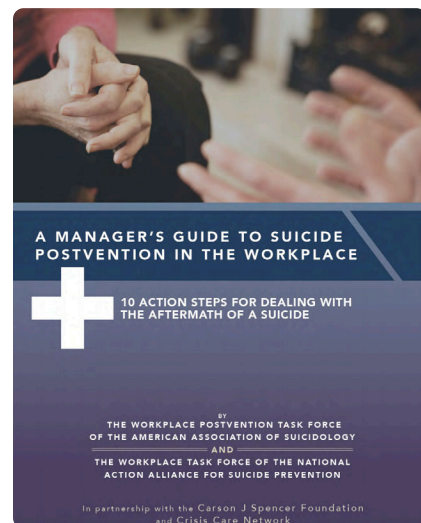
They may be afraid that talking about such issues directly may upset the individual further or cause a "breakdown." Coworkers may feel that they are walking on eggshells and wish to avoid upsetting a peer. This concern illuminates the critical importance of specialized training, which can prepare work teams and coworkers for these situations. In addition, it highlights the unique role of team managers in setting the right tone and providing direction. Many of the specialized training resources provided in the previous section fully address these concerns through skills-based learning.

Policy and Practice Pro Tip
A Manager's Guide to Suicide Postvention in the Workplace[34]

Action steps to take after a suicide death or attempt impacts a workplace.

A MANAGER'S GUIDE TO SUICIDE POSTVENTION IN THE WORKPLACE

10 ACTION STEPS FOR DEALING WITH THE AFTERMATH OF A SUICIDE

BY
THE WORKPLACE POSTVENTION TASK FORCE OF THE AMERICAN ASSOCIATION OF SUICIDOLOGY
AND
THE WORKPLACE TASK FORCE OF THE NATIONAL ACTION ALLIANCE FOR SUICIDE PREVENTION

In partnership with the Carson J Spencer Foundation and Crisis Care Network

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34   Workplace Suicide Prevention. (n.d.). Resources. https://workplacesuicideprevention.com/resources/

#12: How do we address employees' perceived lack of support?

Employees may fear that if they disclose any personal or sensitive information to an employer, supervisor, or colleague, they will be seen as "weak" or face retribution. There is a very real fear among employees that they will not receive vital support and may, in fact, be looked down upon for their disclosure. For this reason, they may feel the need to hide their concerns. Hiding these needs serves only to worsen an already demanding situation for both individual and employer as well as to increase anxiety.

Employers can do a great deal to mitigate this concern by having regular, open conversations about mental health and employee needs. The training programs discussed should be interactive. Have HR attend sessions and reinforce their commitment to making this an exceptional place to work. The programs are not offered to check the box—instead, they are part of an initiative. Prompt and proper handling of complaints foster a belief that the employer is really trying to do the right thing.

Encouraging the use of resources such as HR departments, EAP programs, work–life programs, and community or online support while providing ongoing training and education for all employees can allay fears and open lines of communication for all. Bringing to light these "hidden issues" can also raise the level of employee satisfaction and favorable employer review.

Fear #13: How do we face suicide and mental health issues proactively and directly?

From the employer's view, addressing the "elephant in the room"—or specifically the issue of mental health and crossover from personal to work life—may present numerous complications. These concerns, some of which have already been addressed, include diminished workplace morale or productivity, budgetary changes, staffing issues, change in cultural environment and atmosphere, employee disengagement, and even turnover.

From an emotional standpoint, leadership may be uncomfortable addressing this most personal and delicate matter, fearing reprisal or staff lashing out at management for trying to discuss personal and protected information. Those same fears that coworkers may identify of "saying the wrong thing" or upsetting someone may also keep management from addressing this issue candidly.

By offering regular educational mental health and suicide prevention content (communication tactics/training), continually promoting resources, and helping demystify the recovery process, dismantling the barriers to help-seeking and help-giving will become "baked in" to the organization's overall culture.

Fear #14: Can We Create a Peer Support Initiative Without Incurring Liability?

Peer support has long been recognized as a successful means of supporting employees through stress, trauma, and mental health issues.[35] The rationale for peer support is that individuals who share challenges or conditions can cope more effectively by discussing their experiences, sharing practical information, and offering moral support to one another in an informal setting.

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35   Goth, G. (2018, November 29). Peer Support Strengthens Mental Health Offerings: Employees who have overcome emotional challenges offer support to colleagues. SHRM. Retrieved December 27, 2021, from https://www.shrm.org/resourcesandtools/hr-topics/benefits/pages/peer-support-strengthens-mental-health-offerings.aspx#:~:text=In%20workplace%20peer%2Dsupport%20programs,who%20are%20facing%20similar%20issues

Many employees who are hesitant to use EAP or individual therapy will use peer support. By providing employees with a readily accessible peer assistance network, peer support programs can reach individuals with escalating personal concerns that might otherwise fall through the fissures. Additionally, peers can help provide a bridge to professional assessment and counseling services that employees might need but are reluctant to access without additional encouragement from a coworker.

Employers that invest in the appropriate infrastructure of establishing and maintaining peer support programs, under the guidance of legal counsel, should not have significant liability concerns. In fact, a survey of corporate and government peer support practitioners by the authors of this white paper revealed no one had experienced a liability incident.

> **Policy and Practice Pro Tip**
> Critical peer support program infrastructure includes:
>
> **Personnel:** Volunteer peer counselors who are carefully selected based on interest in helping others, commitment to the principles of peer support, and credibility as demonstrated through a reputation for trustworthiness.
>
> **Training:** Robust training for volunteer peer counselors from a mental health professional who has worked as a clinical advisor in the employer's industry.
>
> **Coordination and Oversight:** A coordinator of the program who establishes protocols and policies, oversees training, schedules meetings, oversees compliance with confidentiality, and remains current on all resources available to employees for their mental, physical, and spiritual health.

Several states have passed laws protecting peer support communications as privileged. The vast majority of these apply to first responders in response to law enforcement suicides.[36]

Fear #15: Can employers be held accountable in a worker's suicide death?

Under Section 301(a) of the Workers' Compensation Act,[37] an employer is not liable for compensation when an employee's death is self-inflicted. There are, however, exceptions. If the claimant can prove 1) there was an initial work injury, 2) the injury caused the employee to be severely overcome with a disturbance of the mind as to override normal, rational judgment, and 3) the disturbance resulted in the employee's suicide, benefits may be awarded.

What does this mean? A worker's suicide may be compensable if the pain and despair from a work-related injury becomes so severe it results in the loss of rational judgment.

36   Perine, T. (2021, May 26). The Law Enforcement Suicide Data Collection: The FBI's New Data Collection on Officer Suicide and Attempted Suicide. Police Chief Online. https://www.policechiefmagazine.org/the-le-suicide-data-collection

37   Southeastern Transportation Authority (SEPTA) v. WCAB (Hansell), 464 C.D. (2020).

Case Study Highlight

While the authors are not aware of such a case in the United States, precedence has been established in Europe. In 2012, the Chief Executive of France's Telecom was forced to resign and six other executives faced legal action following an investigation related to the suicide attempts and deaths of employees.

Charges filed against the company related to workplace bullying, harassment, and toxic "management-by-terror" practices that were allegedly connected to over 80 employees' suicide attempts or deaths. Several of the suicide notes written by those who went on to die by suicide explicitly identified France Telecom as the sole cause for death due to "intolerable conditions." In this case, the executives reportedly mandated a number of highly disruptive practices in order to downsize the company. For instance, they repeatedly transferred highly skilled workers to low-level jobs and then relocated the workers, disrupting their families. The communication around these transitions was infused with guilt and fear, and pitted workers against one another. These former professional technicians were often placed in humiliating situations where they needed to ask permission to use the toilet. Once questioned about the suicides (which reached a peak in 2010 with 27 deaths), the leaders resorted to concealing or denying the deaths or rationalizing them as individual anomalies to keep hidden from public view.[38]

During the summer of 2019, the Chief Executives were tried in a criminal case and in December they were found guilty, sentenced to prison, and ordered to pay large fines.

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38   Workplace Suicide Prevention. (n.d.). FAQs. https://workplacesuicideprevention.com/about-us/faqs/

SECTION 3: NEXT STEPS

The intent of this white paper is to provide a foundation for HR professionals and employment lawyers that will alleviate concerns and establish a starting point for building a comprehensive approach to mental health promotion and suicide prevention in the workplace. We started by working to enroll HR professionals and employment lawyers into the team of people who are already working to make their organization safer from suicide and mental health emergencies. The first step of the paper was to name the fears of employees and employers. The second step is to take inventory of solutions available to address those concerns. The third is to put those solutions into action and to learn from a community of practice.

Now, we call you to action.

Step 1: Take the Pledge

Go to www.WorkplaceSuicidePrevention.com and take the pledge to make suicide prevention a health and safety priority at work. Once you have registered as a pledge partner, you will have access to many additional free resources, tools, and assistance.

Step 2: Listen to Your Workers

Too often, large-scale initiatives are undertaken without adequately listening to those most impacted. Allow employees to weigh in on where the sources of distress and buffers of community resilience are. Have them share the "word on the street" regarding the psychological safety of the organization and the trustworthiness of the resources. Invite employees' input on resources they believe will assist the creation of a mental health-friendly organization that will aid in the prevention of mental health issues and in reducing the barriers for those seeking help.

Step 3: Offer Organization-Wide Training

Much of the fear that surrounds suicide originates from a lack of knowledge and preparedness. Many effective training modules exist that will help you, your leadership, and your work teams develop confidence. Go beyond a "one-and-done" training mentality—construct a stratified training program that builds skills and awareness over many sessions throughout one's career.

See Appendix for a list of recommendations.

Step 4: Audit and Promote Existing Mental Health and Crisis Resources

Work with other partners in your organization to take inventory of the mental health and crisis resources available to your organization, then evaluate their accessibility and effectiveness.
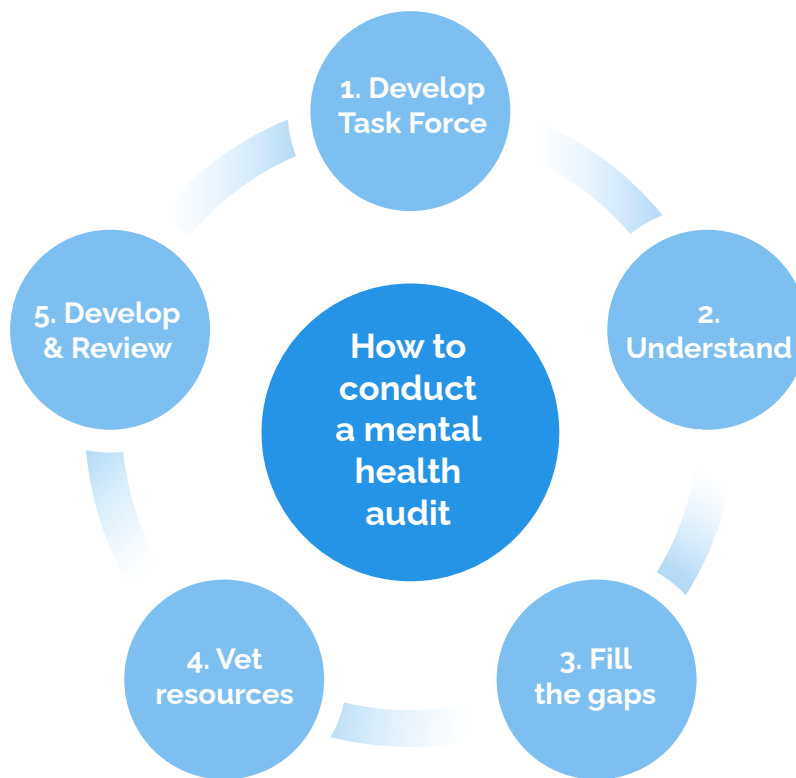
See Appendices A and B for more suggestions.

Step 5: Identify Needed Policies and Programs and Provide Gap-Filling Tools

Based on the listening sessions in Step 2, develop an organization-specific, long-term strategy to build on the strengths and shore up the gaps.

Appendices

Appendix A: Mental Health Resource Audit[39]

Step 1: Develop an ad hoc Mental Wellness Champion Task Force for the job site.
Involve a diverse group of stakeholders from across the organization.
Establish a 3–6-month timetable for achieving the following steps.

Step 2: Understand which resources are needed.
Listen to workers to understand their biggest mental health questions, needs, and concerns.
Through a gap analysis, identify which resources exist and which are needed.

Step 3: Fill the gaps.
Find resources to fill the gaps in the gap analysis.

Step 4: Conduct a secret shopper vetting of resources in which:
Members of the Mental Wellness Champion Task Force reach out to resources and/or experience their support services directly.
Secret shopper participants write out answers to key questions about the services.

Step 5: Develop a "What to Expect" document and review with workers.

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39   Adapted from: Spencer-Thomas, S. & Vega, E. (2020). Psychological Supports for Construction Playbook: Turnkey Solutions for Contractor Mental Health and Suicide Prevention. Volume 2. Mental Health and Crisis Services Audit. Construction Working Minds.

Appendix B: Promote Mental Health Supports[40]

☑ Distribute leadership testimonials of lessons learned after speaking with mental health providers.

☑ Share employee testimony (especially powerful when given by highly credible leaders) on the efficacy of the resources after benefiting from resources.

☑ Bring representatives from the resources to the workers on site (instead of waiting until the workers stumble upon the resources) for "lunch-and-learn" programs.

☑ Provide new employees briefings on how to access resources during onboarding.

☑ Highlight resources and what to expect from them during the benefit renewal process.

☑ Offer briefings that feature resources and when to use them. Conclude with a wallet card handout or sticker that shares information on how to access the resources.

☑ Design a psychologically supportive all-staff briefing, inviting representatives from the resource to share what to expect when workers reach out to them.

☑ Publish newsletter highlights of one resource in each edition.

☑ Create "Stall Street Journals"—back-of-bathroom stall flyers that promote resources and best ways to access.

☑ Embed mentions of the resources in safety moments by connecting physical safety with psychological safety.

☑ Require or strongly encourage new supervisors to attend at least one session with your EAP provider and/or call the crisis resources so they can become better advocates for the resources.

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40   Adapted from: Spencer-Thomas, S. & Vega, E. (2020). Psychological Supports for Construction Playbook: Turnkey Solutions for Contractor Mental Health and Suicide Prevention. Volume 2. Mental Health and Crisis Services Audit. Construction Working Minds.

Appendix C: Reasonable Accommodations for People Living with Mental Health Conditions

WORK SUPPORTS & REASONABLE ACCOMMODATIONS		
Limitation	**Reasonable Accommodation Ideas**	
Concentration and memory issues	Job coach, mentor, buddy Daily, Weekly, monthly task lists with color information coding for prioritization Divide large assignments into smaller tasks	Provide notebooks and planners to record information Reduce distractions, provide quiet workspace, white noise, permit headphones
Executive functioning, difficulty meeting deadlines	Same as concentration above Weekly meetings with job coach To do lists and calendaring	Give written job assignments Develop work agreements with clear expectations Develop electronic reminder process
Thinking/communicating: impulsivity, difficulty communicating under stress and emotional overwhelm	Communication agreements Discuss breaks to calm down Therapist/doctor appts. during workday Mindfulness training	Breaks to apply coping techniques, including walks, stretching, music Exercise
Communicating - difficulty interacting with public or others	Reduce time dealing with public Provide communication/sensitivity training	Do not mandate social interactions or social functions
Learning challenges	Provide extra time for training Provide extra training Provide refresher courses	Weekly coaching sessions Provide cognitive supports Over-communicate
Thinking and cognitive challenges	Plan ahead and give notice Over-communicate	Weekly meetings to discuss workplace issues

Appendix D: Reintegration Checklist After a Well-Being Leave

About 50% of long-term absences from work are due to mental health challenges.[41] In order for the reintegration process to be successful, it must begin as soon as leave is determined.

☐ <u>Pre-Leave Action Steps:</u>

- ☐ Reassure the employee that they are a valuable asset to the organization's mission and community.

- ☐ Let them know that their well-being is the #1 priority.

- ☐ Share with them that many people have periods in their life that are incredibly difficult; they are not alone.

- ☐ Tell them that any harassment or discrimination due to their mental health condition will NOT be tolerated.

    Discuss parameters about contact with the work team during leave:
    - Can the manager reach out on occasion to extend support and reassure them that they continue to be a valued member of the team?
    - Can team members send personal updates about their families, vacations, and so on?
    - Can coworkers encourage the person taking leave to focus on recovery and not worry about work?

☐ <u>Returning to Work</u>
Before the first day back after a well-being leave, it's helpful to have a clear set of written expectations, including:

- ☐ Documentation needed

- ☐ Job duties

- ☐ Pace of reintegration (e.g., starting with a few shorter shifts and gradually increasing work)

- ☐ Schedule

- ☐ Confidentiality—what is shared and not shared with others

- ☐ Accommodations needed to get back on the job

- ☐ Available support from coworkers (e.g., a check-in buddy)

- ☐ Work conditions that might affect work quality or quantity

- ☐ Expectations for the first day back (e.g., meeting with direct manager, getting caught up on what has happened during leave)

- ☐ Expectations for ongoing mental health supports and self-care

41   Cohen, M. C. (n.d.). Return to Work, Friends, and Routine after Mental Illness. Shepell·fgi Retrieved March 11, 2022, from https://www.shepellfgi.com/understandingmentalillness/article. aspx?title=ReturntoWork,FriendsandRoutineafterMentalIllness&a=71&lang=US

Additional Resources

Take the Pledge to Make Suicide Prevention a Health and Safety Priority at Work: https://workplacesuicideprevention.com/

Employee Assistance Professionals Association: https://www.eapassn.org/

Community Mental Health Centers and Substance Use/Addiction Recovery
- Find a community mental health resource near you: https://www.thenationalcouncil.org/resources/ccbhc-location-list-updated-7-22-21/
- Choosing and Addiction Treatment Center: https://www.hazeldenbettyford.org/treatment/choosing-addiction-treatment-center

12-Step Programs
- About 12-step programs: https://americanaddictioncenters.org/rehab-guide/12-step
- List of types of 12-step groups: https://en.wikipedia.org/wiki/List_of_twelve-step_groups
- Online: https://www.12step.org/social/online-meetings/

Tele-Mental Health Resources
- LiveHealthOnline – Psychiatric care: https://livehealthonline.com/psychiatry/
- Talkspace – Individual therapy, couples' therapy, and therapy for teens: https://www.talkspace.com/
- BetterHelp – Individual, couples, and teen counseling; https://www.betterhelp.com/
- Regain – Individual and couples counseling focused on relationships: https://www.regain.us/
- Online-Therapy.com – Cognitive behavioral therapy, or CBT (read more about e-therapy here): https://www.online-therapy.com/
- Pride Counseling – Counseling for the LGBTQ+ community: https://www.pridecounseling.com/

Crisis Resources
- National Suicide Prevention Lifeline: https://suicidepreventionlifeline.org/
- Crisis Text Line: https://www.crisistextline.org/
- Veterans Crisis Line: https://www.veteranscrisisline.net/
- International Crisis Resources: https://www.iasp.info/resources/Crisis_Centres/
- Psychological First Aid and Recovery: https://learn.nctsn.org/course/index.php?categoryid=11

Peer Support Training and Consultation
- Humannovations: https://www.humannovations.net/
- MindShare Partners: https://www.mindsharepartners.org/post/the-case-for-professional-communities-and-mental-health-peer-groups
- Mental Health America – How to Become a Certified Peer Specialist: https://www.mhanational.org/how-become-peer-support-specialist

Basic Suicide Prevention Training
- Working Minds (2-hour training, 8-hour Train-the-Trainer certification course): https://www.coloradodepressioncenter.org/workingminds/
- QPR (Question, Persuade, Refer): https://qprinstitute.com/
- safeTALK: https://www.livingworks.net/safetalk
  [ADVANCED TRAINING] ASIST: https://www.livingworks.net/asist

Counseling on Access to Lethal Means (CALM): https://www.sprc.org/resources-programs/calm-counseling-access-lethal-means

Mental Health Literacy Training
- Resilience at Work: https://www.worksmartpartners.com/resilience-at-work/
- Mental Health First Aid – Workplace: https://www.mentalhealthfirstaid.org/population-focused-modules/workplace/
- Workplace Strategies for Mental Health: https://www.workplacestrategiesformentalhealth.com/resources/Assessments-tools-and-workshops
- WorkSmart Partners: https://www.worksmartpartners.com/
- Other workplace mental health trainings: https://askjan.org/solutions/Workplace-Mental-Health-Awareness-Training.cfm

Suicide Postvention, Support for Suicide Attempt Survivors, and Suicide Grief Support
- Manager's Guide to Suicide Postvention in the Workplace: https://workplacesuicideprevention.com/wp-content/uploads/2020/11/managers-guidebook-to-suicide-postvention-web.pdf
- "A Journey Toward Health and Hope: Your Handbook for Recovery after a Suicide Attempt": https://store.samhsa.gov/product/A-Journey-Toward-Health-and-Hope-Your-Handbook-for-Recovery-After-a-Suicide-Attempt/SMA15-4419
- Alliance of Hope: https://allianceofhope.org/
- American Foundation for Suicide Prevention: https://afsp.org/ive-lost-someone

Industry-Specific Toolkits and Resources

Construction
- Construction Working Minds: https://www.constructionworkingminds.org/
- Construction Industry Alliance for Suicide Prevention: https://preventconstructionsuicide.com/

First Responders
- International Association for Police Chiefs: https://www.policechiefmagazine.org/the-brief-preventing-law-enforcement-suicide-toolkit/

For Healthcare
- American Foundation for Suicide Prevention: https://afsp.org/suicide-prevention-for-healthcare-professionals
- American Medical Association: https://www.ama-assn.org/practice-management/physician-health/preventing-physician-suicide
- All In: WellBeing First for Health Care: https://www.allinforhealthcare.org/
- American Nurses Association: https://www.nursingworld.org/practice-policy/nurse-suicide-prevention/

For Farming and Agriculture
- Farm Crisis Center: https://farmcrisis.nfu.org/
- Rural Health Information Hub: https://www.ruralhealthinfo.org/topics/farmer-mental-health

For Veterans

- U.S. Department of Veterans Affairs: https://www.mentalhealth.va.gov/suicide_prevention/
- National Action Alliance for Suicide Prevention: https://theactionalliance.org/veteran-and-military-suicide-prevention-resources
- American Foundation for Suicide Prevention: https://afsp.org/military-and-veteran-suicide-prevention
- U.S. Department of Veterans Affairs – Suicide Prevention Toolkit for Caregivers: https://www.caregiver.va.gov/pdfs/VA-Suicide-Prevention-Toolkit-for-Caregivers.pdf
- Zero Suicide Institute: https://zerosuicide.edc.org/resources/populations/military-and-veterans

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workplacesuicideprevention.com

WORKPLACE
SUICIDE PREVENTION