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Access to mental health records is a double-edged sword

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ESPN has reported that despite the NBA's efforts to destigmatize mental illness, some [owners are requesting access to the mental health records](#) of their players, citing the millions of dollars they pay in player salaries and the need to protect that investment.

Whether these owners can or will follow through remains an open question — the league's official policy comes down in favor of confidentiality.

But the notion that employers in other businesses and endeavors might follow suit and request or even require access to this kind of information raises serious questions and red flags.

From a purely pragmatic point of view, it's understandable that an employer might want to know, for example, whether an employee has struggled in the past with clinical depression that might cause him to miss work. However, an employer who comes into knowledge of this kind also gains several new responsibilities under the law.

Americans with Disabilities Act

When an employee discloses a disability, the employer is obligated to begin an interactive process to understand and implement a possible reasonable accommodation that will enable the employee to continue his or her work, provided the employee can still perform the essential functions of the job.

An employer who fails to make a reasonable accommodation might face liability under the Americans with Disabilities Act if the employee shows that they could have performed the essential functions of their job if an accommodation had been made.

Therefore, requiring employees to hand over mental health records could create compliance costs that might outweigh any benefits employers might realize from the disclosures.

The ADA also protects employees from discrimination based on their disability. Once an employer has knowledge of the disability, the employer must take care not to discriminate with respect to the terms and conditions of employment.

If the employee with a disability is passed over for a promotion or raise, or if he or she is terminated, the employer must be able to show that the decision was not discriminatory.

Once again, while access to these records may provide helpful information, it can come at a high cost for employers.

Privacy concerns

Employers who gain access to employee mental health records are also responsible for ensuring the information does not fall into the wrong hands. Sharing health information among managers or employees could violate the employee's right to privacy guaranteed under the Health Insurance Portability and Accountability Act.

Leaked health information also could lead to harassment and other incidents that would have a negative impact on the employee (and possibly create an actionable legal claim) and the work environment overall.

Collective bargaining agreements

In industries where a union negotiates on behalf of employees, a collective bargaining agreement may already include language restricting the type of information employers can request.

In the case of the NBA players' contract, the team owners have the right to certain medical records regarding physical health, which is understandable given that physical abilities are necessary to perform the essential functions of the job. But other health records are excluded.

In businesses and professions governed by collective bargaining, employers would have an even higher hurdle to overcome to obtain the mental health information.

While the NBA is an unusual business in many ways — tens of millions of dollars in employee pay is in play, and disputes between employers and employees are sensational and high-profile — the issues at stake from an employment law standpoint are essentially the same as they would be in any business or profession.

Employers must think carefully about whether gaining access to their employees' mental health records is really worth the potential legal issues that might result from that access.

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