

Should Tweet of CEO's Response to Mental Health Day Prompt Reevaluation of Your PTO Policy?

By former Associate Jeffrey Hord

The concept of a "mental health day" is often overlooked when employers craft their vacation and leave policies. However, a recent tweet by a San Francisco-based web developer has sparked a national discussion about mental health and the appropriate way for employers to handle these situations.

Madalyn Parker, who works for Olark (a live chat software engineering company), is one of more than 40 million Americans affected by an anxiety disorder.¹ She has previously blogged and spoken at industry conferences about her struggles with mental health issues and the many ways in which America's corporate culture often stigmatizes depression, anxiety and other mental disorders.

On the morning of June 29, 2017, Parker sent an email to her team at Olark alerting them to the fact that she would be taking the next two days "to focus on my mental health. Hopefully I'll be back next week refreshed and back to 100%." After receiving a supportive email from the company's CEO, affirming her choice and applauding her courage, Parker tweeted a screenshot of the exchange, expressing her appreciation for working in such a progressive workplace.

Less than 2 weeks later, the tweet has gone viral, accumulating more than 40,000 likes and 13,000 retweets. The ensuing national conversation has called attention to the stigma that still surrounds mental health issues in the workplace, and the way in which many Americans feel guilty about using sick time, particularly to care for their own mental health.

With summer in full swing, employers may suspect that their employees are sometimes taking sick days simply to "play hooky" from work and enjoy the warm weather and sunshine. However, employers must be careful not to encroach on employees' legal rights:

- **Americans with Disabilities Act.** The requested time off from work may be a reasonable accommodation under the ADA that an employee needs in order to control his or her anxiety or depression. An employer violates the ADA by refusing to grant an employee's reasonable request, unless it can show that to do so would create an undue hardship on the business. Likewise, if the employer has a company policy governing sick leave and paid time off, then it must apply and uphold the policy consistently to all employees; refusing an employee's proper leave request simply because the employer doubts the employee's mental health condition is "real" can expose the employer to substantial civil liability.
- **Family Medical Leave Act.** Employers who are covered by the FMLA must grant eligible employees up to twelve (12) weeks of unpaid leave, either consecutively or intermittently, in cases of serious health conditions. Mental health conditions that could result in 3 or more days of incapacity and/or inpatient care qualify as "serious health conditions" for purposes of the FMLA. While the FMLA allows the employer to require an employee to provide medical certification of his or her condition, such inquiries should be narrowly directed towards job-related issues, and any medical information obtained should be kept private and separate from personnel files.

- Local Sick and Safe Leave Laws. More and more counties—including Montgomery County, Maryland—are enacting “sick and safe leave” laws. These statutes require employers in those jurisdictions to provide their employees with paid leave away from work that can be used for any purpose described in the law. An employee can then use his or her earned sick and safe leave “to care for or treat the employee’s physical or mental illness, injury, or condition[.]” Corporate counsel and HR professionals should consult with their employment attorneys and advisors about what (if any) changes to the company’s PTO policy are needed in light of these legislative developments.

Beyond the basic legal requirements listed above, employers should consider taking a long-term view when faced with requests for “mental health days.” Even if no federal, state, or local law applies to the employer (whether due to its size, industry, or location), the employer should strongly consider implementing a PTO policy that provides for a reasonable number of paid “sick days” that can be used for any purpose. While employee abuse of sick days can sometimes be a legitimate problem, such concerns can usually be handled in other ways. Moreover, a liberal PTO policy that respects the legitimacy of mental health concerns may very well bring increased productivity due to improved morale and peak mental performance...not to mention the reduced risk of having to defend against an employee’s ADA or FMLA claim.

1. Source: Anxiety and Depression Association of America (ADAA), 2015.?