

Technical Assistance Brief:
Legal and Personnel Considerations in Employing Persons in Recovery
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(Note: This document was prepared by Janis Tondora, Psy.D., Yale Program on Recovery and Community Health {PRCH} on behalf of the Connecticut Recovery Employment Consultation Service {C-RECS} project managed by Focus on Recovery, Inc. {FOR-U}. It was reviewed by the Department of Administrative Services Employment Attorney.)

Introduction:

The purpose of this document is to outline common personnel and legal issues which may arise as behavioral health agencies strive to maximize the employment of persons in recovery across all levels of the service system and in multiple roles. These roles include employment in positions tied directly to individuals' lived experience of behavioral health illness and recovery, i.e., "peer-based" positions, as well as any general employment role within the behavioral health system – from administrative assistant to security guard to Chief Executive Officer.

This document is not intended to be an exhaustive review; nor is it a substitution for situation-specific advice from human resource and legal professionals. At the conclusion of this document, the reader will be referred to multiple supplemental resources which provide greater detail reading personnel and legal considerations in employing persons in recovery.

General Questions Regarding Employment Law and Disability:

What types of employment-related laws may be relevant as we expand our hiring of people in recovery?

The federal Rehabilitation Act of 1973 was the first "rights" legislation to prohibit discrimination against people with disabilities. The scope of this law, however, was limited to programs conducted or funded by Federal agencies. It did not extend protections to the private sector.

The federal Family and Medical Leave Act (FMLA) of 1993 provides eligible employees with up to 12 weeks of unpaid leave within a 12 month period during which their jobs are protected. Job restoration is guaranteed unless the employee is unable to perform the essential functions of the job.

The State Personnel Act (5-248a) provides for 24 weeks unpaid leave in a two year period for state employees, and the Connecticut Family and Medical Leave Act (FMLA) provides 16 weeks in two years for private sector employees (31-51kk).

The employment provisions of the Americans with Disabilities Act (ADA, Title I) of 1990 prohibited discrimination against persons with disabilities in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment. Title I of the ADA provides extensive guidance for organizations and employers regarding compliance expectations both pre- and post-hire.

But does the ADA apply to persons with behavioral health conditions?

The ADA does not contain a list of "covered" conditions that constitute disabilities. Instead, the ADA has a general definition of disability that each person must meet in order to be considered a "qualified individual with a disability." The definition of disability focuses on whether or not the person has a physical or

mental impairment that substantially limits one or more major life activities, a record of such an impairment, or is regarded as having such an impairment (EEOC, 1992). Therefore, some people with mental health impairments will have a disability under the ADA and some will not.

The term qualified individual means an individual with or without [reasonable accommodation](#), can perform the [essential functions](#) of the employment position that such individual holds or desires. The ADA definition of "qualified individual with a disability" requires consideration of reasonable accommodation; assessing whether a person can work with reasonable accommodation is a key part of determining if the person meets the ADA definition of the term "qualified individual with a disability."

The 2008 federal ADA Amendments Act (ADAAA) reinstates a broad scope of protection available under the ADA. The ADAAA focuses on the discrimination at issue instead of the individual's disability. The Act retains the ADA basic definition of "disability" as an impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment. However, it changes the way that the statutory terms should be interpreted. Most significantly, the ADAAA:

- Directs EEOC to revise the portion of its regulations that defines the term "substantially limits";
- Expands the definition of "major life activities" by including two non-exhaustive lists:
 1. The first list includes many activities that the EEOC has recognized (e.g., walking) as well as activities that EEOC has not specifically recognized (e.g., reading, bending, and communicating);
 2. The second list includes major bodily functions (e.g., "functions of the immune system, normal cell growth, digestive, bowel, bladder, respiratory, neurological, brain, circulatory, endocrine, and reproductive functions");
- Clarifies that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active;
- Provides that an individual subjected to an action prohibited by the ADA (e.g., failure to hire) because of an actual or perceived impairment will meet the "regarded as" definition of disability, unless the impairment is transitory and minor;
- Provides that individuals covered only under the "regarded as" prong are not entitled to reasonable accommodation; and
- Emphasizes that the definition of "disability" should be interpreted broadly.

The Connecticut Fair Employment Practices Act (46a-60) also prohibits discrimination on the basis of disability. Connecticut law defines a mental (health) disability (46a-51(20)) to include anyone with a DSM IV diagnosis is covered.

Pre-Hire Issues for Consideration:

How do we word handle advertisements/ postings as we do assertive outreach to hire persons in recovery?

For all positions, the EEOC advises employers to include a non-discrimination clause in job postings, e.g., "We are an Equal Employment Opportunity Employer. We do not discriminate on the basis of race, religion, color, sex, age, national origin, disability, sexual orientation, marital status, genetic history, military/veteran status..." For specialized positions tied directly to individuals' lived experience of behavioral health illness and recovery ("peer-based" positions) it is allowable to refer to psychiatric disability within the job description/posting if this lived experience is considered to be an "essential

function” of the job. For example, Chinman and colleagues (2009) provide the following suggested wording for the posting of peer-based positions:

“As one who has availed themselves of mental health services, the CP will share their own experiences and what skills, strengths, supports, and resources they use. As much as possible, the CPs will share their own recovery stories and will demonstrate how they have directed their own recovery processes.”

Are there certain types of questions we can/cannot ask during the interview and hiring process?

Title I of the ADA prohibits employers from asking disability-related questions at certain points in the employment process. Disability-related questions are those that are likely to elicit information about a disability. The types of questions which are prohibited differ across the following three phases: pre-job offer, post-job offer, and during employment. At the pre-offer stage, an employer cannot ask disability-related questions – either directly or indirectly. For example, it is prohibited to ask the following: “Do you have any physical or mental impairment that would keep you from performing the job you seek” or “What medications are you currently taking?” or “How many days were you out sick last year?” These questions, either directly or indirectly, require an individual to disclose personal medical or disability-related information, and they are prohibited to ensure that an applicant’s possible hidden disability is not considered before employers objectively evaluate the applicant’s qualifications. In addition, these questions do not focus on what should be the primary focus during the interviewing phase, i.e., whether or not the applicant can perform the essential functions of the job, with or without reasonable accommodations. In the pre-hire and post-conditional offer phase, the rule is that a medical examination is permissible as long as all applicants in the same job category are required to have it. The exam does not have to be job-related/business required; but if a candidate is not hired because of the examination, the employer must show that the reasons for exclusion are job-related and necessary to the business. After an applicant is hired, disability-related questions may be asked and a medical examination required if it is job-related and consistent with medical necessity. Drug tests are not medical exams and are permitted under ADA at any time.

What do we do if a person who receives services here in our agency applies for an open position?

In the case of consumer, or peer-based positions, there is a growing consensus in the field that it is preferable for peer-based providers to receive treatment in another facility in order to minimize the difficulties caused by dual relationships. This is particularly true in agencies where peer-based positions are structurally embedded on clinical teams. For example, it is recommended that if an individual is hired to fill a peer-based position on his or her current treatment team, the individual should make arrangements to receive treatment elsewhere if possible (Chinman et al., 2009). The same difficulties regarding dual-relationships may be encountered when individuals apply to any open employment position within the behavioral health agency e.g., security guard, administrative assistant, etc. Despite the above complexities, the process of fully including persons in recovery as employees in the behavioral health workforce is a process which has only just begun. There is much to be learned about methods for successfully designing inclusive workplace environments, and employment applications should be considered on a case-by-case basis and discussed in collaboration with the individuals involved.

Post-hire Issues for Consideration:

Will a person in recovery be entitled to special treatment on the job due to their disability?

First, do not assume that a person in recovery will require any modifications to the job. It can be presumptuous and insulting to an employee to assume s/he will need special treatment or to automatically “exempt” him/her from performance expectations which are expected of others on the job. If and when performance issues do arise, employers should also not assume these issues are necessarily related to the person’s behavioral health condition. However, if an employee does disclose that they have a disability (behavioral health or otherwise), and this disability is interfering with their ability to meet expectations, they then have the right to request “reasonable accommodation.” A reasonable accommodation is any change in the work environment or in the way a job is performed that enables a person with a disability to perform the essential functions of the job and to have access to the benefits and privileges of employment. But does not impose an undue burden on the employer or fundamentally change the nature of the job. The employee may make the accommodation request in “plain English,” which might include language such as, “I have a medical condition that requires breaks every two hours...” or “Because of health issues, I need a quiet work space at the back of the office.”

What should we do when presented with the request for reasonable accommodation?

Prior to responding to the request, the employer does have a right to request documentation of the disability and the nature of its impact on work performance. The important thing to remember is that requested medical documentation should focus not on things such as diagnosis or history of hospitalization, but rather, on a) the functional limitations of the disability, b) how these limitations might impact work performance, and c) recommendations for what types of reasonable accommodations might be effective. While the employer has a right to request such documentation, this can often be avoided by first having an informal and supportive conversation with the employee in order to clarify needs and identify appropriate accommodations. Remember, your best source of information is the employee him/herself!

How does reasonable accommodation apply to persons in recovery?

The employee must be able to perform the essential functions of the job. It is not a reasonable accommodation if it eliminates an essential function. The issue of meeting performance/production standards is part of the essential function analysis.

Accommodations for persons who use wheelchairs make intuitive sense, e.g., curb cuts, wheelchair ramps, handrails, and desk-lifts. But what types of accommodations might benefit a person in recovery from a behavioral health condition? The answer to this question depends on exactly how the person’s condition impacts their functioning and work performance. Examples of things that people *might* experience difficulty with include the following: screening out the environment and excessive stimulation, sustaining concentration, maintaining stamina over the work day, handling time pressures, maintaining professional appearance, interacting with others and following social/business norms, prioritizing tasks, or dealing with negative feedback. As an employer or supervisor, there are a wide range of accommodations that you might offer persons in recovery in order to enable them to perform the essential functions. These include things such as: being sensitive to late/early arrival or “standard” schedule to accommodate appointments, offering longer or more frequent breaks, providing task lists in writing, accepting alternative formats for work, e.g., typed/ hand-written/ or recorded notes if submitting written work, providing access to a partitioned work space or more private work area, allowing use of white noise technology, providing increased supervision, or designating co-worker mentors. There are extensive public and private resources to help employers design reasonable accommodations. For example, employers can contact the Job

Accommodations Network (JAN) free of charge. The Job Accommodation Network is a service provided by the U.S. Department of Labor's Office of Disability Employment Policy (ODEP). JAN's mission is to facilitate the employment and retention of workers with disabilities by providing employers, employment providers, people with disabilities, their family members and other interested parties with information on job accommodations, entrepreneurship, and related subjects. A sample JAN accommodations profile for a person in recovery is provided below:

An administrative assistant in a social service agency has bipolar disorder. Her duties include typing, word processing, filing, and answering the telephone. Her limitations include difficulties with concentration and short-term memory. Her accommodation included assistance in organizing her work and a dual headset for her telephone that allowed her to listen to music when not talking on the telephone. This accommodation minimized distractions, increased concentration, and relaxed the employee. Also, meetings were held with the supervisor once a week to discuss workplace issues. These meetings are recorded so the employee can remember issues that are discussed and can replay the information to improve her memory.

For more information on the Job Accommodations Network and its extensive resources, see reference guide at the end of this document.

How do we handle other employees who ask why someone is receiving special treatment?

Confidential information about an employee's disability, medical condition or accommodation can only be shared on a business necessity basis. Typically, this means involving the person providing or approving the accommodations, those in charge of safety and risk procedures, or those responsible for Equal Opportunity or Affirmative Action. Disclosure beyond this "need to know" circle, without the permission of the employee, is illegal. It is true that many of the simple accommodations that work for someone with a behavioral health condition may be desired by co-workers, and this may breed resentment or suspicion. Employers can address this by telling the co-worker that they are acting in accordance with employment laws and that they strive to design supportive work environments for all employees, while offering to meet with that employee at a later time to discuss their personal needs. Many employers with experience providing reasonable accommodations have found that they cost little to implement, and significantly enhance work performance – which begs the question of whether such modifications should be "special treatment" or should, in fact, be a more standard part of good business and management practice.

How do we respond to inappropriate behavior on the job?

Under current employment laws, an employer never has to excuse a uniformly applied conduct rule that is job related and consistent with business necessity. According to the Job Accommodations Network, This means, for example, that an employer never has to tolerate or excuse violence, threats of violence, stealing, or destruction of property. An employer may discipline an employee with a disability for engaging in such misconduct if it would impose the same discipline on an employee without a disability. Furthermore, an employer must make reasonable accommodation to enable an otherwise qualified employee with a disability to meet such a conduct standard in the future.

Specific to the employment of persons in recovery, it is important to highlight the notion that conduct rules must be "uniformly applied." If an employee with a disclosed behavioral health condition was involved in an inappropriate verbal or physical altercation with a co-worker, is the discipline which is imposed on the person in recovery the same as it has been for other employees in the past? Is it the same for both parties involved in the current altercation? Or is the employee with the behavioral health condition perhaps

expected to comply with counseling through the agency's EAP while others are given only verbal or written reprimands in their personnel file? This would be an example of a conduct policy that is not uniformly applied, and is arguably, influenced by inaccurate and discriminatory beliefs regarding the potential for violence among persons with behavioral health conditions.

Can we fire a person in recovery if s/he is not doing the job?

Yes, a person with a disability, behavioral health or otherwise, may be terminated if they are unable to perform the essential functions of the job. However, the employer is obligated to first make attempts to provide reasonable accommodations in order to allow the employee to meet performance expectations.

Conclusion:

This document has outlined common personnel and legal issues which may arise as agencies strive to maximize the employment of persons in recovery within the behavioral health system. It focuses on the *basic* obligations of employers, and that which is necessary to meet the *minimum* threshold of creating work environments which are free from discrimination. This is a necessary foundation on which to build future behavioral health workforce development efforts. However, a focus on the “basics” is not sufficient in itself to realize the ultimate, and more noble, vision of transformation efforts around the country. Indeed, the Connecticut Recovery Employment Consultation Service (C-RECS) has been built on the spirit that one day persons in recovery will be afforded the opportunity to occupy diverse workforce roles across the system – not simply because it is in accordance with legal and human resource guidelines, but because the presence, talents, and contributions of persons in recovery is actively sought after and celebrated for the transformative impact it can, and should, have on the behavioral health field.

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Where to Go For More Information:

Mental Health Consumer Providers: A Guide for Clinical Staff. Matthew Chinman, Alison Hamilton, Brittany Butler, Ed Knight, Shannon Murray, and Alexander Young. Rand Corporation, 2009. This purpose of this booklet is to provide mental health clinic staff and administrators with a brief guide to implementing and sustaining a consumer provider (also referred to as “peer-based provider) program. Booklet addresses common administrative and supervisory issues that arise in the employment of consumer-providers.

- www.rand.org/pubs/technical_reports/2008/RAND_TR584.pdf

National Center on Workforce and Disability (NCWD). <http://www.onestops.info/>

Based at the Institute for Community Inclusion at the University of Massachusetts, NCWD provides training, technical assistance, policy analysis, and information to improve access for all in the workforce development system. Representative resources:

- *Myths and Facts about Mental Illness.*
 - http://www.onestops.info/article.php?article_id=62
- *Financial Incentives for Hiring People with Disabilities.*
 - http://www.onestops.info/print.php?article_id=55
- *Employer Tips on Interviewing Applicants with Disabilities.*
 - http://www.onestops.info/article.php?article_id=2&subcat_id=701

Job Accommodation Network. <http://www.jan.wvu.edu>

The Job Accommodation Network (JAN) is a free consulting service that provides information about job accommodations, the Americans with Disabilities Act (ADA), and the employability of people with disabilities. JAN also provides extensive information regarding the application of accommodations for persons with specific types of disabilities, including “mental health impairments.” Representative Resources:

- *Pre-Offer, Disability-Related Questions: Dos and Don'ts.*
 - <http://www.jan.wvu.edu/media/preofferfact.doc>.
- *Accommodation and Compliance Series: Employees with Mental Health Impairments.*
 - <http://www.jan.wvu.edu/media/Psychiatric.html>

Boston Center for Psychiatric Disability (BCPR). <http://www.bu.edu/cpr/reasaccom/index.html>

BCPR is a research, training, and service organization dedicated to improving the lives of persons who have psychiatric disabilities. Representative Resources:

- *Frequently Asked Questions From Employers.*
 - <http://www.bu.edu/cpr/reasaccom/employ-faq.html>
- *How does mental illness interfere with work performance?*
 - <http://www.bu.edu/cpr/reasaccom/employ-func.html>
- *What Accommodations Work on the Job?*
 - <http://www.bu.edu/cpr/reasaccom/employ-accom.html>

U.S. Equal Employment Opportunity Commission. <http://www.eeoc.gov/types/ada.html>

The EEOC is the Federal agency in charge of administrative and judicial enforcement of the federal civil rights laws, including those which pertain to the employment of persons with disabilities. Representative Resources:

- *A technical assistance manual on the employment provisions Title I) of the Americans with Disabilities Act. (1992)*
 - <http://www.jan.wvu.edu/links/ADAtam1.html>
- *Final Report: Best Practices for the Employment of People with Disabilities in State Government*
 - http://www.eeoc.gov/initiatives/nfi/final_states_best_practices_report.html

- *The Americans With Disabilities Act: Applying Performance And Conduct Standards To Employees With Disabilities.*
 - <http://www.eeoc.gov/facts/performance-conduct.html>
- [EEOC Notice Concerning Americans with Disabilities Act Amendments Act of 2008](#): information on ADA Amendments
 - www.eeoc.gov/ada/amendments_notice.html