# Hot Topics in Employment Law

**October 22, 2022 | IMLA 2022 Annual Convention**

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# Agenda

- ✓ Introduction
- ✓ LGBTQIA+ Policy Considerations
- ✓ Culturally Competent Natural and Synthetic Hair Policies
- ✓ Mental Health in the Municipal Workplace
- ✓ Questions?

# LGBTQIA+ Policy Considerations

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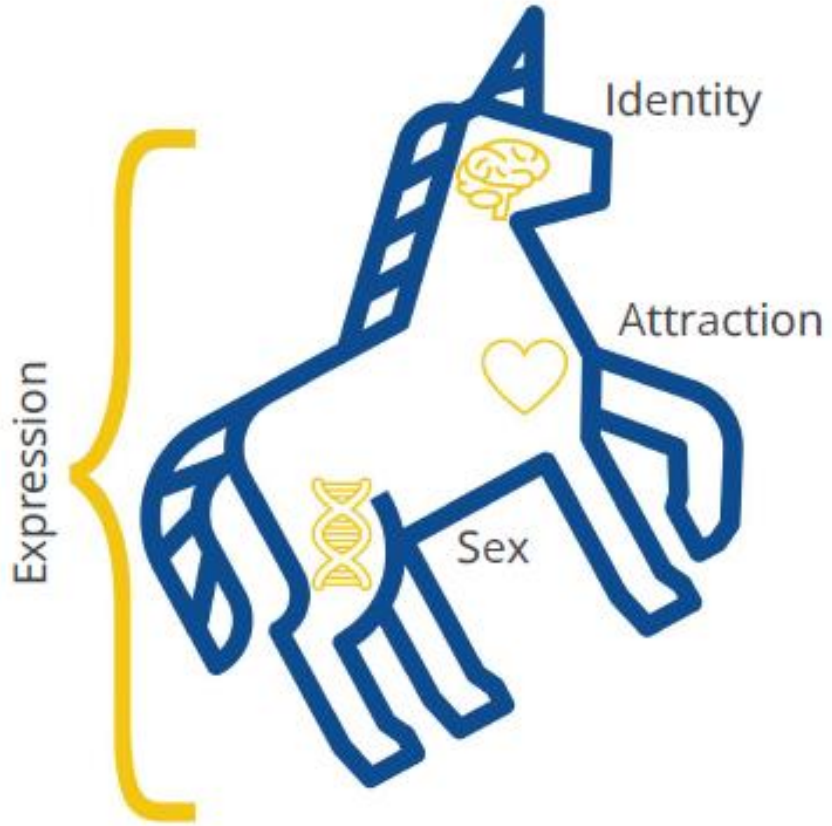
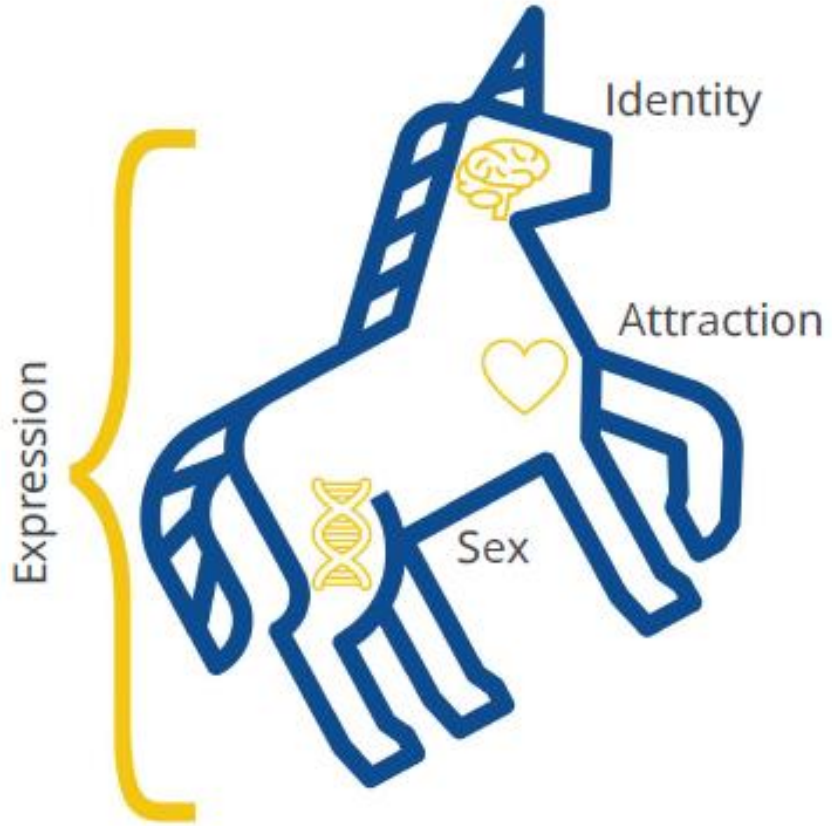
# *Terminology*

- **LGBTQIA+** is an acronym and an umbrella term that encompasses many diverse sexualities and genders
- **Sexual orientation** – physical and/or romantic attraction
  - E.g., gay, lesbian, straight, bisexual, pansexual, asexual, etc.
  - People may label themselves or avoid them because they find labels unhelpful and insufficient; folks may also align with a different label than you'd assume, e.g., queer instead of bi
- **Sex –** typically based on certain biological factors, such as reproductive organs, genes, and hormones
  - Intersex people to constitute ~1.7% of the population– about the same percentage as natural redheads



# *Terminology*

- **Gender identity –** the way you define your gender, or the lack thereof; can change over time; our psychological sense of gender
  - Agender: does not identify with any particular gender; no gender
  - Cisgender: identifies with the sex that they were assigned at birth
  - Transgender: an umbrella term that encompasses all people who experience and identify with a different gender than that which their assigned sex at birth would suggest
  - Genderfluid: has a gender identity and presentation that shifts between, or shifts outside of, society's expectations of gender
  - Nonbinary: does not experience gender within the gender binary
  - Two Spirit: an umbrella term that encompasses different sexualities and genders in Indigenous Native American communities
  - There is no fixed number of gender identities – in a spectrum, the possibilities are infinite – don't assume, ask folks' their pronouns!



# *Legal Timeline*



- **1868 – Fourteenth Amendment Ratified**
- **1972 – *Baker v. Nelson***
  - First marriage equality case: "no federal question"
- **1986 – *Bowers v. Hardwick***
  - State laws criminalizing LGBT+ sex are *allowed*
- **1996 – *Romer v. Evans***
  - First case recognizing protected class status
- **2003 – *Lawrence v. Texas***
  - State laws criminalizing LGBT+ sex are unconstitutional
- **2010 – Repeal of "Don't Ask Don't Tell"**
- **2013 – *U.S. v. Windsor* (Repeal of DOMA)**
- **2015 – *Obergefell v. Hodges***
  - Fundamental right to marry is guaranteed
- **2020 – *Bostock v. Clayton County***
  - LGBTQIA+ employees protected against discrimination

# *Bostock (2020)*

- ***Bostock*** – Plaintiff fired after he expressed interest in a gay softball league at work
  - 11th Cir. held that Title VII *does not* protect employees from sexual orientation discrimination
- ***Altitude Express*** – skydiving instructor Plaintiff came out to female customer to make her more comfortable being attached to him during a skydive – later fired
  - 2nd Cir. held that Title VII protects employees from sexual orientation discrimination
- ***R.G. & G.R. Harris Funeral Homes Inc.*** –Plaintiff, a funeral home employee, wrote employer a letter coming out as a woman and advising she would live and dress consistent with her gender after vacation – fired shortly thereafter
  - 6th Cir. held that Title VII protects transgender employees from discrimination



# *Bostock (2020)*

- **SCOTUS accepted certiorari to resolve circuit split**
- Landmark 6-3 holding – Title VII of the Civil Rights Act of 1964 protects employees against discrimination because they are gay or transgender
- Trump-appointed Justice Neil Gorsuch wrote the majority opinion, with dissents by Alito, Thomas, and Kavanaugh
- Strict textualist approach in majority opinion– "persons" in Title VII means we look at specific people and how they present in the world, not at groups of people as a whole
- Discrimination based on sex is more than just discriminating against someone because she is a woman, for instance; it includes discriminating against her for all the stereotypes she fails to fulfill, e.g., how masc she presents or who she marries







**“Title VII’s message is “simple but momentous”:** … An individual’s homosexuality or transgender status is not relevant to employment decisions. That’s because it is **impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”**







# *Litigation in the States*

- *Christina Ketcham v. Clatsop County, Oregon, et al.*
  - County agreed to pay **$345k in damages**, including $40k to cover Plaintiff's facial feminization surgery
- *Anna Lange v. Houston County, Georgia, et al.*
  - Sherriff told 20-year deputy that he "doesn't believe in sex changes" and wanted to keep insurance costs low; judge found violation in light of *Bostock;* jury trial only on issue of emotional damages ended 9/27/22: $60k award
- *Rem Wransky v. Cleveland Orchestra, et al.*
  - August 2022 lawsuit; settled >two months
- *Jesse Vroegh v. State of Iowa, et al.*
  - Iowa Supreme Court upheld a **$120k jury award** and found that the State had discriminated against transgender employee by (1) denying him the use of the men's restroom and locker rooms; and (2) by providing an employee health insurance plan w/o GAH care.

# *What needs to change at your City?*

- Ensure that LGBTQIA+ protections are in your EEO statement and consider an independent non-discrimination policy (see Handout)
- Pass resolution or other appropriate legislation ensuring gender neutral language in all City policies and documents, and ensuring employee access to gender neutral bathrooms (see Handout)
- Confirm employee health insurance policies meaningfully cover gender-affirming care, including facial, voice, top, and bottom surgery, HRT, voice training, and therapy



# *What needs to change at your City?*

- Ensure that your fertility and family forming health insurance coverage eschews a hetero/cisgender-focused definition of “infertility” and provides for egg and sperm banking for employees preparing for a gender transition, gestational carrier (GC) services, and donor-assisted reproduction
- LGBTQIA+ Cultural Competency Trainings and strategic planning (see Handout)
- Publish gender transition policies to notify employees of options and guide supervisors/leadership through a consistently applied process (see Handout)





# *What does a Model Gender Transition Policy look like? /1*

- Your handout contains a model draft policy!
- Addresses deadnaming and misgendering
- Exhibits a commitment of allyship to employees
  - Employees can use the gender-specific facilities consistent with their specified gender identity
  - City provides access to gender affirming and culturally competent healthcare
  - Employees have the right to be addressed by their correct pronouns and chosen name; a court-ordered name or gender marker change is not required
  - Employees have the right to discuss their gender identity openly, or to keep that information private; involuntary “outing” is strictly prohibited
  - Employees’ records will be changed upon request to the maximum extent allowed by law, and photos will be updated as quickly as possible to reflect the employee’s changing appearance



# *What does a Model Gender Transition Policy look like? /2*

- Acknowledges that gender transitions may be fluid and changing and that employees who transition, detransition, or retransition can expect the support of leadership, staff, and HR
- Affirms there is no “best” way to transition, that transitioning is personal, and that each chooses what portions of transition (social, legal, medical and/or surgical) are meaningful to their process
- There should be a template overview of what meetings should occur and when between the transitioning employee and others to facilitate the process, but the transitioning employee is the authority on their identity and what is right for them
- Ensure that all name changes (Zoom, Teams; cubicle/office name plaques, etc.), email addresses, photographs are updated in advance so they can go live on the transition day.

# *Other Policy Considerations*

**Oct. 2021: HRAR 6.08, Bereavement, Funeral, and Pregnancy Loss Leave**

- Expanded definition of family member from immediate family to both extended family and anyone "like family," including household members, unmarried couples, and LGBTQIA+ chosen families
- Degendered familial language, e.g., from daughter to child; mother to parent
- Added all forms of pregnancy loss

**June 2022: HRAR 6.04(b), Sick Time**

- Expanded definition of family member to match the bereavement policy.
- City employees can now take sick leave to care for any family or anyone like family
- Both policies in handout



# Culturally Competent Natural & Synthetic Hair Policies

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# Dove’s CROWN Research Study (2019) Cont’d.

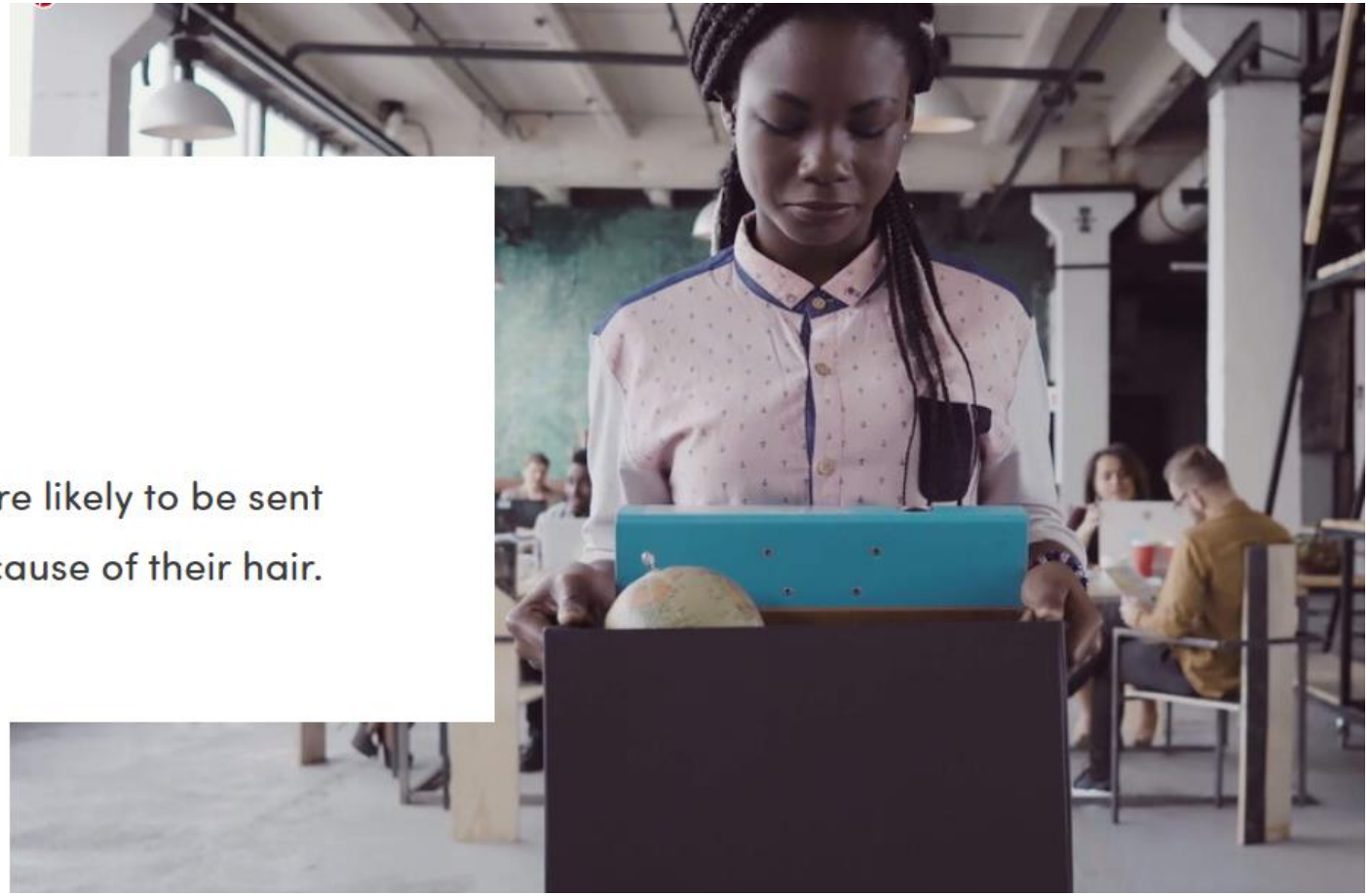
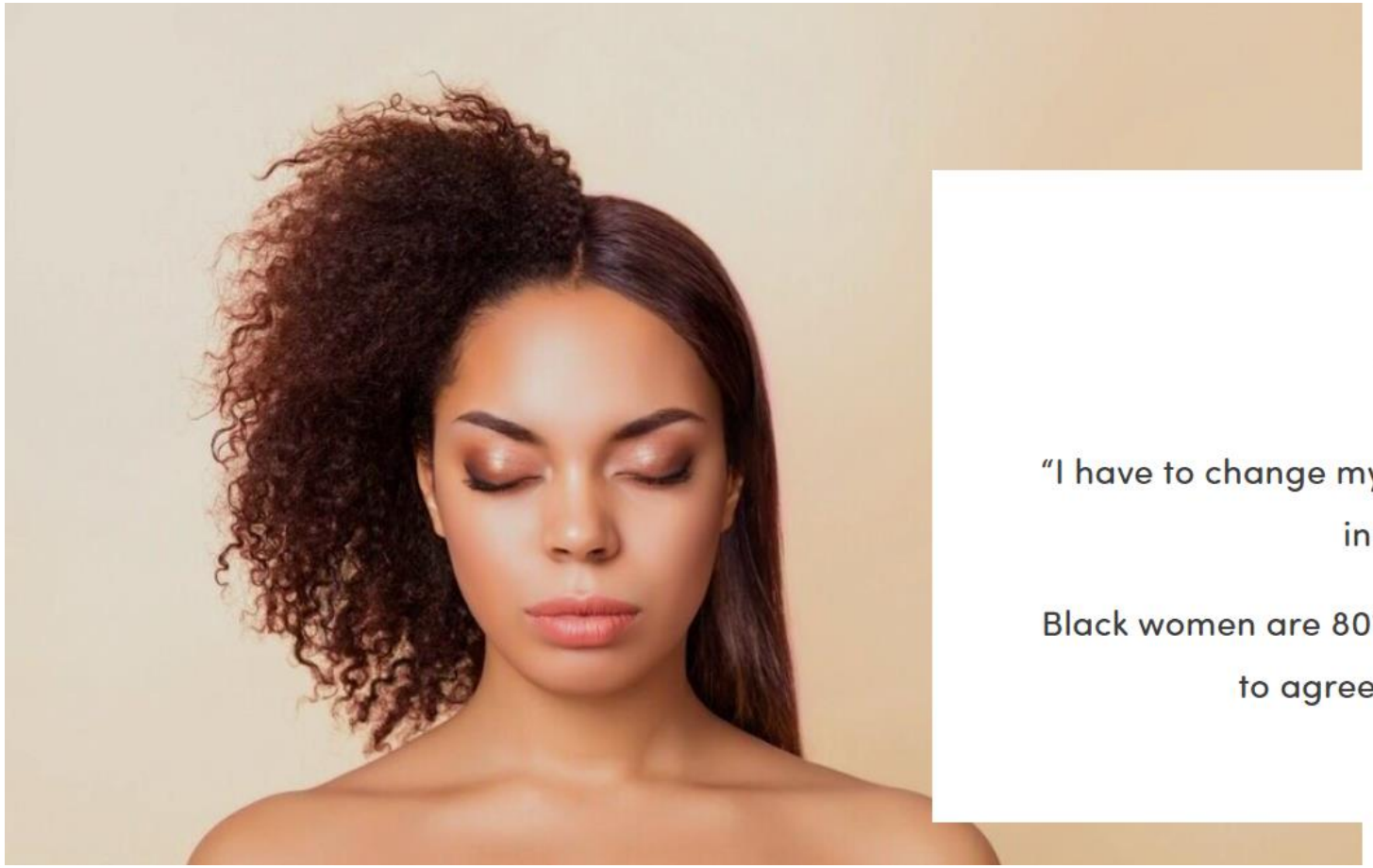



IMAGE COURTESY OF THE OFFICIAL CROWN ACT CAMPAIGN

# Dove’s CROWN Research Study (2019)



**80%**

“I have to change my hair from its natural state to fit in at the office.”

Black women are 80% more likely than white women to agree with this statement.

IMAGE COURTESY OF THE OFFICIAL CROWN ACT CAMPAIGN

# California State Senate Bill 188: The CROWN ACT



# The CROWN Coalition

Creating a

Respectful and

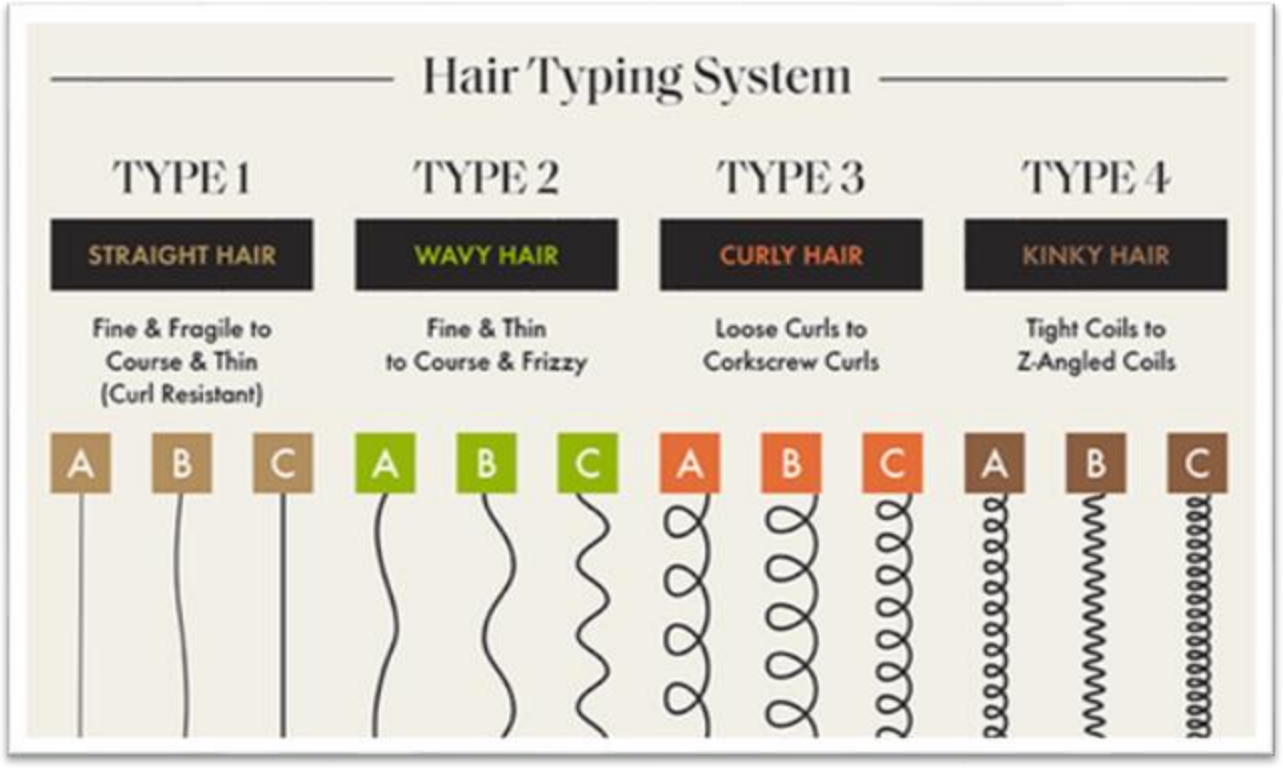
Open

World for

Natural hair

# Afro/Kinky Textured Hair Characteristics

- Grows up and out rather than straight down
- Soft, wooly textured, and/or wiry
- Fragile as single strands, but stronger when clumped together
- Very dry
- Prone to breakage and individual strand knots



# Terminology

**Natural hair**: texture of hair as it grows from one's head, may include its state after manual manipulation

**Shrinkage:** appearance of tightly coiled hair that curls in on itself. Hair may appear shorter than actual length

**Protective style**: any style that temporarily keeps one's natural hair tucked away or limits manipulation (e.g., cornrows, individual braids, buns)

**Cornrows**: hair tightly braided to the scalp

**Dreadlocks**: Permanently twisted strands of hair that form a collection of uniform rope like strands of hair; typically range in width from ¼ of an inch to 1 inch in diameter

**Locs/locks**: a short form of the term "dreadlocks"

**Synthetic hair**: hair-like strands made of non-human materials. Often used in braid extensions

**Extensions**: extra human or synthetic hair added to one's hair that may add length or bulk to a style; can be long or short term



# History of Texture Based Hair Discrimination

**Tignon Laws in 1700s**

- Louisiana laws that required black and creole women to wear a cloth to cover their hair signifying belonging to "slave class" regardless of actual status

**Civil Rights Act of 1964**

- Banned employment discrimination on the basis of race, color, religion, sex, and national origin

**Jenkins v. Blue Cross Mut. Hosp. Ins., Inc.,** 538 F.2d 164 (7th Cir. 1976)

- Title VII also protected discrimination for wearing an afro.

**Rogers v. Am. Airlines, Inc**., 527 F.Supp. 229 (S.D.N.Y. 1981)

- Employers permitted to ban "all braided" hairstyles in company grooming policy

**Eatman v. United Parcel Serv.,** 194 F.Supp.2d 256 (S.D.N.Y. 2002)

- Employer's proffered reason for terminating African-American employee with dreadlocks was not pretext for race discrimination.

**EEOC v. Catastrophe Management Solutions**, 852 F.3d 1018 (11th Cir. 2016)

- Employer did not discriminate against job applicant on basis of race when it rescinded offer because applicant refused to cut off her dreadlocks.



"[T]he airline did not require plaintiff to restyle her hair. It suggested that she could wear her hair as she liked while off duty and permitted her to pull her hair into a bun and wrap a hairpiece around the bun during working hours… Plaintiff has done this, but alleges that the hairpiece has caused her severe headaches. A larger hairpiece would seem in order. But even if any hairpiece would cause such discomfort, the policy does not offend a substantial interest.

Rogers v. Am. Airlines, Inc., 527 F.Supp. 229, 233 (S.D.N.Y. 1981)

"This Court does not doubt that Plaintiff had a good faith belief that Defendant's grooming policy constituted an unlawful employment practice. But however genuine this belief may have been, it was not objectively reasonable in light of existing case law…[I]t was well-established at that time of Plaintiff's alleged protected activity that § 1981 only prohibits discrimination based on the immutable characteristics of race. **Dreadlocks and cornrows are not immutable characteristics. Instead, they are hairstyles that an individual chooses to wear.** Moreover, Defendant's grooming policy did not implicate a fundamental right."

Pitts v. Wild Adventures, Inc., CIV.A.7:06-CV-62-HL, 2008 WL 1899306, at *8 (M.D. Ga. Apr. 25, 2008)





# The CROWN ACT Today

March 18, 2022
The U.S. House of Representatives passed the CROWN Act (H.R. 2116) with a vote of 235-189

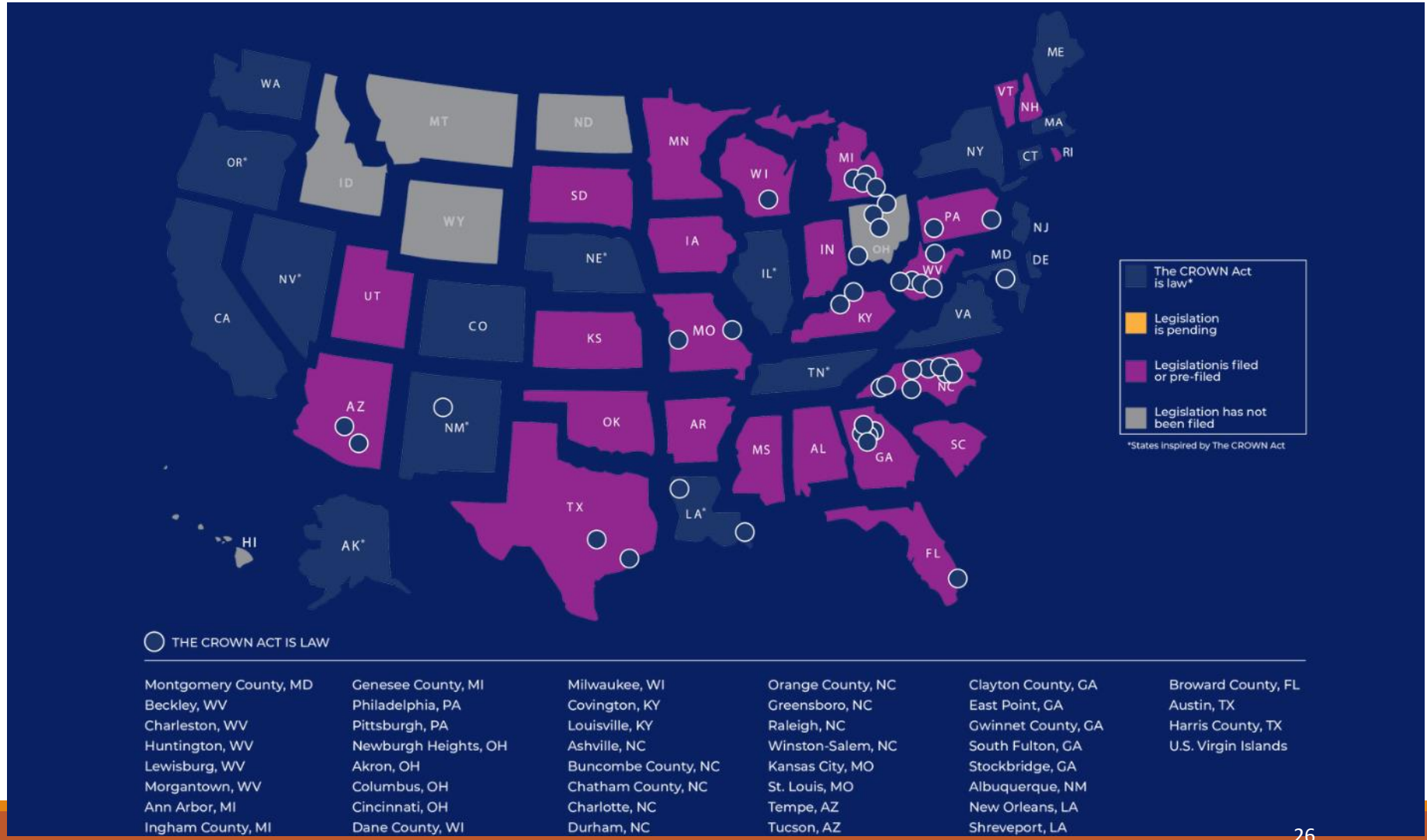



IMAGE COURTESY OF THE OFFICIAL CROWN ACT CAMPAIGN

# Best Practices in the Meantime

Stay up to date on relevant legislation and laws

Obtain relevant education on hairstyles historically associated with race or culture

Update grooming policies to 2022 and avoid using vague and subjective terms like “excessive hairstyles” or “cornrows”

Ensure whatever grooming policy is in place is enforced uniformly, without regard to race or ethnicity

Avoid broad prohibition on specific hairstyles historically associated with race

Do not attribute hair type to unprofessionalism

Create a safe and healthy space for employees where there is zero tolerance for bias or prejudices on hair appearances



# MENTAL HEALTH IN THE MUNICIPAL WORKPLACE

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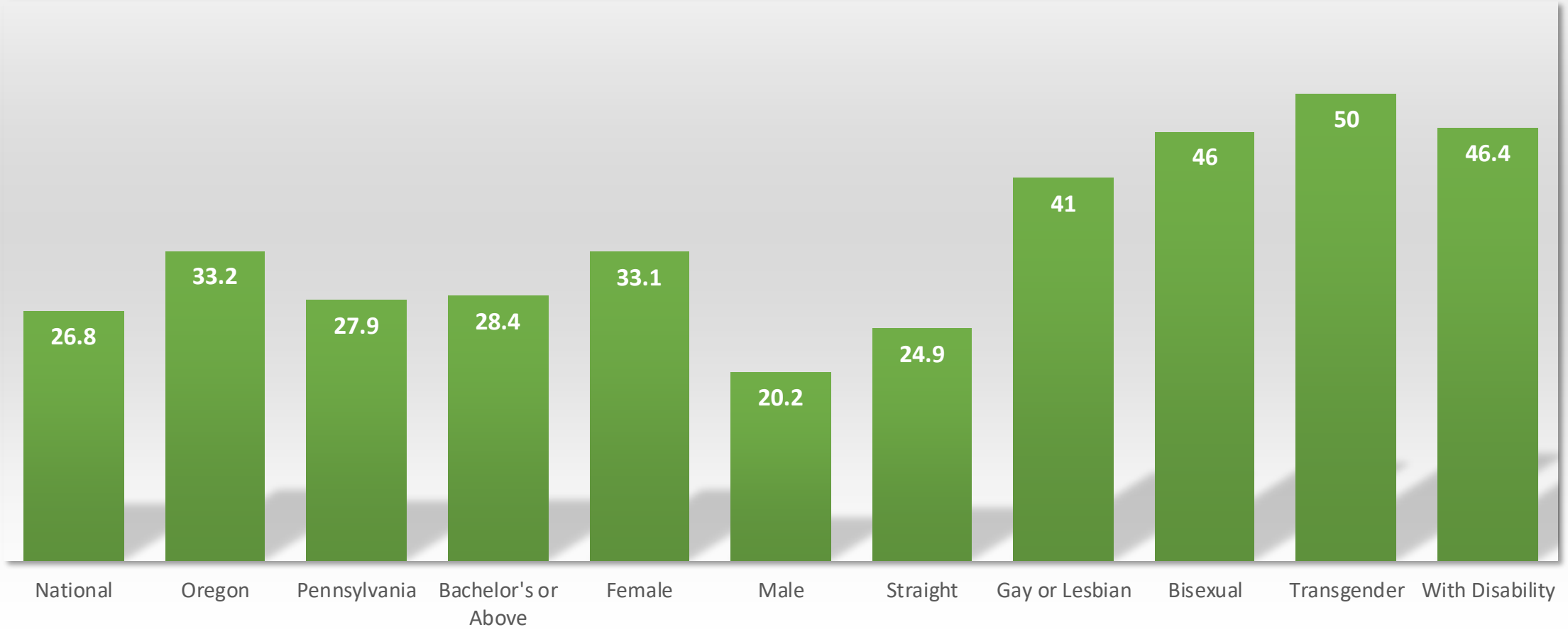
# Mental Health Statistics

- Over 50% of Americans will develop a mental illness or disorder
- 1 in 25 Americans live with a serious mental illness, identified by the CDC as conditions like schizophrenia, bipolar disorder, or major depression
- Recently, the CDC found that 25% of all individuals surveyed had indicators of anxiety or depression
  - This number increased to 62% in individuals with some form of disability
  - The prevalence of anxiety and depression increased 25% worldwide during the Pandemic
- Attorneys and Mental Health:
  - 11th highest rate of suicide of any profession
  - 2016 Betty Ford and ABA Commission Study showed, among 13,000 licensed and employed attorneys:
    - 28% were experiencing depression
    - 20.6% screened positive for alcohol abuse or dependency
    - 19% were experiencing anxiety

CDC Mental Health Basics, WHO, State Rep. Mike Scholossberg (PA), ABA, and U.S. News & World Report

# Individuals Taking Prescription Medication and/or Receiving Counseling or Therapy for Mental Health Conditions Within the Previous Four Weeks
## CDC Household Pulse Survey
## (CDC Grouping/Terminology, 4.27-5.9.2022)



# Americans with Disabilities Act

- ADA provides it is unlawful to discriminate in employment against a qualified individual with a disability (42 U.S.C. § 12101, et seq.)
- Disability:
  - Physical or mental impairment that substantially limits one or more major life activities of such individual
  - A record of such impairment OR
  - Being regarded as having such an impairment (42 U.S.C. § 12102(2))
- To demonstrate disability-based discrimination, plaintiff must show:
  - They have a disability
  - They are a qualified individual (that is, can perform the essential functions of the job) AND
  - They suffered an adverse employment action because of the disability
    - Turner v. Hershey Chocolate U.S., 440 F.3d 604, 611 (3d Cir. 2006)
- ADA intended to prevent subtle types of discrimination, but is not unlimited in scope
  - Chapman v. Pier 1 Imports (U.S.) Inc., 631 F.3d 939, 945-46 (9th Cir. 2011)

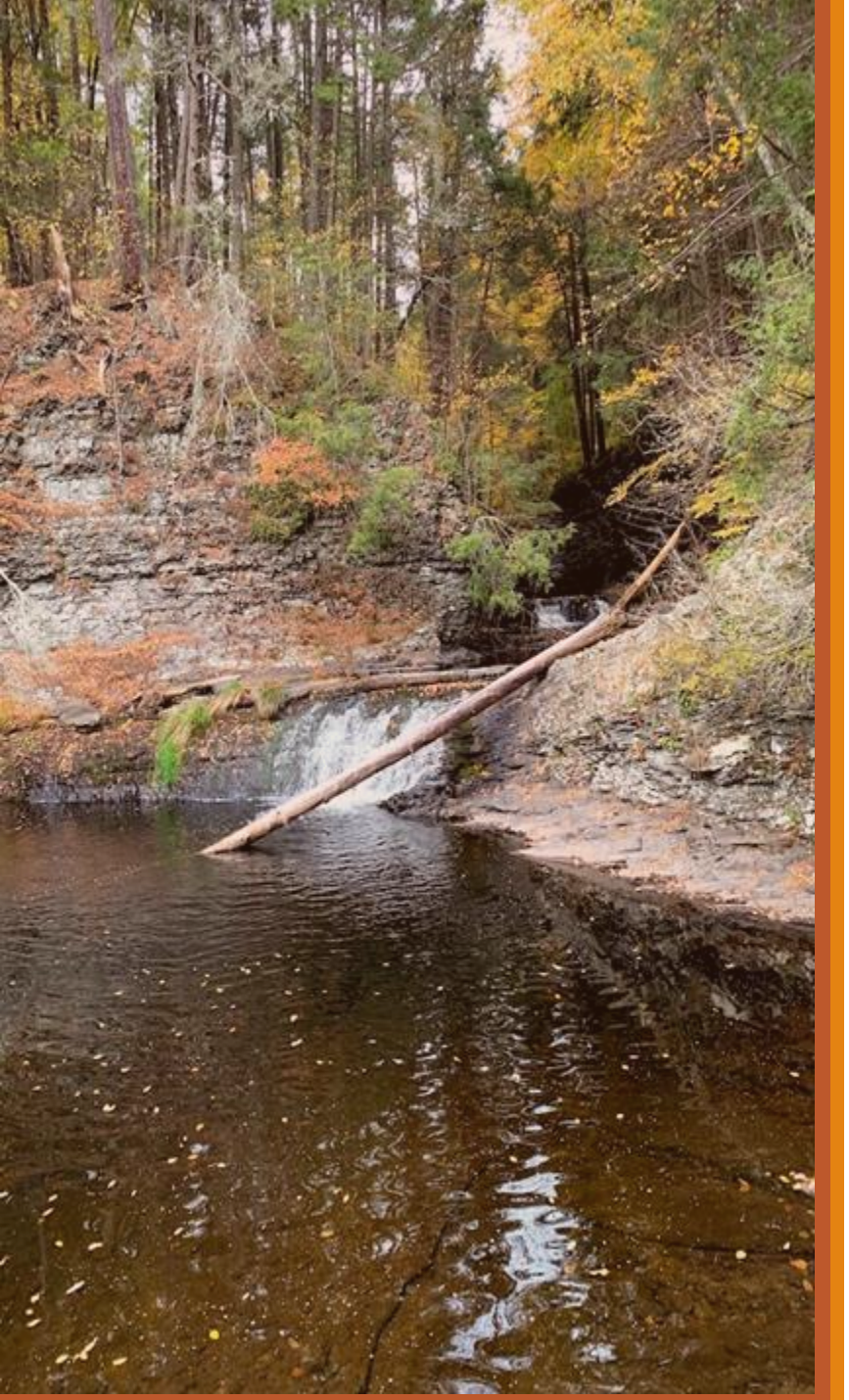


# Mental Health Under the ADA

- Mental Impairment Disability
  - Mental Impairment is “any condition that prevents the mind from functioning normally” – Third Circuit Model Jury Instructions
  - Modified as “any mental or psychological disorder…emotional or mental illness...” 29 C.F.R. §1630.2(h) (2019)
- To qualify, employee must have actual or perceived disability
  - May show actual disability by request for accommodation
- An employer MUST provide reasonable accommodations to employees with disabilities, BUT
  - The accommodation cannot cause undue hardship to the employer 42 U.S.C. 12112(b)(5)(A)

# FMLA & MHPAEA

- Family and Medical Leave Act of 1993 (29 U.S.C.A. § 2601 et seq.):
  - The FMLA requires that an employer provide twelve work-weeks of unpaid leave in a twelve-month period for various personal and family medical issues, but also for:
    - "[A] serious health condition that makes the employee unable to perform the essential functions of their job" (U.S. Dept. of Labor)
- Mental Health Parity and Addiction Equity Act of 2008 ("MHPAEA"; 29 U.S.C. § 1185a (2012) & 42 U.S.C. § 300gg-26 (2012))
  - Employers and health plans prohibited from limiting coverage of mental health benefits more stringently than other physical health benefits – predated by OR law
    - MHPAEA adopted by Pennsylvania in 2010 40 Pa. C.S. § 4301 et seq.
    - Oregon Mental Health Parity Act of 2007, Or.Rev.Stat. § 743A.168
  - Applies to both financial requirements, quantitative treatment limits, and nonquantitative treatment limits ("NQTL"; i.e. fail-first policies or geographic restrictions)



# Reasonable Accommodations

Employees with a mental health condition who, after taking a leave of absence for treatment, can return to perform the essential functions of the job are qualified individuals covered by the ADA

> Humphrey v. Memorial Hospitals Ass'n, 239 F.3d 1128, 1136 (9th Cir. 2001)
>
> Plaintiff developed OCD which made her late for work; employer had affirmative duty to offer reasonable accommodation

Failure to request accommodations is a valid defense

> Adams v. County of Maricopa, 2022 WL 42472 (9th Cir. Jan. 5, 2022)
>
> Plaintiff specifically denied limitations and refused to request accommodations

# 9th Circuit Case Law – Recent Trends

Magee v. Trader Joe's Company, 2020 WL 9550008 (D. Or. Sept. 1, 2020)

- Written warnings are not adverse employment actions, but a negative performance evaluation may be if undeserved
  - Importance of temporal connection
  - Plaintiff must show that mental health condition prevented them from requesting accommodation if not done prior to suit

An Employer-Focused Analysis:

- "[t]he primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred," rather than "whether an individual's impairment substantially limits a major life activity" 29 C.F.R. § 1630.2 (j)(1)(iii)
- Employer must engage in interactive process





# Best Practices

- Mental health issues may present themselves in a variety of ways
- Human Resources and counsel may not:
  - Ask if they have a mental health condition
  - Ask others close to employee if the employee has such a disability
  - Inquire about prescriptions, unless the specific job duties forbid their ingestion
- Human Resources and/or counsel should, especially if issues are noticed:
  - Ask about an employee's well-being
  - Inquire as to whether they can perform the functions of their job
  - Request that an employee provide medical documentation should they desire an accommodation and/or any type of intermittent or extended leave



# Supporting Employees' Mental Health

- Reduce or remove barriers to treatment (i.e. no copay for in-network mental health treatment)
- Rethink work from home policies – COVID demonstrated it is doable in many sectors
- Advise management to provide information on available resources to employees
- Encourage harm reduction methods including mental health leave, sabbaticals, and disconnecting

# Questions?



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