

WORLD MENTAL HEALTH DAY

# Employee mental health – how to act in accordance with the law?





According to a report on sick leave published by the Social Security Agency, the number of sick notes issued due to mental and behavioural disorders is growing every year. The reasons include depression, neurosis, and reactions to severe stress.

In 2024, doctors issued over 1.6 million sick notes related to mental disorders, which represents an increase of 13.8% compared to 2023. In turn, if we compare this data with 2019, the period before the pandemic, the number of sick notes has increased by 38.1%.

This poses new challenges for employers. How should they respond when an employee's behaviour causes concern? How can they ensure safety in the workplace without violating the employee's personal rights?

At the same time, information about mental health constitutes sensitive data, protected by the GDPR as special category data, and its processing requires that additional obligations be met.



# How should an employer respond to an employee whose behaviour indicates mental health disorders?

First of all, it should be emphasised that there is no single, universal approach to dealing with employees who exhibit unusual behaviour in the workplace, especially if they are aggressive, hyperactive, suffer from depression, or demonstrate significant mood swings.

The issue of mental health in the workplace is complex because it requires an individual approach to very sensitive matters. An additional difficulty is the fact that the provisions of the Labour Code, other legal regulations, and court rulings are rather brief when it comes to the mental health of employees.

However, regardless of the above, employers have a legal obligation to ensure safe and hygienic working conditions, which also includes the mental well-being of employees. An employee whose behaviour indicates mental disorders may pose a threat to themselves and other employees and cause an accident at work. And an employer that knows about an employee's poor health but fails to take appropriate action may be subject to both civil and criminal liability.

However, it is possible to act according to some general recommendations that employers can follow. Below we present some of our own recommendations. They were prepared based on our experience and practice.

Nevertheless, it is important to remember that each situation is different, and the following recommendations should be adapted to the given case. In some situations, instead of taking specific action (e.g. talking to the employee), it may be necessary to immediately call the appropriate public services to protect health and life.



## 1. Careful observation and preventive measures

First and foremost, it is the role of supervisors and managers to carefully observe their employees for behaviour that may have an effect on the safe and hygienic working conditions and the performance of official duties, such as aggression, mood swings, decreased efficiency, communication difficulties, and interpersonal conflicts.

In addition, a key element that can prevent the need to take the steps described below is the introduction of appropriate and consistent preventive measures by the employer.

Within this framework, it is particularly important to promote knowledge about mental health in the workplace, including through the organisation of training courses on stress management and atypical behaviours, including neuroatypical individuals, effective communication, and recognising the symptoms of a mental health crisis.

In addition, the atmosphere in the workplace should be regularly monitored, for example by conducting anonymous surveys, providing channels for reporting irregularities, and holding individual conversations with employees, which allows for the early identification of difficulties and the taking of quick supportive action.

It is also recommended that employers, as far as possible, offer employees psychological support, for example through assistance programmes, consultations with

specialists, including access to psychological and psychiatric hotlines, and company initiatives aimed at promoting mental well-being.

It is also worth providing employees, especially managers who have a significant impact on the development of their subordinates on a daily basis, with practical tools for recognising and supporting neuroatypical talents.



## 2. Conducting a conversation with the employee

If a supervisor has doubts about the mental health of an employee, the first step should be for the supervisor to talk to the employee. The main purpose of this is to enable the supervisor to assess the scale of the problem and the possibility of the employee's posing a threat to themselves and/or their colleagues.

During the conversation, particular caution should be exercised and, at this stage, the supervisor should limit themselves to listening to the employee and analysing what they say and how they behave. The conversation may focus on work-related issues or discuss situations that have occurred in the workplace and contributed to the supervisor's suspicions.

If, after this initial conversation, the supervisor still has doubts about the employee's health, in particular that they may pose a potential threat to themselves and/or their colleagues, the matter should be reported immediately to the HR department.



# Practical tips for conducting the conversation

Note! Unless the employee has mentioned the subject themselves, the supervisor should not state or even suggest that the employee is suspected of having a mental disorder.

Only if the employee shares this information themselves and expresses a willingness to discuss the matter may the supervisor ask the employee about their well-being, whether any deterioration is related to their work or relationships in the company, and whether the tasks assigned to them are causing them problems or excessive stress. The supervisor should also check whether the employee needs help from the employer. Questions should be asked with great care and sensitivity.

Under no circumstances should questions be asked about the course of an illness, stages of treatment, prospects for recovery, or medications taken.

If the supervisor behaves in a different way or asks questions suggesting the existence of a mental illness, this may violate the employee's personal rights (e.g. the right to privacy) and result in liability for damages.

In extreme situations, if at any stage the employee's health poses a threat to themselves and/or their colleagues, they should be immediately removed from the workplace and sent home. Before sending the employee home, it is necessary to check whether they are able to travel independently or whether it is necessary to offer them assistance in this regard, e.g. by calling a taxi or notifying their family or a trusted person.

The question often arises as to whether the employer can notify the family or another person designated by the employee to be contacted in an emergency. Again, it all depends on the situation, but if there is a risk that the employee poses a threat to themselves or others, such contact should be considered justified and even advisable.





# Processing of personal data

Information about an employee's health constitutes a special category of personal data which, in the light of Article 9(1) of the GDPR, should not be processed by the employer, unless one of the exceptions specified in Article 9(2) of the GDPR applies, such as:

- i. the employee gives prior and explicit consent,
- ii. processing is necessary to protect the vital interests of the data subject or another natural person, and the data subject is physically or legally incapable of giving consent,
- iii. processing is necessary for the establishment, exercise, or defence of legal claims or in the course of judicial proceedings,
- iv. it is necessary for, among other things, the purposes of preventive healthcare or occupational medicine, for the assessment of the employee's capacity for work, medical diagnosis, the provision of health care, or social security.

These and other exceptions specified in Article 9(2) of the GDPR should be interpreted narrowly, and the general principles of the GDPR, including the principle of data minimisation and the limitation of the purpose

of data processing, should also be taken into account. As a result, if a prior risk analysis for the processing does not indicate that the collection of such personal data would be necessary for the purposes pursued, the recording of data on the employee's state of health, including their mental state, may be considered excessive. In that case, the employer may refrain from processing this personal data or limit it to specific cases, conditioned by a potential threat to the health and life of employees, in which it would be possible to indicate one of the exceptions mentioned in Article 9(2) of the GDPR.

In addition, each employee should be informed about the purposes, grounds, and methods of processing their data, as well as their rights, in an appropriate information clause, in accordance with Article 13 of the GDPR.

Furthermore, based on the wording of Article 22(1b) of the Labour Code, the prior consent of the employee and ensuring that the transfer of information is made on the employee's own initiative may be necessary in order to demonstrate the lawfulness of the processing of this type of personal data, regardless of the above-mentioned requirements of the GDPR. As a result, it is necessary to conduct a prior analysis of the legal basis that could apply to such cases.







### 3. Second interview with the employee, attended by a representative of the HR department and an external specialist

After notifying the HR department, a second interview with the employee should be conducted in the presence of a representative of the HR department and, optionally, a psychologist or other external specialist. The purpose of the meeting will be to assess the validity of the suspicions regarding the employee's possible mental disorders, in particular those that may pose a threat to their health or the safety of their colleagues or hinder the proper performance of their duties.

The practical guidelines for conducting the first interview also apply during this second interview.

The participation of a psychologist or other external specialist is important in that it may have an impact on limiting the employer's liability.

However, it should be remembered that, pursuant to the GDPR, only authorised persons should be allowed to process data concerning an employee's health. Under Article 22(1b) §3 of the Labour Code, only persons with written authorisation from the employer to have the access to such data may be allowed to do so. At the same time, these persons are obliged to keep such data confidential.

In addition, depending on the model in which the services of an external specialist are provided to the employer, it may also be necessary to sign a personal data processing agreement with the psychologist or the entity employing them, in accordance with Article 28 of the GDPR, which would specify the obligations regarding the proper protection of personal data.



### 4. Referral for medical examination

Pursuant to the Labour Code, the employer may not admit an employee to work if they do not have a current medical certificate stating that there are no medical reasons why they cannot work in a given position.

Therefore, if there is a reasonable suspicion that an employee's mental health may affect their own safety or that of others, it is possible to refer the employee for a preventive examination by an occupational health doctor.

If the employer believes that an employee is manifesting behaviour indicating a risk that the medical certificate may lose its validity, it may refer the employee for additional examinations.

However, in order for the employer not to be accused by the employee of harassment, discrimination, mobbing, or a violation of personal rights, this decision should be made after carrying out the actions described in the points above.

Until the employee undergoes preventive examinations, it is possible to temporarily suspend them from their duties while retaining the right to remuneration.

The basis for this decision is Article 207 of the Labour Code, according to which the employer is obliged to ensure occupational health and safety. It should be remembered that work performed by a person who is unable to do so due to their state of health may result in an accident at work and pose a threat to the environment, and the employer would be liable for such an event if it had not taken any preventive measures.

Furthermore, if, as a result of a preventive medical examination, a doctor decides that the employee's health condition prevents them from continuing to work in their current position, pursuant to Article 229 § 4 of the Labour Code, the employer is strictly prohibited from admitting the employee to work.







## 5. Confidentiality

As mentioned above, information concerning an employee's mental health should be treated as sensitive data, subject to special protection in accordance with the provisions of the GDPR and requiring a proper legal basis for its lawful processing. In addition, if the employer decides to process such data, in accordance with Article 32 of the GDPR, taking into account the state of technical knowledge, the cost of implementation, the purposes of the processing and the risks involved (e.g. the possible consequences of a data breach), the employer and its processor(s) (e.g. subcontractors) should implement appropriate technical and organisational measures to ensure a level of security

appropriate to that risk. The regulations of GDPR do not contain a closed list of appropriate measures, but examples include pseudonymisation and encryption of data, ensuring the confidentiality, integrity, availability, and resilience of processing systems and services, the ability to quickly restore availability in the event of an incident, and regular testing, measurement, and evaluation of the measures used.

Furthermore, under no circumstances should an employer inform other people in the company about an employee's mental health. Access to this type of data should be limited to a strictly necessary group of people, while maintaining the confidentiality of the information and the appropriate nature of the authorisation to process the data, as described in point 3.

Caring for the mental well-being of employees is not only a matter of fulfilling obligations under labour law (including Article 207 of the Labour Code, which imposes an obligation on employers to ensure safe and hygienic working conditions). It is also an investment in the stability and effectiveness of the entire organisation. Neglect in this area can lead to increased absenteeism, decreased engagement, and, as a result, higher labour costs and financial losses.

On the other hand, the implementation of appropriate preventive measures and employee support systems not only reduces the employer's legal risk but also brings measurable financial benefits in the form of reduced turnover, reduced sick leave, and increased employee efficiency. Ultimately, it is worth standing out in the market by creating an organisational culture based on trust and safety, thus creating an attractive workplace for both employees and future candidates.





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