The image features the Gibson Dunn logo in the top left corner. The background is a black and white photograph of a modern building's facade, characterized by a complex, layered structure of horizontal and diagonal panels that create a strong sense of depth and geometric pattern. The lighting highlights the textures and shadows of the architectural elements.

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**Grappling with the New Normal:**  
Addressing Mental Health and Other  
Struggles When the Workplace is Remote

Tiffany Phan and Megan Cooney

California MCLE Marathon Blitz | January 2022

## What We'll Cover

1. The Challenges of Work From Home
2. Addressing the Challenges
3. Mental Health & A Lawyer's Duties
4. Accommodating Mental Health Concerns
5. Returning to the Office

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# 1. The Challenges of Work From Home

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# WFH is a Part of the New Normal

9 out of 10 corporate legal department employees want increased flexibility in both where and when they work



## And WFH Is Not All Bad

- FlexJobs survey found that **65%** of those working remotely during the pandemic wanted to continue this lifestyle.
- Upsides of WFH that support mental health
  - Saving money
  - Avoiding commuting
  - Increased flexibility
  - Increased productivity
  - Less distractions
  - Some employees of color feel a *greater* sense of inclusion
- The proportion of US lawyers who want to work remotely at least one day a week has doubled from pre-pandemic levels.

# Mental Health is a Pre-Existing Issue in the Legal Profession



- Attorneys are particularly susceptible to mental illnesses.
- A 1990 Johns Hopkins study found that:
  - Lawyers suffer from depression at a rate of **3.6 times** that of other professions
  - Optimism outperformed pessimism among the various professions “except in the legal profession, because lawyers are hired to always look out for what can go wrong.”

# Mental Health is a Pre-Existing Issue in the Legal Profession

- The legal profession rewards character traits that lend themselves to depression and anxiety
  - **Perfectionism**
  - **Control**
  - **Pessimism**
  - **Environment of Adversity**



# Mental Health Post-Pandemic

**PRE-PANDEMIC**

**62%** of employees felt their mental health was in a positive place

**PANDEMIC**

**28%** of employees felt their mental health was in a positive place

# Lawyers Are Struggling

## **Pandemic Statistics – an ABA Survey**

- **54%** of lawyers reported that they now work from home close to full-time.
- **37%** of the lawyers indicated that they had a mental-health-related problem or concern in the last three years.
- About **17%** of lawyers indicated that, since the COVID-19 pandemic, they had consumed more alcohol or drugs.
- **4%** of lawyers are not sure whether their substance use is a problem.
- The most dissatisfied lawyers said they feel burnout **74%** of the time, on average, while satisfied lawyers feel burnout **28%** of the time.

# When Your Home Is Your Office



## **ABA Survey Results**

- Work disruptions
- Missing coworkers
- Disengagement from employer
- Overwhelmed
- Stressed out
- Neverending days
- Difficulty taking time off
- Burnout

# Added Struggles of In-House Counsel

- More responsibility
- Guiding organizations through unprecedented times
- Navigating a public health crisis on one hand and government demands on the other
- Detrimental effects on collaboration, innovation, and knowledge transfer
- Nearly half (**47%**) of GCs say WFH is hurting employee morale

# The Impact of the Pandemic on Diverse Attorneys

- **Lawyers of Color**

- 31% of Black lawyers, 23% of Hispanic and Latino lawyers, and 20% of Asian lawyers said they have **contemplated suicide** during their legal career.
- Black and Hispanic attorneys reported **higher levels of depression and anxiety**
- And some have reported **increased rates of harassment** in the remote setting

- **Female Lawyers**

- One in four female attorneys has **considered leaving the profession** during the pandemic.

# Struggles of Lawyer Parents

- As the pandemic has continued on, parents have experienced a higher toll on their mental health as they attempt to balance childcare responsibilities in the remote environment
- **27%** of parents reported that their mental health declined as a result of the pandemic
- Mothers report struggling more than fathers
  - **75% of mothers compared to 69% of fathers** report acute or moderate mental health concerns



# Substance Use During Work From Home

## **All types of substance use increased during the pandemic**

- 13% of Americans reported starting or increasing substance use as a way of coping with stress or emotions related to COVID-19
- Among adults over age 30, alcohol consumption rose by 14% during the pandemic, with a 41% increase in women heavily drinking
- More than 40 U.S. states have seen increases in opioid-related mortality

# Pandemic Culture Exacerbates Alcohol Use



## **Drinking became a normalized coping skill**

- At least 33 states and D.C. permitted restaurants and bars to sell cocktails to-go during the pandemic
- Consuming alcohol in the pandemic moved the activity from a social one to a solo one
- People are not drinking to feel good – they are drinking to not feel bad

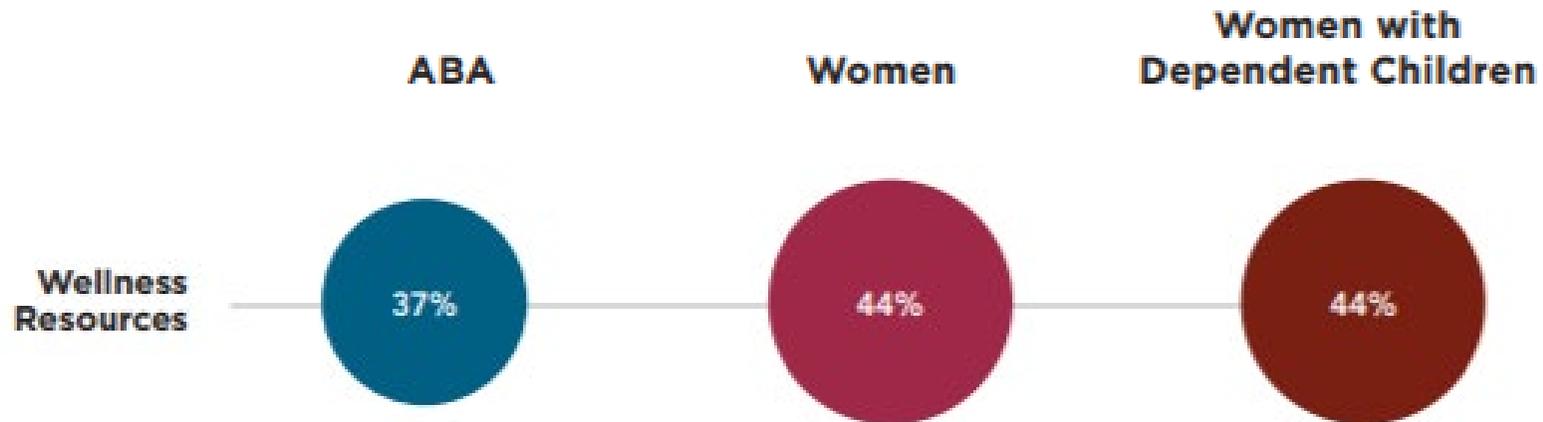
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## 2. Addressing the Challenges

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# Make Mental Health a Priority

A substantial number of lawyers (**34%**) report that guidance about enhancing mental health and well-being would **help them in the practice of law** going forward.



# Tips for Detecting Depression

## What to *notice in yourself and others...*

- Physical symptoms:
  - Exhaustion?
  - Significant appetite changes?
  - Difficulty sleeping?
- A consistent and persistent sense of sadness
- Feelings of hopelessness, like nothing will change or get better
- Inability to find joy in activities that used to “fill you up”



# Tips for Detecting Burnout

## Identifying burnout *can be difficult ...*



- An early warning sign can be working night and day - so much that you have no balance
- Feelings of being disengaged or detached. Do you not care about your work as much as you used to?
- Deadlines are missed and your attention to detail is waning
- Irritable in your interpersonal interactions

# Open Communication

- Encouraging a culture of “**checking in**” to start the conversation is critical.
- Move beyond temporary solutions and think **long term** about workplace **culture**
- **Two** in five lawyers say they cannot discuss wellness issues for fear of doing damage to their careers
- **It's OK not to be OK**



# Tips for Addressing Burnout – Your Team

- Say thank you more than your current practice.
- Offer in-time feedback to peers and direct reports.
- Be clear when giving assignments in order to minimize conflicting requests and ambiguity (two known accelerants of burnout).
- Make constructive feedback a learning-focused, two-way conversation.
- Keep people informed of changes.
- Keep track of and talk about small wins and successes.
- Provide a rationale or explanation for projects, goals, and big-picture vision.
- Prioritize “you matter” cues like calling people by name, making eye contact, and giving colleagues your full attention.

# Tips for Addressing Burnout – Soft Skills

**Soft skills** to improve mental wellbeing and building trust

- Listening
- Accountability
- Emotional Intelligence
- Empathy



# Tips for Addressing Your Own Burnout

- Adopt a nonnegotiable **mindset** for your mental health as an attorney
- Take a **break**
- Use video tools and platforms with built-in **communication** that can be used to promote face-to-face learning and clearer conversations
- Prioritize **health and exercise**
- Create a **support** network
- **Separate** your home office from the rest of your home
- Establish meaningful **boundaries** at work

# Establish and Encourage Boundaries



- Establish firm professional boundaries in remote work context.
- Emphasize professional conduct at work by being inclusive of all colleagues and not allowing inappropriate conversations or comments to go unaddressed.
- Ensure that training is up to date for employees.

# Mental Health Resources

Potential options that leaders can consider to promote mental health and well being include:

- Providing **mental health training** for your company's leaders to help them be more aware of and invested in this aspect of their employees' well-being.
- Offering **mental health coverage** as part of your health care plan.
- Using an **employee assistance program (EAP)** to support workplace mental health (but recognize stigma and take steps to address)
- Organizing **wellbeing workshops** for employees, such as yoga, meditation, or breathing exercises.

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### 3. Mental Health & A Lawyer's Duties

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# Rules of Competence

## California Rule of Professional Conduct 3-110

- A member shall not fail to perform legal services with competence
- Competence applies to the diligence, learning and skill, and **mental, emotional**, and physical ability reasonably necessary to perform legal services

## Model Rules of Professional Conduct 1.16(a)(2)

- A lawyer shall not represent a client if the lawyer's physical or **mental condition** materially impairs the lawyer's ability to represent the client

# ABA Formal Opinion 498: Competence in Office and Remote

## **ABA Formal Opinion 498**

Offers guidance for remote working attorneys, focusing on the importance of competence, adequate supervision and maintaining client confidentiality.

### **Competence**

- For lawyers to meet the fundamental duty of competence, their remote practice must be the same standard as their in-office practice.
- Given the pandemic's effect on mental health, there may be an ethical responsibility to assist lawyers with wellness and mental health efforts under the duty of competence to ensure lawyers meet the standard of their pre-pandemic or in-office practice.

# ABA Formal Opinion 498: Competence in Office and Remote

## **Supervision**

- Lawyers must ensure tasks are being completed in a timely, competent, and secure manner
- This will require regular interaction and **communication** with teams
- This has benefits in multiple ways—as we have seen, open communication fosters a positive work culture that improves mental health

# When Mental Illness Compromises the Competence of Another Attorney

## ABA Formal Opinion 03-431

- A lawyer who believes that another lawyer's mental condition **materially impairs** his or her ability to represent clients, must report that lawyer's violation of Rule 1.16(a)(2) (duty to withdraw when not competent)
- “A lawyer may be impaired by senility or dementia due to age or illness or because of alcoholism, drug addiction, substance abuse, chemical dependency, **or mental illness.**”



# When Mental Illness Compromises Your Competence

## **Get help if you need it**

- Mental health *is health*
- Just as you would treat any other physical symptom, mental health concerns are treatable
- Lawyers Depression Project
  - <https://www.lawyersdepressionproject.org/>
- Confidential Lawyer Assistance Program
  - [www.calbar.ca.gov/ Attorneys/MemberServices/LawyerAssistanceProgram.aspx](http://www.calbar.ca.gov/Attorneys/MemberServices/LawyerAssistanceProgram.aspx)
- The Other Bar
  - <https://otherbar.org/>
- American Bar Association
  - [www.americanbar.org/groups/lawyer\\_assistance.html](http://www.americanbar.org/groups/lawyer_assistance.html)

# ABA Formal Opinion 498: Confidentiality in Office and Remote

## Confidentiality

- Unless the technology is assisting the lawyer's law practice, disable the listening capability of devices such as smart speakers, virtual assistants, and other listening-enabled devices while communicating about client matters.
- Any client-related meetings or information should not be overheard or seen by others in the household, office, or other remote location, or by other third parties who are not assisting with the representation, to avoid jeopardizing the attorney-client privilege and violating the ethical duty of confidentiality.
- Consider ways you can help employees meet these standards—i.e. **stipends to purchase headsets or at-home office set-ups**

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## 4. Accommodating Mental Health Concerns

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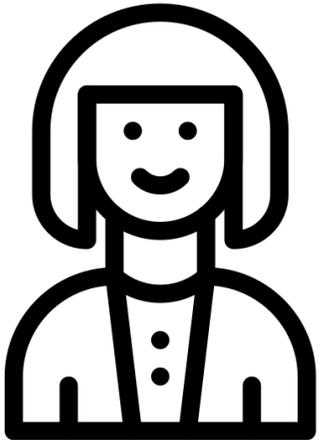
# Mental Health and the ADA

An employee's mental health may qualify as a **disability** under the Americans with Disabilities Act or other state protections

- Does the employee have an “emotional or mental illness”?
- Is the employee “substantially limit[ed in] in one or more major life activities”? An impairment is **substantially limiting** if it lasts for more than several months and **significantly restricts** the performance of one or more major life activities—not necessarily work. (EEOC Compliance Manual § 902.4(d).)

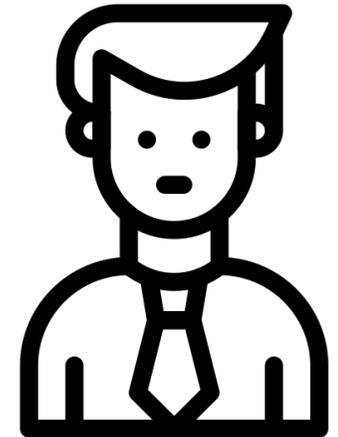
# Mental Health and the ADA: What Qualifies?

## Employee A



In lockdown, has been intensely sad and socially withdrawn, **but** still performing well at work; has been diagnosed with **major depressive disorder**, has developed serious insomnia, and has had severe problems concentrating—has not improved since March 2020.

## Employee B



In lockdown, went through divorce; was able to maintain her daily routine but often became agitated and short-tempered; started talk therapy and was diagnosed with **adjustment disorder**, but began to feel an improved mood in weeks.

# Mental Health and the ADA: Accommodations

## **If an employee's mental health rises to the level of disability, reasonable accommodations may be necessary:**

- Altered break and work schedules — for example, scheduling work around therapy appointments or changing shifts in recognition of medication's side effects
- Adjusting supervisory methods – how employees receive assignments (e.g. written versus verbal) and feedback
- Leave – use of sick pay for mental health reasons, FMLA unpaid leave
- Permitting 100% remote work
- Modifications of workplace policy so long as it is not an undue hardship on the employer

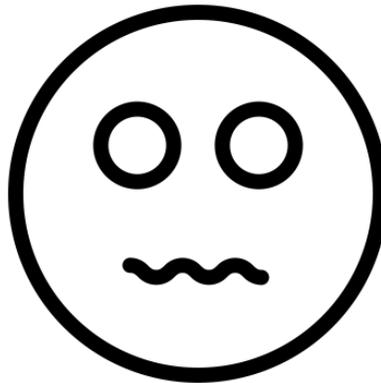
# Handling Requests for Accommodation

## Question

An employee asks for time off because COVID has made him “anxious and stressed.” **Is this an adequate request for an accommodation?**

## Answer

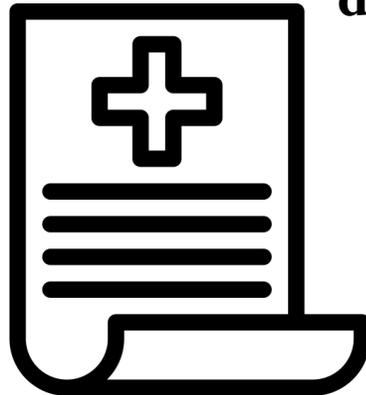
Yes. Employees can request accommodations in “**plain English,**” and this is sufficient to put an employer **on notice.**



# Handling Requests for Accommodation

## Question

The employer responds by asking for his entire psychiatric history and details of his therapy sessions. **Is this an appropriate request for documentation?**



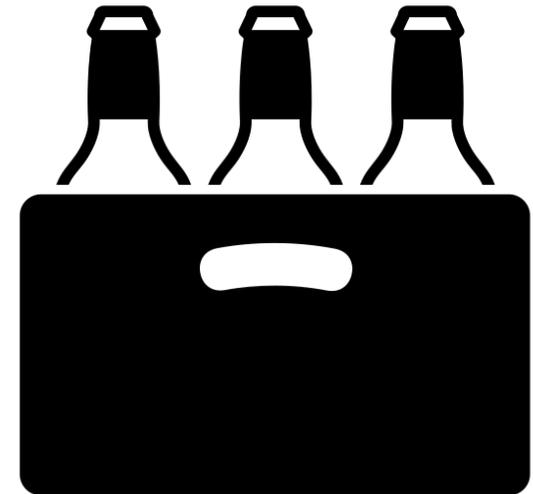
## Answer

No. While an employer may request documentation that an employee has a disability within the meaning of the ADA, it must be **reasonable documentation.**

# Alcohol Use & The ADA: What Qualifies?

## Alcohol use

- Alcoholism can be a covered disability under the ADA.
- Even though alcoholism is a covered disability, employers can still enforce rules concerning alcohol:
  - Prohibit alcohol in the workplace
  - Require employees not be under the influence in the workplace
  - Hold an employee with alcoholism to the same employment standards



# Identifying Employees Who May Be Abusing Substances

**1 in 3 employees** have admitted to **drinking while working from home** since the pandemic began



## ***Signs to look for:***

- Employee routinely looks tired;
- Displays slurred speech;
- Is frequently late to meetings;
- Lacks engagement; or
- Repeatedly refuses to use the video function.

## Consider ***referring the employee to an EAP***

- Gives an employee a safe space to discuss substance use
- Get referrals to necessary treatment

# Alcohol Use & The ADA: Reasonable Accommodations

## **If an employee's alcohol use rises to a disability, reasonable accommodations are a statutory requirement**

- Most common reasonable accommodations for alcohol abuse
  - A modified work schedule so that an employee can attend Alcoholics Anonymous meetings
  - A leave of absence for the employee to seek treatment
- Employees cannot blame misconduct on alcoholism
- An employer is generally not required to provide leave to an alcoholic employee if the treatment would appear to be futile

# Drug Use & The ADA: What Qualifies?



## Drug use

- Any employee or job applicant who is currently engaging in the illegal use of drugs is not a qualified individual with a disability (42 USC § 12114(a))
- An employer does not violate the ADA by uniformly enforcing its rules prohibiting employees from illegally using drugs (EEOC Technical Assistance Manual on the ADA)
- An employee cannot enroll in a rehabilitation program to avoid disciplinary action

# When an Employee is a Danger to Him or Herself

According to the ABA, **11.5% reported suicidal thoughts** during their career, **2.1% reported self-injury**, and **0.7% reported at least one suicide attempt**

- Demonstrate **care and empathy**
- Show **support** – understanding their pain
- Offer **accommodations** (time off or leave)
- **Contact** family members (emergency contacts) or authorities if necessary
- **Offer help** (Employee Assistance Program [“EAP”], suicide hotline)
- **Investigate** the circumstances before taking any action.



# When an Employee is a Danger to Him or Herself

As a last resort, an employer may **terminate a suicidal employee** if the employee poses a significant risk of harm to himself or herself and that which cannot be eliminated or reduced by reasonable accommodations.

However, to take action against an employee with a history of suicide attempts, there must be other factors in play:

- *Spades v. City of Walnut Ridge* (8th Cir. 1999) 186 F.3d 897:
  - City fired police officer who attempted suicide with city-issued handgun.
- *EEOC v. Amego, Inc.* (1st Cir. 1997) 110 F.3d 135:
  - Residence home for severely disabled individuals terminated team lead when, after being denied a promotion, she intentionally overdosed twice.

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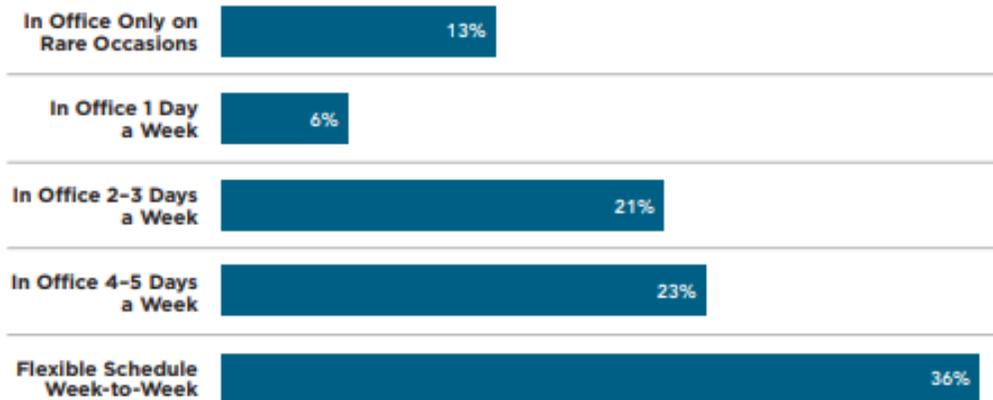
## 5. Returning to the Office

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# Flexibility in Work Structures

## IDEAL MIX OF OFFICE + REMOTE

### ABA

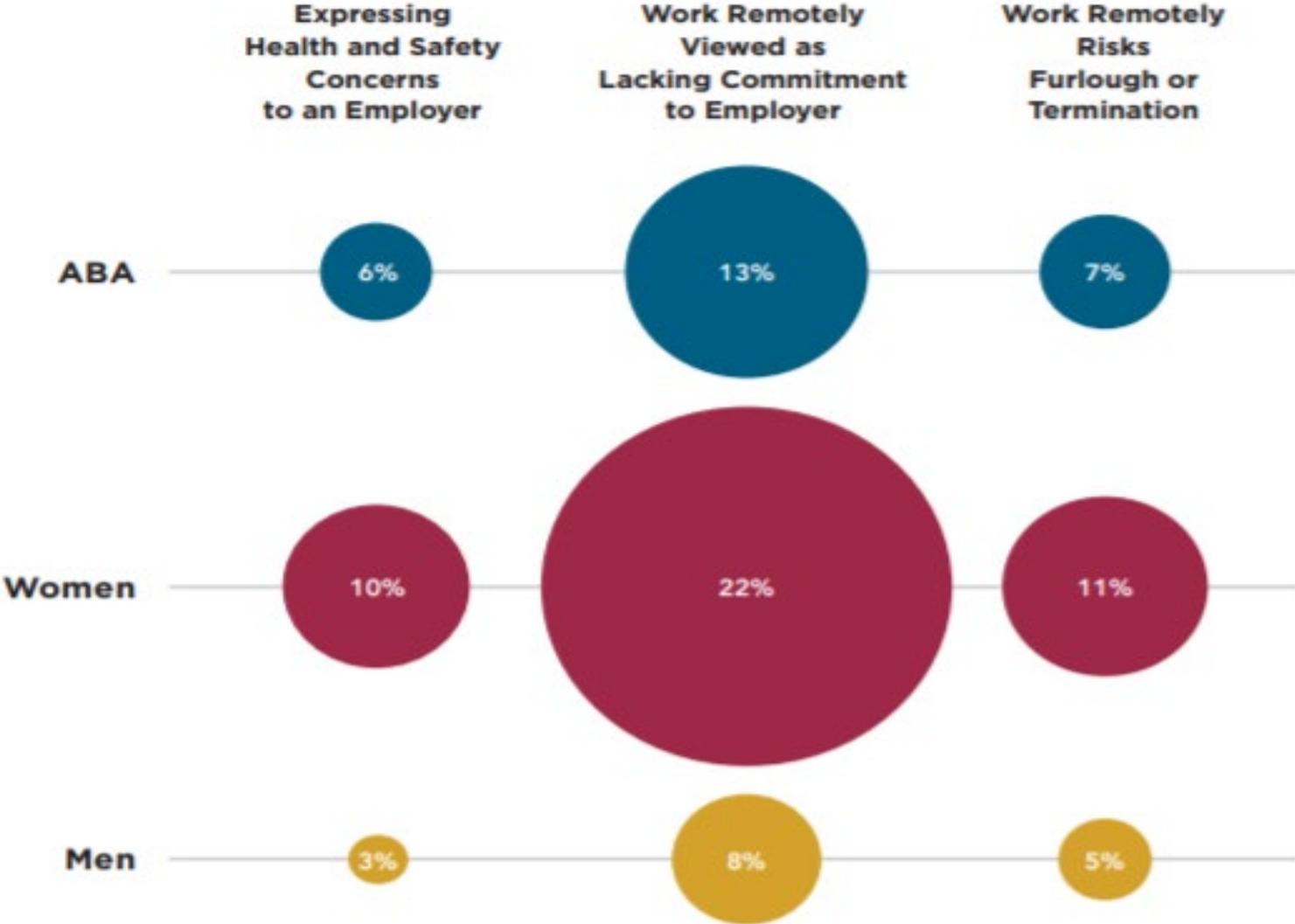


- Options can help calm agitated nervous systems.
- Survey employees to understand their priorities and preferences.
- If possible, give employees choices over how they return to the office. For example, a staggered return or a hybrid model

# Returning to the Office Is a “Mixed Blessing”



# VERY OR EXTREMELY CONCERNED ABOUT:



# Clarity in Return-to-Office Expectations

Quell anxiety about transitions by **communicating as much information about the plan as soon as possible**

- Provide written material about the firm's back-to-the-office plan.
- Lay out what will be the same and what will be different.
- List the things for which you don't yet have answers and acknowledge the challenges being faced; identifying what isn't yet decided but is in the works can also calm anxiety



# Takeaways

- **Communicate** and stay engaged with your workforce—monitor attorneys' wellbeing and foster an open environment to address concerns
- **Be flexible** in navigating these unprecedented times
- **Check** to see if attorneys need support—accommodations, leave, counseling
- Make **mental health** a priority and encourage dialogue about wellbeing
- Promote **positivity, appreciation,** and a **team mentality**—we'll get through it together

# Speakers – Thank you!



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