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Navigating Neurodiversity Policies Gives Employers A Leg Up

By **Adele Redmond**

Law360, London (November 1, 2022, 6:05 PM GMT) -- Employers must revisit their diversity strategies and business structures if they want to gain the competitive edge that employees with autism, ADHD and other neurodivergent conditions can bring to workplaces, lawyers say.

Neurodiversity — an umbrella term for up to 15 developmental conditions including autism, attention deficit hyperactivity disorder and dyslexia — can be treated as a disability under the Equalities Act, placing an onus on employers to provide reasonable adjustments.

These conditions — which also include dyscalculia, difficulty in understanding numbers, and dyspraxia, which affects physical co-ordination — can present challenges.

Social anxiety, sensory overload and a blunt style of communication are common among autistic adults, for example. But employees with those conditions can also offer benefits to businesses, such as greater creativity, enhanced memory and pattern-spotting skills and intense focus.

Employers are increasingly aware of the value of neurodivergent thinking, but workers with these conditions are often an afterthought when it comes to retention, promotion and career development opportunities, attorneys said.

"There are all these higher-skilled people who aren't being used in the labor market to their full potential," Tom Heys, a legal analyst at Lewis Silkin LLP, said.

Despite efforts to get neurodiverse people into work — the U.K. government announced a £7.6 million (\$8.7 million) package in August — employment rates remain low. Government data indicates that just 22% of autistic adults were working in 2021. And almost half of autistic employees feel bullied or harassed at work, according to surveys by the National Autistic Society.

Tribunal claims for neurodiversity-based discrimination grew by a third during 2021, according to research from law firm Fox & Partners. Neurodiversity in the workplace is not easily addressed by standardized processes, raising the potential for "well-intentioned confusion and a lack of rigor," partner Ivor Adair said.

Adair said that organizations must consider neurodiversity when they implement diversity and inclusion schemes and when they evaluate employees and promote people to senior roles.

"Often the best way to manage it is through lots of communication and information," Adair said. "It's a resource drain, and it's hard to do well — but those who do it well have fantastic businesses."

Don't focus on the diagnosis

Occupational health assessments are a useful go-to and can be a crucial step in getting a diagnosis outside the overloaded National Health Service: the waiting list for an autism diagnosis is 100,000 people long in England alone.

But attorneys warned that diagnoses are only as useful as the accommodations that follow. The Equality Act does not require a diagnosis to prove disability, specifying instead a "physical or mental impairment" that has a continuing damaging effect on an individual's ability to do their job.

Adam Lambert, head of employment at Bryan Cave Leighton Paisner LLP, said it can be difficult

for human resources teams and managers to distinguish mental illness — a frequent topic of training — from mental impairment.

"If you have an HR professional who wants to do the best for their neurodiverse colleague, and they're faced with little to no medical evidence, a long wait list to get a diagnosis and, inevitably, a long time to get someone through occupational health, it's hard to know what to do," Lambert said.

"This is a situation where you can't get hung up on dogmatic procedure," he added.

Lawyers recommended instead that employers should focus on policies that encourage people to disclose when they're struggling by signposting resources and publicizing any leaders with neurodiverse conditions.

But, although "impairment" is a useful definition, neurodiverse people might not consider themselves impaired or disabled.

"Referring to it as a mental impairment is kind of disparaging. It's not in line with where a lot of thinking is around equity, diversity and inclusion," David Regan, a director in Squire Patton Boggs LLP's employment practice, said.

Basic adjustments such as flexible hours, access to break-out rooms, dictation software and being allowed to wear headphones in the office can benefit the whole workforce.

"The whole point of an adjustment is that it's not a charitable idea," Adair said. "There's a step before accommodations, which is dialogue. Otherwise everyone is just talking about labels rather than the person."

Put the person first

Individualization is the keystone of a diversity strategy for employers that includes neurodiversity, lawyers said, as they recommended training for line managers to improve communication with workers.

Charities and Acas — the government's workplace advice service — can recommend accommodations to suit different conditions, but lawyers noted that only the individual will know what works best for them.

They recommend that organizations promote their openness to adjustment throughout the employment life cycle, particularly during recruitment, performance reviews and changes of role.

Heys said better talent will emerge if these steps are clear and inclusive and tailored to the job in question.

Neurodiverse people typically prefer clear instructions on what to do and expect — so it can help to provide questions in advance. Some might struggle to imagine hypothetical scenarios.

"Consider whether 'thinking on your feet' questions are really necessary," Heys said. Specific targets for performance reviews — "achieve this by this date" — can be helpful for those on the autism spectrum, he added.

Tim Nicholls, head of policy and public affairs at the National Autistic Society, said organizations should rethink what success looks like for neurodiverse workers. Career progress is often tied to managerial responsibilities, he said.

"There is an assumption that autistic people might not be capable of line management," Nicholls said. "If a person is skilled and could progress at their role, and the only thing holding them back is line management, is it actually important to their job?"

GQ Littler partner Caroline Baker said organizations should go one step further and shape their business structures around their personnel.

Adjustments often excuse employees from some responsibilities when the business could instead arrange duties according to an individual's strengths, she said — encouraging organizations to think outside the box.

"You can tick the box legally and not help your organization that much," Baker said. "That's a big change for many employers, not having such an in-the-box mentality — funnily enough, it's often one of the things that neurodiverse employees bring to a business."

Understand the other risk factors

Neurodiversity discrimination claims are still rare, but some lawyers think that mismanaging neurodiverse employees could also give rise to sex and age discrimination.

Some say the link is tenuous, arguing that disability discrimination is a much lower bar for neurodiverse employees. But other attorneys said that a historical lack of diagnoses and differences in how conditions such as autism present themselves in men and women add more complexity for employers.

Women are usually better at masking neurodiversity, making it less likely they will ask for — or be offered — adjustments, Lambert at BCLP noted. But they are more likely to have been diagnosed with a neurodiverse condition in childhood.

Older employees, who are less likely to have been diagnosed in their youth, could be at a disadvantage because it is harder for them to make a case for accommodations, Heys said.

"There also may be many who are completely unaware of their own neurodiversity. This creates particular challenges for employers", he said.

Baker said she didn't see a link to age discrimination, but she acknowledged that older employees are less likely than their younger colleagues to share information about their mental state. Adair also said that cultural biases can make it harder for some neurodivergent workers to get access to support.

But he and others warned against "jumping too quickly to labels" and inadvertently stereotyping workers. "You need to be careful that you don't pigeonhole people," Regan said.

Neurodiverse people are most commonly found in IT and the creative industries, but 80% of National Autistic Society members say they are interested in employment in other sectors.

"There is a bit of a lazy trope of 'neurodiverse people are really good at sorting through data and code,'" Regan said.

Businesses often "medicalize" bad management, he added, attributing stress and anxiety to individual workers when they just need different or better management.

Leigh Day partner Mike Cain, who has represented neurodiverse finance workers in litigation, said sectors unaccustomed to having disabled employees must ensure their neurodiversity policies are being put into practice.

Cain suggested that "a significant number of people working in EC4", London's foremost financial district, could be neurodivergent. These professionals are likely to fall through the cracks of policies that are well-intentioned but poorly implemented.

"In reality, there will always be room for a corrective, litigative audit of the truth behind the propositions," Cain added.

--Editing by Ed Harris.