Americans With Disabilities Act

EEOC Releases Guidance Regarding the Acceptability of Employers’ Performance and Conduct Standards

SUMMARY
The Equal Employment Opportunity Commission (“EEOC”) has recently issued guidance concerning how the employment discrimination provisions of the Americans with Disabilities Act (“ADA”) relate to employers’ legitimate need to enact and apply workplace performance and conduct standards (http://www.eeoc.gov/facts/performance-conduct.html) (“Guide”). The Guide contains examples demonstrating the respective responsibilities of employees and employers when performance or conduct problems arise with respect to employees covered by the ADA. The Guide also discusses the role of “reasonable accommodation” in dealing with performance and conduct problems. While lacking the force of law, the Guide helpfully sets forth the EEOC’s views regarding many common-place performance and conduct related issues involving employees with disabilities.

THE REQUIREMENTS OF TITLE I OF THE ADA
Title I of the ADA prohibits discrimination against applicants and employees who meet the statute’s definition of a “qualified individual with disability.” The ADA defines a disability as: (i) a physical or mental impairment that substantially limits one or more of the major life activities of an individual; (ii) having a record of such an impairment; or (iii) being regarded as having such an impairment. A qualified individual with a disability is one who can satisfy the requisite skill, experience, education and other job-related requirements and perform the essential functions of a position with or without reasonable accommodation.

If an employee or applicant cannot meet a specific job-related requirement—also known as a qualification standard—because of a disability, the ADA requires that adverse action would be appropriate only if the qualification standard is “job-related and consistent with business necessity.”
APPLICATION OF TITLE I TO PERFORMANCE STANDARDS

The Guide acknowledges that employers routinely establish standards governing the specific tasks or assignments that an employee must perform and the methods to evaluate that performance. The Guide confirms that an employer can apply the same quantitative and qualitative performance standards to disabled and non-disabled employees when the standards relate to essential job functions. For example, when an essential element of a millwright's job is climbing ladders and steps to repair equipment, an employer need not remove the requirement in the case of a disabled millwright who cannot climb ladders and steps.

The Guide states that an employer may have to provide a reasonable accommodation to assist a disabled employee in meeting a specific performance standard when possible. For example, if a disabled employee's marginal work duties hinder her performance of essential job functions, a reasonable accommodation might be for the employer to remove the employee's marginal duties so that the employee can better perform her essential functions.

An employer may generally use the same evaluation criteria for employees with disabilities as for employees without disabilities. If an employee's disability requires an alternative method of performance, then the employer’s evaluation criteria for that employee should be altered accordingly. For example, if part of a deaf employee's job is giving lectures, and if that employee uses a sign language interpreter to voice for her, the quality of the employee's lecture cannot be measured by the employee's use of her voice. In this instance, an employer should provide a reasonable accommodation by altering its performance standard to take into account the employee’s disability.

APPLICATION OF TITLE I TO CONDUCT STANDARDS

The Guide indicates that when an employee violates a conduct standard, and the employee’s disability has not caused the violation, an employer may impose the same discipline for the violation on the disabled employee as it would impose on other employees. Even when an employee’s disability causes the violation of a conduct standard, an employer may discipline the employee if the conduct standard is job-related and consistent with business necessity. In such cases, the Guide states that the “ADA does not protect employees from the consequences of violating conduct requirements even where the conduct is caused by the disability.”

Certain conduct standards—such as prohibitions on violence, threats, theft, destruction of property and using alcohol or illegal drugs on the premises—will always meet the “job-related and consistent with business necessity” standard. Similarly, employers may, regardless of an employee’s disability, prohibit insubordination toward supervisors and managers, and require that employees show respect toward customers and observe safety and operational rules.
Beyond these categories, the determination whether the application of a conduct standard to an employee with a disability is job-related and consistent with business necessity may rest on several factors, including (i) the manifestation or symptom of a disability affecting an employee's conduct, (ii) the frequency of occurrences, (iii) the nature of the job, (iv) the specific conduct at issue, and (v) the working environment.

If the penalty for violation of a conduct standard involves discipline short of termination, an employer may have to provide a reasonable accommodation to assist the disabled employee in avoiding future violations of the conduct standard.

OTHER ISSUES

The Guide addresses several other areas of potential interest to employers.

TIMING OF REQUEST FOR REASONABLE ACCOMMODATION

An employer need not rescind scheduled discipline (including termination) or a planned negative performance evaluation just because an employee makes a request for a reasonable accommodation before the discipline is imposed or the evaluation is given. The EEOC advises that if a disabled employee waits until the moment of discipline or evaluation to request reasonable accommodation, the employer may proceed with the discipline or negative review.

SEEKING MEDICAL INFORMATION

The Guide indicates that an employer may request medical information or order a medical examination when the employer has a reasonable belief, based on objective evidence, that an employee is unable to perform an essential job function or poses a direct threat because of a medical condition. The scope and manner of any inquiry must be limited to information necessary to determine whether the employee is unable to perform essential job functions or poses a direct threat because of a medical condition.

ATTENDANCE ISSUES

The EEOC advises that employees with disabilities are entitled to whatever form of leave the employer generally provides to other employees.

The ADA may also require employers to modify attendance policies as a reasonable accommodation (e.g., by allowing an employee to work from 10 a.m. to 6 p.m. instead of 9 a.m. to 5 p.m. or by granting a medical leave of absence). On the other hand, when an employee is chronically, frequently and unpredictably absent, an employer may be able to show that an accommodation would impose an undue burden or that the employee cannot perform one or more essential functions of her job.
DRESS CODES
The Guide states that an employer may require an employee with a disability to observe a dress code imposed on other employees. When an employee’s disability makes it difficult to fully comply with a dress code, however, an employer may have to provide a reasonable accommodation.

ALCOHOLISM AND ILLEGAL USE OF DRUGS
The Guide confirms that an employer may discipline an employee who violates a conduct standard prohibiting the use of alcohol and illegal drugs, even if the violation stems from alcoholism or drug addiction. The ADA, however, may protect an alcoholic who can meet the definition of disability, and an employer may have to provide an alcoholic employee with a reasonable accommodation, such as a flexible work schedule, to allow time for treatment.

CONFIDENTIALITY
The ADA’s confidentiality provisions do not permit employers to tell co-workers that an employee with a disability is receiving a reasonable accommodation. The Guide urges employers to train managers how to respond to questions concerning reasonable accommodations extended to disabled employees so that managers may avoid disclosing confidential arrangements made between an employer and a disabled employee.

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