

Client Alert



A report for clients and
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EEOC Addresses Workplace Performance and Conduct Standards under the ADA

The Equal Employment Opportunity Commission (“EEOC”) recently published helpful informal guidance that addresses the application of the Americans with Disabilities Act (“ADA”) to enforcement of workplace performance and conduct standards (the “Guide”). Issued in response to a regular influx of questions from employers and employees with disabilities, the EEOC Guide sets forth the Agency’s views as to how Title I of the ADA affects fundamental personnel issues that are implicated where employers apply performance and conduct standards to employees with disabilities.¹ (Throughout this Client Alert, please be aware that what is said about employees also applies to applicants for employment.)

While the Guide does not have the force of law, it sets forth the Agency’s position as to how employers should approach performance and conduct-related issues involving employees with disabilities based on the EEOC’s reading of dozens of cases that have confronted these questions. The issues addressed include: performance standards; conduct rules; requests for medical information; attendance rules and policies; dress codes; drug and alcohol abuse; and confidentiality. Proskauer’s ADA Taskforce thought it important to highlight for you the EEOC’s influential views on this subject which human resources professionals and in-house counsel confront daily in today’s workplace. Moreover, given the broader definition of “disability” found in the ADA Amendments Act (“ADAAA”) wherein Congress

reiterated that compliance with the reasonable accommodations obligations is the critical component of the disability law, employers will no doubt confront an increasing array of such issues in the years ahead.

Background Regarding Basic ADA Legal Requirements

Title I of the ADA and Section 501 of the Rehabilitation Act of 1973 contain identical provisions that prohibit employers from discriminating against a qualified employee on account of the employee’s disability.

To qualify for the protection of either statute, the employee must be a “qualified individual with a disability.” As of January 1, 2009, “disability” means an individual who has: (i) a physical or mental impairment that substantially limits one or more major life activities; (ii) has a record of a disability; or (iii) has been regarded as having an impairment without reference to any mitigating measures available to the employee and under the broader reading of the definition (see Proskauer’s Client Alert on the ADAAA).

To constitute a “qualified” individual, the employee must: (i) satisfy the requisite skill, experience, educational, and other job-related requirements (*e.g.*, possess specific training or licenses, meet health and safety requirements, or demonstrate certain attributes); and (ii) perform the essential functions of the position with or without reasonable accommodations. If an employee cannot meet a specific qualification standard because of his/her disability, the employer, if challenged, has to demonstrate that the standard is “job-related and consistent with business necessity.” Absent this showing, an employer, in most instances, cannot use the disability as a basis for taking an adverse employment action against the employee.

¹ The EEOC acknowledged that the Guide went to press before the recent enactment of the ADA Amendments Act of 2008 (the “ADAAA”) and opined that it did not believe the amendment would substantially affect its views on these issues.

Further, the ADA makes clear that “discriminate” means *not* making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability *unless* the covered entity can demonstrate that the accommodation would pose an undue hardship on the operation of the business. Thus, an employer has an obligation to provide a disabled employee with a “reasonable accommodation” that could enable the employee to meet job-related qualification or performance standards. A “reasonable accommodation” is any change in the work environment or the way in which the work is customarily performed that enables the qualified individual with a disability to perform the essential functions of that job. Examples of common accommodations include, but are not limited to: modified schedules, the elimination of non-essential functions, providing specialized equipment, and unpaid leave for a definite period of time.

While it is well established, generally, that the disabled employee must take responsibility to request an accommodation, there is no “magic word” requirement, and an employee need only state that s/he needs the employer to provide her/him with an adjustment or alteration at work due to a medical condition. At that point, the employer must engage the employee in the interactive process to determine a reasonable accommodation. However, an employer is not obligated to provide the exact accommodation the employee requests so long as the one provided is effective. Moreover, an employer has no obligation to provide an accommodation that would: (i) constitute an undue hardship (*e.g.*, significant difficulty or expense); (ii) require removing an essential function of the job; or (iii) result in an indefinite leave.

Notwithstanding the above, there are exceptional instances, as some courts have noted, where the employee’s disability is so obvious that the employer is placed on notice of the disability. In those situations, if the employee’s performance or conduct deteriorates or fails to meet a standard, the employer may well have a duty to initiate the interactive reasonable accommodation conversation, even absent a specific request from the employee.

Applying the ADA to Performance Standards And Conduct Rules

Most employers have established job-specific performance requirements, including specific tasks and assignments the employee must perform. Similarly, employers often require that employees comply with specific codes of conduct (*e.g.*, prohibiting an employee from being under the influence at work, fighting in the workplace, or accessing pornographic websites from company computers). Maintaining the integrity of these standards while also successfully navigating the intricate nuances of the ADA is not easy, but the Guide offers important tips.

Performance Standards

An employer has the right to apply the same quantitative and qualitative requirements for the performance of the *essential functions* of a job to all its employees, including employees with disabilities. An employer need not lower nor change its requirements or standards as an accommodation to a disabled employee so long as it does not do so for anyone else. However, under certain circumstances, an employer may be required to provide a reasonable accommodation to assist the employee in meeting performance or production standards/requirements. For example, if budget constraints prompt a company to increase the scope of the territories covered by each of its sales associates, the employer is not required to allow a disabled employee to maintain his/her original smaller territory. However, if the employee indicated that because of his disability he anticipates difficulties covering the newly enlarged territory, the employer should engage the employee in an interactive process to identify the nature and impact of the disability vis-à-vis performance requirements, and explore reasonable accommodations that would enable the employee to perform the essential functions of the job. Absent an undue hardship, if no such accommodations were readily identifiable, the employer might have to consider whether reassignment was an accommodation that it could offer.

An employer also is entitled to apply its standard evaluation criteria when reviewing the performance of disabled employees. Therefore, absent potential disparate treatment issues, the employer can uniformly apply its standards to disabled employees, and, as appropriate, issue discipline and critical evaluations of performance when warranted. Moreover, if the employer already is providing a reasonable accommodation (*e.g.*, a modified schedule, or a work-at-home arrangement) to a disabled employee, and that employee receives an unsatisfactory performance rating, the employer cannot rescind the accommodation in response to the poor rating. Of course, if the employee is unable to effectively perform the essential functions of his job – even with the reasonable accommodation – the employer may need to re-engage the employee in the interactive process in an effort to identify other possible accommodations that could be provided to assist the employee in meeting performance standards as a necessary step to be taken prior to terminating the employee.

Conduct Rules

The Guide also makes it clear that an employer may hold a disabled individual to the same conduct standards applied to the rest of its workforce. Thus, an employer can discipline a blind employee for insubordination who deliberately spits on a supervisor, or routinely curses at the supervisor, notwithstanding the employee’s disability, and absent disparate treatment.

It is also well established that an employer may discipline an employee whose disability allegedly triggers the conduct rule violated *provided* the conduct rule at issue is job-related, consistent with a business necessity, and is applied uniformly to all employees. Notably, the ADA does *not* protect disabled employees from the consequences of violating conduct requirements even when the disability is alleged to cause the conduct at issue. Certain conduct rules that exist in most workplaces will always meet this standard, including prohibitions on: violence, threats of violence, stealing, destruction of property, insubordination, harassment or substance abuse in the workplace (note that “drinking” on the job and drug use are not considered disabilities).

The Importance of Timing – Disclosure of Disabled Status & Requests for Accommodations

Appropriately enforcing performance standards and conduct rules is often complicated when the employee first reveals disability status, and/or the need for a reasonable accommodation in response to a poor performance evaluation and/or discipline. The timing of the employee’s disclosure is a significant factor in ascertaining an employer’s obligations and an appropriate response.

If a disabled employee fails to meet an employer’s production or performance standards, and/or fails to comply with the employer’s code of conduct, the employer can follow its standard disciplinary rules and discipline that employee up to and including termination, *provided* it would ordinarily do so for other employees. This is still appropriate even when an employee first discloses his/her disability at the meeting in response to the counseling for subpar performance and/or to discipline. For example, if an employee has a learning disability that prevents the employee from achieving performance objectives but the employee fails to disclose the learning disability and need for an accommodation until *after* the performance problem has occurred, the employer can discipline the employee for the performance deficiency. If the appropriate discipline is termination, the EEOC concurs that the ADA would *not* require further discussion about the employee’s disability or request for reasonable accommodation. However, if the disabling condition was obvious such that it placed the employer on notice that it was the cause of the subpar performance, then, in given circumstances, the employer may have an obligation to initiate the interactive process *before* disciplining the employee.

The EEOC further instructs that, short of discharge, if the employee claims a disability in response to a poor performance review or discipline, the employer must then initiate the interactive process. *First*, the employer may ask the employee how the purported disability impacted the employee’s ability to meet the employer’s performance or conduct standards. *Second*, the employer also should engage the employee in a discussion of potential accommodations that would assist the employee in improving his/her conduct

and/or performance. Further, in such circumstances, as appropriate, the employer may be permitted to seek appropriate medical information to learn if the impairment constitutes a disability and how the impairment affects performance for the purpose of identifying reasonable accommodations to address the performance and/or conduct issues. Note, however, under the ADAAA, Congress declared that the “disability” determination should not “demand extensive analysis.”

It is important to underscore, as the Guide does, that if the employee does not give notice of a need for an accommodation until *after* the performance or conduct problem arises, a reasonable accommodation does *not* require that the employer: (i) tolerate or excuse the poor conduct or performance; (ii) withhold disciplinary action (including termination) warranted by the performance or conduct; (iii) raise a performance rating; or (iv) provide an evaluation or other write-up that does not reflect the employee’s actual performance or conduct.

Attendance & Leave Policies

Recognizing that most employers have attendance requirements and leave policies, the EEOC explored a number of scenarios. As an initial matter, an employer must grant disabled employees the same access to the employer’s existing leave programs afforded to all other employees. Next, absent an undue hardship, an employer may have to modify its attendance policies as a reasonable accommodation, as appropriate. For example, an employer might have to allow an employee to modify the start and end times of his/her shift, or to take periodic breaks to perform rehabilitation exercises or meditation.

However, employers need not completely exempt disabled employees from time and attendance requirements. Thus, EEOC advises, employers do *not* have to: (i) grant open-ended schedules; (ii) accept irregular, unreliable attendance (with the exception of leave pursuant to the FMLA); or (iii) accommodate repeated instances of tardiness or absenteeism that occur with frequency over an extended period of time or without advance notice. In these circumstances, the employee might not be capable of performing the essential functions of the job, or the employer might be able to prove that the employee is not “qualified,” or that granting an accommodation would pose an undue hardship.

Finally, while employers have no obligation to grant indefinite leave as a reasonable accommodation, short of undue hardship, successive grants of unpaid leave may be required in circumstances where the employee and his/her health care provider identify specific return-to-work dates. That said, even the EEOC recognizes that employers may act, in certain instances, where the medical notes provided extend the leave’s

return-to-work date repeatedly and consecutively so as to create the reality of open-ended indefinite leave. Employers are well-advised to act cautiously here taking into account FMLA obligations (particularly concerning intermittent leave) because these circumstances are extremely nuanced and must be handled carefully so as to not run afoul of the ADA or related state laws.

Dress Codes

Many employers require their employees to wear specific items of clothing for reasons including safety (*e.g.*, hard hats; goggles or work gloves), being easily recognizable to clients, and promoting a certain image (*e.g.*, uniforms in specific colors, adorned with the company name and logo). Similarly, employers may prohibit employees from wearing certain items (*e.g.*, jewelry or baseball caps).

The Guide explains that, generally, it is acceptable for an employer to require that its disabled employees abide by its dress code. Thus, an employer can require a disabled employee to comply with elements of a dress code that are job-related and consistent with business necessity or with items that are required by federal law (*e.g.*, safety equipment required under the Occupational Safety and Health Act). However, where an employee's disability renders it difficult to fully comply with the dress code, and absent business necessity, the employer may have to provide the employee with an accommodation. For example, an employer who requires its employees to wear dress shoes in the office might have to permit an employee with chronic ulcers on his foot to wear black leather sneakers.

Alcoholism & the Illegal Use of Drugs

Given the distinctions in the way the ADA treats alcoholics and drug addicts (the ADA may protect an alcoholic or may protect a recovered drug addict who is no longer engaging in the illegal use of drugs, but does *not* protect an individual who currently engages in the illegal use of drugs), the Guide clarifies to what extent an employer can enforce conduct rules prohibiting the use of alcohol or drugs at the workplace.

To be clear, an employer has the right to prohibit the use of alcohol or the illegal use of drugs at the workplace and may discipline an employee who violates such a policy. Even if the conduct stems from alcoholism or drug addiction, the employer may impose the same discipline that any other employee would incur for being under the influence at work. Thus, an employer may suggest that the employee seek help from an Employee Assistance Program. Finally, an employer also has the option – but is not required – to provide a “last chance agreement” to an employee who could otherwise be terminated for poor performance or misconduct arising from alcoholism or drug addiction.

Confidentiality

The Guide reinforces the ADA's confidentiality provisions and cautions employers not to disclose to co-workers that an employee is receiving a reasonable accommodation. Keep in mind, as well, that some conditions or records may implicate HIPPA obligations.

Conclusion

EEOC's Performance and Conduct Standards Guide is a useful reference tool for human resources professionals and their counsel. Keep in mind, however, that while it informs and sets forth the Agency's view on these issues, it will not be afforded the deference that courts give to Agency Regulations. The Guide serves to reinforce that the ADA is a particularly nuanced statute, interfaces with the Family and Medical Leave Act and/or state disability and workers' compensation laws, and requires individualized assessments. In addition, with the effective date of the new ADAAA just two months away (January 1, 2009), the focus of attention will be drawn to whether employers have complied with their reasonable accommodation obligations. As performance and conduct issues play out in the workplace, they are fact-driven, and each instance must be weighed on its own merits. In many instances, therefore, human resources professionals will be consulting with their in-house counsel and business management to address the many real life scenarios that touch upon a Bermuda Triangle of legal issues. Of course, Proskauer's ADA Taskforce is here to assist you as well.

The new publication is available at the EEOC's website at: <http://www.eeoc.gov/facts/performance-conduct.html>

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