



**Labor & Employment Client Alert  
September 2008**

**EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
ISSUES GUIDANCE ON THE RELATIONSHIP BETWEEN  
THE ADA AND EMPLOYER PERFORMANCE AND  
CONDUCT STANDARDS**

*For a fuller discussion of these and other issues, please visit the complete update on our website at [www.mhtl.com](http://www.mhtl.com). To receive this alert via email, please email [information@mhtl.com](mailto:information@mhtl.com).*

On September 3, 2008, the EEOC issued a comprehensive question and answer guide discussing the relationship between the Americans with Disabilities Act (ADA) and workplace performance and conduct. The guide is primarily designed to help employers navigate tricky situations where an employee with a known or suspected disability exhibits poor performance or unacceptable workplace conduct.

The guide highlights what MHTL has advised employers for years: performance management systems providing clear expectations, accurate assessments, feedback to employees, and consistent enforcement of workplace rules will minimize the risk of liability under the ADA and other antidiscrimination laws.

**Overview of Employer Obligations**

The EEOC guide addresses 30 specific questions relating to performance and conduct issues in the workplace, and offers nearly 50 examples drawn from actual cases or specific scenarios presented to the federal agency. Before addressing more specific questions, the guide sets forth an overview of general employer obligations under the ADA which provides the framework for its discussion of issues relating to employee performance and conduct:

- Employers cannot discriminate against “qualified individual(s) with a disability.” Employees are considered “disabled” under the law if they (a) have a physical or mental impairment that substantially limits a major life activity; (b) have a record of such an impairment; or (c) are regarded as having such an impairment. A “qualified individual,” among other things, must possess the requisite skills, education, or experience for a particular position and also must be able to perform the “essential functions” of a position with or without reasonable accommodation.



- If an applicant or employee cannot meet a specific job requirement because of a disability, the employer must be able to demonstrate that such requirement is “job related and consistent with business necessity,” that is, the required skills, education, or experience must actually be necessary for a person to successfully perform a particular job.
- Employers must provide qualified disabled individuals with a “reasonable accommodation” to meet qualifications that are job-related and consistent with business necessity, or to perform the essential functions of a position. While the EEOC, in construing the ADA, generally places the burden on an employee to request a reasonable accommodation, we would remind employers that the ADA and the disability laws of Massachusetts and other states have been interpreted to place a greater obligation on the employer to initiate discussions with the employee, (the “interactive process”), where it has knowledge of the disability and/or the possible need for an accommodation. Whether an accommodation is ultimately required, as well as what specific accommodation(s) are required, is a case-specific determination considering whether a given accommodation would place an “undue burden” on the employer. Here too, we would remind and caution employers that a reasonable accommodation can include leaves of absence, schedule adjustments, and other potential modifications that can relate to an employer’s conduct and performance standards – notwithstanding the general conclusions set forth in the EEOC guide.

### **ADA Allows Enforcement Of Performance & Conduct Standards By Employer**

After reviewing these basic ADA requirements, the EEOC then applies these standards to a variety of common workplace scenarios relating to employee performance and conduct.

The EEOC makes clear that employers may apply the same quantitative and qualitative performance standards for essential functions to all employees, both disabled and non-disabled. The guide also clarifies that employers may hold disabled and non-disabled employees to the same standards of conduct – *even where it is claimed that a disability caused or contributed to the conduct at issue* – so long as those standards are job related, consistent with business necessity, and uniformly applied. Where an employer first learns of an employee’s disability when it counsels or disciplines him for misconduct or poor performance, the employer is not required to rescind the discipline, including a termination. For discipline short of termination, an employer is obligated to participate in an interactive process to evaluate reasonable accommodations that may aid the employee’s performance in the future.

The advisory also offers guidance on issues that apply equally to employee performance and conduct concerns, such as performance or disciplinary meetings. The EEOC



counsels employers to address the performance or conduct at issue, and not to focus on an employee's disability, except where it is appropriate to ask an employee with a known disability if the employee needs an accommodation. The EEOC also reminds employers of their obligation to provide disabled employees with reasonable accommodations permitting them to participate in performance evaluations, disciplinary meetings, and workplace investigations on the same terms as their non-disabled coworkers.

### **Employer-Initiated Medical Evaluations**

Employers often wonder if they may approach a poorly performing employee to request medical information or to ask that the employee undergo a medical evaluation. The EEOC clarifies that the employer may do so in situations where the employer has a reasonable belief, based on objective evidence, that the employee is unable to perform an essential function of the employee's job, or where the employee poses a "direct threat" due to a medical condition. The scope and manner of such inquiry is limited to a determination of whether the employee can perform the essential functions and/or can work without posing a direct threat.

### **Leave Issues**

Employers also struggle with the amount of leave they are required to provide disabled employees, as well as the circumstances in which leave must be offered. The guide makes it clear that disabled employees should be allowed to participate in all employer leave programs, (e.g., leaves of absence, vacation, family leave), on the same terms and conditions as non-disabled employees. Absent undue hardship, employers may also need to adjust their attendance policies to meet the needs of disabled employees – though an employer need not completely exempt an employee from time and attendance requirements. Additionally, while leave in excess of the FMLA entitlement and/or the employer's established policies may, in some circumstances, be required as a reasonable accommodation, the EEOC makes it clear that an employer is not required to provide leave of an indefinite duration.

### **Substance Abuse Issues**

The advisory offers useful guidance on the challenging issues surrounding substance abuse. While alcoholism and past illegal drug use, (e.g., such as in the case of a recovering drug addict), may qualify as disabilities under the ADA, the guide clarifies that an employer can prohibit the use of alcohol or illegal drugs in its workplace, and can discipline employees who are impaired on the job. The current use of illegal drugs is not protected by the ADA. So long as its policies are consistent with business necessity and uniformly enforced, the employer can apply the same performance and conduct expectations to all workers, and need not excuse tardiness, absenteeism, poor performance, or misconduct that is tied to alcohol or illegal drug use. Though an



employer is required to consider reasonable accommodations that will support treatment and recovery for alcoholic employees, (e.g., leave or a modified schedule to attend a rehab program), it is not obligated to make schedule adjustments to support the employee's drinking or to mitigate its consequences.

### **Confidentiality**

Finally, the guide notes that where an employee receives a reasonable accommodation from his or her employer, coworkers who observe that the employee is working a different schedule, or is excused from certain non-essential duties will often ask why their coworker is "getting off easy." The EEOC reminds employers that the ADA's confidentiality provisions do not permit employers to tell coworkers that the disabled employee is receiving an accommodation. The guide suggests that supervisors tell the inquiring employee that while it will not discuss one employee's situation with another in order to assure the privacy of all employees, the coworker is meeting the employer's work requirements.

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*The EEOC guide and this summary are limited to considerations under the ADA, and do not address related federal laws, (e.g., the FMLA), or state disability and leave laws which, as noted above, impose additional and different requirements with respect to employee disability and handicap issues. When dealing with specific situations, employers should always consult with legal counsel.*

*If you have any questions about this guidance, the ADA, or any other employment law topics, please contact Kathryn Murphy, Thomas Colomb or the Labor & Employment attorney assigned to your account at Murphy, Hesse, Toomey & Lehane, LLP at 617-479-5000.*

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