



**Labor & Employment Client Alert  
September 2008**

**EEOC'S NEW ADA GUIDANCE A HELPFUL TOOL FOR  
EMPLOYERS**

On September 3, 2008, the EEOC issued a comprehensive question and answer guide discussing the interface between the Americans with Disabilities Act (ADA) and workplace performance and conduct issues. The guide is a useful tool for employers, helping them navigate tricky situations involving disabled employees whose performance or conduct are affecting the employer's operations.

The guideline reinforces what MHTL has advised employers for years: performance management systems which provide clear performance expectations, accurate measures, feedback to employees, and consistent enforcement of workplace rules will minimize the likelihood of ADA liability.

**OVERVIEW OF EMPLOYER OBLIGATIONS UNDER THE ADA**

Employers considering the performance of a disabled employee need to consider certain ADA "basics" before initiating any corrective action process. In its new guidance, the EEOC reviews the following "basics":

- 1) Under the ADA, employers cannot discriminate against "qualified individual(s) with a disability." Employees can be "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.
- 2) The employer must demonstrate that the skills, education, or experience it requires for a position are "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.
- 3) If an employee can perform the position's essential functions with a reasonable accommodation, the employer is obligated to provide the accommodation.



## Labor & Employment Client Alert September 2008

Generally, employees must request a reasonable accommodation. Once an accommodation is requested, employers must either grant the accommodation or engage in the “interactive process” of exploring with the employee whether alternative accommodations exist or whether providing an accommodation would impose “undue hardship.” Employers need not provide any accommodation which would impose an undue hardship on the employer. Employers should also be aware that they may be required to initiate discussions with an employee, *i.e.* engage in the “interactive process,” when they have knowledge of the disability and/or the possible need for an accommodation.

### THE ADA AND PERFORMANCE STANDARDS

The guidance clearly informs employers that they may apply the same quantitative and qualitative standards for essential functions to both disabled and non-disabled employees. Simply put, **employers may hold disabled and non-disabled employees to the same performance standards** when those standards involve essential job functions. Through examples, the EEOC makes clear that:

- Employers need not lessen caseloads or other production standards (assuming those standards are essential functions);
- Employers need not lessen travel requirements (again, assuming essential function);
- Employers may discipline and discharge disabled employees who fail to meet performance standards (as long as discipline is consistently applied to all employees);
- Employers may, and in fact should, evaluate disabled employees’ job performance in the same manner in which they evaluate other employees. However, an employer may as a reasonable accommodation allow disabled employees to perform job functions in a different manner than other employees do;
- **Employers need not “reverse” poor performance ratings or other discipline (including discharge) if the employee informs the employer of a disability after the discipline has been initiated;**



## Labor & Employment Client Alert September 2008

- If an employee notifies the employer of a disability before discharge, the employer should engage in the interactive process with the employee to (a) determine whether a disability exists; (b) determine to what extent the disability is affecting performance; and (c) determine if any reasonable accommodations exist. In some cases, this process may require delaying the implementation of performance improvement plans.

### THE ADA AND CONDUCT STANDARDS

The guidance also clearly informs employers that they may hold disabled and non-disabled employees to the same standards of conduct **even if the claimed disability caused the conduct at issue**, as long as those standards are job related, consistent with business necessity, and consistently applied. The EEOC explains that:

- Employers may discipline employees for violation of conduct rules (such as misuse of break time, insubordination, or use of company property for personal reasons) regardless of the employee's disabled status;
- If an employee is the victim of harassment due to his/her disability, and "takes the law into his/her own hands" by violently reacting to the harassment (fights, property damage, etc.) rather than going through proper channels to complain, an employer may discipline the employee for the inappropriate conduct. The employer also has a parallel obligation to promptly investigate to determine whether harassment occurred and, if so, take appropriate action to prevent future harassment;
- The EEOC identifies conduct standards which are always job-related and consistent with business necessity. Accordingly, employers may discipline for violations of these conduct standards even if such violations were caused by the employee's disability:
  - Requirement of showing respect for and dealing appropriately with clients and customers;
  - Prohibition of threats, violence, stealing and destruction of property;
  - Prohibition of insubordination towards supervisors and managers;
  - Prohibition of inappropriate behavior between co-workers, such as yelling, cursing, shoving or making obscene gestures;
  - Prohibition against sending inappropriate or offensive emails and using the Internet to access inappropriate websites;



## Labor & Employment Client Alert September 2008

- Prohibition against excessive use of employer's computers and equipment for purposes unrelated to work;
  - Requirement to observe safety rules;
  - Prohibition of drinking and illegal drug use in the workplace.
- Mere "disruptive" behavior caused by a disability (such as shouting caused by Tourette Syndrome) may or may not warrant discipline and/or discharge. In determining whether discipline is warranted the standard must be job related and consistent with business necessity. In determining whether the standard is job related and consistent with business necessity, the following factors are considered:
    - (i) The manifestation or symptom of a disability affecting the 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 a disruptive employee requests a reasonable accommodation in response to termination, the ADA does not require any further discussion about the employee's disability or request for accommodation;
  - If a disruptive employee requests a reasonable accommodation in response to discipline, the employer can still impose the discipline but should also begin the "interactive process" to determine whether an accommodation is needed to correct a conduct problem and, if so, what accommodation would be effective. An employer may seek medical documentation to determine if the employee's condition is a disability under the ADA, whether the disability is affecting the employee's conduct, and what accommodations may address the problem;
  - Employers may enforce common sense workplace conduct rules (like no stealing) which are job related, consistent with business necessity, and uniformly applied, **even if the conduct is not specifically stated in an employee handbook or policy; Examples of this type of conduct includes:**
    - Acting belligerently towards supervisors and workers;
    - Physical contact with customers; and
    - Requirement that employees clean up after themselves in the office or the kitchen.



## **Labor & Employment Client Alert September 2008**

- Employers should focus on workplace conduct; and refrain from requiring an employee to take medication or make certain treatment decisions, such as requiring an employee to change medications.

### **GENERAL STANDARDS**

The EEOC goes on to provide guidance on issues that apply equally to employee performance and conduct concerns:

- In performance or disciplinary meetings, the employer should focus on the conduct at issue, and should avoid discussing the disability unless the employee (a) requests a reasonable accommodation or (b) has a disability known to the employer;
- If the employer knows the employee has a disability, because the disability is obvious or because the employee has divulged the information, the employer may ask the employee if the employee needs a reasonable accommodation;
- The employer may have to provide a reasonable accommodation to allow an employee to participate in a performance review (such as providing a written performance review in Braille to a blind employee);
- The employer may need to provide a reasonable accommodation to enable an employee to participate in an investigation into misconduct, whether as the subject of the investigation or a witness (such as providing an interpreter for a deaf employee).

### **MEDICAL INFORMATION**

Employers commonly wonder if they may approach a poorly performing employee with a request for either medical information or a request 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 or is a “direct threat” because of a medical condition.

- The EEOC states that in certain situations, an employee’s performance may provide this “objective evidence.” For instance, if an employee with a stellar job



## Labor & Employment Client Alert September 2008

history suddenly develops both conduct and performance problems, with missed deadlines, nonsensical explanations, and surly behavior, the employer may reasonably suspect that the employee is suffering from a medical condition and **may** (but is not required to) reasonably demand the employee:

- Go to an employee assistance program (EAP);
  - Produce medical documentation showing that the employee is fit to work;
  - Undergo a medical examination related to the performance issues.
- Without such “objective evidence,” employers should refrain from requiring poorly performing employees to divulge medical information, and should instead focus on employee performance and appropriate corrective action.

### ATTENDANCE ISSUES

Employers often question whether employees with disabilities should be treated similarly to non-disabled employees with respect to time off work. The EEOC further clarifies this area of ADA law.

- Disabled employees should be allowed to participate in employer leave programs (such as leaves of absence, vacation, family leave, etc.) on the same terms and conditions as non-disabled employees;
- Absent undue hardship, as a reasonable accommodation, employers may have to modify their attendance policies, and leave policies, to suit the needs of disabled employees. This could include allowing an employee to use accrued paid leave or unpaid leave, adjusting arrival or departure times, and providing periodic breaks;
- Employers generally need not tolerate frequent, unexcused, and unpredictable employee tardiness and absences, where those absences affect essential job functions;
- Employers need not grant leaves of indefinite duration as a reasonable accommodation. If employees ask for a leave of definite duration, fail to return on the date specified, then request more leave, the employer may seek medical documentation to determine whether it can continue providing leave without undue hardship or whether the request for leave has become one for leave of indefinite duration;



## Labor & Employment Client Alert September 2008

- Employers need not rescind previously issued discipline (including discharge) for attendance problems if the employee failed to notify the employer of his disability prior to the discipline.

### DRESS CODES

Many employers require their employees to adhere to a dress code or require employees to wear uniforms. Subject to the employer's obligation to provide reasonable accommodation, the EEOC clarifies that the employer may require disabled and non-disabled employees adhere to the same dress code.

- Employers may have to modify dress codes, or provide alternative uniforms, if given the circumstances the action would be a "reasonable accommodation" for a disabled employee;
- Employers may strictly enforce dress codes that are consistent with business necessity (such as an employer who is mandated by OSHA to require employees to wear protective equipment).

### ALCOHOLISM AND DRUGS

Employers wrestle with employee problems related to drugs and alcohol. The ADA protects alcoholics and addicts who are not currently using drugs; the ADA does not protect an individual currently engaging in the illegal use of drugs. However, the EEOC makes it clear that alcoholics or current illegal drug users may be held to the same performance and conduct standards as all other employees.

- Employers may uniformly enforce job related conduct provisions, such as those requiring a drug or alcohol free workplace, regardless of whether an employee's disability resulted in his violation of the provisions;
- Poor job performance or unsatisfactory behavior, such as absenteeism, tardiness, insubordination, or on-the-job accidents, related to an employee's alcoholism or illegal drug use need not be tolerated;



## Labor & Employment Client Alert September 2008

- An employer has no obligation to accommodate a request made by an employee who is currently using illegal drugs, since that employee is not covered by the ADA;
- If an employee has engaged in misconduct due to alcoholism or the illegal use of drugs, the employer may:
  - Discipline the employee;
  - Suggest the employee seek help;
  - Do both.
- If an employee mentions drug addiction or alcoholism, or requests accommodation, for the first time in response to discipline or discharge for unacceptable performance or conduct:
  - The employer may impose the discipline, including termination;
  - If the discipline is termination, no further discussion regarding the disability or request for accommodation is required;
  - If the discipline is the result of the current illegal use of drugs, no further discussion regarding the disability or request for accommodation is required; and
  - If the discipline (short-of termination) is the result of alcoholism, the employer should begin the “interactive process” to determine if an accommodation is needed to correct the problem. Possible reasonable accommodations may include a modified work schedule to enable the employee to attend a self-help program.
- “Last chance” agreements are not required under the ADA for employees subject to termination for poor performance or misconduct resulting from alcoholism or drug addiction. An employer may choose to offer such a “last chance” agreement as an alternative to termination.

### CONFIDENTIALITY

Many times, an employee’s request for an accommodation, and the employer’s subsequent granting of the accommodation, generates a “buzz” in the workplace. Other employees often request or demand to know why the co-worker is “getting off easy.” The EEOC makes it clear that employers cannot tell co-workers that an employee with a disability is receiving a reasonable accommodation. Rather, the EEOC suggests that managers be trained to respond that one employee’s situation is not discussed with





## Labor & Employment Client Alert September 2008

another in order to protect the privacy of all employees and to assure co-workers that the employee is meeting the employer's work requirements.

### APPLICABILITY

The EEOC guidance in these areas serves as a helpful guide to employers as they deal with performance or conduct issues in the workplace. However, remember that the EEOC does not interpret state laws which may also provide disabled employees protection. Further, the EEOC does not interpret other areas of federal law which may have an impact, such as the Family and Medical Leave Act. Therefore, in dealing with specific situations, employers should always consult with their 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.*

*This alert is for informational purposes only and may be considered advertising. It does not constitute the rendering of legal, tax or professional advice or services. You should seek specific detailed legal advice prior to taking any definitive actions.*

©2008 MHTL