

Labor & Employment Law UPDATE

*Practical and preventive information for managing
your workplace*

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The EEOC Addresses Performance and Conduct Issues under the ADA

On September 3, 2008, the U.S. Equal Employment Opportunity Commission (EEOC) issued “a comprehensive question-and-answer guide” instructing employers how to address performance and conduct issues under the Americans with Disabilities Act (ADA). We note that the recent ADA amendments do not change the content of the guidance, as the guidance assumes that the employee suffers from a “disability,” which would include anyone who falls under the new expanded definition.

While the EEOC question-and-answer guide is advisory only (meaning it does not change existing requirements under the ADA, nor does it have the force of law), the guide serves as a useful resource for employers when confronted with performance and conduct issues in the workplace.

The EEOC’s guidance sets forth 30 questions and examples on various ADA-related subjects, including performance and conduct, as well as related issues such as attendance, dress codes, drug and alcohol use, and confidentiality. Generally, the guidance clarifies that employers may apply the same performance standards to all employees, including those with disabilities, and emphasizes that the ADA does not affect an employer’s right to hold all employees responsible for its basic conduct standards. Nevertheless, employers must make reasonable accommodations that enable individuals with disabilities to meet performance and conduct standards.

A summary of the guidance’s important points is included below.

Performance Standards

- An employer may require a disabled employee to meet the same production standards as a non-disabled employee in the same position, whether those standards are quantitative or qualitative. In fact, an employer need not lower or change its production *standard* because an employee cannot meet the standard due to a disability. A reasonable accommodation, however, may be required to assist an employee in *meeting* a specific production standard.

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- Likewise, employers should evaluate disabled employees using the same evaluation criteria used for non-disabled employees.
- If an employer gives a lower performance rating to an employee, and the employee responds by revealing she suffers from a disability that caused the performance problem, the employer is not required to rescind the rating. In other words, the employee does not get a free pass for prior conduct just because the employee blames the performance issue on a disability. Rather, if the employee claims that her disability is the cause of the performance problem, the guidance advises the employer to engage in the “interactive process” by making clear to the employee the level of performance required and by asking why the employee believes the disability is affecting the performance. If the employee does not ask for an accommodation, the employer may ask whether there is an accommodation that may help raise the employee’s performance level. In the case of termination, the employer need not engage in the interactive process after-the-fact.

Conduct Standards

- With regard to conduct issues, if an employee’s disability does not cause the misconduct, the employer may hold the individual to the same conduct standards that it applies to all other employees. In most cases, an employee’s disability is irrelevant to conduct violations.
- If the disability *does* cause the misconduct, the employer may discipline the individual, but only if the conduct rule is job-related and consistent with business necessity, and other employees are held to the same standard. In other words, the ADA does not protect employees from the consequences of violating conduct requirements, even where the conduct is caused by the disability. According to the guidance, certain conduct standards that exist in all workplaces and cover all types of jobs will always meet this standard, such as prohibitions on violence, threats of violence, stealing, or destruction of property. Employers may also:
 - Prohibit insubordination towards supervisors and managers and require that employees show respect for, and deal appropriately with, clients and customers;
 - Prohibit inappropriate behavior between coworkers (*e.g.*, employees may not yell, curse, shove, or make obscene gestures at work);
 - Prohibit employees from sending inappropriate or offensive e-mails (*e.g.*, those containing profanity or messages that harass or threaten coworkers); using the Internet to access inappropriate Web sites (*e.g.*, pornographic sites, sites exhibiting crude messages, etc.); and making excessive use of the employer’s computers and other equipment for purposes unrelated to work;
 - Require that employees observe safety and operational rules enacted to protect workers from dangers inherent in certain workplaces (*e.g.*, factories with machinery with accessible moving parts); and
 - Prohibit drinking or illegal use of drugs in the workplace.
- As with performance issues, an employer may discipline an employee for unacceptable conduct even if the employee blames the misconduct on a disability (assuming the employer has no prior knowledge of the disability).

In other words, the employee does not get a free pass for prior conduct just because the employee blames the performance issue on a disability.

If the misconduct does not result in termination, the employer must then engage in the “interactive process” to determine whether a reasonable accommodation is needed to correct the conduct problem. The guidance warns, however, that employers cannot refuse to discuss an employee’s request for reasonable accommodation as a punishment for the conduct problem.

- Although employers may not require employees to undergo treatment for a disability to comply with a conduct standard, if an employee does not take his or her medication or receive treatment and, as a result, cannot meet a conduct standard, even with a reasonable accommodation, the employer may take disciplinary action.

Issues Related to Both Performance and Conduct Standards

- It is inappropriate for an employer to focus the discussion of a performance or conduct standard issue on an employee’s disability if the employee does not raise the issue. An employer, however, may ask an employee with a *known* disability who is having performance or conduct issues if he or she needs an accommodation to improve performance or conduct.
- If an employee needs a reasonable accommodation to participate in a performance evaluation or misconduct investigation, the employer may be required to provide an accommodation for purposes of that discussion.

Medical Information

- The ADA permits an employer to order a medical examination or request medical information when it is job-related and consistent with business necessity. The medical inquiry must be limited to the information needed to determine if the employee is able to perform the essential functions of the position or poses a direct

threat to the safety of others.

- Not all performance or conduct problems justify an employer’s request for medical information or a medical examination. For instance, an employer cannot require a medical examination solely because an employee’s behavior is annoying, inefficient, or otherwise unacceptable, as there may be other causes of the performance or conduct problem that are unrelated to any medical condition (*i.e.*, insufficient knowledge, conflict with a supervisor, lack of motivation or skills, a poor attitude, or non-medically related personal problems).

Attendance Issues

- Employers are not required to completely exempt a disabled employee from time and attendance requirements, grant open-ended schedules, or accept irregular or unreliable attendance. Nevertheless, an employer may have to *modify* attendance policies as a reasonable accommodation (absent undue hardship). Modifications may include allowing an employee to use accrued paid leave or unpaid leave, adjusting arrival or departure times (*e.g.*, allowing an employee to work from 10 a.m. to 6 p.m. rather than the usual 9 a.m. to 5 p.m. schedule required of all other employees), or providing periodic breaks.
- If an employee fails to request an accommodation and continues to violate the employer’s attendance policy, the employer may discipline the employee for such conduct.
- Employers may be required to grant extended medical leave as a reasonable accommodation; however, there is no obligation that an employer grant leave indefinitely.

Dress Codes

- An employer may require an employee

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with a disability to comply with the same dress code as other non-disabled employees in the same position. For instance, a professional office may require appropriate business attire because of the nature of the job. If an employee's disability prevents the employee from complying with the dress code, the employer may have to provide a reasonable accommodation.

- If the disabled employee cannot meet the dress code, the employer may still require compliance if the dress code is job-related and consistent with business necessity. Additionally, the employer may require compliance with dress standards required by federal law (e.g., OSHA's requirement that an employee wear steel-toed boots).

Alcoholism and the Illegal Use of Drugs

- The guidance reiterates that the ADA does *not* protect an individual who currently engages in the illegal use of drugs, but it may protect a recovered addict who otherwise meets the requirements of a disability under the Act. Employers may require an employee who is an alcoholic or who engages in illegal drug use to meet the same performance and conduct standards as other employees.
- The ADA specifically permits an employer to prohibit the use of alcohol or the illegal use of drugs in the workplace and to require that employees not be under the influence of alcohol or illegal drugs in the workplace. Therefore, an employee who violates such policies, even if the conduct stems from alcoholism or drug addiction, may face the same discipline as other employees.
- An employer is not required under the ADA to give an alcoholic employee or a drug addict, who could be terminated for poor performance or misconduct, a "last chance agreement."

Confidentiality

- An employer may not tell coworkers that a disabled employee is receiving a reasonable accommodation.

In all, the EEOC's guidance is a helpful resource for employers as they deal with day-to-day personnel issues that may implicate the ADA. We therefore encourage employers to review the guidance and the new ADA amendments to ensure that all employment decisions align with these recent legal developments.

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Continued Employment Not Adequate Consideration For Employment Contract

Background: The Missouri Court of Appeals (Western Division) recently held that an employment agreement that required employees to arbitrate most employment disputes, including discrimination, was not enforceable because the employer did not provide consideration for the contract. Consideration can either be a promise to do something or not do something or to provide something of value, commonly money. Both parties must provide consideration, or there is no contract.

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The employer argued that it provided consideration by allowing the employee to continue at-will employment. At-will employment allows both the employer and the employee to terminate the relationship at any time for any reason without notice. The arbitration agreement also allowed the employer to revise or eliminate the arbitration agreement at any time.

Ruling: The court held that the employer did not provide any consideration for the arbitration agreement. First, the right to continue at-will employment is not consideration because the employer remains free to terminate the employment relationship at any time. Stated another way, the employer gave the employee nothing of value because it could end the employment relationship within seconds of the employee signing the agreement. Second, because the employer received the right to change the agreement at any time, the employer did not provide consideration by allowing the employee to participate in the arbitration agreement.

Lessons: Employers need to re-examine employment agreements to make sure that the contracts are supported by more than continued at-will employment as consideration. In many noncompete agreements, employers state that the consideration is continued employment but further advise that the employee is employed at-will. Distinguishing noncompete agreements, the Missouri Court of Appeals noted that an employer provided consideration for a noncompete agreement by allowing the employee access to customers and information belonging to the employer, not continued employment. It is important that employers ensure that their noncompete agreements state that access to clients and information is at least a portion of the consideration.

Employers have many forms of consideration that they can use. For example, (1) contracts of employment for a specified period of time, (2) employment that can only be terminated for cause, (3) salary increases, (4) access to severance plans at termination, (5) payment of other benefits such as additional vacation, and (6) deferred compensation.

This is not an issue peculiar to Missouri. The Court's rationale was logical, and appellate courts in other states could adopt the reasoning.

Christopher R. Hedican

IRS Makes Sweeping Changes to 403(b) Plans

On July 26, 2007, the Internal Revenue Service published final regulations applicable to 403(b) Plans available to employees of public schools and Code Section 501(c)(3) tax exempt organizations. These regulations become effective January 1, 2009. The regulations finalize proposed regulations from 2004 and represent the first comprehensive guidance issued under Code Section 403(b) since 1964.

The new rules will require examination of 403(b) programs maintained for employees to determine changes needed to comply with the final regulations and to assure the continued tax-qualification of the 403(b) annuities or custodial accounts that have been purchased for employees under the program. The following is a summary of the

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significant changes made by the new rules that will have to be addressed for section 403(b) retirement plans.

Written Plan Document Requirement.

The final regulations impose, for the first time, a requirement that there be a written plan document containing all terms and conditions for eligibility, benefits, applicable limitations, the contracts available under the plan, and the time and form under which benefit distributions are made. In addition, any optional provisions (such as loans, hardship distributions, contract transfers, and exchanges and rollovers) must be set forth in the plan document.

Contract Exchanges and Transfers.

The final regulations permit non-taxable transfers from one 403(b) Plan to a 403(b) Plan of a different employer, provided that certain requirements are met. The 403(b) Plans must each permit the transfer, the individual's benefit after the transfer must be at least as great as before the transfer, and the new 403(b) Plan must contain distribution restrictions that are not less stringent than the former 403(b) Plan. Contract exchanges within the same 403(b) Plan are also permitted under the final regulations, provided that requirements similar to those for plan-to-plan transfers are met. In addition, contract exchanges require that the employer must enter into an agreement with the issuer of the new contract to ensure the exchange of certain information related to tax compliance requirements.

Universal Availability and

Nondiscrimination Rules. 403(b) Plans are generally subject to a "universal availability" requirement. This requirement, with a few exceptions, provides that all employees must be permitted to make salary deferral elections into a 403(b) Plan if any employee of the employer is permitted to do so.

Controlled Group Rules. The final 403(b) regulations also impose new controlled group rules on tax-exempt entities (other than churches and governmental agencies). In general, control by one organization of 80 percent or more of the board members of another organization will cause the organizations to be treated as a single employer for benefit plan purposes. This means that nondiscrimination tests and other code-imposed limits will have to be applied across both organizations as if the two organizations were a single employer. Additionally, vesting service and plan eligibility may need to be tracked across multiple organizations.

As mentioned above, these final regulations go into effect January 1, 2009, and will require 403(b) programs and any individual 403(b) annuity contracts and custodial arrangements to be examined in determining what changes, if any, need to be made and how you want to proceed in responding to the new rules under the final 403(b) regulations.

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