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LEGAL ALERT



Legal Alert: EEOC Guidance on Applying Performance and Conduct Standards Under the ADA

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Within the past few months, the EEOC issued guidance entitled "The Americans with Disabilities Act: Applying Performance and Conduct Standards to Employees with Disabilities." Recently, the EEOC updated the guidance to conform to the Americans with Disabilities Act Amendments Act of 2008.

The guidance makes clear that employees with disabilities must meet job-related qualifications standards that are consistent with business necessity, and must be able to perform the essential functions of the position, with or without reasonable accommodation.

Performance Standards

The guidance contains a number of examples of performance standards that employers may apply to persons with disabilities, including:

- Employers may apply the same quantitative and qualitative requirements for performance of essential functions to employees with disabilities that they apply to employees without disabilities, such as production standards.
- Employees may use the same evaluation criteria for employees with disabilities as for employees without disabilities, such as annual performance reviews.
- An employer may give an employee a lower performance rating even if the employee responds by revealing that a disability is causing the performance problem.

On the other hand, the following may not be permissible:

- An employer cannot necessarily require that an employee with a disability perform a job in the same manner as a non-disabled employee. Reasonable accommodation may be required.
- An employer cannot withdraw a reasonable accommodation because an employee is given an unsatisfactory performance rating.

Conduct Standards

The guidance also directs employers in how to properly apply conduct

standards:

- Employers may discipline employees with disabilities for violating a conduct standard.
- As long as the conduct rule is job-related and consistent with business necessity, an employer may discipline an employee even if the employee's disability caused violation of the conduct rule.

Attendance Issues

- Employers must grant employees with disabilities the same access to an employer's existing leave program as all other employees.
- Employers must modify attendance policies as a reasonable accommodation, absent undue hardship.
- However, employers need not completely exempt employees with disabilities from time and attendance requirements. For example, an employer may be able to demonstrate that an employee's chronic, frequent, and unpredictable absences preclude the employee from performing one or more essential functions of the job.

Alcoholism

Employers may require that an employee who is an alcoholic meet the same standards of performance and conduct applied to other employees.

- Employers may discipline employees who violate a workplace policy that prohibits the use of alcohol in the workplace.
- An employer may suggest that an employee who had engaged in misconduct due to alcoholism go to its Employee Assistance Program in lieu of discipline.

Employers' Bottom Line:

As seen above, the ADA requires employers to navigate a myriad of requirements in enforcing their performance, conduct, and other standards. Employers, and their supervisors, must become intimately familiar with the ADA's requirements to make sure they do so lawfully. Also, keep in mind that although courts generally adopt the EEOC's guidance on the laws it enforces, they are not legally bound to do so. Some courts, therefore, may interpret the ADA differently than the EEOC.

If you have any questions about these issues or other ADA or employment-related issues, please contact the author of this Alert, Tim Bland, a partner in our Memphis office, at 901-291-1514 or tbland@fordharrison.com, or the Ford & Harrison attorney with whom you usually work.