

Compliance Overview

Highlights

Employers generally may define jobs and evaluate their employees according to consistently applied standards governing performance and conduct.

- Employers may apply the same quantitative and qualitative requirements for performance of essential functions to an employee with a disability that they apply to employees without disabilities; and
- An employer may discipline an employee if their disability causes a violation of a conduct rule when the conduct rule is job-related and consistent with business necessity and other employees are held to the same standard.

Navigating Discipline for Employees With Disabilities

Title I of the Americans with Disabilities Act (ADA) prohibits employment discrimination against qualified individuals with disabilities. However, the law generally does not impinge on the right of employers to define jobs and evaluate their employees according to consistently applied standards governing performance and conduct. Employees with disabilities must meet qualification standards that are job-related and consistent with business necessity and must be able to perform the essential functions of the position, with or without reasonable accommodation.

Employers may question what steps are appropriate when an employee's disability is causing a performance or conduct problem, when a request for accommodation should be made, and when an employer can properly raise an employee's disability as part of a discussion about performance or conduct problems. Even when a disability is not causing a performance or conduct problem, employers may still question what actions they can take in light of concerns about potential ADA violations. This Compliance Overview highlights considerations when disciplining employees with disabilities.

Links and Resources

- [Applying Performance and Conduct Standards to Employees with Disabilities](#), from the U.S. Equal Employment Opportunity Commission (EEOC)
- [Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA](#), from the EEOC
- [A Technical Assistance Manual on the Employment Provisions \(Title I\) of the Americans with Disabilities Act](#), from the EEOC

Provided by **Employco USA, Inc.**

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Introduction

Title I of the ADA generally covers (among other entities) private-sector employers with 15 or more employees. The ADA prohibits discrimination against applicants and employees who meet the statute's definition of a "qualified individual with a disability." The ADA defines a "disability" in three ways:

- ☑ Having a physical or mental impairment that substantially limits one or more of the major life activities of an individual;
- ☑ Having a record of such an impairment; or
- ☑ Being regarded as having such an impairment.

A "qualified" individual with a disability can satisfy the requisite skill, experience, education and other job-related requirements and perform the essential functions of a position with or without reasonable accommodation. Job-related requirements, also known as "qualification standards," may include the following:

- ☑ Possessing specific training;
- ☑ Possessing specific licenses or certificates;
- ☑ Possessing certain physical or mental abilities (e.g., meeting vision, hearing or lifting requirements; showing an ability to run or climb; exercising good judgment);
- ☑ Meeting health or safety requirements; or
- ☑ Demonstrating certain attributes, such as the ability to work with other people or to work under pressure.

Most jobs require that employees perform both "essential functions" and "marginal functions." The essential functions are the most important job duties, the critical elements that must be performed to achieve the objectives of the job. Removal of an essential function would fundamentally change a job. Marginal functions are those tasks or assignments that are tangential and not as important.

If an applicant or employee cannot meet a specific qualification standard because of a disability, the ADA requires that the employer demonstrate the importance of the standard by showing that it is "job-related and consistent with business necessity." This requirement ensures that the qualification standard is a legitimate measure of an individual's ability to perform an essential function of the specific position the individual holds or desires.

Compliance Tip: If an employer cannot show that a particular standard is job-related and consistent with business necessity, the employer cannot use the standard to take an adverse action against an individual with a disability.

Employers may have to provide a "reasonable accommodation" to enable an individual with a disability to meet a qualification standard that is job-related and consistent with business necessity or to perform the essential functions of their position. A reasonable accommodation is any change in the work environment or in the way things are customarily done that enables an applicant or employee with a disability to enjoy equal employment opportunities. An employee generally has to request accommodation, but does not have to use the term "reasonable accommodation" or even "accommodation," to put the employer on notice. Rather, an employee only has to say that they require the employer to provide an adjustment or change at work due to a medical condition. An employer never has to provide an accommodation that would cause undue hardship, meaning significant difficulty or expense, which includes removing an essential function of the job.

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Key Points: Employers typically establish job-related requirements, the specific tasks or assignments that an employee must perform, and methods to evaluate performance. Evaluation criteria might take into account how well an employee is performing both essential and marginal functions and whether the employee is meeting basic job requirements (e.g., working well with others or serving customers in a professional manner). Employers might also enforce conduct standards (e.g., rules prohibiting the destruction of company property or the use of company computers to access questionable material). Certain performance and conduct standards will apply to all employees working for a company, organization or government agency; others might only apply to certain offices or jobs within an entity.

Performance Standards

Employers may apply the same quantitative and qualitative requirements for performance of essential functions to an employee with a disability that they apply to employees without disabilities. An employee with a disability must meet the same production standards, whether quantitative or qualitative, as a nondisabled employee in the same job. Lowering or changing a production standard because an employee cannot meet it due to a disability is not considered a reasonable accommodation. However, a reasonable accommodation may be required to assist an employee in meeting a specific production standard. It is a general best practice for employers to give clear guidance to an employee with a disability (as well as all other employees) regarding the quantity and quality of work that must be produced and the timetables for producing it.

Example #1: A computer programmer with a known disability has missed deadlines for projects, necessitating that other employees finish his work. Further, the employee has not kept abreast of changes in the database package, causing him to misinterpret changes that he should have known about as system problems. The employee is placed on a performance improvement plan, but his performance does not improve and he is terminated. At no time does the employee request a reasonable accommodation (i.e., inform the employer that he requires an adjustment or change as a result of a medical condition). The termination is justified as long as the employer holds the employee to the same performance standards as other programmers.

Employers may use the same evaluation criteria for employees with disabilities as for employees without disabilities. An employer should evaluate the job performance of an employee with a disability the same way it evaluates any other employee's performance. However, a supervisor may not necessarily require that an employee with a disability perform a job in the same manner as a nondisabled employee. In many instances, an essential function can be performed in different ways (including with reasonable accommodation). An employee who must use an alternative method of performance because of a disability must be evaluated accordingly. That said, an employer is not required to allow use of an alternate method that would impose an undue hardship.

If an employer gives a lower performance rating to an employee and the employee responds by revealing they have a disability that is causing the performance problem, the employer **may still give the lower rating**. The rating reflects the employee's performance regardless of what role, if any, a disability may have played. If an employee states that their disability is the cause of the performance problem, the employer could follow up by making clear what level of performance is required and asking why the employee believes the disability is affecting performance. If the employee

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does not ask for an accommodation (the obligation generally rests with the employee to ask), the employer may ask whether there is an accommodation that may help raise the employee's performance level.

REQUESTING ACCOMMODATION AFTER PERFORMANCE PROBLEMS ARISE

The ADA does not compel employees to ask for accommodation at a certain time. Employees may ask for reasonable accommodation before or after being told of performance problems. Sometimes, an employee may not know or be willing to acknowledge that there is a problem requiring accommodation until the employer points out deficiencies in performance. Although the ADA does not require employees to ask for an accommodation at a specific time, **the timing of a request for reasonable accommodation is important because an employer does not have to rescind discipline (including a termination) or an evaluation warranted by poor performance.**

Employers may question how to proceed if an employee requests an accommodation for the first time in response to counseling or a low performance rating. When an employee requests a reasonable accommodation in response to the employer's discussion or evaluation of the person's performance, the employer **may proceed with the discussion or evaluation**, but it should also begin an interactive reasonable accommodation process by discussing with the employee how the disability may be affecting performance and what accommodation the employee believes may help to improve it.

Key Points: Employers cannot refuse to discuss the request or fail to provide a reasonable accommodation as punishment for the performance problem. If a reasonable accommodation is needed to assist an employee in addressing a performance problem, and the employer refuses to provide one, absent undue hardship, the employer has violated the ADA.

The employer may seek appropriate medical documentation to learn if the condition meets the ADA's definition of "disability," whether and to what extent the disability is affecting job performance, and what accommodations may address the problem. The employer may also suggest possible accommodations. The employee may need reasonable accommodation, for example, to enable them to meet a production standard or to perform an essential function. Where a lower performance rating results from an inability to perform a marginal function because of the disability, the appropriate accommodation would be to remove the marginal function (and perhaps substitute one that the employee can perform).

An employer may need to determine what happens to an employee while it is handling a request for accommodation. For example, an employer might require an employee to perform only those functions of the job for which accommodation is not needed while processing the request. In other situations, it may be appropriate for an employee to take leave.

When an employee does not give notice of the need for accommodation until after a performance problem has occurred, reasonable accommodation does not require that the employer:

- Tolerate or excuse the poor performance;
- Withhold disciplinary action (including termination) warranted by the poor performance;
- Raise a performance rating; or
- Give an evaluation that does not reflect the employee's actual performance.

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Example #2: An employee at a small advertising firm has a learning disability. Because the employee had a bad experience at a prior job when he requested accommodation, he decides not to disclose his disability or ask for any accommodations during the application process or once he begins working. Performance problems soon arise, and the employee's supervisor brings them to the employee's attention. He tries to solve the problems on his own but cannot. The firm follows its policy on counseling and disciplining employees who are failing to meet minimum requirements, but these efforts are unsuccessful. When the supervisor meets with the employee to terminate his employment, the employee asks for a reasonable accommodation.

The employer may refuse the request for reasonable accommodation and proceed with the termination because an employer is not required to excuse performance problems that occurred prior to the accommodation request. Once an employer makes an employee aware of performance problems, the employee must request any accommodations needed to rectify them. This employee waited too long to request reasonable accommodation.

An employer may not withdraw a reasonable accommodation as punishment for an unsatisfactory performance rating.

For example, an employer may not withdraw a telework arrangement or a modified schedule provided as a reasonable accommodation because the employee is given an unsatisfactory performance rating. Simply withdrawing the telework arrangement or a modified schedule is no different than discontinuing an employee's use of a sign language interpreter or assistive technology as reasonable accommodations.

Nor should an employer assume that an unsatisfactory rating means that the reasonable accommodation is not working. The employer can proceed with the unsatisfactory rating, but may also wish to determine the cause of the performance problem to help evaluate the effectiveness of the reasonable accommodation. If the reasonable accommodation is not assisting the employee in improving their performance as intended, the employer and employee may need to explore whether any changes would make the accommodation effective, whether an additional accommodation is needed, or whether the original accommodation should be withdrawn and another should be substituted.

Conduct Standards

Employers may discipline an employee with a disability for violating a conduct standard. If an employee's disability does not cause the misconduct, an employer may hold the individual to the same conduct standards that it applies to all other employees. In most instances, an employee's disability will not be relevant to any conduct violations.

If an employee's disability causes a violation of a conduct rule, the employer may discipline the individual—if the conduct rule is job-related and consistent with business necessity and other employees are held to the same standard. The ADA does not protect employees from the consequences of violating conduct requirements, even where the conduct is caused by the disability.

The ADA generally gives employers wide latitude to develop and enforce conduct rules. The only requirement imposed by the ADA is that a conduct rule be job-related and consistent with business necessity when it is applied to an employee whose disability caused them to violate the rule. 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

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property. Similarly, employers may prohibit insubordination towards supervisors and managers and also require that employees show respect for, and deal appropriately with, clients and customers. Employers also may:

- ☑ Prohibit inappropriate behavior between co-workers (e.g., employees may not yell, curse, shove or make obscene gestures at each other at work);
- ☑ Prohibit employees from sending inappropriate or offensive emails (e.g., those containing profanity or messages that harass co-workers), using the Internet to access inappropriate websites (e.g., sites exhibiting crude messages), 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.

Whether an employer's application of a conduct rule to an employee with a disability is job-related and consistent with business necessity may rest on several factors, including the manifestation or symptom of a disability affecting an employee's conduct, the frequency of occurrences, the nature of the job, the specific conduct at issue and the working environment. These factors may be critical when the violation concerns "disruptive" behavior, which, unlike prohibitions on stealing or violence, is more ambiguous concerning exactly what type of conduct is viewed as unacceptable.

Example #3: New bank teller Steve barks, shouts, utters nonsensical phrases and makes other noises that are so loud and frequent that they distract other tellers and cause them to make errors in their work. Customers also hear Steve's vocal tics, and several of them speak to Donna, the bank manager. Donna discusses the issue with Steve, and he explains that he has Tourette syndrome, a neurological disorder characterized by involuntary, rapid, sudden movements or vocalizations that occur repeatedly. Steve explains that while he could control the tics sufficiently during the job interview, he cannot control them throughout the workday, nor can he modulate his voice to speak more softly when these tics occur. Donna lets Steve continue working for another two weeks, but she receives more complaints from customers and other tellers who, working in close proximity to Steve, continue to have difficulty processing transactions. Although Steve is able to perform his basic bank teller accounting duties, Donna terminates Steve because his behavior is not compatible with performing the essential function of serving customers and his vocal tics are unduly disruptive to coworkers. Steve's termination is permissible because it is job-related and consistent with business necessity to require that bank tellers be able to (1) conduct themselves in an appropriate manner when serving customers and (2) refrain from interfering with the ability of coworkers to perform their jobs. Further, because Steve never performed the essential functions of his job satisfactorily, the bank did not have to consider reassigning him as a reasonable accommodation.

Example #4: Assume that Steve has all the severe tics mentioned above, but he now works in a noisy environment, does not come into contact with customers and does not work close to coworkers. The environment is so noisy that Steve's vocalizations do not distract other workers. Steve's condition would not necessarily make him unqualified for a job in this environment.

REQUESTING ACCOMMODATION AFTER MISCONDUCT

Employers may question how to proceed when an employee first mentions a disability and/or the need for an accommodation in response to counseling or discipline for unacceptable conduct. **If an employee states that their disability is the cause of the conduct problem or requests accommodation, the employer may still discipline the**

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employee for the misconduct. If the appropriate disciplinary action is termination, the ADA would not require further discussion about the employee's disability or their request for reasonable accommodation. Although the ADA does not require employees to ask for an accommodation at a specific time, the timing of a request for reasonable accommodation is important because an employer does **not** have to rescind discipline (including termination) warranted by misconduct. Also, an employer's knowledge of an employee's disability does not require the employer to ask if the misbehavior is disability-related.

If the discipline is something less than termination, the employer may ask about the disability's relevance to the misconduct or whether the employee thinks there is an accommodation that could help them avoid future misconduct. If an accommodation is requested, the employer should begin an interactive process to determine whether one is needed to correct a conduct problem, and, if so, what accommodation would be effective. The employer may seek appropriate medical documentation to learn if the condition meets the ADA's definition of disability, whether and to what extent the disability is affecting the employee's conduct, and what accommodations may address the problem.

Key Points: Employers cannot refuse to discuss the request or fail to provide reasonable accommodation as a punishment for the conduct problem. If a reasonable accommodation is needed to assist an employee with a disability in controlling their behavior and thereby preventing another conduct violation, and the employer refuses to provide one that would not cause undue hardship, then the employer has violated the ADA.

When disciplining an employee whose misconduct results from a disability, employer discipline is not limited solely to conduct prohibited in an employee handbook or similar document. An employer may enforce conduct rules that are not found in workplace policies, employee handbooks or similar documents so long as they are (1) job-related and consistent with business necessity and (2) applied consistently to all employees and not just to a person with a disability. Many times, the proscribed conduct is well understood by both the employer and employees as being unacceptable without being formally written, such as a prohibition on insubordination. Also, sometimes, an employee's conduct may not be directly addressed by a conduct rule but nonetheless clearly violates a behavior norm that is job-related and consistent with business necessity.

Whether rules are written or not, employers should be careful that all conduct rules are applied consistently and should not single out an employee with a disability for harsher treatment. In addition, an employer may have more difficulty demonstrating that ad hoc rules are job-related and consistent with business necessity.

MEDICATION AND TREATMENT

Employers may not require an employee to receive or change treatment for a disability to comply with a conduct standard. Decisions about medication and treatment often involve many considerations beyond the employer's expertise. Regardless of whether employers believe they are trying to help employees who have medical conditions, employers should focus instead on addressing unacceptable workplace conduct. Employer comments about the disability and its treatment could lead to potential ADA claims (e.g., the employer regarded the employee as having a disability or the employer engaged in disparate treatment).

Although employers should not intervene in medical decisions, they **should be prepared to discuss providing a reasonable accommodation that will enable an employee to correct a conduct problem.** The ADA requires an employer to provide reasonable accommodation regardless of what effect medication or other medical treatment may have on an employee's ability to perform the job. However, if an employee does not take medication or receive treatment and, as a result, cannot perform the essential functions of the position or poses a direct threat, even with a reasonable accommodation, they are

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unqualified. Similarly, if an employee does not take medication or receive treatment and, as a result, cannot meet a conduct standard, even with a reasonable accommodation, the employer may take disciplinary action.

Example #5: An employee with a psychiatric disability takes medication, but one side effect is that the employee sometimes becomes restless. The employee's restlessness leads him to become easily distracted by nearby colleagues which, in turn, causes him to interrupt his coworkers. The supervisor counsels the employee about his disruptiveness and lack of focus. The employee tells the supervisor about his disability and the side effect of the medication he takes, and asks to be moved to a quieter work space to lessen the distractions. He also says that it would be helpful if his supervisor gave him more structured assignments with more deadlines to focus his attention.

The supervisor consults with the HR director, telling her that he thinks there is a special medication that could control the restlessness. The HR director appropriately rejects the supervisor's suggestion and recommends that the supervisor begin providing more structured assignments while she requests medical documentation from the employee confirming the side effect. Once confirmed, the HR director finds a vacant cubicle in a quiet part of the office which, together with the more structured assignments, resolves the issue.

Discussions About Performance or Conduct

Employers may question whether they should mention an employee's disability during a discussion about a performance or conduct problem if the employee does not do so. **Generally, it is inappropriate for the employer to focus the discussion about a performance or conduct problem on an employee's disability.** The point of the employer's comments should be to provide a clear explanation of the employee's performance deficiencies or misconduct, and what the employer expects the employee to do to improve. Moreover, emphasizing the disability can distract from the focus on performance or conduct and, in some cases, could result in a claim under the ADA that the employer regarded (or treated) the individual as having a disability. It is generally preferable that the employee initiate any discussion on the role of the disability. Ideally, employers should discuss problems before they become too serious in order to give the employee an opportunity as soon as possible to address the employer's concerns.

When discussing performance or conduct problems with an employee who has a known disability, **an employer may ask if the employee needs a reasonable accommodation.** Alternatively, an employer may prefer to ask if some step(s) can be taken to enable the employee to improve their performance or conduct without mentioning accommodation or the employee's disability. In order to have a productive discussion about whether reasonable accommodation might be needed, it may be helpful if the employer is first clear with the employee about the performance or conduct issue and what the employee needs to do to improve.

Employers must provide a reasonable accommodation for an employee with a disability who needs one to discuss a performance or conduct problem. An employer might have to provide a reasonable accommodation to enable an employee with a disability to understand the exact nature of any performance or conduct problem and to have a meaningful discussion with the employer about it.

Similarly, an employer may need to provide reasonable accommodation to enable an employee with a disability to participate in a performance review. Even if there are no performance problems, the employee is entitled to the same opportunity as a nondisabled employee to discuss their performance. An employer may also need to provide a reasonable accommodation to enable an employee with a disability to participate in an investigation into misconduct, whether as the

subject of the investigation or as a witness, to ensure the employee understands what is happening and can provide meaningful input.

Seeking Medical Information

Some employers want to ask for medical information in response to an employee's performance or conduct problem because they believe it might help them understand why the problem exists and what an appropriate response might be. **The ADA permits an employer to request medical information or order a medical examination when it is job-related and consistent with business necessity.** Generally, this means that the employer has a reasonable belief, based on objective evidence, that an employee is unable to perform an essential function or will pose a direct threat because of a medical condition. The scope and manner of any inquiries or medical examinations must be limited to information necessary to determine whether the employee is able to perform the essential functions of the job or can work without posing a direct threat.

An employer must have objective evidence suggesting that a medical reason is a likely cause of the problem to justify seeking medical information or ordering a medical examination. In limited circumstances, the nature of an employee's performance problems or unacceptable conduct may provide objective evidence that leads an employer to a reasonable belief that a medical condition may be the cause.

Example #6: An employee with no history of performance or conduct problems suddenly develops both. Over the course of several weeks, her work becomes sloppy and she repeatedly misses deadlines. She becomes withdrawn and surly, and in meetings, she is distracted and becomes belligerent when asked a question. When her supervisor starts asking her about her behavior, she responds with answers that make no sense.

The sudden, marked change in performance and conduct, the nonsensical answers and the belligerent behavior all reasonably suggest that a medical condition may be the cause of the employee's performance and conduct problems. This employer may ask the employee medical questions (e.g., "Are you ill"; "Have you seen a doctor"; "Is there a medical reason for the sudden, serious change in your behavior"). The employer also may, as appropriate, require the employee to:

- Go to an employee assistance program (EAP);
- Produce medical documentation that she is fit to continue working (including the ability to meet minimum performance requirements and exhibit appropriate behavior); and/or
- Undergo an appropriate medical examination related to the performance and conduct issues.

The employer also may take a number of actions while it awaits medical documentation on whether she is able to continue performing her job, including placing the employee on leave.

Not all performance problems or misconduct will justify an employer's request for medical information or a medical examination. An employer cannot require a medical examination solely because an employee's behavior is annoying, inefficient or otherwise unacceptable. In fact, there may be other reasons that an employee experiences performance or conduct problems that are unrelated to any medical condition, such as insufficient knowledge, conflict with a supervisor or co-worker, lack of motivation or skills, a poor attitude or personal problems (such as a divorce or other family problems).

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An employer who has a sufficient basis for requesting medical information or requiring a medical examination is not required to take such steps instead of imposing discipline for poor performance or conduct; the ADA **permits but does not require** an employer to seek medical information. An employer may choose to focus solely on the performance or conduct problems and take appropriate steps to address them.

Key Points: Even when the ADA permits an employer to seek medical information or require a medical examination, it still may be difficult to determine if that is an appropriate course of action. It is advisable for employers to determine whether simply addressing the problem without such information will be effective.

Attendance Issues

Employers generally have attendance requirements. Many employers recognize that employees need time off and therefore provide paid leave in the form of vacation or annual leave, personal days and sick days. Some employers also offer opportunities to use advanced or unpaid leave, as well as leave donated by co-workers. Certain laws may require employers to extend leave, such as the ADA (as a reasonable accommodation) and the federal Family and Medical Leave Act.

Employees with disabilities **must be granted the same access** to an employer's existing leave program as all other employees. When an employee with a disability seeks leave under an employer's regular leave policies, the employee must meet any eligibility requirements for the leave that are imposed on all employees (e.g., only employees who have completed a probation program can be granted advance leave). Similarly, employers must provide employees with disabilities with equal access to programs that grant flexible work schedules and modified schedules.

If an employee with a disability needs leave or a modified schedule/attendance policy beyond that provided for under an employer's benefits program, the employer may have to grant the request as a reasonable accommodation if there is no 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), and providing periodic breaks.

An employer may impose disciplinary action, consistent with its policies as applied to other employees, for attendance problems that occurred prior to a request for reasonable accommodation. However, if the employee's infraction does not merit termination but some lesser disciplinary action (e.g., a warning), and the employee then requests reasonable accommodation, the employer must consider the request and determine if it can provide a reasonable accommodation without causing undue hardship.

IRREGULAR, UNRELIABLE ATTENDANCE

Although the ADA may require an employer to modify its time and attendance requirements as a reasonable accommodation (absent undue hardship), **employers need not completely exempt an employee from time and attendance requirements, grant open-ended schedules (e.g., the ability to arrive or leave whenever the employee's disability necessitates), or accept irregular, unreliable attendance.** Employers generally do not have to accommodate repeated instances of tardiness or absenteeism that occur with some frequency, over an extended period of time and often without advance notice. The chronic, frequent and unpredictable nature of such absences may put a strain on the employer's operations for a variety of reasons, such as the following:

- ☒ An inability to ensure a sufficient number of employees to accomplish the work required;

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- ❌ A failure to meet work goals or to serve customers/clients adequately;
- ❌ A need to shift work to other employees, thus preventing them from doing their own work or imposing significant additional burdens on them; or
- ❌ Incurring significant additional costs when other employees work overtime or when temporary workers must be hired.

Under these or similar circumstances, an employee who is chronically, frequently and unpredictably absent may not be able to perform one or more essential functions of the job, or the employer may be able to demonstrate that any accommodation would impose an undue hardship, thus rendering the employee unqualified.

Example #7: An employee with asthma who is ineligible for FMLA leave works on an assembly line shift that begins at 7 a.m. Recently, his illness has worsened, and his doctor has been unable to control the employee's increasing breathing difficulties. As a result of these difficulties, the employee has taken 12 days of leave during the past two months, usually in one- or two-day increments. The severe symptoms generally occur at night, thus requiring the employee to call in sick early the next morning. The lack of notice puts a strain on the employer because the assembly line cannot function well without all line employees present and there is no time to plan for a replacement.

The employer seeks medical documentation from the employee's doctor about his absences and the doctor's assessment of whether the employee will continue to have a frequent need for intermittent leave. The doctor responds that various treatments have not controlled the asthmatic symptoms, there is no way to predict when the more serious symptoms will suddenly flare up, and he does not expect any change in this situation for the foreseeable future. Given the employee's job and the consequences of being unable to plan for his absences, the employer determines that he cannot keep the employee on this shift. Assuming no position is available for reassignment, the employer does not have to retain the employee.

It is best if an employee requests accommodation once they are aware that they will be violating an attendance policy or requiring intermittent leave due to a disability. Otherwise, **an employer is entitled to continue holding the employee accountable for such absences without any obligation to consider if there is a reasonable accommodation that might address the problem.** Moreover, prompt requests for accommodation may enable an employer to better plan for schedule modifications or absences, thus permitting an employee to get the accommodation.

INDEFINITE LEAVE

Although employers may have to grant extended medical leave as a reasonable accommodation, they have no obligation to provide leave of indefinite duration. Granting indefinite leave, like frequent and unpredictable requests for leave, can impose an undue hardship on an employer's operations. Indefinite leave is different from leave requests that give an approximate date of return (e.g., a doctor's note says that the employee is expected to return around the beginning of March) or give a time period for return (e.g., a doctor's note says that the employee will return sometime between March 1 and April 1). If the approximate date of return or the estimated time period turns out to be incorrect, 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.

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Example #8: An employer's policy allows employees one year of medical leave but then requires either that they return (with or without reasonable accommodation, if appropriate) or be terminated. An employee with a disability who has been on medical leave for almost one year informs her employer that she will need a total of 13 months of leave for treatment of her disability, and then she will be able to return to work. She provides detailed medical documentation in support of her request. This request is not for indefinite leave because the employee provides a specific date on which she can return; the employer must provide the additional month of leave as a reasonable accommodation unless it would cause an undue hardship. The employer may consider the impact on its operations caused by the initial 12-month absence, along with other undue hardship factors. The mere fact that granting the requested accommodation requires the employer to modify its leave policy for this employee does not constitute undue hardship.

Example #9: An employer has the same leave policy described above. An employee with a disability has been on medical leave for one year when he informs his employer that he will never be able to return to his old job due to his disability, and he is unable to provide information on whether and when he could return to another job that he could perform. The employer may terminate this worker because the ADA does not require the employer to provide indefinite leave.

Dress Codes

Employers may require employees to wear certain articles of clothing to protect themselves, co-workers or the public (e.g., construction workers are required to wear certain headgear to prevent injury; health care workers wear gloves to prevent transmission of disease from or to patients). Sometimes employers impose dress codes to make employees easily identifiable to customers and clients, or to promote a certain image (e.g., a movie theater requires its staff to wear a uniform; a store requires all sales associates to dress in black). A dress code also may prohibit employees from wearing certain items either as a form of protection or to promote a certain image (e.g., prohibitions on wearing jewelry or baseball caps, or requirements that workers wear business attire).

An employer may require an employee with a disability to observe a dress code imposed on other employees in the same job. For example, a professional office may require its employees to wear appropriate business attire because the nature of the jobs could bring them into contact with clients, customers and the public. Where an employee's disability makes it difficult to comply fully with a dress code, an employer may be able to provide a reasonable accommodation.

Example #10: An employer requires all of its employees to wear a uniform provided by the employer. An employee with quadriplegia cannot wear this uniform because he cannot use zippers and buttons and because the shape of the uniform causes discomfort when he sits in a wheelchair. The employee tells the employer about these difficulties and informs the employer about manufacturers that specialize in making clothes for people with disabilities. The individual shows the employer a catalog, and together they are able to choose items that approximate the uniform, thus meeting the needs of both the employer and the individual. As a reasonable accommodation, the employer provides the employee with the specified uniform.

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If an employee cannot meet a dress code because of a disability, an employer may still require compliance if the dress code is job-related and consistent with business necessity. An employer also may require that an employee with a disability meet dress standards required by federal law (e.g., the Occupational Safety and Health Act). If an individual with a disability cannot comply with a dress code that meets the business necessity standard or is mandated by federal law, even with a reasonable accommodation, they will not be considered qualified.

Alcoholism and Illegal Use of Drugs

The ADA may protect a “qualified” individual with alcoholism who can meet the definition of “disability.” The ADA **does not protect an individual who currently engages in the illegal use of drugs, but may protect an individual who has recovered from drug addiction** who is no longer engaging in the illegal use of drugs, who can meet the other requirements of the definition of “disability,” and who is qualified.

The ADA provides that employers may require an employee who has alcoholism or who engages in the illegal use of drugs to **meet the same standards of performance and behavior as other employees**. Poor job performance or unsatisfactory behavior, such as absenteeism, tardiness, insubordination or on-the-job accidents, related to an employee’s alcoholism or illegal use of drugs need not be tolerated if similar performance or conduct would not be acceptable for other employees.

Example #11: An employer has a lax attitude about employees arriving at work on time. One day a supervisor sees an employee he knows to be recovered from alcoholism come in late. Although the employee’s tardiness is no worse than that of other workers and there is no evidence to suggest the tardiness is related to drinking, the supervisor believes such conduct may signal that the employee is drinking again. Thus, the employer reprimands the employee for being tardy. The supervisor’s actions violate the ADA because the employer is holding an employee with a disability to a higher standard than similarly situated workers.

The ADA specifically permits employers to prohibit the use of alcohol or the illegal use of drugs in the workplace. Consequently, an employee who violates related policies, even if the conduct stems from alcoholism or drug addiction, may face the same discipline as any other employee. The ADA also permits employers to require that employees not be under the influence of alcohol or the illegal use of drugs in the workplace.

Employers may comply with other federal laws and regulations concerning the use of drugs and alcohol, including the Drug-Free Workplace Act of 1988; regulations applicable to particular types of employment, such as law enforcement positions; regulations of the Department of Transportation for airline employees, interstate motor carrier drivers and railroad engineers; and the regulations for safety sensitive positions established by the Department of Defense and the Nuclear Regulatory Commission.

Also, employers may suggest that an employee who has engaged in misconduct due to alcoholism or the illegal use of drugs go to their EAP in lieu of discipline. The employer may discipline the employee, suggest that the employee seek help from the EAP or do both. An employer will always be entitled to discipline an employee for poor performance or misconduct that results from alcoholism or drug addiction. However, an employer may choose instead to refer an employee to an EAP or to make such a referral in addition to imposing discipline. That said, the ADA does not require employers to establish EAPs or to provide employees with an opportunity for rehabilitation in lieu of discipline.

Compliance Overview

REQUESTING ACCOMMODATION AFTER DISCIPLINE

Employers may question how to proceed if an employee mentions drug addiction or alcoholism, or requests accommodation, for the first time in response to discipline for unacceptable performance or conduct. **The employer may impose the same discipline that it would for any other employee who fails to meet its performance standard or who violates a uniformly-applied conduct rule.** If the appropriate disciplinary action is termination, the ADA would **not** require further discussion about the employee's disability or request for accommodation.

An employee whose poor performance or conduct is attributable to the **current illegal use of drugs is not covered under the ADA.** Therefore, the employer has no legal obligation to provide a reasonable accommodation and may take whatever disciplinary actions it deems appropriate, although nothing in the ADA would limit an employer's ability to offer leave or other assistance that may enable the employee to receive treatment.

By contrast, **an employee whose poor performance or conduct is attributable to alcoholism may be entitled to a reasonable accommodation,** separate from any disciplinary action the employer chooses to impose and assuming the discipline for the infraction is not termination. If the employee only mentions the alcoholism but makes no request for accommodation, the employer may ask if the employee believes an accommodation would prevent further problems with performance or conduct. If the employee requests an accommodation, the employer should begin an interactive process to determine if an accommodation is needed to correct the problem. This discussion may include questions about the connection between the alcoholism and the performance or conduct problem. The employer should seek input from the employee on what accommodations may be needed and also may offer its own suggestions. Possible reasonable accommodations may include a modified work schedule to permit the employee to attend an ongoing self-help program.

An employer may choose, but is not required by the ADA, to offer a "firm choice" or "last chance agreement" to an employee who otherwise could be terminated for poor performance or misconduct resulting from alcoholism or drug addiction. Generally, under a firm choice or last chance agreement, an employer agrees not to terminate an employee in exchange for the employee's agreement to receive substance abuse treatment, refrain from further use of alcohol or drugs, and avoid further workplace problems. A violation of such an agreement usually warrants termination because the employee failed to meet the conditions for continued employment.

Confidentiality Issues

The ADA's confidentiality provisions do not permit employers to tell co-workers that an employee with a disability is receiving a reasonable accommodation. It is imperative that managers be trained about how to respond to such questions because it is reasonable to assume they may be asked questions by an employee's co-workers where the accommodation involves modification of a work schedule or dress code, or any other change in the workplace that a co-worker may perceive as holding the employee with a disability to a different performance or conduct standard.

Key Points: Employers already keep many types of information confidential despite inquiries from their workers, such as personnel decisions like the reason an employee left a job or was transferred. This situation should be treated in a similar fashion. An employer could respond that they do not discuss one employee's situation with another in order to protect the privacy of all employees, but they could assure the coworker that the employee is meeting the employer's work requirements.

Employer Takeaways

Employers may question what actions they can take when an employee's disability is causing a performance or conduct problem. As noted above, the ADA generally does not impinge on the right of employers to define jobs and evaluate their employees according to consistently applied standards governing performance and conduct. Employers may apply the same quantitative and qualitative requirements for performance of essential functions to an employee with a disability that they apply to employees without disabilities. In addition, if an employee's disability causes a violation of a conduct rule, the employer may discipline the individual—if the conduct rule is job-related and consistent with business necessity and other employees are held to the same standard.

As a general best practice, employers should apply disciplinary policies and actions consistently to similarly situated employees—including employees with disabilities—to avoid claims of discrimination or retaliation. Also, employers should maintain detailed documentation on the reasons for decisions (including disciplinary decisions), in order to help prove that their actions were motivated by lawful reasons and not illegal discrimination.

Employers should also keep in mind that their obligations may be affected by other federal, state and/or local laws. Employers with questions on disciplining employees with disabilities should contact local counsel for specific legal advice.