

ALI-ABA Audio Seminar

**NEW Proposed Regulations for the ADA Amendments Act**

October 21, 2009

Telephone Seminar/Audio Webcast

**The Americans With Disabilities Act: Applying Performance And Conduct  
Standards To Employees With Disabilities**

By

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# The Americans With Disabilities Act: Applying Performance And Conduct Standards To Employees With Disabilities

## Notice Concerning The Americans With Disabilities Act Amendments Act Of 2008

On September 25, 2008, President George W. Bush signed into law the ADA Amendments Act of 2008. See the [list of specific changes to the ADA](#) made by the ADA Amendments Act. As a result of this new legislation, which will go into effect on January 1, 2009, minor changes have been made to this document. These changes are found in endnotes 5 and 11 and do not affect the overall content or guidance in this document.

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## I. INTRODUCTION

A core function for any supervisor is managing employee performance. Performance management, if done effectively, can help avoid discrimination, in addition to furthering an employer's business objectives. "Performance management systems that involve explicit performance expectations, clear performance standards, accurate measures, and reliable performance feedback, and the consistent application of these standards [to all employees], help to reduce the chances of discriminatory ratings."<sup>1</sup> Additionally, employees work most effectively

when they clearly understand what is expected of them and know that their performance will be measured against a standard that is fair and applied even-handedly. The same principles apply to workplace rules concerning employee conduct.

Title I of the Americans with Disabilities Act (ADA) and Section 501 of the Rehabilitation Act, which prohibit employment discrimination against qualified individuals with disabilities, generally do not impinge on the right of employers to define jobs and to evaluate their employees according to consistently applied standards governing performance and conduct. Under both laws, 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.

Although, an employee's disability typically has no bearing on performance or conduct, sometimes an individual's disability may contribute to performance or conduct problems. When this is the case, a simple reasonable accommodation often may be all that is needed to eliminate the problem. However, EEOC continues to receive questions from both employers and employees about issues such as what steps are appropriate where a disability is causing – or seems to be causing – a performance or conduct problem, when a request for accommodation should be made, and when an employer can properly raise the issue of an employee's disability as part of a discussion about performance or conduct problems. Even when the disability is not causing the performance or conduct problem, some employers still have questions about what action they can take in light of concerns about potential ADA violations.

This publication discusses relevant ADA requirements, provides practical guidance, and offers examples to demonstrate the responsibilities of both employees and employers when performance and conduct issues arise. It also discusses the role of reasonable accommodation in preventing or addressing performance or conduct problems, including the relationship between reasonable accommodation and disciplinary action and the circumstances in which an accommodation may or may not have to be granted.<sup>2</sup> Many of the examples in this document are based on actual cases or on specific scenarios presented to EEOC, and many of the points of "practical guidance" respond to questions received from both employers and individuals with disabilities.

## II. BASIC LEGAL REQUIREMENTS

Title I of the ADA covers private, state, and local government employers with 15 or more employees; Section 501 of the Rehabilitation Act of 1973 covers federal agencies. The statutes contain identical anti-discrimination provisions.<sup>3</sup>

The ADA prohibits discrimination against applicants and employees who meet the statute's definition of a "qualified individual with a disability."<sup>4</sup> The ADA defines a "**disability**" in three ways:

A physical or mental impairment that substantially limits one or more of the major life activities of an individual

A record of such an impairment

Being regarded as having such an impairment.<sup>5</sup>

A "**qualified**" individual with a disability can (1) satisfy the requisite skill, experience, education and other job-related requirements and (2) perform the essential functions of a position with or without reasonable accommodation.<sup>6</sup>

**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

- Demonstrating certain attributes such as the ability to work with other people or to work under pressure.<sup>7</sup>

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.<sup>8</sup>

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.”<sup>9</sup> 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.<sup>10</sup> 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 her position.<sup>11</sup> 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 she requires the employer to provide her with an adjustment or change at work due to a medical condition.<sup>12</sup> 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.<sup>13</sup>

### III. APPLICATION OF ADA LEGAL REQUIREMENTS TO PERFORMANCE AND CONDUCT STANDARDS

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 destruction of company property or the use of company computers to access pornography). 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.

## A. Performance standards

### **1. May an employer apply the same quantitative and qualitative requirements for performance of essential functions to an employee with a disability that it applies to employees without disabilities?**

Yes. An employee with a disability must meet the same production standards, whether quantitative or qualitative, as a non-disabled employee in the same job.<sup>14</sup> Lowering or changing a production standard because an employee cannot meet it due to a disability is not considered a reasonable accommodation.<sup>15</sup> However, a reasonable accommodation may be required to assist an employee in meeting a specific production standard.

*Practical Guidance: It is advisable 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 federal agency requires all of its investigators to complete 30 investigations per year in addition to other responsibilities. Jody's disability is worsening, causing her increased difficulty in completing 30 investigations while also conducting training and writing articles for a newsletter. Jody tells her supervisor about her disability and requests that she be allowed to eliminate the marginal functions of her job so that she can focus on performing investigations. After determining that conducting trainings and writing articles are marginal functions for Jody and that no undue hardship exists, the agency reassigns Jody's marginal functions as a reasonable accommodation.

Example 2: Robert is a sales associate for a pharmaceutical company. His territory covers a 3-state region and he must travel to each state three times a year. Due to staff cutbacks, the company is increasing the number of states for each salesperson from three to five. Robert explains to his manager that due to his disability he cannot handle the extra two states and the increased traveling, and he asks that he be allowed to have responsibility only for his original three states. The company may refuse this request for accommodation because it conflicts with the new production standard. However, the company should explore with Robert whether there is any reasonable accommodation that could enable him to service five states, and if not, whether reassignment is possible.

Example 3: 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 as system problems changes that he should have known about. 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.<sup>16</sup>

### **2. May an employer use the same evaluation criteria for employees with disabilities as for employees without disabilities?**

Yes. An employer should evaluate the job performance of an employee with a disability the same way it evaluates any other employee's performance.<sup>17</sup>