

Employment Law in Hawaii

Applying Performance and Conduct Standards to Employees With Disabilities discussion – October 1, 2008 from 8:30 to 10:30

Posted: 05 Sep 2008 04:03 PM CDT

You are invited to join Jeff Harris and his partner Tamara Gerrard for a discussion about the comprehensive question and answer guide published by the the Equal Employment Opportunity Commission on September 3, 2008, covering how the Americans with Disabilities Act applies to performance and conduct concerns.

Hawaii employers should carefully consider the information in this guide, whenever they have questions about what steps are appropriate where a disability is causing – or seems to be causing – a performance or conduct problem, when requests for accommodation are made, when the issue of an employee's disability should be raised as part of a discussion about performance or conduct problems or when they have any other concerns about what action they should take to address poor performance or misconduct in light of concerns about potential ADA violations.

Tamara and Jeff will go over the guide and related developments (including the ADA Amendments Act of 2008 pending in the U.S. Senate, having already passed the U.S. House) on Wednesday October 1, 2008 from 8:30 to 10:30 a.m. So please contact Ro (523-5320, rlp@torkildson.com) to let her know that you would like to join them.

Where disabilities cause performance or conduct problems – September 6, 2008

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An employer may discipline an employee whose disability causes violation of a conduct rule, if the rule is job-related and consistent with business necessity and if other employees are held to the same standard.

That's one of the many things said by the Equal Employment Opportunity Commission on September 3, 2008, in a comprehensive question-and-answer guide covering how the Americans with Disabilities Act applies to performance and conduct concerns. See, The American With Disabilities Act: Applying Performance and Conduct Standards to Employees with Disabilities, available at www.eeoc.gov/facts/performance-conduct.html (last modified September 4, 2008).

Prohibitions on violence, threats of violence, stealing, or destruction of property will always be job-related and consistent with business necessity when applied to an employee whose disability caused him or her to violate them, according to question and answer 9 in the new guide. Employers may also prohibit insubordination towards supervisors and managers. They may require all employees to show respect for, and deal appropriately with, clients and customers. And they may apply a wide variety of standards even though misconduct may be caused by a disability, that same section says.

The publication contains thirty questions and answers, with detailed explanations, practical examples and legal citations. Each question answered is listed at the end of this post.

Hawaii employers should carefully consider this new guidance provided by the federal agency, whenever they have questions about what steps are appropriate where a disability is causing – or seems to be causing – a performance or conduct problem, when requests for accommodation are made, when thinking about if an employee's disability should be raised or when they have any other concerns about what action they should take to address poor performance or misconduct in light of concerns about ADA compliance.

Questions Answered by Guide

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?
2. May an employer use the same evaluation criteria for employees with disabilities as for employees without disabilities?
3. May a supervisor require that an employee with a disability perform a job in the same manner as a non-disabled employee?
4. If an employer gives a lower performance rating to an employee and the employee responds by revealing she has a disability that is causing the performance problem, may the employer still give the lower rating?
5. Must an employee with a disability ask for a reasonable accommodation at a certain time?
6. What should an employer do if an employee requests an accommodation for the first time

in response to counseling or a low performance rating?

7. May an employer withdraw a telework arrangement or a modified schedule provided as a reasonable accommodation because the employee is given an unsatisfactory performance rating?
8. May an employer discipline an employee with a disability for violating a conduct standard?
9. If an employee's disability causes violation of a conduct rule, may the employer discipline the individual?
10. What should an employer do if an employee mentions a disability and/or the need for an accommodation for the first time in response to counseling or discipline for unacceptable conduct?
11. May an employer only discipline an employee whose misconduct results from a disability for conduct prohibited in an employee handbook or similar document?
12. May an employer require an employee to receive or change treatment for a disability to comply with a conduct standard?
13. Should an employer mention an employee's disability during a discussion about a performance or conduct problem if the employee does not do so?
14. When discussing performance or conduct problems with an employee who has a known disability, may an employer ask if the employee needs a reasonable accommodation?
15. Does an employer have to provide a reasonable accommodation to an employee with a disability who needs one to discuss a performance or conduct problem?
16. May an employer require an employee who is having performance or conduct problems to provide medical information or undergo a medical examination?
17. Must an employer who has a sufficient basis for requesting medical information or requiring a medical examination take such steps instead of imposing discipline for poor performance or conduct?
18. Must employees with disabilities be granted the same access to an employer's existing leave program as all other employees?

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19. Does the ADA require employers to modify attendance policies as a reasonable accommodation, absent undue hardship?
 20. Does the ADA require that employers exempt an employee with a disability from time and attendance requirements?
 21. Do employers have to grant indefinite leave as a reasonable accommodation to employees with disabilities?
 22. Does an employer have to grant a reasonable accommodation to an employee with a disability who waited until after attendance problems developed to request it?
 23. May an employer require that an employee with a disability follow the dress code imposed on all workers in the same job?
 24. Does the ADA protect employees with substance abuse problems?
 25. May an employer require an employee who is an alcoholic or who illegally uses drugs to meet the same standards of performance and conduct applied to other employees?
 26. May an employer discipline an employee who violates a workplace policy that prohibits the use of alcohol or the illegal use of drugs in the workplace?
 27. May an employer suggest that an employee who has engaged in misconduct due to alcoholism or the illegal use of drugs go to its Employee Assistance Program (EAP) in lieu of discipline?
 28. What should an employer do if an employee mentions drug addiction or alcoholism, or requests accommodation, for the first time in response to discipline for unacceptable performance or conduct?
 29. Must an employer provide 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?
 30. May an employer tell a coworker that an employee is receiving a reasonable accommodation?