

The EEOC has issued guidance addressing how the Americans with Disabilities Act (ADA) applies to conduct issues

Employers should note, the Americans with Disabilities Act applies to employers with 15 or more employees. The new guide reemphasizes the fact that employers can apply the same attendance, performance and quality standards to all employees, including those with disabilities. It also includes a new category “conduct”. The guide stresses that the ADA does not affect an employer’s right to hold all employees accountable for the same basic conduct standards.

Below are some frequently asked questions and answers related to the “conduct” guidance:

May an employer discipline an employee with a disability for violating a conduct standard?

Yes. 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.

Example: A blind employee has frequent disputes with her supervisor. She makes personal phone calls on company time, despite being told to stop. She routinely walks away from the job to smoke a cigarette despite warnings that she can do so only on breaks. She taunts the supervisor and disobeys his instructions regarding safe use of equipment. The employee’s actions are unrelated to her disability and the employer may discipline her for insubordination.

Example: Coworkers frequently taunt an employee with cerebral palsy because of his speech impediment, but the supervisor neither knows nor has reason to know about the taunting. Instead of reporting the coworkers’ behavior to his supervisor or human resources department, the employee goes into the offices of his coworkers and destroys some of their property. The employer may discipline the employee for his inappropriate response. (Because management is now aware of the coworkers’ actions, it must promptly investigate to determine whether they constitute harassment. If so, the employer must take appropriate action to prevent future harassment.)

If an employee’s disability causes violation of a conduct rule, may the employer discipline the individual?

Yes, 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 her 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 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 coworkers (e.g., employees may not yell, curse, shove, or make obscene gestures at each other 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 websites (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.

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 especially 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. The following examples illustrate how different results may follow from application of these factors in specific contexts.

Example: Steve, a new bank teller, 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 work day; 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: Steve works as a bank teller but his Tourette Syndrome now causes only infrequent throat clearing and eye blinks. These behaviors are not disruptive to other tellers or incompatible with serving customers. Firing Steve for these behaviors would violate the ADA because it would not be job-related and consistent with business necessity to require that Steve refrain from minor tics which do not interfere with the ability of his coworkers to do their jobs or with the delivery of appropriate customer service.

Example: Assume that Steve has all the severe tics mentioned in the first example 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.

Example: A telephone company employee’s job requires her to spend 90% of her time on the telephone with coworkers in remote locations, discussing installation of equipment. The company’s code of conduct requires workers to be respectful towards coworkers. Due to her psychiatric disability, the employee walks out of meetings, hangs up on coworkers on several occasions, and uses derogatory nicknames for coworkers when talking with other employees. The employer first warns the employee to stop her unacceptable conduct, and when she persists, issues a reprimand. After receiving the reprimand, the employee requests a reasonable accommodation. The employee’s antagonistic behavior violated a conduct rule that is job-related and consistent with business necessity and therefore the employer’s actions are consistent with the ADA. However, having received a request for reasonable accommodation, the employer should discuss with the employee whether an accommodation would assist her in complying with the code of conduct in the future.

Example: Darren is a long-time employee who performs his job well. Over the past few months, he is frequently observed talking to himself, though he does not speak loudly, make threats, or use inappropriate language. However, some coworkers who are uncomfortable around him complain to the division manager about Darren’s behavior. Darren’s job does not involve customer contact or working in close proximity to coworkers, and his conversations do not affect his job performance. The manager tells Darren to stop talking to himself but Darren explains that he does so as a result of his psychiatric disability. He does not mean to upset anyone, but he cannot control this behavior. Medical documentation supports Darren’s explanation. The manager does not believe that Darren poses a threat to anyone, but he transfers Darren to the night shift where he will work in relative isolation and have less opportunity for advancement, saying that his behavior is disruptive.

Although the coworkers may feel some discomfort, under these circumstances it is not job-related and

consistent with business necessity to discipline Darren for disruptive behavior. It also would violate the ADA to transfer Darren to the night shift based on this conduct. While it is possible that the symptoms or manifestations of an employee's disability could, in some instances, disrupt the ability of others to do their jobs that is not the case here. Employees have not complained that Darren's voice is too loud, that the content of what he says is inappropriate, or that he is preventing them from doing their jobs. They simply do not like being around someone who talks to himself.

May an employer only discipline an employee whose misconduct results from a disability for conduct prohibited in an employee handbook or similar document?

No. 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.

Example: Mary's disability has caused her to yell at and insult her supervisor and coworkers. There is no formal policy addressing such conduct, nor need there be. Prohibiting an employee from acting belligerently towards a supervisor or coworkers is job-related and consistent with business necessity, and thus Mary's supervisor may discipline her as long as the same discipline would be imposed on a non-disabled employee for the same conduct.

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.

Example: Jane has Down syndrome and is employed as a bagger at a grocery store. Jane is very friendly and likes to hug customers as they leave. Although she means well, management finds this behavior is unacceptable. Jane's manager talks to her and also contacts the job coach who helped Jane learn to do her job. The manager explains the unacceptable behavior and as a reasonable accommodation has the job coach return to work with Jane for a few days until she learns that she cannot hug the customers.

It is job-related and consistent with business

necessity to require that Jane refrain from hugging customers. Although the grocery store does not have a rule specifically prohibiting physical contact with customers, refraining from such conduct is an inherent part of treating customers with appropriate respect and courtesy.

Example: Jenny has cerebral palsy which causes her hands to shake. The supervisor observes Jenny spilling some of her drink on the counter in the office kitchen, and notices that she fails to clean it up. The supervisor has observed non-disabled employees leaving a mess, but has never disciplined them for this behavior. Nevertheless, the supervisor tells Jenny she can no longer use the kitchen because of her failure to clean up the spill. Although Jenny's disability did not prevent her from cleaning up, singling Jenny out for punishment could be a violation of the ADA.

On the other hand, the supervisor could have prohibited Jenny from using the kitchen if he had previously announced that employees would be required to clean up after themselves or risk being denied access to the kitchen.

As a matter of practical guidance: 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, because ad hoc rules are just that, ad hoc, an employer may have more difficulty demonstrating that they are job-related and consistent with business necessity.

May an employer require an employee to receive or change treatment for a disability to comply with a conduct standard?

No. Decisions about medication and treatment often involve many considerations beyond the employer's expertise.

Practical Guidance: 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, she is 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: 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.

The Americans with Disabilities Act is fluid and tricky. Refer to qualified counsel on all matter pertaining to disability accommodation and discipline.

News and Updates

Hire Act Affidavit Available

The HIRE Act, a jobs bill President Obama signed into law on March 18, 2010, provides tax breaks to employers that hire unemployed workers or individuals who were working only part-time in 2010. Under the HIRE Act, qualified employers could receive a payroll tax incentive and a general

business tax credit. The HIRE Act was designed to encourage employers to hire and retain new workers.

Employers who hire unemployed workers this year (after February 3, 2010, and before January 1, 2011) may qualify for a 6.2 percent payroll tax incentive, in effect exempting them from the employer's share of Social Security tax on wages paid to these workers after March 18. This reduction will have no effect on the employee's future Social Security benefits. The employee's 6.2 percent share of Social Security tax and the employer and employee's shares of Medicare tax still apply to all wages.

For an employee to be "qualified," employers must receive a signed affidavit from a new hire that they have not been employed for more than 40 hours during the previous 60 days (the 60-day period ends on the date the employee starts work).

Please note that in addition, for each qualified employee retained for at least a year (52 consecutive weeks) whose wages did not significantly decrease in the second half of the year, businesses may also be eligible for a general business tax credit, referred to as the new hire retention credit, of 6.2 percent of wages paid to the qualified employee over the 52 week period, up to a maximum credit of \$1,000.

Form W – 11 should be sent to all new employees hired through December 31, 2010 along with all other new employee paperwork. Find the form here.

Compliance Poster Updates

Note the following pending updates for mandatory poster changes:

1. **Nevada Minimum Wage Increase 7/1/2010:** New Notice Required as the employees with Health Benefits 2010 Minimum wage will increase to \$7.25 per hour and employees without Health Benefits 2010 Minimum wage will increase to \$8.25 per hour.
2. **Kansas No Smoking Law 7/1/2010:** HB 2221 bans smoking in restaurants, bars, places of employment, and other public places. This law requires proprietors or persons in charge of places where smoking is prohibited to post No Smoking signs.
3. **Utah Private Employer Verification Act 7/2010:** Verification by private employers is

required for new hires. A private employer who employs 15 or more employees as of July 1, 2010, may not hire a new employee unless the private employer does the following:

- o Is registered with a status verification system to verify the federal legal working status of any new employee, and
 - o Uses the status verification system to verify the federal legal working status of the new employee in accordance with the requirements of the status verification system.
4. **NLRA "Employee Rights" Notice 6/21/2010):** Effective June 21, 2010 federal contractors and subcontractors (Anyone with a covered contract to provide goods and/or services to the federal government) must post this notice pursuant to the National Labor Relations Act (NLRA).
5. **New Jersey Payment of Wages Notice (7/2010):** The change comes as a result

of the passage of NJ S 2773 (2008), which adds to other sanctions that may be taken against employers for failure to maintain and report records regarding wages, benefits, taxes and other contributions and assessments as required by law. The Act also requires employers to post the LWD's "Payment of Wages" notice with the new provisions. Employers must also give employees a copy of the notice within 30 days and new-hires a copy upon being hired. Effective July 14, 2010, New Jersey's Commissioner of Labor and Workforce Development ("LWD") is authorized to order the suspension and revocation of any one or more licenses held by an employer or successor firm for violations under New Jersey's recordkeeping and payment of wages law.

These articles should not be construed as legal advice or as pertaining to specific situations. Consult with your legal counsel for further information.

Stay "in the know" in 2010 –

Educational Seminars

We have a variety of educational seminars planned for 2010. Most will be held at the office of our partner in Campbell:

Leavitt Pacific Insurance Brokers
695 Campbell Technology Parkway, Ste 250
Campbell, CA 95008

July Educational Session

Understanding Medicare with Tami Sires

Tami will present information designed to help employers understand the basics of the federal Medicare program, and how to evaluate whether group coverage or retiree group coverage interacts with Medicare. This session will also cover Medicare Supplement plans and Part D



Prescription Drug plans. Join us on Thursday, July 29th at 10:00 AM in Campbell, Ca for the live presentation. [Register here](#)

Agenda:

- A Quick Look at Medicare
- Medicare Eligibility
- Medicare Part A and Part B
- Medicare Supplement Plan Information
- Medicare Prescription Drug Program (Part D)
- Medicare Part D Prescription Drug Plans (Part D)
- Guaranteed Issue Rights
- Lock-In
- How Your Group Coverage Stacks Up
- Q & A Session

OHR's Quarterly Harassment Prevention Training for Managers

As a service to your business we have a quarterly Harassment Prevention Training. Those sessions occur each quarter on the last Thursday of the month at 1:00 PM. Mark your calendars for March, June, September and December. We also do individual sessions for your offices, including Managers and Supervisors and non supervisory employees.

The next OHR Harassment Prevention Training for Managers session is scheduled for September 30th at 1:00 pm in Campbell, CA. To register please RSVP to [Harassment Prevention Training](#)

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