

# JAN

Job Accommodation Network

Practical Solutions • Workplace Success

## Accommodation and Compliance Series

# Accommodation and Compliance Series: Conduct

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## **JAN'S Accommodation and Compliance Series**

### **Introduction**

Employers have all types of formal and informal conduct policies, ranging from how employees should dress and act to prohibitions on violence and illegal drug use. However, even though they have these policies, employers are sometimes uncertain about how to apply them when there is the possibility that a disability is causing or contributing to a conduct problem. In some cases, employers ignore the problem and completely fail to apply their usual policies. In other cases, employers try to deal with the problems indirectly, for example finding other reasons to terminate the employee. Ignoring conduct problems or dealing with them indirectly often means the problems will continue until they start disrupting the workplace or affecting customer service or might even lead to a discrimination complaint.

The following process is intended to help employers deal directly with conduct problems before they get out of hand and when appropriate, apply existing conduct policies.

#### **Step 1: Identify the problem**

The first step in the process is to identify the problem. Employers may want to first decide who will deal with conduct problems when they arise (e.g., human resources or the employee's direct supervisor). The person chosen to deal with the problem should verify that the problem exists, by either making sure information about the problem came from a reliable source or through direct interaction with the employee who has the problem. Before talking with the employee, the employer should decide whether the source of the information will be provided to the employee, be prepared to discuss details about the problem, and be familiar with company policy and procedure related to the problem.

If the employee has a known disability, the employer should not assume that the conduct problem is disability-related. There may be other causes for the problem besides the disability, such as personal or financial difficulties, cultural differences, or simply a failure to comply with the conduct rule.

#### **Step 2: Communicate with the employee**

Once the employer has identified the problem, it is time to meet with the employee. When discussing the problem with the employee, the employer should be direct, letting the employee know what the problem is, that it must be addressed, and the consequences of not addressing it. In some cases, the employee may be unaware that a problem exists and may need specific information about what the problem is. It may be useful to describe the problem and let the employee know how it is affecting the workplace.

The employer also should let the employee know what is expected (e.g., when must the problem be fixed, what happens in the meantime, and what follow up will take place). If there is a specific company policy that applies, the employer should point it out or provide a copy. The employer also may want to make a general statement such as, “If I can help you resolve this problem, please let me know.”

### **Step 3: Modify or apply usual policies**

If the employee does not indicate that the problem is related to a disability, then the employer can apply its usual policies. If the employee indicates that the problem is related to a disability, then the employer should initiate an interactive process to determine whether the Americans with Disabilities Act (ADA) applies and whether there are accommodations that may resolve the problem. The ADA applies when an employer has at least 15 employees and the employee meets the ADA definition of disability.

- For information about how to determine whether an employee has a disability under the ADA, see [JAN's A to Z: Definition of Disability](#).

### **When can an employer apply its usual policies to an employee with a disability?**

In some cases, even if the employee indicates that a disability is causing a conduct problem, the employer may be able to apply its usual policies. Employers can apply conduct policies to all employees, including employees with disabilities, when the policies are “job-related and consistent with business necessity.” According to the Equal Employment Opportunity Commission (EEOC), certain conduct policies will always meet this standard, such as:

- Prohibiting violence, threats of violence, stealing, and destruction of property
- Prohibiting insubordination and inappropriate behavior between coworkers
- Prohibiting sending inappropriate or offensive emails, using the internet inappropriately, or using computers and other equipment for non-work related purposes
- Requiring employees to observe safety and operational rules
- Prohibiting drinking alcohol or illegal use of drugs in the workplace

Other conduct policies may sometimes be job-related and consistent with business necessity and sometimes not, such as:

- Complying with dress codes
- Behaving appropriately
- Meeting attendance and tardiness standards
- Prohibiting animals in the workplace
- Prohibiting eating at workstations

- Limiting personal calls during work time

### **How can employers determine when a policy is job-related and consistent with business necessity?**

To determine whether a conduct policy is job-related and consistent with business necessity and whether it can be applied to a specific employee with a disability, the following factors should be considered:

- The manifestation or symptom of a disability affecting the employee's conduct
- The frequency of occurrences
- The nature of the employee's job
- The specific conduct at issue
- The working environment

The following are examples from EEOC guidance called *The ADA: Applying Performance and Conduct Standards to Employees with Disabilities*.

**Example 1:** Steve, a bank teller, barks, shouts, 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 the bank manager. The manager talks with Steve and he explains that he has Tourette Syndrome, a disorder that causes repeated involuntary movements or sounds. Steve explains that he cannot control the tics nor can he speak more softly when these tics occur. Steve can be reassigned, or terminated if no reassignment is available, 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.

**Example 2:** 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 that do not interfere with the ability of his coworkers to do their jobs or with the delivery of appropriate customer service.

**Example 3:** Assume that Steve has all the severe tics mentioned in Example 1, 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.

If a conduct policy is not job-related and consistent with business necessity, then the employer should modify the policy for the employee. If a conduct policy is job-related

and consistent with business necessity, then the employer should try to provide accommodations so the employee can comply with the policy.

### **How can an employer determine effective accommodations?**

To help determine effective accommodation options, an employer should gather whatever information is needed regarding the employee's limitations or symptoms, the work environment, and in some cases, the employee's accommodation ideas. If the accommodation is obvious, no additional information may be needed.

It may be possible that the employee knows that he/she is having difficulty, but is uncertain about the exact cause or possible solution. In this case, the employer may need to request medical information to help determine the cause and to help explore accommodations. Employers also may need to contact outside resources such as JAN.

- For information about medical inquiries in response to an accommodation request, visit [JAN's A to Z: Medical Exams and Inquiries](#).

If there are no accommodations that would help the employee comply with the conduct policy, the employer can apply its usual discipline if the employee continues to violate the policy.

The following are examples from EEOC guidance called [The ADA: Applying Performance and Conduct Standards to Employees with Disabilities](#).

**Example 1:** A professional office requires that its employees wear business dress at all times. Due to diabetes, Carlos has developed foot ulcers making it very painful to wear dress shoes. Also, dress shoes make the ulcers worse. Carlos asks to wear sneakers instead. The supervisor is concerned about Carlos's appearance when meeting with clients. These meetings usually occur once a week and last about an hour or two. Carlos and his doctor agree that Carlos can probably manage to wear dress shoes for this limited time. Carlos also tells his supervisor that he will purchase black leather sneakers to wear at all other times. The supervisor permits Carlos to wear black sneakers except when he meets with clients.

**Example 2:** 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.

## Situations and Solutions:

The following situations and solutions are real-life examples of accommodations that were made by JAN customers. Because accommodations are made on a case-by-case basis, these examples may not be effective for every workplace but give you an idea about the types of accommodations that are possible.

### **A waitress with psoriasis did not want to wear the short sleeved uniform required under her employer's dress code because her arms had an obvious rash**

The employer modified the dress code for the waitress and allowed her to wear a long sleeved version of the uniform.

### **An office worker with a sleep disorder had trouble waking up in the morning and was often tardy for work.**

He asked not to be disciplined for his tardiness. His employer accommodated him with a thirty minute arrival window and allowed him to extend his day to make up the time.

### **An employee with multiple sclerosis had fallen multiple times at work, resulting in disruption to the workplace.**

After the employer told the employee that the issue needed to be addressed, the employee asked the employer to add a railing along the wall from her desk to the restroom, breakroom, and copy machine room. The employer installed the railing as requested and that addressed the issue.

### **A sales representative with alcoholism had a relapse after going through a difficult divorce**

She was facing termination for coming to work intoxicated, but when she told her employer she was ready to enter rehab, her employer gave her a last chance agreement. The agreement stated that she would not be terminated if she followed through with treatment and did not come to work intoxicated again.

### **An employer who had just hired a new employee with Tourette Syndrome was shocked when he discovered that the employee was making sexually offensive comments to female coworkers as well as passing around lewd pictures he had drawn.**

Meeting immediately with the employee and his job coach, the employer discovered that the employee had Tourette syndrome, had experienced the same issues in previous positions, and was unable to refrain from the comments and the drawings due to his Tourette's. Since no accommodation had previously been found to be effective, the employer terminated this employee.

### **A claims processor with a gastrointestinal disorder was having flare ups of his condition, which resulted in a strong odor that was affecting coworkers.**

He asked to work from home until he could get his condition under control. His employer granted his request.

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