



Policy and Procedures for Implementing Reasonable Accommodations for Applicants and Employees with Disabilities and Pregnancy-related Conditions in New York State Agencies

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INTRODUCTION

New York State has long been committed to the proposition that every individual in the State has an equal opportunity to enjoy a full and productive life. This commitment to equal opportunity extends to the workplace. Under New York State law, employees are protected from acts of bias, harassment, prejudice or discrimination. This protection extends to those individuals with disabilities and pregnancy-related conditions. To enable qualified employees and applicants with disabilities and pregnancy-related conditions to contribute to the State's workforce, the State has a uniform policy to ensure the provision of reasonable accommodation to such individuals.

SECTION I: UNIFORM STATE POLICY

A. Policy Statement

No decision affecting hiring, promotion, firing or a term, condition or privilege of employment shall discriminate on the basis of a person's disability, nor shall employees be harassed or otherwise discriminated against on such basis, or perceived basis.

All employees must be able to perform the essential functions of their jobs in a reasonable manner, with or without a reasonable accommodation. Consideration of requests for accommodation of applicants or employees with disabilities is required and should be granted where reasonable.

Individuals with disabilities or pregnancy-related conditions have the right to equal job opportunity. Employers must consider the availability of potential reasonable accommodation, when needed by the individual, at all stages of employment. Employers must provide reasonable accommodation to a qualified employee or applicant with a disability, or pregnancy-related condition, unless the accommodation would create an undue hardship for the employer.

Each agency, department, office, and facility ("employer") shall follow the Policy and Procedures for Implementing Reasonable Accommodations for Applicants and Employees with Disabilities and Pregnancy-related Conditions in New York State Agencies, as set forth herein, and communicate its commitment to provide reasonable accommodation to employees and applicants with disabilities or pregnancy-related conditions.

The State of New York is committed to assuring equal employment opportunity for persons with disabilities. To this end, it is the State's policy to provide reasonable accommodation to a qualified person with a disability to enable such person to perform the essential functions of the State government position for which they are applying, or in which they are employed. This policy is based on the New York State Human Rights Law, Sections 503/504 of the Federal Rehabilitation Act of 1973, as amended, the Americans with Disabilities Act (ADA), and all applicable Executive Orders and Memoranda. The policy applies to all employment practices and actions. It includes, but is not limited to, recruitment, the job application process, examination and testing (if applicable), hiring, training, disciplinary actions, rates of pay or other compensation, advancement, classification, transfer and reassignment, and promotions.

By providing reasonable accommodations in a consistent fashion, the State and agency, as the employer, benefit by:

- overcoming otherwise exclusionary employment practices, policies, and consequences;
- providing equal opportunities for participation in education and training programs; and
- enhancing the retention and upward mobility of qualified employees with disabilities or pregnancy-related conditions.

B. Employee Access to Information on Reasonable Accommodation

Every agency must periodically inform its employees of the reasonable accommodation policy and procedures. Acceptable means of communicating this information include distributing a copy of the policy and procedures to all employees annually via email; referring to the policy on an annual basis in the

employer's newsletter and advising employees of where the policy is available both in hardcopy and electronic format; and having the employer remind staff of the policy and procedures on an annual basis.

Information on reasonable accommodation is included in New York State's Employee Handbook, titled, "Equal Employment Opportunity in New York State, Rights and Responsibilities" ("Employee Handbook"). Information on the agency's internal discrimination complaint procedure, along with information on an employee's right to file a complaint under the Human Rights Law, Sections 503/504 of the Rehabilitation Act of 1973, and the Americans with Disabilities Act for alleged discriminatory acts is also included in the Employee Handbook.

This policy should be made available to applicants, to address potential barriers to applying or interviewing, and employees. The names and office phone numbers of key personnel involved in providing accommodation, including the agency's Designee for Reasonable Accommodation (DRA), shall be posted and the listing maintained by the agency's DRA. This listing shall also be provided to and made available from personnel offices, Employee Assistance Program (EAP) coordinators, as well as an agency's Counsel's Office. DRAs and any Alternate DRAs may be employees of an agency's human resources/personnel office or an agency's diversity, equity, inclusion and accessibility office. DRAs must always work closely with an identified individual or individuals in their employer's Counsel or Legal Office to ensure that potential legal issues are identified and addressed in a timely manner. For difficult issues or those that require technical assistance, agencies should contact their Diversity and Inclusion Specialist at the Department of Civil Service Office of Diversity and Inclusion Management (ODIM).

Assistive technology may also play an important role in accommodating individuals in the workplace with disabilities. Agency questions regarding assistive technology should be directed through your agency's liaison to the NYS Office of Information Technology Services by submitting an ITS consultation request form (Please note that employee medical information should **not** be included in the ITS consultation request).

C. Confidentiality Requirements

The agency must protect and maintain the privacy and confidentiality of information provided by, or on behalf of, employees and applicants with disabilities. In particular, New York State and federal laws mandate very strict limitations on the use of any medical information obtained through the reasonable accommodation process. These limitations also apply to such information obtained from medical examinations or inquiries of employees or applicants.

All medical information must be treated as confidential medical records. Agency personnel must take steps to guarantee the security of the employee's medical information, including keeping the information in files in a secure location, separate from personnel files, and designating a specific person or persons to have access to the medical file. Supervisors and managers are not entitled to copies of medical records or specific medical information and need only be informed about necessary restrictions on the work or duties of the employee and necessary accommodations. A person with a disability who requires specific emergency evacuation procedures or emergency treatment should inform the agency's Designee for Reasonable Accommodation (DRA) and can be involved in discussions regarding what information is disclosed or used by first aid and safety personnel in case of fire or other evacuations.

All written forms must include a statement informing agency personnel that all medical information pertaining to reasonable accommodation must be kept confidential.

SECTION II: DEFINITIONS AND PROCEDURES FOR HANDLING REQUESTS FOR REASONABLE ACCOMMODATIONS IN NEW YORK STATE AGENCIES

A. Definitions

The following definitions are based on the New York State Human Rights Law. Unlike both the Americans with Disabilities Act and the Rehabilitation Act of 1973, the New York State Human Rights Law protects all individuals with physical, mental, or medical impairments that either impede normal bodily function or are demonstrable by medically accepted diagnostic technique. The protection of the federal statutes is limited to those impairments which substantially limit one or more major life activities. Therefore, State law coverage is broader, and the broader definition of disability must be applied when making a determination as to whether an individual is a person with a disability. Additionally, the New York State Human Rights Law requires employers to provide a reasonable accommodation to individuals with pregnancy-related conditions.

1. Disability

A disability is a physical, mental, or medical impairment resulting from anatomical, physiological, genetic, or neurological conditions which prevent the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques. As this definition includes any impairment that is demonstrable by clinical or laboratory diagnostic techniques, it should be construed broadly to include the majority of disabling conditions.

“Person with a disability” also includes a person with a disability as defined above, who has a record or history of impairment, even if they do not currently have an impairment, or a person who is perceived by others as having such an impairment.

2. Pregnancy-related Condition

A pregnancy-related condition is a medical condition related to pregnancy or childbirth that inhibits the exercise of a normal bodily function, or is demonstrable by medically accepted clinical or laboratory diagnostic techniques.

3. Reasonable Accommodation

The New York State Human Rights Law, the Rehabilitation Act of 1973, and the Americans with Disabilities Act require that employers provide reasonable accommodation to the known physical or mental limitations of otherwise qualified applicants or employees with disabilities, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of its business.

A reasonable accommodation is a modification or adjustment to the work environment, or the manner or circumstances under which a job is performed, which enables a person with a disability, or pregnancy-related condition, to perform the essential functions of a job in a reasonable manner. All otherwise qualified applicants and employees are entitled to a reasonable accommodation of a disability unless it poses an undue hardship. Accommodation is required if it is both reasonable and will assist in overcoming an obstacle caused by the disability preventing the person from applying for the position, from performing the essential functions of the position or from receiving equal terms, conditions or privileges of the position. It is a modification that enables a qualified individual with a disability to fully participate in the activities in their job or the position sought. For prospective employees, a reasonable accommodation is

a modification that enables a qualified individual with a disability to fully participate in the application and interview process for the position sought, unless the modification poses an undue hardship.

Reasonable accommodations may include, but are not limited to: making facilities more readily accessible to individuals with disabilities; acquisition or modification of equipment; job restructuring; modified work schedules; adjustments to work schedule for treatment or recovery; reassignment to an available, vacant position for which the employee is qualified; adjustment of examinations, training materials or policies; providing readers or interpreters or providing high or low assistive technology, such as voice recognition software. Generally, the employer is not required to provide personal items for personal care needs, such as hearing aids or wheelchairs, are not the responsibility of the employer. Support personnel or service providers, when provided by the employee or applicant, should be permitted to accompany and assist the employee or applicant. Individuals who require these services should engage in the interactive process as needed to ensure that arrangements regarding these providers are consistent with the operational needs of the agency.

The reasonableness of an accommodation is determined by balancing the efficacy or benefit provided by the accommodation toward removing the impediments to performance caused by the disability; the convenience or reasonableness of the accommodation for the employer, including its comparative convenience as opposed to other possible accommodations; and the hardships, costs, or problems it will cause for the employer, including those that may be caused for other employees.

While pregnancy-related conditions are treated as temporary disabilities for purposes of applying existing regulations under the Human Rights Law, pregnancy-related conditions need not meet any definition of disability to trigger an employer's obligation to accommodate under the law. Any medically-advised restrictions or needs related to pregnancy will trigger the need to accommodate, including such things as the need for extra bathroom breaks, or increased water intake.

4. Essential Job Functions

Essential functions are those fundamental to the position; a function is essential if not performing that function would fundamentally change the job or occupation for which the position exists. Determining an essential function is a factual question to be resolved by the employer after considering all relevant evidence.

Factors indicating essential functions include, but are not limited to:

- The employer's judgment as to which functions are essential, particularly where so indicated in a pre-existing written job description, or where there are clearly specified tasks and standards;
- How often the function is actually performed by other similar employees in the position;
- How many other employees are available to whom the function could be reallocated by job restructuring;
- The direct and specific consequences to the employer's business if the function is not performed by the particular employee with a disability;
- The terms of a collective bargaining agreement; and
- Other relevant evidence.

5. Reasonable Performance

Reasonable performance is not perfect performance or performance unaffected by a disability, but job performance reasonably meeting the employer's needs to achieve its governmental functions and business goals. More specifically, it is the minimum acceptable performance of the essential functions of

the job as established by the employer. These standards can include minimum productivity standards or quotas. All standards for performance must be applied equally to all employees in the same position.

6. Undue Hardship

Undue hardship means significant difficulty or expense to the employer. In determining whether an accommodation would result in undue hardship, any relevant factor may be considered. Relevant factors can include, but are not necessarily limited to, those set forth in the Human Rights Law, at §296.3(b):

- The overall size of the business, program or enterprise with respect to the number of employees, number and type of facilities, and size of budget;
- The type of operation which the business, program or enterprise is engaged in, including the composition and structure of the work force; and
- The nature and cost of the accommodation needed.

Before granting a reasonable accommodation, the DRA must consider whether the accommodation may have a direct impact on the terms of a collective bargaining agreement. The agency designee should seek guidance from the employer's counsel and/or Human Resources Director. These individuals may consult with the New York State Office of Employee Relations as needed.

7. Direct Threat

Direct threat means a significant risk of harm to the health or safety of the employee or others that cannot be eliminated or reduced by reasonable accommodation. In determining whether a threat exists, the employer must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or the best available objective information, to ascertain: the nature, duration, and severity of the risk, the probability that potential injury will actually occur and whether reasonable accommodations, such as modifications of policies, practices, or procedures, will mitigate the risk. Some jobs may be classified as safety sensitive such as vehicle operators or persons who work with children. Heightened consideration of direct threat is encouraged in safety-sensitive positions.

B. Uniform Procedures for Processing Reasonable Accommodation Requests

This section describes the procedures for handling reasonable accommodation requests from applicants and State employees with disabilities. It also articulates the role of the agency's DRA—the individual identified by the agency head to coordinate agency compliance obligations arising from the New York State Human Rights Law, Sections 503/504 of the Rehabilitation Act of 1973, and/or the ADA. This section identifies the options that are available to employees when an accommodation has been denied.

Many specific issues that arise in connection with the provision of reasonable accommodation of disability are addressed in the regulations of the Division of Human Rights, 9 NYCRR § 466.11, which are attached as Appendix B. These regulations provide substantial guidance as to what constitutes a reasonable accommodation.

Requests for reasonable accommodation may be made orally or in writing; however, an oral request must be reduced to writing on the "Request for Reasonable Accommodation" form (Appendix A). These forms are provided by the agency and will be available from the DRA, as well as available online. Individuals requesting accommodation should be encouraged to make copies of the completed form for their records. At the end of the process, the original form is filed by the agency's DRA.

To request an accommodation, an individual (“requestor”) does not need to reference the Human Rights Law, the ADA, or use the phrase “reasonable accommodation.” The requestor simply needs to advise the employer that they require an adjustment or change during the application process, or for current employees assistance in the performance of their duties, due to a disability.

The accommodation process should involve an interactive back and forth between the employer and requestor. It should not be adversarial in nature. The requestor may also be required to provide reasonable medical documentation where needed, as requested by the DRA. The interactive process should contain a meaningful dialogue between the employer and the requestor and/or their representative to determine the accommodation best suited to meet the requestor’s needs. Although the requestor can request a specific accommodation, the employer’s obligation is to provide an effective accommodation that addresses the requestor’s limitations and enables them to perform the essential job duties.

As a best practice, employers engaging in the interactive process should:

- (1) Analyze the particular job involved and determine its purpose and essential functions;
- (2) When not already provided by the requestor but deemed necessary by the employer, appropriate medical documentation can be required. Review any medical documentation that was provided and ensure that the requestor’s specific functional limitations are clear. Additional medical documentation can be requested by the employer in order to clarify the specific functional limitations related to the reasonable accommodation request;
- (3) In consultation with the requestor, identify how job-related limitations could be overcome by reasonable accommodation, assess the effectiveness/efficacy of each possible accommodation in sufficiently addressing functional limitations and enabling the requestor to perform the essential functions of the position;
- (4) Consult with the requestor’s supervisor to determine if the proposed accommodations are feasible and will allow the requestor to fully perform the essential functions;
- (5) Consider the preference of the requestor and select and implement the accommodation that is most appropriate for both the requestor and the employer; and
- (6) Maintain records documenting discussions and the decision-making process used when evaluating the original request and alternative accommodation options, particularly for any offers that include a modification or a denial.

When the requesting individual makes use of a representative, the employer must obtain consent from the requestor prior to sharing any confidential information with representatives regarding the disability or pregnancy-related condition.

Information provided for purposes of a reasonable accommodation cannot be used by the agency for another purpose, such as the basis for referring an employee for a medical evaluation for fitness for duty pursuant to Civil Service Law § 72(1), or placing the employee on an involuntary leave of absence pursuant to Civil Service Law § 72(5), or other personnel actions. Agencies should complete the reasonable accommodation process prior to initiating or proceeding with any action pursuant to Civil Service Law § 72.

Note, reasonable accommodation is not required where the disability or accommodation itself poses a direct threat.

The agency's DRA is responsible for maintaining records regarding the number of accommodations requested and the outcome of reasonable accommodation requests.

1. Who May Request a Reasonable Accommodation?

Employees or applicants with disabilities may request a reasonable accommodation, regardless of title, salary grade, bargaining unit, employment status (permanent, contingent, temporary, provisional, interns, apprentices, contractors, or volunteers) or jurisdictional classification (exempt, non-competitive, competitive or labor class.)

An employee with a disability may request an accommodation at any time.

The need for an accommodation may be brought to the attention of the agency in any of the following situations:

- a job applicant may request an accommodation for a civil service examination and/or an interview;
- a new employee self-identifying as having a disability may request an accommodation to perform the job, regardless of probationary status;
- an employee returning to work after experiencing an illness or injury may request an accommodation; or
- a current employee with a disability whose medical condition has changed may request an accommodation for the first time or a change in accommodation.

a. *Applicants*

The agency must provide a reasonable accommodation during the application process to applicants with disabilities who request such accommodation. Reasonable accommodation requests should be forwarded by agency personnel to the agency's DRA.

If an applicant with a disability is subsequently hired by the agency and a reasonable accommodation is requested to perform the essential functions of the position, every attempt should be made by the agency's DRA to have the approved accommodation in place prior to the first day of work. If this is not possible, the agency DRA should consult with the new employee when they first report to work.

b. *Current Employees*

Current employees may request an accommodation through their supervisory chain or the agency's DRA. If an employee makes their request through the supervisor, the supervisor shall forward the request to the DRA for handling.

2. Processing a Request for Reasonable Accommodation

Many requests for accommodation can be approved at the initial stages of the process, particularly those that are minor or routine in nature. Others may require a more extensive review and/or submission of supporting medical documentation. The various steps to be followed in handling a Request for Reasonable Accommodation are set forth in detail, below. We recommend that you refer to Appendix A, which contains the sample forms referred to below, as you review the following information.

a. *Request for Reasonable Accommodation (Section A)*

This section serves as an initial application form and asks for basic information needed to consider and act upon the request, such as the name of the requestor; title information; office or unit; work location (for

current State employees); and contact information, along with a description of the reasonable accommodation being requested and the reason for the accommodation.

If the requestor is unable to complete, sign and date the application, the DRA, an employee's supervisor, or whoever is assisting the requestor to complete the form can provide assistance with the express permission of the requestor.

b. *Acknowledgement of Request for Reasonable Accommodation (Section B)*

This section, once completed, either provides confirmation to the requestor that the requested accommodation has been approved or advises the individual that the request is undergoing further review. It must be signed and dated by the agency's DRA and a copy provided to the requestor, with the original retained for recordkeeping purposes. Reasonable accommodations may have legal implications. DRAs must always work closely with their agency Counsel or Legal office to ensure that potential legal issues are identified and addressed in a timely manner. For difficult issues or those that require technical assistance, agencies should contact their Diversity and Inclusion Specialist at the Department of Civil Service Office of Diversity and Inclusion Management (ODIM).

The following steps should be followed:

- If the application has been submitted directly to the agency's DRA, they must consult with the employee's supervisor before granting an accommodation, to ensure that it is operationally feasible.
- If the reasonable accommodation proposed to be provided may have a direct impact on the terms of a collective bargaining agreement, the agency's DRA must confer with the agency's labor relations representative to resolve any conflict with collectively bargained rights of other employees prior to granting the accommodation.
- If the proposed reasonable accommodation requires more than a de minimis expenditure, the DRA must confer with the agency's administration and/or fiscal office(s).

c. *Status Update/Notification of Need for Additional Information (Section C)*

This section is used to provide an update to the requestor or to request additional information/supporting documentation, when it is determined necessary for a decision to be made regarding a reasonable accommodation. No later than 14 calendar days after providing a completed Section B to the requestor, the DRA must provide this form to the individual who has requested the reasonable accommodation, specifying the additional information or documentation that is required to make a determination. Such additional information must be essential to complete the process, and includes, but is not limited to information regarding the specific functional limitations of the requestor, medical documentation, and/or information regarding specific type or types of accommodations that might be effective.

i. Considerations Before Requesting Additional Information or Documentation Which is Medical in Nature

The DRA must consider whether or not it is appropriate to request medical information. The following provides some guidance in this regard:

- If an applicant or employee requests an accommodation and the need for an accommodation is not obvious, the employer may request documentation or require a medical examination to identify the individual's functional limitations to support the request.

- Since a reasonable accommodation must take into consideration the specific abilities and functional limitations of a particular requestor, and the specific functional requirements of a particular job, the focus should be on identifying the abilities and limitations of a requestor, not on the diagnosis and prognosis of a physical or mental condition.
- If the DRA has questions regarding the appropriateness of requesting medical documentation, they should confer with agency counsel for guidance.

ii. Requesting Medical Information / Documentation

Once the DRA has determined that it is appropriate to request medical information to verify an employee's need for an accommodation:

- An agency may require that the requestor with the disability provide reasonable documentation substantiating the need for an accommodation. The agency may require only that documentation necessary to establish that the requestor has a disability, and that the disability or pregnancy-related condition necessitates a reasonable accommodation--the medical documentation should identify the requestor's specific functional limitations imposed by the disability or pregnancy-related condition, and the precise job limitations imposed by the disability or pregnancy-related condition.
- Medical documentation submitted that does not clearly outline the related, specific functional limitations may be considered insufficient and require additional follow-up.
- An employer has the right to require—and requestors have the right to supply—documentation about the disability and functional limitations from a physician or other medical provider, including, but not limited to, a psychologist, social worker, rehabilitation counselor, occupational or physical therapist, independent living specialist, or other professional who treats such disability, with knowledge of the employee's disability or pregnancy-related condition. Such documentation should be on the medical provider's letterhead and be signed by the provider.
- If the agency determines that the medical documentation provided is inadequate to support the request or has reason to doubt its veracity, the agency should explain to the requestor why the documentation is inadequate and provide the requestor with an opportunity to submit additional documentation supporting the request.
- However, in a situation where the disability and/or the need for accommodation is not obvious, and an agency finds that, based on its criteria, the need for an accommodation or the exact functional limitations are still not clearly established, the agency may require the requestor to submit to a medical examination by the Employee Health Service of the Department of Civil Service or an appropriate medical professional designated by the agency. The agency, as employer, must pay any costs associated with the visit.
- If the requestor's disability or need for reasonable accommodation is not obvious, and they fail to submit documentation meeting agency criteria or they refuse to submit to a medical examination required by the agency, and such information or documentation is necessary to complete the reasonable accommodation process, then the agency may deny the requested accommodation.
- Any medical documentation submitted may be used only to evaluate the employee's request for accommodation. An agency may not use documentation obtained during this process or the refusal to submit to the medical examination as a basis for taking any adverse personnel action.

- While an agency may seek technical assistance from a medical professional, state or local rehabilitation agencies or disability constituent organizations in determining how to accommodate a particular individual in a specific situation, decisions defining what is and what is not a reasonable accommodation are to be made by the agency.

If additional medical documentation is being requested, the requestor is asked to inform their medical provider of the pending application for an accommodation, and have the medical provider send medical documentation, indicating the limitations that the requestor's disability would place on job performance, to the agency's DRA. A copy of the "duties description" or other document describing the duties associated with the relevant title is often helpful and should be attached to Section C of Appendix A for consideration by the medical professional. A date by which the information should be sent is to be noted on the form. The agency's DRA shall also indicate a date by which the decision will be made, upon no further information being requested. Section C may be used whenever necessary during the interactive process, as needed, in order to obtain all necessary information and to inform the requestor of progress in the review process.

The agency's DRA signs and dates the form, and the requestor is provided with a copy of Section C, with the original filed for recordkeeping purposes.

d. *Notification of Agency Determination (Sections D & E)*

i. Overview of Process

These sections advise the requestor of the agency's determination and provide information regarding potential remedies should the individual be dissatisfied with the agency's determination. It is to be completed once the DRA completes the review process, as described below, but must be provided to the requestor within 21 calendar days of either receipt of Section A, or the receipt of final additional information required to properly review and assess the request. Once the form, Section D, is sent to the requestor, they sign the form, indicate whether they accept or reject the reasonable accommodation, retain a copy, and return the original to the agency's DRA for filing. If the requestor accepts the accommodation, a letter from the DRA (or agency's designee) confirming the acceptance is sent to the requestor within one (1) week. If the requestor does not accept the offered accommodation (which may differ from the accommodation requested), the form shall be returned to the agency's DRA and filed. The requestor is then free to pursue the various options outlined in the notification of rights provided as part of Sections D and E.

ii. Final Review

The final review process takes place once adequate information/documentation has been received by the DRA, as determined by the agency. During the final review, the DRA must determine whether or not there is an accommodation that would enable the requestor to perform the essential functions of their job in a reasonable manner, or to enjoy equal benefits and privileges of employment. This requires the DRA's assessment of all relevant documentation, and consultation with the requestor. It may also include meeting with the requestor and/or supervisor, arranging for a job analysis, and consulting with relevant State agencies or community-based organizations providing services to persons with disabilities. In some instances, it may be necessary to discuss with the provider the functional limitations imposed on the requestor by virtue of their impairment. As always, written authorization must be obtained from the requestor prior to any discussions with third parties.

The DRA should consult with the agency's fiscal officer to determine whether a reasonable accommodation will have a fiscal impact on the agency. In addition, when appropriate to the review, the DRA should also consult with the agency's human resources manager, equal opportunity specialist, diversity and inclusion liaison, labor relations officer and/or counsel. The agency's DRA may find it useful to establish a standing committee comprised of these individuals to facilitate obtaining their input whenever necessary. All available resources should be used to resolve the issue, including consultation with the Department of Civil Service Office of Diversity and Inclusion Management.

After a review of all documentation, the DRA must determine whether or not an undue hardship would result from granting the requested accommodation(s), or if an alternate accommodation would address the requestor's functional limitations to achieve reasonable performance of the essential job functions. The DRA should also confer with the relevant supervisor prior to granting any accommodation. In making the undue hardship determination, some factors to be considered include:

- the nature and cost of the accommodation;
- the size of the agency and number of employees;
- the type and location of facilities of the covered entity;
- the effect of the accommodation on other employees;
- operational impact on the facility or agency that is making the accommodation; and
- the terms of any relevant collective bargaining agreement(s).

Remember that reasonable accommodation seeks to facilitate the individual's reasonable performance of essential job functions, but does not require the permanent reassignment of essential job functions. However, non-essential functions that the requestor cannot perform due to their disability can be removed or reassigned, whenever feasible as determined by the employing agency.

iii. Alternative Accommodation

If the employer identifies alternative accommodations determined to be as, or more, effective than the requested accommodation, the agency may offer an alternative accommodation. However, whenever possible, the agency should certainly take into consideration the employee's preferences.

Example: If an employee with a disability requests that the thermostat in the workplace be raised to a certain level to accommodate their disability, and this level would make it uncomfortably hot for other employees or customers, the employer would not have to provide this accommodation. However, if there were an alternative accommodation that would be effective in addressing the workplace barrier, such as placing the employee in a room with a separate thermostat, the employer should consider the alternative as a potentially effective accommodation.

iv. Consultation with Requestor

The DRA must always conduct a consultation with a requestor before denying a request for reasonable accommodation or offering an alternative accommodation. A requestor consultation *may* be conducted before approval of a reasonable accommodation.

General guidelines for consultation are as follows:

- Before an accommodation is denied, a review of whether there is the opportunity for a voluntary reassignment or transfer to a vacancy, for which the requestor meets the minimum qualifications, at the same or lower salary grade. For a transfer, the proposed transaction must

meet the technical requirements for transfer determined by the Department of Civil Service pursuant to Civil Service Law sections 70.1, 70.4, 52.6 and/or Civil Service Rule 5.1.

- If the accommodation is being denied, an explanation of why the agency is unable to provide the requested accommodation.
- If the accommodation is being denied, an inquiry as to if there are any other accommodations that may effectively meet the need.
- If an alternative accommodation is being offered, how the proposed alternative accommodation will effectively meet the needs of the requestor.

v. If the Agency Will Provide the Reasonable Accommodation as Requested

If the agency determines the requested accommodation effectively meets the needs of the requestor and the employer, and grants the employee's requested accommodation, the DRA will indicate the approval in Section D.

A reasonable accommodation may be provided for a limited duration, such as where an unusual or even novel reasonable accommodation is being provided, and the agency needs the opportunity to assess whether or not the accommodation is working well, and whether or not it is operationally disruptive or otherwise causes an undue hardship, or the disability is not expected to persist. If this is the case, the DRA must specify a date upon which the reasonable accommodation will be reevaluated.

The agency is responsible for effectuating the implementation of the reasonable accommodation. If the requestor has any questions, they should contact the agency's DRA.

vi. If the Agency Offers an Alternative Accommodation

As stated above, where more than one possible reasonable accommodation exists, the agency has the discretion to choose among the various effective reasonable accommodations. However, the agency should nonetheless consider the requestor's preference.

If the agency determines that it will offer an accommodation different from the one requested, then the requestor's supervisor should be consulted about the proposed accommodation before an offer is made to the requestor. Section D should indicate that an alternative accommodation is being offered and describe in detail the accommodation and should be sent to the requestor to inform the requestor of the agency's determination.

If the requestor does not accept the offered accommodation, Section D should be returned to the DRA, with the requestor's signature, indicating that they reject the accommodation that has been offered.

vii. If the Agency Is Unable to Provide a Reasonable Accommodation

If the agency determines that the requested accommodation would not be effective to meet the needs of both the requestor and the employer, and that there is no effective alternative accommodation available, the DRA will so note in Section E. A reason for the denial must be given to the requestor.

If the agency offers an accommodation different from the one requested or determines that an effective reasonable accommodation is not available, the agency must provide the requestor with information on next steps and remedies which include: filing request for review with the DCS Office of Diversity and Inclusion Management (ODIM) Accommodation Review Committee (ARC), filing an internal complaint with Office of Employee Relations (OER) Anti-Discrimination Investigations Division (ADID), or filing an

external complaint with a human rights agency such as the New York State Division of Human Rights (DHR) or the U.S. Equal Employment Opportunity Commission (EEOC).

At this point, the requestor may elect to accept the agency's decision and end the process; to file an internal discrimination complaint under the State's Equal Employment Opportunity Policy, as set forth in the Handbook of Rights and Responsibilities for New York State agency employees; or to pursue various other remedies, as set forth in Section D or Section E. If pursuing an external complaint, the requestor should consult with the appropriate human rights agency, such as the DHR or EEOC, regarding the time limitations for initiating an action. Although these time limitations vary, the time for filing a complaint pursuant to all the alternatives begins to run at the time of the agency's first denial of the accommodation request.

C. Pregnant Workers Fairness Act

The final regulation to carry out the Pregnant Workers Fairness Act (PWFA) went into effect on June 18, 2024. The PWFA requires reasonable accommodation to be provided for a requestor's known physical or mental limitations related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, unless the accommodation will cause an undue hardship.

A reasonable accommodation under the PWFA can include temporary suspension of one or more essential job functions, as long as:

- the inability to perform the essential function(s) is temporary;
- the requestor can perform the function(s) in the near future; and
- the inability to perform the essential function(s) can be reasonably accommodated.

A limitation may be an impediment or problem that is minor or modest and can be episodic (such as migraines or morning sickness). A limitation is "known" once the requestor or the requestor's representative has communicated to the employer about the limitation.

Under the PWFA, a simple discussion with the requestor may be sufficient and supporting medical documentation will not be needed. The EEOC expects that many accommodations under the PWFA can be granted after simple exchanges of information between the requestor and the employer. This may occur via brief conversations or emails about the known limitation and the adjustment or change needed at work.

Medical documentation should only be sought after it is determined reasonable by the DRA and Counsel. The employer may seek information from the requestor's health care provider under limited circumstances related to an accommodation request under the PWFA. It would generally not be reasonable to request medical documentation under the following circumstances:

- if the limitation or need for adjustment in the workplace is obvious
- if the employer already knows about the limitation and the adjustment/change at work due to the limitation
- if the employee is currently pregnant and
 - needs breaks to eat/drink/use the restroom
 - needs to carry water with them to drink
 - needs to stand if their job requires sitting, or sit if their job requires standing

When it is determined reasonable for the employer to request medical documentation, the PWFA limits the medical documentation to:

- confirmation of the physical or mental condition;
- confirmation that the physical or mental condition is related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions; and
- description of the adjustment or change at work that is needed due to the limitation.

While DRAs are expected to process all requests for reasonable accommodation as expeditiously as possible, agencies should be particularly mindful of the timeliness of PWFA accommodation requests given the temporary and limited window generally associated with PWFA accommodations.

D. Request for ARC Review of the Agency Determination

The Accommodation Review Committee (ARC) at the Department of Civil Service, at the request of the employee, will review accommodation determinations and provide recommendations on the RA process and outcomes. An individual has the right to request a review upon receipt of an agency's final denial or modification of a request for accommodation.

Absent extenuating circumstances, an individual wishing to initiate a review of an agency's final determination must do so within 30 calendar days from the date of denial or modification of a reasonable accommodation. The individual must complete and submit the "Request for Review of a Reasonable Accommodation Determination" (Section F), along with all available relevant documentation to the Accommodation Review Committee at ARC@cs.ny.gov or by mail to: Department of Civil Service, Empire State Plaza, Swan Street Building – Core 1 Albany, NY 12239 Attn: ODIM – ARC.

If the ARC determines that there is need for additional information/documentation in order to complete its preliminary review, the ARC will advise the requestor of the need.

The ARC will only consider requests for review of accommodations that have concluded the reasonable accommodation process, which requires the issuance of a final determination by the agency. However, ARC may review Reasonable Accommodation requests that have not received a final determination from the accommodating agency (in accordance with the timeframes specified in Section II.B.2.d.i of this document) when it is determined that an agency's failure to issue a final determination amounts to a constructive denial of a request.

Upon receipt of a request for review, the ARC will acknowledge receipt of the request to both the requestor and the relevant agency's DRA.

Upon receipt of the acknowledgment, the accommodating agency will have seven (7) calendar days to provide the ARC with a copy of the reasonable accommodation file—including any medical documentation received by the agency in support of the request—as well as any additional supporting documentation in support of the agency denial or modification. Documentation should be sent to the ARC electronically via email to (ARC@cs.ny.gov). Additional supporting documentation includes but is not limited to:

- Log entries
- Date-stamped emails and traditional (mail) correspondence with the requestor
- Demonstration of the interactive process:

- Documentation of the requestor's functional limitations due to their disability
- Details of interactive process steps taken by agency
- Timeline of events with narrative summary of interactive process
- What alternate accommodations were considered
- For modified offers, describe how the modified accommodation meets the requestor's functional limitations
- For a denial, clearly articulate how determination of undue burden was reached
- File notes (including notes from telephone conversations)
- Interagency communications discussing factors contributing to the agency's decision to deny and/or modify the accommodation in question (including communication with the requestor's assigned program area)
- Tasks and standards for the requestor's position/job title

Upon receipt of all required documentation from the agency, the ARC will have 30 calendar days to complete its review and issue a written recommendation; however, this timeline may be extended if the ARC requires additional information from the parties or if additional review is necessary to reach a final recommendation. Agencies are required to respond in a timely fashion to any inquiries and/or requests for additional information that the ARC determines necessary to complete their review and issue a recommendation. ARC recommendations will reflect support of the agency's original decision, or it will reflect a recommendation that the agency reconsider its determination and grant the accommodation, or explore alternative accommodations consistent with applicable policies and statutes. ARC may also recommend that an agency reengage in the interactive process in instances when it appears that the interactive process is incomplete. All recommendations will be provided, in writing, to both the requestor and the DRA at the agency that issued the determination.

Composition of Accommodation Review Committee and meeting frequency:

The ARC will be comprised of a five-member panel which will include: three (3) representatives from the Department of Civil Service Office of Diversity and Inclusion Management; one (1) representative from the Department of Civil Service Counsel's Office; and one (1) representative from the Department of Civil Service Staffing Services Division.

The ARC will meet once per week to conduct reviews, to the extent practicable.

E. Maintenance of Records and Data Collection

To the extent that any applicable laws, Executive Orders or Memoranda, rules, regulations, or policies require the maintenance of records regarding requests for accommodation, it shall be the DRA's responsibility to maintain such records in accordance with relevant record retention schedules issued by the New York State Education Department.

APPENDIX A: SECTIONS A-F

Application for reasonable accommodation may be made to the supervisor or the agency's *Designee for Reasonable Accommodation (DRA)*. If the request is made to the supervisor, the supervisor shall forward the request to the DRA. **All confidential information received by Department personnel pertaining to your request shall be handled as such.** All medical information is confidential and maintained separately from personnel records.

Section A

Application to Request Reasonable Accommodation of a Disability

(To be completed by
requestor and returned to
supervisor or *DRA*)

Requestor's name	Civil Service title	Job title (if different)
Office/unit	Work location	Telephone number(s)
E-mail address	Preferred method of communication	

I am requesting the following reasonable accommodation(s):

It is necessary for me to have this accommodation for the following reason(s):

Requestor's signature

Date

The requestor should retain a copy of this form. The original is filed by the *DRA*.

Section B

Initial Response to Request for an Accommodation

(To be completed by DRA)

Requestor's name

We have reviewed your application for an accommodation.

☐ Your request has been approved

Comments:

☐ No decision has been made at this time. We will continue to assess your request. The agency's DRA will contact you within the next 14 calendar days.

Comments:

Agency DRA's signature

Date

DRA's name:

The requestor should retain a copy of this form. The original is filed by the *DRA*.

Section C

Notification of Need for Additional Information (To be completed by the *DRA* and returned to the requestor)

Requestor's name

We are continuing to assess your request. To make a determination, we need the following information:

☐ **Medical Documentation**

Please inform your medical provider of your application for an accommodation and have your provider send us medical documentation, indicating the functional limitations that your disability places on your ability to perform the essential functions of your job. We have enclosed a copy of the duties description for your title and/or a list of the essential functions of your position for the provider's reference.

Information should be received by the following date: _____

The requested information should be provided to the agency's Designee for Reasonable Accommodation (DRA).

All medical information pertaining to reasonable accommodation must be kept confidential by the agency.

☐ Other

Explain:

☐ We require no additional information from you at this time.

The [agency]'s review process will include an evaluation of all relevant information. This may include an interview with you and/or your supervisor. After completion of the review, you will be informed in writing by the DRA or the Department's designee, regarding the Department's decision.

We anticipate that the decision will be made by (date): _____. If you have any questions, please contact [the DRA].

Signature of *DRA*

Date

The employee should retain a copy of this form. The original is filed by [the *DRA*].

Section D

Notification of Agency Determination

(To be completed by the DRA and returned to the requestor)

Requestor's name

Based on the information you provided, the [agency] is able to provide you with a reasonable accommodation of your disability, as follows:

☐ The accommodation granted is as you requested in your application.

☐ The accommodation granted differs from the accommodation you requested, as follows:

Please discuss any questions regarding implementation of the accommodation with your supervisor. A letter from the Designee for Reasonable Accommodation (DRA), or the Department's designee, confirming this decision will be sent to you within the next week once you accept the accommodation. If you have any questions, please call [the DRA]. The employee should retain a copy of this form and return the original with their signature to be filed by [the DRA].

I accept _____ / reject _____ the above reasonable accommodation.

Requestor's signature

Date

Due Process After the Agency's Reasonable Accommodation Determination

A letter from [the DRA or the Department's designee] confirming the decision will be sent to you within the next seven (7) calendar days after you receive the Notification of Agency Determination. If you are dissatisfied with the determination, the following options are available to you:

1. You may choose to accept this decision and end the process; or
2. You may choose to request a review by the Accommodation Review Committee (ARC) in accordance with

procedures established in the “Procedures for Implementing Reasonable Accommodation for Applicants and Employees with Disabilities and Pregnancy-related Conditions in New York State Agencies.” To file your request for ARC review, submit the enclosed form, (Section F) “Request for Review of a Reasonable Accommodation Determination” to the Accommodation Review Committee at ARC@cs.ny.gov or by mail at **Department of Civil Service, Swan Street Building – Core 1, Empire State Plaza, Albany NY 12239, Attn: ODIM – ARC**. Requests for review must be submitted within 30 calendar days from the date of denial or modification of a reasonable accommodation.

3. You may choose to file an internal discrimination complaint with the Office of Employee Relations (OER) Anti-Discrimination Investigations Division (ADID) if you believe that the *[Agency]*’s determination is unlawful.
4. In addition to the options stated above, other alternatives may also be available. These include, but are not limited to:
 - filing a complaint with the New York State Division of Human Rights;
 - filing a complaint with the Equal Employment Opportunity Commission or any appropriate federal oversight agency under the Americans with Disabilities Act;
 - filing a complaint with any compliance agency designated under Sections 503/504 of the Rehabilitation Act of 1973; and
 - filing a private right of action to challenge the alleged discriminatory act, under the New York State Human Rights Law, or any applicable statute.

You may initiate these alternatives after the first denial by the *[Department]* of your request for an accommodation. Although these time limitations vary, the time for filing a complaint pursuant to all the alternatives begins to run when the *[Department]* first denies your request for an accommodation. However, you should consult with the appropriate anti-discrimination agency as to the time limitations for initiating such an action.

Section E

Notification of Agency Denial of Reasonable Accommodation

(To be completed by the DRA and returned to the
requestor)

Requestor's name

Based on the information you provided, the *[Department]* is unable to provide you with a reasonable accommodation of your disability, as you requested on _____.

We are denying your request for the following reason(s):

Signature of *[DRA]*

Date

If you have any questions, please call *[the DRA]*.

The employee should retain a copy of this form. The original will be filed by *[the DRA]*.

Due Process After the Agency's Reasonable Accommodation Determination

A letter from *[the DRA or the Department's designee]* confirming the decision will be sent to you within the next seven (7) calendar days after you receive the Notification of Agency Determination. If you are dissatisfied with the determination, the following options are available to you:

1. You may choose to accept this decision and end the process; or
2. You may choose to request a review by the Accommodation Review Committee (ARC) in accordance with procedures established in the "Procedures for Implementing Reasonable Accommodations for Applicants and Employees with Disabilities and Pregnancy-related Conditions in New York State Agencies." To file your request for ARC review, submit the enclosed form, (Section F) "Request for Review of a Reasonable Accommodation Determination" to the Accommodation Review Committee at ARC@cs.ny.gov or by mail at **Department of Civil Service, Swan Street Building – Core 1, Empire State Plaza, Albany NY 12239, Attn: ODIM –**

ARC. Requests for review must be submitted within 30 calendar days from the date of denial or modification of a reasonable accommodation.

3. You may choose to file an internal discrimination complaint with the Office of Employee Relations (OER) Anti-Discrimination Investigations Division (ADID) if you believe that the *[Agency]*'s determination is unlawful.
4. In addition to the options stated above, other alternatives may also be available. These include, but are not limited to:
 - filing a complaint with the New York State Division of Human Rights;
 - filing a complaint with the Equal Employment Opportunity Commission or any appropriate federal oversight agency under the Americans with Disabilities Act;
 - filing a complaint with any compliance agency designated under Sections 503/504 of the Rehabilitation Act of 1973; and
 - filing a private right of action to challenge the alleged discriminatory act, under the New York State Human Rights Law, or any applicable statute.

You may initiate these alternatives after the first denial by the *[Department]* of your request for an accommodation. Although these time limitations vary, the time for filing a complaint pursuant to all the alternatives begins to run when the *[Department]* first denies your request for an accommodation. However, you should consult with the appropriate anti-discrimination agency as to the time limitations for initiating such an action.

Section F

Request for Review of a Reasonable Accommodation Determination

(This form shall not be modified by accommodating agencies)

After your agency has issued a final determination, to request review, submit this form and all available relevant documentation **WITHIN 30 CALENDAR DAYS** (of denial or modification) to the ODIM Accommodation Review Committee (ARC) at ARC@cs.ny.gov or by mail at Department of Civil Service, Swan Street Building – Core 1, Empire State Plaza, Albany NY 12239, Attn: ODIM – ARC. Inquiries should be directed to ARC@cs.ny.gov.

Requestor's name:	Telephone number:
Mailing address:	Email address:
(*Required*) Preferred method of communication/notification (for example, "Email to address listed above"):	
Agency/location/office/division:	Job title:
Date of initial request for accommodation:	Specific accommodation requested:
Date of agency determination:	Medical/functional limitation(s):
Check here if you have not received a determination from your agency and are not currently engaged in the interactive process regarding your accommodation request: <input type="checkbox"/>	Have you filed a complaint of discrimination related to this reasonable accommodation request? YES <input type="checkbox"/> NO <input type="checkbox"/>

Please provide as much of the following information as is available to you to go along with this Request for Review:

Reasonable accommodation request:

- ☐ Initial request for accommodation
- ☐ Agency confirmation of the received request for accommodation
- ☐ Agency request for additional supporting/medical documentation
- ☐ Notification of agency determination

Correspondence/written communication with your agency:

- ☐ Any email or hard copy correspondence with your agency related to the requested accommodation. Do not delete or eliminate any information from emails/email chain

Medical documentation/functional limitations:

- ☐ In addition to medical documentation, please also include any agency requests for additional documentation and/or requests to speak directly with a medical provider

Job duties:

- ☐ Detailed description of job duties and responsibilities, including classification standard

Requestor's signature	Date
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APPENDIX B: NEW YORK STATE REGULATIONS

REASONABLE ACCOMMODATION

9 New York Code of Rules and Regulations (NYCRR) §466.11

466.11 Provision of "reasonable accommodation" by employers, pursuant to Human Rights Law §292.21, §292.21-e, §295.5, §296.3 and §296.3-a.

(a) Reasonable accommodation.

(1) Reasonable accommodation is defined in the Human Rights Law at §292.21-e, as follows:

The term "reasonable accommodation" means actions taken which permit an employee, prospective employee or member with a disability to perform in a reasonable manner the activities involved in the job or occupation sought or held and include, but are not limited to, provision of an accessible worksite, acquisition or modification of equipment, support services for persons with impaired hearing or vision, job restructuring and modified work schedules; provided, however, that such actions do not impose an undue hardship on the business, program or enterprise of the entity from which action is requested.

(2) Reasonable accommodations may include, but are not limited to: making existing facilities more readily accessible to individuals with disabilities; acquisition or modification of equipment; job restructuring; modified work schedules; adjustments to work schedule for treatment or recovery; reassignment to an available position; adjustment of examinations, training materials, or policies; providing readers or interpreters.

(3) Reasonable accommodation does not include among other things: providing for personal care needs, such as a personal care assistant, although such a personal care assistant should be accommodated where provided by the employee at no cost to the employer; providing non-work-related aids, such as a personal hearing aid or wheelchair, which are the employee's own responsibility.

(b) Determination of reasonableness.

(1) Whether an accommodation that has been requested or is under consideration is a "reasonable accommodation" required by the Human Rights Law will turn on a balancing of the following factors:

(i) efficacy or benefit provided by the accommodation toward removing the impediments to performance caused by the disability,

(ii) convenience or reasonableness of the accommodation for the employer, including its comparative convenience as opposed to other possible accommodations, and

(iii) the "hardships", costs, or problems it will cause for the employer, including those that may be caused for other employees.

(2) Accommodations that pose an "undue hardship" on the employer will not be required. "Undue hardship" means significant difficulty or expense to the employer. In determining whether an accommodation would result in undue hardship, consideration will be given to any relevant factor. Relevant factors can include, but are not necessarily limited to, those set forth in the Human Rights Law, at §296.3(b):

- (i) The overall size of the business, program, or enterprise with respect to the number of employees, number and type of facilities, and size of budget;
- (ii) The type of operation which the business, program or enterprise is engaged in, including the composition and structure of the workforce; and
- (iii) The nature and cost of the accommodation needed, including consideration of any money available from other sources to assist the employer in paying the cost.

(c) Omitted.

(d) Who is entitled to a reasonable accommodation?

(1) To be entitled to the protection of the Human Rights Law, the disabled individual must have the requisite job qualifications as well as be able to satisfactorily perform in the job.

(i) The disabled individual must be otherwise qualified for the job by education, skill, experience, ability, etc., to the same extent that such education, skill, experience, ability, etc., are required as bona fide job qualifications for nondisabled applicants or employees. See further, paragraph (f) (4) of this section.

(ii) The disabled individual must be able, with or without accommodation, to attain "reasonable performance". Reasonable performance is not perfect performance or performance unaffected by the disability, but reasonable job performance, reasonably meeting the employer's needs to achieve its business goals. See further, paragraphs (f) (1)-(3) of this section.

(2) To be entitled to a reasonable accommodation, the individual must meet the qualification and performance standards set forth in paragraph (1) of this subdivision, and must have a disability and a need for an accommodation which are known, or are made known, to the employer.

(e) Circumstances giving rise to the requirement that the employer consider reasonable accommodation, in accordance with the factors set forth in subdivision (b) of this section.

(1) Reasonable accommodation must be considered where the disability and need for accommodation are known to the employer.

(2) Reasonable accommodation must be considered when a qualified applicant or employee with a disability informs the employer of the disability (if the employer does not already know of its existence) and requests an accommodation.

(3) Reasonable accommodation must be considered when a current employee with a disability informs the employer of the disability (if the employer does not already know of its existence) and requests an accommodation, even if there has been no change in the employee's medical condition.

(f) Ability to reasonably perform the "activities involved in the job or occupation"; job restructuring.

(1) Ability to reasonably perform the "activities involved in the job or occupation" means the ability, with or without accommodation, to satisfactorily perform the essential functions of the job or occupation. See further, subparagraph (d) (1) (ii) of this section.

(2) Satisfactory performance means minimum acceptable performance of the essential functions of the job as established by the employer. The employer's judgment as to what is minimum acceptable performance will not be second-guessed, so long as standards for performance are applied equivalently to all employees in the same position. Such standards for satisfactory performance may include minimum productivity standards or quotas.

(3) Essential functions are those fundamental to the position; a function is essential if not performing that function would fundamentally change the job or occupation for which the position exists... Evidence for determining the essential functions of a particular position would include, but would not be limited to, the following:

(i) the employer's judgment as to which functions are essential, particularly where so indicated in a pre-existing written job description;

(ii) how often the function is actually performed by other employees in the position;

(iii) how many other employees are available to whom the function could be reallocated by job restructuring;

(iv) the direct and specific consequences to the employer's business if the function is not performed by the particular disabled individual;

(v) the terms of a collective bargaining agreement. (Labor organizations are also required to reasonably accommodate the disabilities of a member, pursuant to §296.3.)

(4) When an employer fills a position with a specific purpose of acquiring special ability or expertise (for example: technical expertise, foreign language skill, physical strength in a firefighter), even if the amount of time actually spent on the job using the special ability or expertise is small, this ability or expertise is a bona fide qualification for the job. See further, subparagraph (d) (1) (i) of this section.

(5) As is true in any area covered by the Human Rights Law, the employer may hire the applicant who is most qualified with regard to the bona fide job qualifications, and is not required to hire a disabled applicant simply because the applicant meets the minimum job qualifications if there are other more qualified applicants.

(6) The Human Rights Law does not require, as a reasonable accommodation in the form of job restructuring, the creation of a completely unique position with either qualifications or functions tailored to the disabled individual's abilities.

(7) Reasonable accommodation, in the form of job restructuring, is required if a disabled individual meets the bona fide job qualifications, and can satisfactorily perform the essential functions of the position; the duties that the disabled individual cannot perform due to the disability, and that are not essential to the position, must not be required of the disabled individual.

(g) Safety concerns; objectionable behaviors.

(1) The Human Rights Law does not require accommodation of behaviors that do not meet the employer's workplace behavior standards that are consistently applied to all similarly situated employees, even if these behaviors are caused by a disability. This would include, but not be limited to:

(i) dress codes, grooming standards and time and attendance policy, though reasonable and necessary deviations must be allowed as accommodations;

(ii) conduct standards, including those which prohibit aggressive or threatening behavior;

(iii) discipline for theft of company property by a kleptomaniac;

(iv) discipline for intoxication or impairment on the job by an alcoholic.

(2) Reasonable accommodation is not required where the disability or the accommodation itself poses a direct threat.

(i) "Direct threat" means a significant risk of substantial harm to the health or safety of the employee or others that cannot be eliminated or reduced by reasonable accommodation.

(ii) In determining whether a direct threat exists, the employer must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective information, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable accommodations, such as modification of policies, practices, or procedures, will mitigate the risk.

(iii) Some jobs may have a bona fide classification as "safety sensitive", such as, for example, vehicle operators or persons who work with children. Heightened consideration of direct threat is to be encouraged in bona fide safety sensitive jobs.

(h) Drug addiction and alcoholism.

- (1) Alcoholism and drug addiction are diseases. However, an individual who is currently using drugs illegally (see paragraph (4) of this subdivision), is not protected in this regard by the Human Rights Law. The Law does protect an individual who is a recovered/recovering alcoholic or drug addict.
- (2) Adjustments to the work schedule, where needed to allow for ongoing treatment, must be allowed as an accommodation where reasonable, if the individual is still able to perform the essential functions of the job including predictable and regular attendance.
- (3) The recovered/recovering alcoholic or drug addict should be expected to perform job tasks just as anyone else with similar skills, experience, and background.
- (4) Where the employer has knowledge of the current illegal use of drugs, the employee is not entitled by law to accommodation, and may be terminated.
 - (i) "Current illegal use of drugs" means illegal use of drugs that occurred recently enough to justify a reasonable belief that a person's drug use is current or that continuing use is a real and ongoing problem.
 - (ii) In determining whether recent use is enough to justify a reasonable belief in current use, the individual's successful participation in a program for rehabilitation or recovery since the recent use is relevant.
- (5) Employers are encouraged, where the employer knows of current illegal use of drugs, or where job performance of an alcoholic or drug addict deteriorates to below acceptable standards, to utilize the practice of leave of absence and required attendance at a rehabilitation program, along with a "last chance" agreement requiring acceptable performance and attendance upon return. If an employee denies the problem and refuses the leave, treatment and last chance agreement, the employee may be terminated or disciplined for the documented performance problems.
- (6) Drug testing.
 - (i) A test to determine the illegal use of drugs is not to be considered a medical test.
 - (ii) Nothing in these regulations is to be construed to encourage, prohibit, or authorize the conducting of drug tests for the illegal use of drugs by job applicants or employees, or the making of employment decisions based on the test results.
 - (iii) Nothing in these regulations is to be construed to encourage, prohibit, restrict or authorize the otherwise lawful exercise by entities subject to the jurisdiction of the United State Department of Transportation, of authority to test applicants for or employees in safety sensitive positions for the illegal use of drugs or for on-duty impairment by alcohol, or to remove persons who test positive from safety sensitive duties.
 - (iv) Any information regarding the medical condition or history of any applicant or employee obtained from a drug test, except information regarding illegal use of drugs,

must be kept confidential, and may not be used in any way to the disadvantage of the applicant or employee.

(i) Temporary disabilities.

(1) A current employee experiencing a temporary disability is protected by the Human Rights Law where the individual will be able to satisfactorily perform the duties of the job after a reasonable accommodation in the form of a reasonable time for recovery.

(2) The Human Rights Law requires no more than de minimis accommodations for temporary disabilities in the areas of worksite accessibility, acquisition or modification of equipment, job restructuring, or support services for persons with temporarily impaired hearing or vision.

(3) The Human Rights Law may require reasonable accommodation of temporary disabilities in the areas of modified work schedules, reassignment to an available position or available light duty, or adjustments to work schedules for recovery. The employer's past practice, pre-existing policies regarding leave time and/or light duty, specific workplace needs, the size and flexibility of the relevant workforce, and the employee's overall attendance record will be important factors in determining reasonable accommodation in this context.

(j) Rights and duties of the employer.

(1) The employer must not make pre-employment inquiries with regard to the existence of a disability or need for accommodation. The employer should provide information to applicants and new employees as to their rights with regard to reasonable accommodation of disability, and as to procedures to be followed in requesting reasonable accommodation.

(2) The employer should advise all current employees on a regular basis as to their rights with regard to reasonable accommodation of disability, and as to procedures to be followed in requesting reasonable accommodation.

(3) The employer has the duty to reasonably accommodate known disabilities, where the need for the accommodation is known.

(4) The employer has a duty to move forward to consider accommodation once the need for accommodation is known or requested. The employer has the duty to clearly request from the applicant or employee any documentation that is needed.

(5) Once an accommodation is under consideration, the employer has the right to medical or other information that is necessary to verify the existence of the disability or that is necessary for consideration of the accommodation. The employer must maintain the confidentiality of individuals' medical information.

(6) The employer has the right to select which reasonable accommodation will be provided, so long as it is effective in meeting the need.

(7) It is recommended that the employer have a written policy and procedure for reasonable accommodation of disability. A sample procedure is available from the Division.

(k) Rights and duties of the employee.

(1) The employee must make the disability and need for accommodation known to the employer.

(2) An employee with a disability has a right to request an accommodation at any time, even if his/her medical condition has not changed.

(3) The employee must cooperate with the employer in the consideration and implementation of the requested reasonable accommodation.

(4) The employee must cooperate in providing medical or other information that is necessary to verify the existence of the disability or that is necessary for consideration of the accommodation. The employee has a right to have his/her medical information kept confidential.

(5) The employee has the right to refuse an accommodation despite the existence of a disability, if the employee can perform the job in a reasonable manner without the accommodation.