

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) Covered disabilities.

(1) The Human Rights Law protects from discrimination those individuals with disabilities which, with or without reasonable accommodation, do not prevent the individual from performing the duties of the job in a reasonable manner. The definition of "disability" in the Human Rights Law is more comprehensive than that under federal law in that it covers many conditions that have been found to be not a disability under the federal Americans with Disabilities Act.

(2) The term "disability" is defined in the Human Rights Law at §292.21 to mean:

- (i) a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques or
- (ii) a record of such an impairment or
- (iii) a condition regarded by others as such an impairment.

With regard to employment, the term is limited to disabilities which, upon the provision of reasonable accommodations, do not prevent the complainant from performing in a reasonable manner the activities involved in the job or occupation sought or held.

(3) Not every disability covered by the Human Rights Law will require the consideration of reasonable accommodations. Only those disabilities which actually impede, as a matter of fact, the individual in performing the job will give rise to a consideration of accommodation. This is understood to include those situations in which the job impedes the individual's recovery or ability to obtain treatment, and accommodation can make recovery or treatment possible while the individual continues to be employed.

(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. What is an essential function is a factual question to be resolved by all relevant

evidence. 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.

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

**SUGGESTIONS FOR A REASONABLE ACCOMMODATION
PLAN AND PROCEDURE**

For implementation of the employer's duty to reasonably accommodate employees and applicants with disabilities, pursuant to Executive Law (Human Rights Law) §296, §292.21, and §292.21-e.

A written policy or plan with regard to reasonable accommodation is not required by law. However, it is recommended that employers develop a Reasonable Accommodation Plan. Use of such a procedure will not provide a guarantee against a later finding that a denial was in violation of the law, but should guard against inadvertent or uninformed denials of reasonable accommodations, and will provide a record that will be useful to the employer in establishing factually why a denied accommodation was unreasonable. The Plan should contain at a minimum, three elements:

- a formal statement that it is the policy of the employer to provide reasonable accommodations to employees and applicants with disabilities,
- an written "Procedure for Processing Reasonable Accommodation Requests" which is disseminated to all staff, and
- a program designed to provide information to managers, supervisors, and staff about the concept of, and legal requirement for, reasonable accommodation.

Various resources are available, in the local community or from various state agencies, to help provide staff training, at little or no cost.

Sample Procedure

Employers may find that a uniform set of guidelines for reviewing reasonable accommodation requests will serve the best interests of the company and its employees. A procedure will also provide a framework with a definite beginning and end; if the employer proceeds with the procedure with reasonable diligence, questions of whether an accommodation has been denied or is still under consideration will not arise, and filing of unnecessary complaints will be forestalled. Taking time to consider a request may appear as a denial and generate conflict, if the steps in a procedure cannot be referenced. The following sample procedure assumes the request is from a current employee, but the procedure should be adapted for use also by an applicant who wishes to request an accommodation.

The process of accommodation starts when the employee makes his/her request in writing and returns the request to the supervisor. If the employee has difficulty with written communication, or is not sure how to explain the impediment to job performance he/she is experiencing, or is unsure of what accommodation to request, the supervisor should assist the employee in an initial

consultation. The employee's initial inquiry about accommodation or disability-related performance difficulties puts the employer on notice, and triggers the requirement to seek accommodation. Therefore, the technicality of filling out the request adequately to start the process cannot be allowed to block the employee's access to accommodation. Once the request has been submitted, adequately identifying the accommodation requested, or at least the problem to be addressed, the supervisor evaluates the request and either approves or is unable to make a decision.

If the supervisor approves the request, the accommodation is made and an approval memorandum is sent to the designated company representative, (e.g., human resources representative or EEO Coordinator). The process is ended. If the supervisor is unable to make a decision, the request, with the supervisor's comments, is sent to the designated company representative who will conduct a comprehensive review of the request. The employee should be notified of this next step by the supervisor.

It is anticipated that most requests for accommodation can be approved at the supervisory level. Some accommodation requests are very simple and can easily be accomplished by the supervisor. Some examples may include the removal of barriers from aisles for an employee who is blind, raising a desk with small blocks if an employee uses a wheelchair, or granting permission for extended break times if the employee requires a longer rest period, with the time charged, or made up, in some agreed-upon manner.

There may be times, however, when a supervisor lacks the authority or the needed information to recommend that a particular accommodation be made. For example, these accommodations may require monetary expenditures, such as when adaptive equipment needs to be purchased or when requests are made for shift changes or flextime or part-time schedules. In these instances, the supervisor may choose to defer to the designated company representative for further review.

In instances where further review is required, the designated company representative must then assess all relevant documentation. *This may include asking for additional medical and/or other documentation from the employee, meeting with the employee and/or the supervisor, contacting the Job Accommodation Network, or other source of experience and expertise, for specific accommodation information, arranging for a job analysis, or consulting with community-based organizations who provide services to people with disabilities. It is important to note that medical documentation should be received by the designated company representative and not the supervisor. This will help avoid breach of the employee's privacy.*

The designated company representative may also at times need to obtain input from the company's fiscal officer or legal counsel. In a word, all available resources should be used at this stage to resolve the accommodation request.

If the accommodation is to be provided, the designated company representative consults with the supervisor and informs the employee in writing.

If the accommodation is to be denied, the designated company representative consults with the supervisor and notifies the employee in writing. In the notification, the employee is informed

that this decision will be automatically reviewed by a compliance review committee. This committee consist of a representative from human resources, counsel's office, an employee work group or organization, or any other representative deemed to be appropriate. This review body is advisory in nature and the final decision to grant or deny the accommodation rests with the *company owner or the CEO or other highest level managing officer*.

After completion of the review, the final decisionmaker informs the employee in writing of the final decision. If the decision is to deny the accommodation, additional recourse should be delineated to the employee such as filing a discrimination complaint with state or federal agencies if the employee believes the company's denial was based on discrimination.

To summarize:

Step 1: Employee requests an accommodation by submitting the request for accommodation to the supervisor.

Step 2: Supervisor approves, and the process is completed. Or, Supervisor does not approve, and the request is forwarded to the designated company representative.

Step 3: The designated company representative conducts a comprehensive review and analysis, including gathering information from the employee (including medical certification where needed) and from other sources.

Step 4: The designated company representative approves, and the process is completed. Or, the representative does not approve, and advises the employee of the denial, and of the reasons for the denial, and informs the employee that there will be a review of this decision by the compliance review committee and the owner, CEO or other managing officer of the company.

Step 5: The compliance review committee reviews the results of designated company representative's review, analysis and decision, and reports to the owner, CEO or managing officer.

Step 6: The owner, CEO or managing officer of the employer advises the employee of the employer's final decision, and if it is to confirm the denial, the employee is advised of his/her legal rights.

The above sample procedure will of course need to be modified to suit the needs, size, and structure of particular employers.