

Accommodating NY Employees with Disabilities

How To Be a "Reasonable" Employer

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Overview

1 Coverage

2 "Reasonable"

3 "Undue Hardship"

4 Leave

5 Interactive Process

6 Special Issues

- NYC HRL
- Temporary Disabilities
- Job Applicants

Covered Employers

ADA

- Public and private employers
- 15 or more employees

NY HRL

- Public and private employers
- 4 or more employees

Covered Employees

ADA

- Individual with a disability: a person who has a physical or mental impairment that **substantially limits one or more major life activities**, has a record of such an impairment, (or is regarded as having such an impairment)

NY HRL

- Disability: (a) 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 (b) a record of such an impairment or (c) a condition regarded by others as such an impairment

Major Life Activities

ADA

Include, but are not limited to:

- Caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working; and
- The operation of a major bodily function, including functions of the immune system, special sense organs and skin; normal cell growth; and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions. The operation of a major bodily function includes the operation of an individual organ within a body system.

Essential Functions of the Job

- The fundamental job duties of the employment position the individual with a disability holds or desires.
- Does not include the marginal functions of the position.
- NY HRL: a function is essential if not performing that function would fundamentally change the job or occupation for which the position exists.



Essential Function Factors

NY HRL Regulations

- The employer's judgment as to which functions are essential, particularly where so indicated in a pre-existing written job description
- How often the function is actually performed by other 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 disabled individual
- The terms of a collective bargaining agreement

Essential Function Factors

ADA Regulations

- The employer's judgment as to which functions are essential;
- Written job descriptions prepared before advertising or interviewing applicants for the job;
- The amount of time spent on the job performing the function;
- The consequences of not requiring the incumbent to perform the function;
- The terms of a collective bargaining agreement;
- The work experience of past incumbents in the job; and/or
- The current work experience of incumbents in similar jobs.

Reasonable Accommodation

ADA Regulations

- (i) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires;
- (ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or
- (iii) Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.

Reasonable Accommodation

ADA Regulations

May include but is not limited to:

- (i) Making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
- (ii) Job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities.

Reasonable Accommodation

NY Human Rights Law

“Actions taken which permit an employee, prospective employee or member with a disability, or pregnancy-related condition, 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.”

Reasonable Accommodation

NY HRL Regulations

- 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.
- 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.

Reasonableness Factors

NY HRL Regulations

- Efficacy or benefit provided by the accommodation toward removing the impediments to performance caused by the disability;
- 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.

Types of Accommodations

- Equipment
- Job Restructuring
- Leave
- Modified or Part-Time Schedule
- Modified Workplace
- Reassignment
- Other



Undue Hardship

“Significant difficulty or expenses” considering factors such as:

- The nature and net cost of the accommodation needed under this part, taking into consideration the availability of tax credits and deductions, and/or outside funding;
- The overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at such facility, and the effect on expenses and resources;
- The overall financial resources of the covered entity, the overall size of the business of the covered entity with respect to the number of its employees, and the number, type and location of its facilities;
- The type of operation or operations of the covered entity, including the composition, structure and functions of the workforce of such entity, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the covered entity; and
- The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.

Leave as an Accommodation

- Both the ADA and HRL regulations recognize that “modified work schedules” might be a reasonable accommodation in some cases
- Both the EEOC and NYS Division of Human Rights take the position that some period of time off might qualify
- Like other accommodations, must weigh factors to determine whether leave poses an undue hardship to the employer
- Satisfying FMLA, paid sick leave laws (where applicable), etc., does not preclude possibility that additional leave would be considered reasonable

Maximum Leave Policies

- Historically, EEOC has opposed employer policies that dictate that an employee's employment will automatically end after a specified period of leave
- Periods as long as 6 or 12 months (or even longer) remain questionable
- Safer approach is to have guideline maximum with possibility of extension for reasonable additional time period

Accommodation Process

Employee Request



Indication of need for adjustments related to medical condition

Interactive Process



“Informal” exchange with employee

Evaluation



Employer’s individualized assessment

Resolution



Implement or Deny

Goals of Interactive Process

- Understand the employee's medical limitations
- Determine possible accommodations
- Evaluate effectiveness and feasibility of accommodations
- Choose from among available alternatives
- Ideally, reach agreement with employee on the accommodations, if any, to be implemented

Obtaining Medical Information

- Unless medical condition and need for accommodation are obvious, employers may require employees to provide information about their disabilities needing accommodation
- Can ask the employee to sign a release to allow the employer to obtain the information directly
- Often advisable to include a job description in asking the doctor about how the disability affects job performance and need for accommodations
- Employers don't have to accept doctor's opinion, restrictions, and suggestions in all cases

NYC Human Rights Law

Effective October 15, 2018

»» “Cooperative Dialogue”

The process by which an employer and a person entitled to an accommodation, or who may be entitled to an accommodation under the law, engage in good faith in a written or oral dialogue concerning the person’s accommodation needs; potential accommodations that may address the person’s accommodation needs, including alternatives to a requested accommodation; and the difficulties that such potential accommodations may pose for the covered entity.

»» Determination

Employer must provide employee requesting accommodation with written final determination identifying any accommodation granted or denied.

Temporary Disabilities

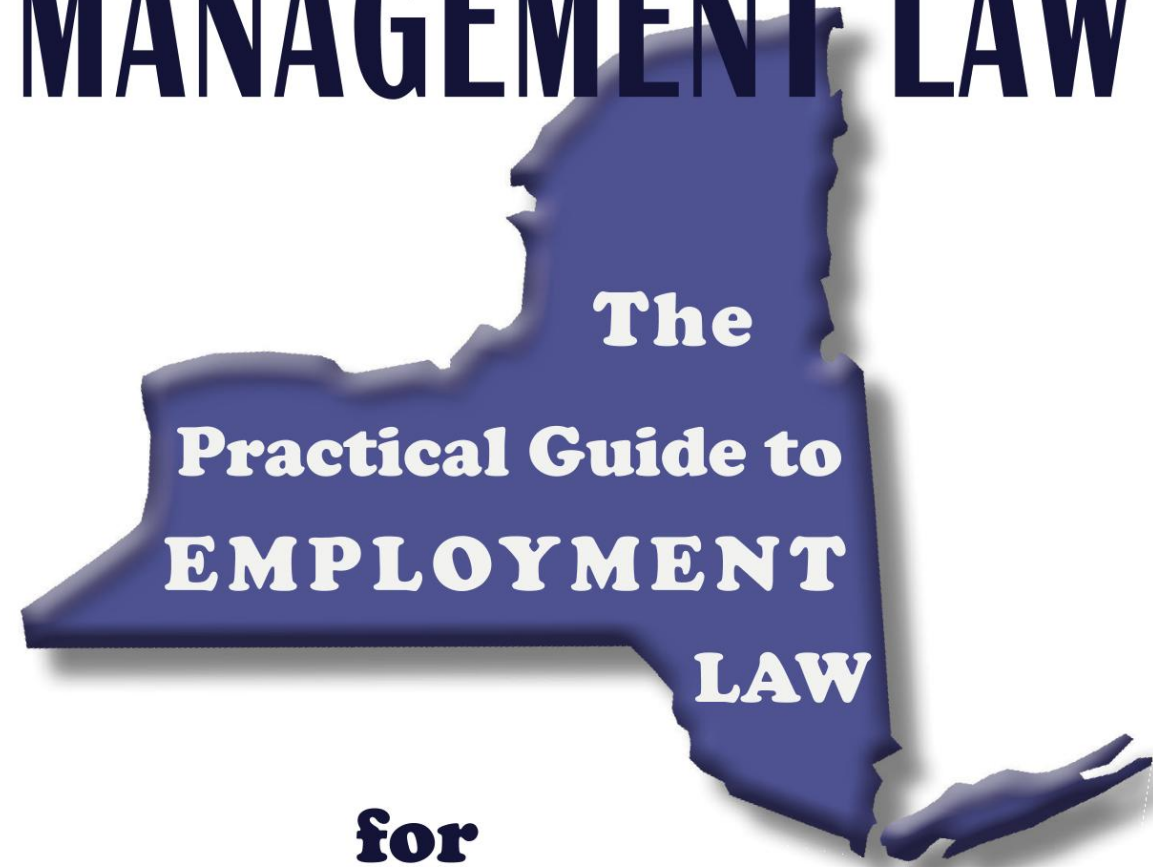
NY HRL

- “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.”
- “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.”

Accommodating Applicants

- Employers must also make reasonable accommodations to applicants with disabilities during the hiring process
- Again involves interactive process and undue hardship analysis
- Have to make reasonable accommodations during hiring process even if it appears employer could not make necessary accommodations if the employee were hired
- Can't ask applicant whether they will need accommodation in performing the job unless the employer knows the applicant has a disability and reasonably believes an accommodation would be necessary to perform job functions

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Thanks for your time!

Questions?

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