PROGRAM MATERIALS
Program #32157
October 13, 2022

# Mental Health and the Workplace: ADA and FMLA Compliance and Employee Wellbeing Best Practices

Copyright ©2022 by


- Mark Goldstein, Esq.-Reed Smith LLP
- Alexandra (Ali) Manfredi, Esq.-Reed Smith LLP


All Rights Reserved.
Licensed to Celesq®, Inc.

Celesq® AttorneysEd Center
www.celesq.com

5301 North Federal Highway, Suite 150, Boca Raton, FL 33487
Phone 561-241-1919

# Mental Health and the Workplace: ADA and FMLA Compliance and Employee Wellbeing Best Practices

Presented by: Mark S. Goldstein & Alexandra Manfredi

ReedSmith

Driving progress
through partnership

# Today's Presentation

Mental health issues are increasing amongst employees and implicate various employer obligations under federal, state, and local discrimination and leave laws.

Today we will discuss why mental health is important, compliance requirements under workplace laws, and how counsel can advise employers on designing and implementing effective policies and procedures on employee wellbeing and mental health.

# Overview of Topics

- ✓ Mental health: why should we care?
- ✓ Mental health & legal obligations of the employer
- ✓ Designing and implementing effective policies and procedures on mental health
- ✓ Applying these principles to workplace scenarios

# Part I: Mental Health: Why should we care?

# Mental health is a global issue…

# …Particularly in the legal profession

## Studies have shown that:

- Lawyers are 3.6 times more likely to suffer from depression than the average person
- Male lawyers are 2 times more likely to die by suicide than men in the general population (this figure does not include attempted deaths by suicide)

# ABA Commission on Lawyer Assistance Programs and Hazelden Betty Ford Foundation's 2016 Study

## Practicing lawyers (13,000)

- 21% - 36% qualify as problem drinkers
  - Versus 15.4% of surgeons
- 28% - depression
- 23% - stress
- 19% - anxiety
- Other issues – suicide, social alienation, sleep deprivation, job dissatisfaction, complaints of work-life conflict
- Young lawyers (first 10 years in private practice) experience highest rates of problem drinking and depression

## Law Students (3,300)

- 17% - depression
- 14% - severe anxiety
- 23% - moderate anxiety

# What do these studies reveal?

- While the majority of lawyers and students do not have a mental health or substance abuse disorder, as an industry, we are not thriving.
- We are not performing at our best and we are often unhappy or unfulfilled.
- One report suggests lawyers exhibit a “profound ambivalence” about their work.

# Why the legal profession?

- Culture of the industry
  - Long hours/lack of flexibility
  - Alcohol and networking (internal and external)
  - Stigma and related fears about professional repercussions
  - Loneliness/isolation

# Why the legal profession?

- Our work is adversarial
  - Absence of professional courtesy
  - Discourages asking for help/showing weakness
  - Specifically as it relates to in-house counsel:
    - Can be viewed as roadblocks to the business
    - May experience “clients” (business stakeholders) who are unhappy with work product, timelines, and/or priorities
    - “Clients” sharing displeasure with us and managers/leaders

# Why the legal profession?

- Lawyer's personality
  - Type A, competitive, perfectionist
- What makes us good lawyers, also lends itself to mental health disorders
- Walking a fine line

# Why should we care about mental health?

**Job performance**
Productivity
Work Product
Absenteeism

**Violence**
Self Harm
Harm to Others

**Company culture**
Right thing to do

**Turnover**
Recruitment and training costs
Morale

**Liability**
ADA, FMLA and state/local laws

# How we can change this culture?

**Buy-in and role modeling: "Tone from the Top"**

- "Leaders can create and support change through their own demonstrated commitment to core values and well-being in their own lives and by supporting others in doing the same." (ABA Report)

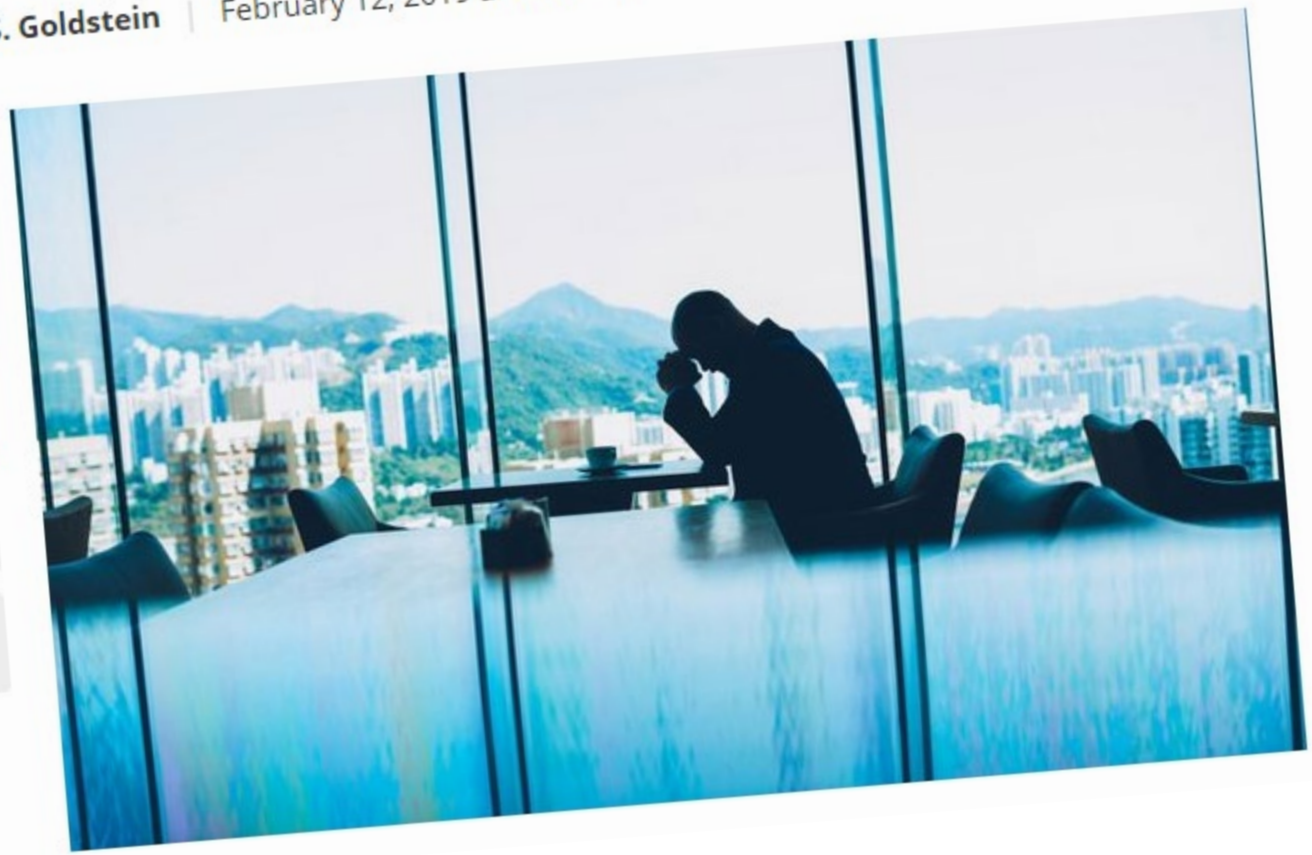
- Critical to minimize stigma
  - Culture change of this magnitude needs to start with leaders, whether partners at law firms or executives in organizations.

- **ALL** parts of the legal profession/industry should partner to prioritize health and well-being…
  - Law schools, law firms, in-house legal departments, government attorneys, judges and so on

# 'Scared. Ashamed. Crippled.': How One Lawyer Overcame Living With Depression in Big Law

Reed Smith counsel Mark Goldstein wasn't sure he could both be a lawyer and have mental health disabilities. But he learned how to survive and thrive in Big Law.

By **Mark S. Goldstein** | February 12, 2019 at 02:15 PM



# My story

- Onset
- Denial
- Acknowledgment/acceptance
- Speaking up
- Making a change/reclaiming my personal and professional lives
- The aftermath/response (the Firm, clients, colleagues, etc)

# Part II: Mental Health & Legal Obligations of the Employer

# What laws are implicated?

- ADA and state/local counterparts
- FMLA and state/local counterparts
- State/local sick leave
- State/local domestic violence and safe leave
- State/local small necessities laws

# What do the ADA and state/local disability laws require?

- What is a “disability” for legal purposes?
- Do mental health conditions constitute “disabilities”?

# ADA and State/Local Counterparts

- The Americans with Disabilities Act (ADA) prohibits discrimination against people with disabilities.
- Disability under the ADA is defined as “a physical or mental impairment that substantially limits one or more major life activities, a person who has a history or record of such an impairment, or a person who is perceived by others as having such an impairment.”
- The ADA **recognizes mental health issues as a disability.**

# ADA and State/Local Counterparts

- In 2016, the EEOC issued guidance on the ADA and mental health conditions. The guidance stated that "mental health conditions like major depression, post-traumatic stress disorder (PTSD), bipolar disorder, schizophrenia, and obsessive compulsive disorder (OCD) should easily qualify [under the ADA], and many others will qualify as well."

- It provided the following examples of possible accommodations: "**altered break and work schedules** (e.g., scheduling work around therapy appointments), **quiet office space or devices that create a quiet work environment**, **changes in supervisory methods** (e.g., written instructions from a supervisor who usually does not provide them), **specific shift assignments**, and **permission to work from home**."

# ADA and State/Local Counterparts

- Many state and local laws likewise provide protections for employees suffering from disabilities, including mental health conditions.
  - New York State and City (NYS and NYC Human Rights Law)
  - California (Cal. Gov't Code § 12940)
  - New Jersey (N.J. Stat. § 10:5-4)
- In many cases, the standard for what constitutes a disability is significantly lower than the ADA and likely covers a broad range of mental health conditions

# ADA and State/Local Counterparts

- For example, New York State and City law have a significantly lower threshold for what constitutes a disability:
  - **New York State Human Rights Law** - “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.”
  - **New York City Human Rights Law** - “any physical, medical, mental or psychological impairment, or a history or record of such impairment.” with such an impairment including “a mental or psychological impairment.”
- Unlike the ADA, there is no requirement under these two laws that the condition substantially limit a major life activity.
- Result = many mental health conditions will likely qualify.

# What do the ADA and state/local disability laws require?

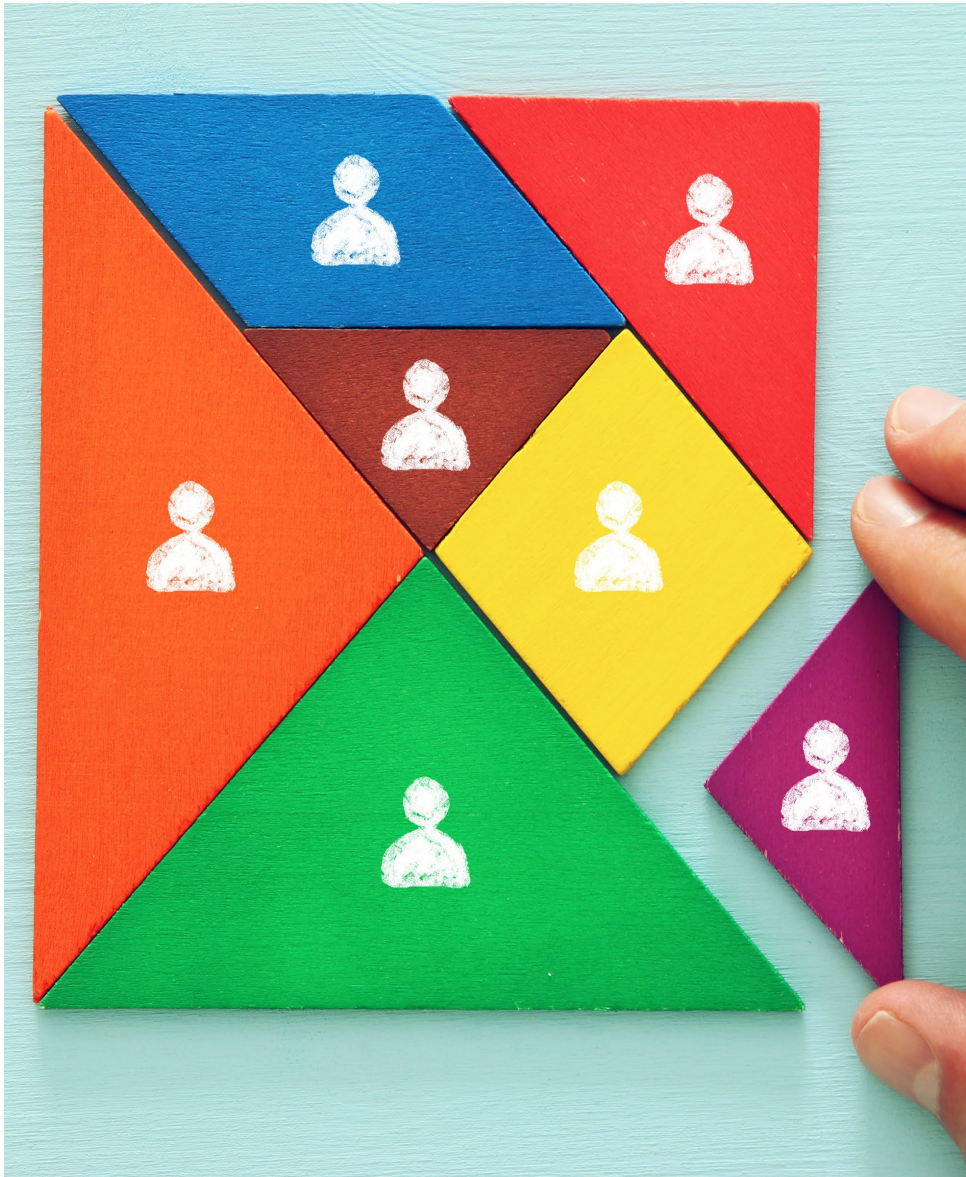
- If an employer is aware that an employee has or claims to have a disability, the employer is:
  - Required to engage in an interactive process

***AND***

  - Provide reasonable accommodation to assist the employee in performing the essential functions of his or her job unless the accommodation would impose an undue hardship on the company

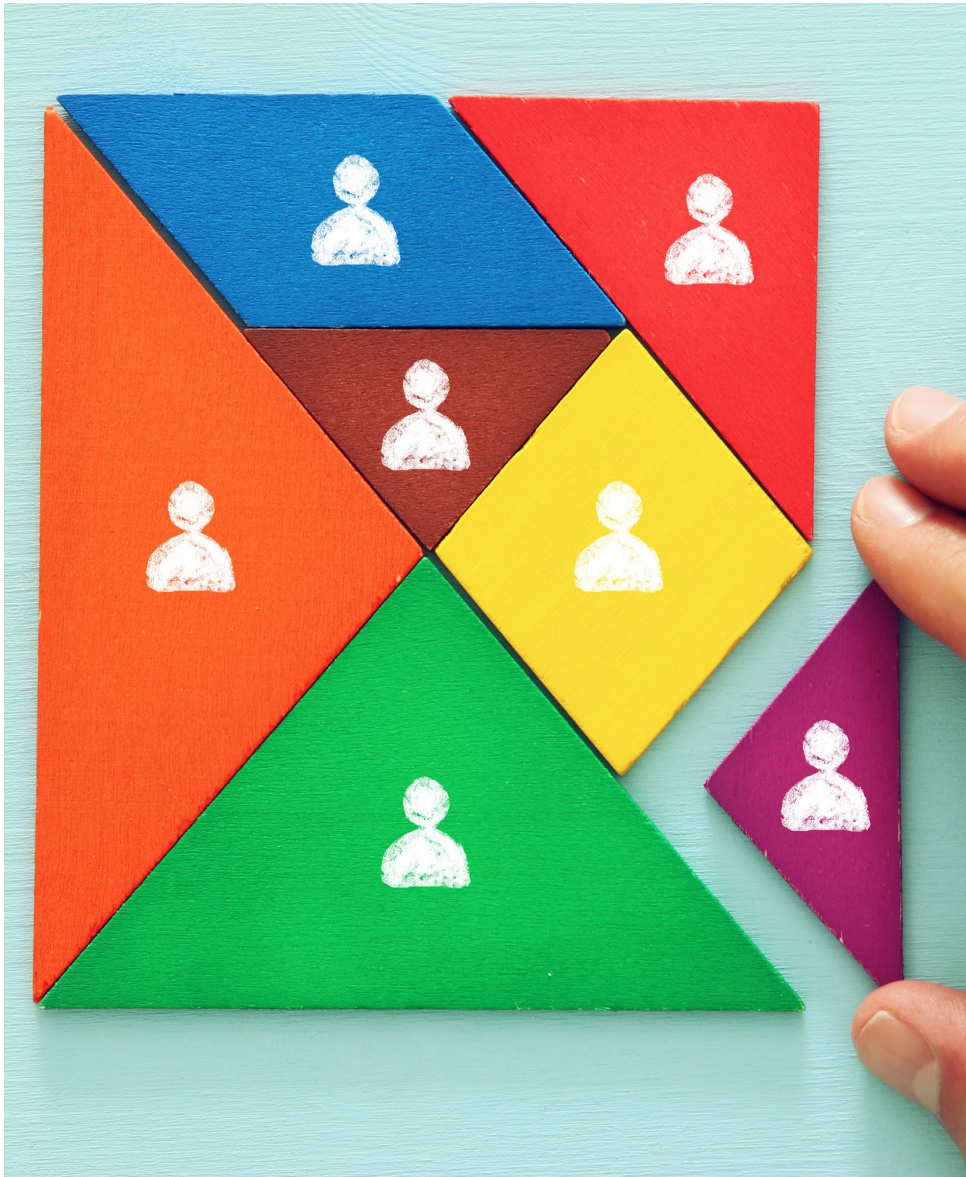
# Reasonable accommodations

- A reasonable accommodation is any modification or adjustment to a job, employment practice, or the work environment that enables the applicant or employee to perform an essential job function
- There is no “one size fits all” solution; reasonable accommodations will vary from person to person and position to position
- Think outside the box



# Reasonable accommodations

- Examples of possible accommodations:
  - Schedule adjustments
  - Modification of work location
  - Providing periodic rest or break periods during the day
  - Job restructuring
  - Eliminate non-essential tasks
  - Policy changes
  - Temporary changes to workload/specific assignments/deadlines
  - Changes in type or frequency of feedback
  - Advance notice of upcoming changes/assignments
  - Unpaid leave of absence



# What do leave laws require?

- Federal Family and Medical Leave Act
  - Up to 12 weeks of unpaid leave per year

- Trends in state and local laws
  - FMLA counterparts
  - Domestic violence leave laws
  - Small necessities leave laws
  - Paid sick leave laws

# FMLA Leave

- Under the FMLA, an employee may take leave for their own serious health condition.
- Serious health condition is defined as “"an illness, injury, impairment, or physical or mental condition that involves: inpatient care in a hospital, hospice, or residential medical care facility; or. continuing treatment by a health care provider.”

# FMLA Leave

- In May 2022, the US Department of Labor (“DOL”) issued a Fact Sheet on mental health conditions and the FMLA.
- The DOL confirmed that a mental health condition is considered qualifying under the FMLA if it either requires **inpatient care** or **continuing treatment** by a healthcare provider.

# FMLA Leave

- **Inpatient care** = an overnight stay in a hospital or other medical care facility, such as, for example, a treatment center for addiction or eating disorders.
- **Continuing Treatment** = Conditions that incapacitate an individual for more than three consecutive days and require ongoing medical treatment, either multiple appointments with a health care provider, including a psychiatrist, clinical psychologist, or clinical social worker, or a single appointment and follow-up care (e.g., prescription medication, outpatient rehabilitation counseling, or behavioral therapy); and chronic conditions (e.g., anxiety, depression, or dissociative disorders) that cause occasional periods when an individual is incapacitated and require treatment by a health care provider at least twice a year.

# FMLA Leave

- Examples of FMLA leaves related to mental health conditions:
  - **Leave for employee's condition** - Karen is occasionally unable to work due to severe anxiety. She sees a doctor monthly to manage her symptoms. Karen uses FMLA leave to take time off when she is unable to work unexpectedly due to her condition and when she has a regularly scheduled appointment to see her doctor during her work shift.
  - **Leave for family member's condition** - Wyatt uses one day of FMLA leave to travel to an inpatient facility and attend an after-care meeting for his fifteen-year-old son who has completed a 60-day inpatient drug rehabilitation treatment program.
  - **Leave to care for an adult child** - Anastasia uses FMLA leave to care for her daughter, Alex. Alex is 24 years old and was recently released from several days of inpatient treatment for a mental health condition. She is unable to work or go to school and needs help with cooking, cleaning, shopping, and other daily activities as a result of the condition.

# State Paid Family Leaves

- Several states have paid family leave laws that permit employees to take time off to care for a family member suffering from a medical condition, which includes mental health conditions.
- In 2021, New York expanded their Paid Family Leave to include care given to one's siblings
  - List otherwise includes spouse, domestic partner, child/stepchild, parent/stepparent, parent-in-law, grandparent, grandchild

# State/Local Domestic Violence and Safe Leaves

- In recent years, states and localities have expanded their laws to provide for domestic violence and safe leaves.
- These leaves permit employees to take time off to obtain psychological counseling or similar medical attention for themselves or a child who is a victim of domestic violence.
  - For example, New York State and City, Illinois, California,

# State/Local Sick Leave

- Some states provide leave to receive inpatient treatment for substance abuse or mental health
  - For example Washington State
- Some states provide sick leave for mental illness regardless of whether it has been diagnosed or requires medical care at the time of the request for leave or for the diagnosis, care, or treatment of a mental illness.
  - For example, New York, New Jersey, California statutes

# State/Local Small Necessities Leave

- **Massachusetts** enacted a **Small Necessities Leave Act** which allows employees to attend mental health appointments with their children or elderly relatives without penalty.
  - The Act provides for 24 hours of leave for every 12 months. Mass. Ann. Laws ch. 149, § 52D
- **California Small Necessities Leave** allows up to 40 hours of unpaid leave in any 12 month period to attend to child care or participate in activities at a child's school or daycare. Cal Lab Code § 230.8

# Part III: Designing and Implementing Effective Policies and Procedures

# How to be compassionately compliant

- Ensure that HR and Legal understand the legal landscape
- Have clear policies in place
- Offer supervisors training
- Communicate policies to employees
- Provide multiple avenues for employees to seek help or raise concerns
- Raise awareness of mental health and debunk the stigma

# Having the hard conversations

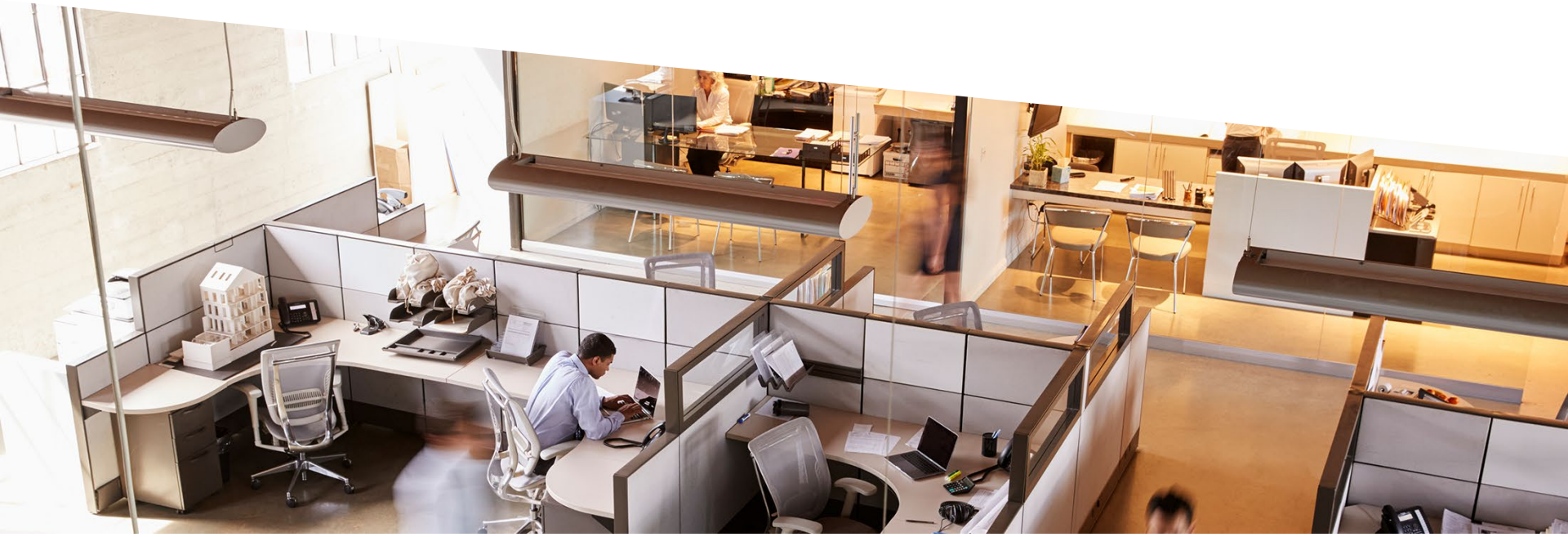
- Express empathy +
  - Examples: “I’m concerned about you,” “I’m here to listen and support you,” “I’m on your side”
- Direct conversations +
  - But note the potential risks
- Follow up
- Open a dialogue
- Address performance issues
- Employee Assistance Programs
- Interactive dialogue and legal/policy compliance

# How to encourage **self-care**?

- Establish confidential reporting procedures and procedures for help
- Reduce expectations of alcohol use at events
- Avoid rewarding extreme behavior
- Set realistic deadlines based on true needs
- Recognize personal needs and accommodate schedules and vacations when possible
- Evaluate 24/7 and face time expectations

# Mental health vs. mental fitness

- Mental health is often stigmatized
- Mental health often correlated to mental illness
- We know it is important to take care of our bodies. It is as important (or more) to care for our minds.
- Going to the gym makes the body more fit; creating and going to a “gym for the mind” makes the mind fit.



# Part IV: Applying these principles to workplace scenarios

# Hypothetical #1

- During Kristin's annual performance review, she received feedback that she does not reply to emails as promptly as is expected of her and that her work product is sometimes turned in late. In response to this constructive criticism, Kristin tells her supervisor that she has been battling depression and anxiety due to some issues in her personal life.

**What should the supervisor do?**

# Hypothetical #1

**Answer:**

- Express empathy and remind Kristin that the company will do what it can to support her.
- Supervisor should be careful not to request/receive too many details about Kristin's condition.
- Supervisor should encourage Kristin to contact HR, which can provide details on any leaves/benefits available, and remind Kristin that the company has robust policies and practices aimed at supporting employees.
- Supervisor should also inform HR that Kristin disclosed these conditions, as it puts the company on notice of a condition that may rise to the level of a disability under applicable law.

***Practice Tip -*** Sometimes employees will raise these issues in response to a bad review in an effort to engage in protected activity/so they are not disciplined or fired. Employers must complete the applicable disability/leave assessments, but should also continue performance counseling/documenting as appropriate.

# Hypothetical #2

- Jason has been having weekly therapy sessions for over a year and has recently been diagnosed with bipolar disorder. His health care provider has recommended that he take some time off from work for more intensive therapy and to switch prescription medications.

**What leave/benefits may Jason take under applicable law?**

# Hypothetical #2

**Answer:**

- Bipolar disorder will most likely be a qualifying condition under the ADA/state/local equivalents and the FMLA.
- Jason may be entitled to a reasonable accommodation (e.g., schedule changes for appointments), a leave of absence under the FMLA/disability statutes for treatment, or intermittent leave under the FMLA to attend treatment.
- This fact pattern likely qualifies as “continuing treatment” under the FMLA guidance on mental health conditions.
- As part of the request/review/approval process, and provided the employer obtains appropriate medical authorizations, it may request supporting documentation/notes from Jason’s health care provider to confirm the basis, need, and duration of any time off request.

# Hypothetical #3

- Lauren confides in her colleague Jen that her boyfriend broke up with her and is now dating her best friend. Lauren is very upset over the break up and is having a hard time focusing at work. She wants to take some time off from work until she gets over the break up.

**Can Lauren take leave or receive an accommodation under applicable law due to this?**

# Hypothetical #3

**Answer:**

- It depends… to meet the standard under disability and leave statutes, there will need to be some sort of diagnosis and corroboration of a need for treatment.
- If the break up results in Lauren being diagnosed as having depression or PTSD, or requiring intensive therapy/inpatient sessions, it may be enough.

# Where do we go from here?

# Questions

# Handout Materials

- US Department of Labor Mental Health and FMLA FAQs
- US Department of Labor Fact Sheet #280: Mental Health and the FMLA
- EEOC Guidance on Depression, PTSD & Other Mental Health Conditions in the Workplace: Your Legal Rights
- EEOC Guidance on Reasonable Accommodation and Undue Hardship under the ADA
- Cases applying the ADA and FMLA standards to mental health conditions
- New York State Paid Sick Leave Fact Sheet
- New York City Commission on Human Rights Legal Enforcement Guidance on Discrimination on the Basis of Disability
- New York City Paid Safe and Sick Leave Law FAQs
- Articles and resources on attorney mental health and substance abuse

ABU DHABI
ATHENS
AUSTIN
BEIJING
BRUSSELS
CENTURY CITY
CHICAGO
DALLAS
DUBAI
FRANKFURT
HONG KONG
HOUSTON
KAZAKHSTAN
LONDON
LOS ANGELES
MIAMI
MUNICH
NEW YORK
PARIS
PHILADELPHIA
PITTSBURGH
PRINCETON
RICHMOND
SAN FRANCISCO
SHANGHAI
SILICON VALLEY
SINGAPORE
TYSONS
WASHINGTON, D.C.
WILMINGTON

**Reed Smith is a dynamic international law firm, dedicated to helping clients move their businesses forward.**

Reed Smith is a dynamic international law firm dedicated to helping clients move their businesses forward. With an inclusive culture and innovative mindset, we deliver smarter, more creative legal services that drive better outcomes for our clients. Our deep industry knowledge, long-standing relationships and collaborative structure make us the go-to partner for complex disputes, transactions, and regulatory matters.

For further information, please visit reedsmith.com




This document is not intended to provide legal advice to be used in a specific fact situation; the contents are for informational purposes only.
"Reed Smith" refers to Reed Smith LLP and related entities. © Reed Smith LLP 2021

**reedsmith.com**

ReedSmith
Driving progress
through partnership

U.S. DEPARTMENT OF LABOR

**Wage and Hour Division**

# Mental Health and the FMLA

## Fact Sheet

- Fact Sheet #28O: Mental Health and the FMLA (PDF)

## Resources

- The Campaign for Disability Employment: What Can You Do?
- The “Mental Health at Work: What Can I do” PSA Campaign

## Frequently Asked Questions

### (Q) May I use FMLA leave when I am unable to work because of severe anxiety? I see a physician monthly for this condition to manage my symptoms.

Yes. Assuming that you work for a covered employer and are eligible for FMLA leave, you may take leave if you are unable to work due to a serious health condition under the FMLA. A chronic condition whether physical or mental (e.g., rheumatoid arthritis, anxiety, dissociative disorders) that may cause occasional periods when an individual is unable to work is a qualifying serious health condition if it requires treatment by a health care provider at least twice a year and recurs over an extended period of time.

### (Q) I am under the care of a psychologist and attend psychotherapy sessions regularly for anorexia nervosa. Is my leave for treatment related to this condition protected under the FMLA?

Yes. Assuming that you work for a covered employer and are eligible for FMLA leave, you may take leave for treatment visits and therapy sessions for the condition.  Under the FMLA, you may use available leave when you are unable to work, including being unable to perform any one of the essential functions of your position, due to a serious health condition, or when you are receiving treatment for that condition.

### (Q) My daughter, who is 24 years old, was recently released from several days of inpatient treatment for a mental health condition. May I use FMLA leave for her care? She is unable to work or go to school and needs help with cooking, cleaning, shopping, and other daily activities.

Yes. Assuming that you work for a covered employer and are eligible for FMLA leave, you may use FMLA leave to care for your child who is 18 years of age or older if the child is incapable of self-care because of a disability as defined by the ADA, has a serious health condition as defined by the FMLA, and needs care because of the serious health condition.

A disability under the ADA is a mental or physical condition that substantially limits one or more of the major life activities of an individual, such as working. Major depressive disorder, bipolar disorder, obsessive compulsive disorder, and schizophrenia are a few examples of mental health conditions that may substantially limit one or more of an individual’s major life activities when active. A mental health condition requiring an overnight stay in a hospital or residential medical care facility would be a qualifying serious health condition under the FMLA.

## (Q) May I use FMLA leave to attend a family counseling session for my spouse who is in an inpatient treatment program for substance abuse?

Yes. Assuming that you work for a covered employer and are eligible for FMLA leave, you may use FMLA leave to provide care for your spouse who is undergoing inpatient treatment for substance abuse. Care could include participating in your spouse's medical treatment program or attending a care conference with your spouse's health care providers.

## (Q) When my father passed away, my mother began to see a doctor for depression and needs assistance with day-to-day self-care because of this condition. Currently, I use FMLA leave to take her to her medical appointments and my sister stays with her during the day. May I also use FMLA leave to help my mother with her day-to-day needs?

Yes. Assuming that you work for a covered employer and are eligible for FMLA leave, you may use FMLA leave to provide physical and psychological care to your mother. You do not need to be the only individual or family member available to help to use FMLA leave for her care. Caring for a family member under the FMLA includes helping with basic medical, hygienic, nutritional or safety needs, and filling in for others who normally provide care.

## (Q) My spouse is a veteran who is suffering from post-traumatic stress disorder (PTSD) since his honorable service discharge last year. May I use FMLA leave for his care?

Yes. An eligible employee who works for a covered employer may use military caregiver leave under the FMLA to care for a relative who is a covered veteran undergoing treatment, recuperating, or in therapy for a serious injury or illness. A serious injury or illness is one that was incurred in the line of duty when the veteran was on active duty in the Armed Forces, including any injury or illness that resulted from the aggravation of a condition that existed before the veteran's service in the line of duty on active duty. The condition may manifest itself during active duty or may develop after the servicemember becomes a veteran, as may be the case with PTSD, a traumatic brain injury (TBI), or depression, for example.

## (Q) I use FMLA leave once a month for appointments with a mental health therapist. Is my employer required to keep my mental health condition confidential?

Yes. The FMLA requires your employer to keep your medical records confidential and maintain them in separate files from more routine personnel files. Your employer must also maintain your records with confidentiality as required under other laws, such as the Americans with Disabilities Act (ADA) or the Genetic Information Nondiscrimination Act (GINA), where those laws also apply.

However, your supervisor and managers may be informed that you need to be away from work, or if you have work duty restrictions or need accommodations.

The FMLA prohibits your employer from interfering with or restraining your right to take FMLA leave. Your employer is prohibited, for example, from sharing or threatening to share information about your health to discourage you or your coworkers from using FMLA leave.

## (Q) My son is in the fourth grade and sees a doctor for attention-deficit/hyperactivity disorder (ADHD). After I used FMLA leave to take my son to a behavioral therapy appointment for this condition my employer sent me an e-mail informing me that I received a negative point on my attendance record. Can my employer punish me for using FMLA leave?

No. Employers are prohibited from discriminating or retaliating against employees for having exercised or attempting to exercise any FMLA right. Examples include using the taking of FMLA leave as a negative factor in employment actions, such as in hiring, promotions, or disciplinary actions or counting FMLA leave against employees in points-based attendance policies.

**U.S. Department of Labor**
Wage and Hour Division

(May 2022)

# Fact Sheet # 28O: Mental Health Conditions and the FMLA

The Family and Medical Leave Act (FMLA) provides job-protected leave to address mental health conditions. This fact sheet explains when eligible employees of covered employers may use FMLA leave for their own or a family member's mental health condition.

## ABOUT THE FMLA

FMLA leave is available to:

- Eligible employees: Employees are eligible if they work for a covered employer for at least 12 months, have at least 1,250 hours of service for the employer during the 12 months before the leave, and work at a location where the employer has at least 50 employees within 75 miles.
- of Covered Employers: Private employers are covered employers under the FMLA if they employed 50 or more employees in 20 or more workweeks in the current or preceding calendar year, including joint employers or successors in interest to another covered employer. Public agencies, including a local, state, or Federal government agency, and public and private elementary and secondary schools are FMLA covered employers regardless of the number of employees they employ.

FMLA requires employers to:

- Provide 12 work weeks of FMLA leave each year;
- continue an employee's group health benefits under the same conditions as if the employee had not taken leave; and
- restore the employee to the same or virtually identical position at the end of the leave period.

FMLA may be unpaid or may be used at the same time as employer provided paid leave.
For more information about the FMLA generally, see Fact Sheet #28.

## LEAVE FOR MENTAL HEALTH CONDITIONS UNDER THE FMLA

An eligible employee may take FMLA leave for their own serious health condition, or to care for a spouse, child, or parent because of a serious health condition. A serious health condition can include a mental health condition.

Mental and physical health conditions are considered serious health conditions under the FMLA if they require 1) inpatient care **or** 2) continuing treatment by a health care provider.

A serious mental health condition that requires **inpatient care** includes an overnight stay in a hospital or other medical care facility, such as, for example, a treatment center for addiction or eating disorders.

A serious mental health condition that requires **continuing treatment** by a health care provider includes—

- Conditions that incapacitate an individual for more than three consecutive days and require ongoing medical treatment, either multiple appointments with a health care provider, including a psychiatrist, clinical psychologist, or clinical social worker, or a single appointment and follow-up care (e.g., prescription medication, outpatient rehabilitation counseling, or behavioral therapy); and
- Chronic conditions (e.g., anxiety, depression, or dissociative disorders) that cause occasional periods when an individual is incapacitated and require treatment by a health care provider at least twice a year.

An employer may require an employee to submit a certification from a health care provider to support the employee's need for FMLA leave. The information provided on the certification must be sufficient to support the need for leave, but a diagnosis is not required.

For more information about certification of a serious health condition under the FMLA, see Fact Sheet #28G.

**REASONS FOR LEAVE**

**Leave for the Employee's Mental Health Condition**

An eligible employee may take up to 12 workweeks of leave for **their own serious health condition** that makes the employee unable to perform their essential job duties.

Example:

> *Karen is occasionally unable to work due to severe anxiety. She sees a doctor monthly to manage her symptoms. Karen uses FMLA leave to take time off when she is unable to work unexpectedly due to her condition and when she has a regularly scheduled appointment to see her doctor during her work shift.*

**Leave to Care for Family Member with a Mental Health Condition**

Leave may also be taken to **provide care** for a spouse, child, or parent who is unable to work or perform other regular daily activities because of a serious health condition. Providing care includes providing psychological comfort and reassurance that would be beneficial to a family member with a serious health condition who is receiving inpatient or home care. FMLA leave for the care of a child with a serious health condition is generally limited to providing care for a child under the age of 18.

Example:

> *Wyatt uses one day of FMLA leave to travel to an inpatient facility and attend an after-care meeting for his fifteen-year-old son who has completed a 60-day inpatient drug rehabilitation treatment program.*

**Leave to Care for an Adult Child with a Mental Health Condition**

A parent may use FMLA leave to care for a child 18 years of age or older who is in need of care because of a serious health condition, if the individual is incapable of self-care because of a mental or physical

disability. For practical purposes, some mental health conditions may satisfy both the definition of "disability" and the definition of "serious health condition," even though the statutory tests are different.

Under the FMLA, a disability is a mental or physical impairment that substantially limits one or more of the major life activities of an individual. To define these terms and determine if a condition is a disability, the FMLA uses the Equal Employment Opportunity Commission's (EEOC) regulations under the Americans with Disabilities Act (ADA). According to the EEOC, conditions that "should easily be concluded" to be "substantially limiting" include major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia.

Conditions that may only be active periodically are considered disabilities if the condition would substantially limit a major life activity when active. The disability does not have to have occurred or been diagnosed before the age of 18. The disability may start at any age.

Example:

> *Anastasia uses FMLA leave to care for her daughter, Alex. Alex is 24 years old and was recently released from several days of inpatient treatment for a mental health condition. She is unable to work or go to school and needs help with cooking, cleaning, shopping, and other daily activities as a result of the condition.*

For more information about FMLA leave for the care of a child 18 years of age or older with a serious health condition, see Fact Sheet #28K and WHD Administrator's Interpretation No. 2013-1.

**Military Caregiver Leave for Mental Health Conditions**

The FMLA also provides eligible employees with up to **26 workweeks** of military caregiver leave in a single 12-month period to care for a covered servicemember and certain veterans with a serious injury or illness. An employee may be an eligible military caregiver if they are the spouse, son, daughter, parent, or next of kin of the servicemember.

For a current servicemember, a serious injury or illness is one that was incurred by the servicemember in the line of duty that may make the servicemember medically unfit to perform the duties of their office, grade, rank, or rating. A serious injury or illness may also result from the aggravation in the line of duty on active duty of a condition that existed before the member began service.

For a veteran, a serious injury or illness is one that made the veteran medically unfit to perform his or her military duties, or an injury or illness that qualifies the veteran for certain benefits from the Department of Veterans Affairs or substantially reduces the veteran's ability to work. For veterans, it includes injuries or illnesses that were incurred or aggravated during military service but that did not manifest until after the veteran left active duty. An injury or illness may manifest after the individual became a veteran, for example, when the military family member has post-traumatic stress disorder (PTSD), a traumatic brain injury (TBI), or depression that occurs well after an event occurred.

Example:

> *Gordon's spouse began to have symptoms of PTSD three years after she was honorably discharged from military service overseas. Gordon uses FMLA leave for two weeks to transport his spouse to and from outpatient treatment at a Veteran's Administration hospital and to assist her with day-to-day needs while she is incapacitated.*

An employer may require that a request for military caregiver leave be supported by a certification. The certification may be completed by a Department of Defense (DOD), Veterans Affairs (VA), or TRICARE health care provider, or by a private health care provider if the provider meets the FMLA definition.

For more information about military caregiver leave under the FMLA, including the definition of a serious injury or illness for a covered servicemember, and certification requirements, see Fact Sheets #28M(a) and #28M(b).

**Confidentiality**

The FMLA requires employers to keep employee medical records confidential and maintain them in separate files from more routine personnel files. Employers must also maintain an employee's records with confidentiality as required under other laws, such as the Americans with Disabilities Act (ADA) or the Genetic Information Nondiscrimination Act (GINA), where those laws also apply.

However, supervisor and managers may be informed of an employee's need to be away from work, or if an employee needs work duty restrictions or accommodations.

**Protection from Retaliation**

Employers are prohibited from interfering with, restraining, or denying the exercise of, or the attempt to exercise, any FMLA right. Any violations of the FMLA or the FMLA regulations constitute interfering with, restraining or denying the exercise of rights provided by the FMLA. Examples include refusing to authorize FMLA leave or disclosing or threatening to disclose information about an employee's or an employee's family member's mental health condition in order to discourage them from taking FMLA leave.

For more information about prohibited employer retaliation under the FMLA, see Fact Sheet #77B and Field Assistance Bulletin 2022-2.

**Enforcement**

The Wage and Hour Division is responsible for administering and enforcing the FMLA for most employees. If you believe that your rights under the FMLA have been violated, you may file a complaint with the Wage and Hour Division or file a private lawsuit against your employer in court. State employees may be subject to certain limitations regarding direct lawsuits about leave for their own serious health conditions. Most federal and certain congressional employees are also covered by the law but are subject to the jurisdiction of the U.S. Office of Personnel Management or Congress.

**Where to Obtain Additional Information**

**For additional information, scan the QR code or visit FMLA website: dol.gov/agencies/whd/fmla and/or call our toll-free information and helpline, 1-866-4USWAGE (1-866-487-9243).**

This publication is for general information and is not to be considered in the same light as official statements of position contained in the regulations, 29 CFR Part 825.

**U.S. Department of Labor**
200 Constitution Ave NW
Washington, DC 20210

**1-866-4-USWAGE (87-9243)**
**Contact Us**
**dol.gov/agencies/whd**

U.S. Equal Employment Opportunity Commission

# Depression, PTSD, & Other Mental Health Conditions in the Workplace: Your Legal Rights

This technical assistance document was issued upon approval of the Chair of the U.S. Equal Employment Opportunity Commission.

**OLC Control Number:**

EEOC-NVTA-2016-11

**Concise Display Name:**

Depression, PTSD, & Other Mental Health Conditions in the Workplace: Your Legal Rights

**Issue Date:**

12-12-2016

**General Topics:**

ADA/GINA

**Summary:**

This document provides information on the ADA rights of people with depression, PTSD, and other Mental Health Conditions.

**Citation:**

ADA, Rehabilitation Act, 29 CFR Part 1630

**Document Applicant:**

Employees, Applicants, Employers

**Previous Revision:**

No

The contents of this document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.

If you have depression, post-traumatic stress disorder (PTSD), or another mental health condition, you are protected against **discrimination** and **harassment** at work because of your condition, you have workplace **privacy** rights, and you may have a legal right to get reasonable **accommodations** that can help you perform and keep your job. The following questions and answers briefly explain these rights, which are provided by the Americans with Disabilities Act (ADA). You may also have additional rights under other laws not discussed here, such as the Family and Medical Leave Act (FMLA) and various medical insurance laws.

**1. Is my employer allowed to fire me because I have a mental health condition?**

No. It is illegal for an employer to **discriminate** against you simply because you have a mental health condition. This includes firing you, rejecting you for a job or promotion, or forcing you to take leave.

An employer doesn't have to hire or keep people in jobs they can't perform, or employ people who pose a "direct threat" to safety (a significant risk of substantial harm to self or others). But an employer cannot rely on myths or stereotypes about your mental health condition when deciding whether you can perform a job or whether you pose a safety risk. Before an employer can reject you for a job based on your condition, it must have objective evidence that you can't perform your job duties, or that you would create a significant safety risk, even with a reasonable accommodation (see Question 3).

**2. Am I allowed to keep my condition private?**

In most situations, you can keep your condition private. An employer is only allowed to ask medical questions (including questions about mental health) in four situations:

- When you ask for a reasonable accommodation (see Question 3).

- After it has made you a job offer, but before employment begins, as long as everyone entering the same job category is asked the same questions.
- When it is engaging in affirmative action for people with disabilities (such as an employer tracking the disability status of its applicant pool in order to assess its recruitment and hiring efforts, or a public sector employer considering whether special hiring rules may apply), in which case you may choose whether to respond.
- On the job, when there is objective evidence that you may be unable to do your job or that you may pose a safety risk because of your condition.

You also may need to discuss your condition to establish eligibility for benefits under other laws, such as the FMLA. If you do talk about your condition, the employer cannot discriminate against you (see Question 5), and it must keep the information confidential, even from co-workers. (If you wish to discuss your condition with coworkers, you may choose to do so.)

**3. What if my mental health condition could affect my job performance?**

You may have a legal right to a reasonable accommodation that would help you do your job. A reasonable accommodation is some type of change in the way things are normally done at work. Just a few examples of possible accommodations include altered break and work schedules (e.g., scheduling work around therapy appointments), quiet office space or devices that create a quiet work environment, changes in supervisory methods (e.g., written instructions from a supervisor who usually does not provide them), specific shift assignments, and permission to work from home.

You can get a reasonable accommodation for any mental health condition that would, if left untreated, "substantially limit" your ability to concentrate, interact with others, communicate, eat, sleep, care for yourself, regulate your thoughts or emotions, or do any other "major life activity." (You don't need to actually stop treatment to get the accommodation.)

**Your condition does not need to be permanent or severe to be "substantially limiting**." It may qualify by, for example, making activities more difficult, uncomfortable, or time-consuming to perform compared to the way that most people perform them. If your symptoms come and go, what matters is how limiting they would be when the symptoms are present. Mental health conditions like major

depression, post-traumatic stress disorder (PTSD), bipolar disorder, schizophrenia, and obsessive compulsive disorder (OCD) should easily qualify, and many others will qualify as well.

**4. How can I get a reasonable accommodation?**

Ask for one. Tell a supervisor, HR manager, or other appropriate person that you need a change at work because of a medical condition. You may ask for an accommodation at any time. Because an employer does not have to excuse poor job performance, even if it was caused by a medical condition or the side effects of medication, it is generally better to get a reasonable accommodation **before** any problems occur or become worse. (Many people choose to wait to ask for accommodation until after they receive a job offer, however, because it's very hard to prove illegal discrimination that takes place before a job offer.) You don't need to have a particular accommodation in mind, but you can ask for something specific.

**5. What will happen after I ask for a reasonable accommodation?**

Your employer may ask you to put your request in writing, and to generally describe your condition and how it affects your work. The employer also may ask you to submit a letter from your health care provider documenting that you have a mental health condition, and that you need an accommodation because of it. If you do not want the employer to know your specific diagnosis, it may be enough to provide documentation that describes your condition more generally (by stating, for example, that you have an "anxiety disorder"). Your employer also might ask your health care provider whether particular accommodations would meet your needs. You can help your health care provider understand the law of reasonable accommodation by bringing a copy of the EEOC publication **The Mental Health Provider's Role in a Client's Request for a Reasonable Accommodation at Work (https://www.eeoc.gov/laws/guidance/mental-health-providers-role-clients-request-reasonable-accommodation-work)** to your appointment.

If a reasonable accommodation would help you to do your job, your employer must give you one unless the accommodation involves significant difficulty or expense. If more than one accommodation would work, the employer can choose which one to give you. Your employer can't legally fire you, or refuse to hire or promote you, because you asked for a reasonable accommodation or because you need one. It also cannot charge you for the cost of the accommodation.

**6. What if there's no way I can do my regular job, even with an accommodation?**

If you can't perform all the essential functions of your job to normal standards and have no paid leave available, you still may be entitled to unpaid leave as a reasonable accommodation if that leave will help you get to a point where you can perform those functions. You may also qualify for leave under the Family and Medical Leave Act, which is enforced by the United States Department of Labor. More information about this law can be found at **www.dol.gov/whd/fmla (https://www.dol.gov/whd/fmla)** .

If you are permanently unable to do your regular job, you may ask your employer to reassign you to a job that you can do as a reasonable accommodation, if one is available. More information on reasonable accommodations in employment, including reassignment, is available **here (https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada)** .

**7. What if I am being harassed because of my condition?**

**Harassment** based on a disability is not allowed under the ADA. You should tell your employer about any harassment if you want the employer to stop the problem. Follow your employer's reporting procedures if there are any. If you report the harassment, your employer is legally required to take action to prevent it from occurring in the future.

**8. What should I do if I think that my rights have been violated?**

The Equal Employment Opportunity Commission (EEOC) can help you decide what to do next, and conduct an investigation if you decide to file a charge of discrimination. Because you must file a charge within 180 days of the alleged violation in order to take further legal action (or 300 days if the employer is also covered by a state or local employment discrimination law), it is best to begin the process early. **It is illegal for your employer to retaliate against you for contacting the EEOC or filing a charge**. For more information, visit **http://www.eeoc.gov (https://www.eeoc.gov)** , call 800-669-4000 (voice) or 800-669-6820 (TTY), or visit your local EEOC office (*see* **https://www.eeoc.gov/field (https://www.eeoc.gov/field)** for contact information).

U.S. Equal Employment Opportunity Commission

# Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA

This guidance document was issued upon approval by vote of the U.S. Equal Employment Opportunity Commission.

**OLC Control Number:**

EEOC-CVG-2003-1

**Concise Display Name:**

Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA

**Issue Date:**

10-17-2002

**General Topics:**

Disability

**Summary:**

This document addresses the rights and responsibilities of employers and individuals with disabilities regarding reasonable accommodation and undue hardship under Title I of the ADA.

**Citation:**

ADA, Rehabilitation Act, 29 CFR Part 1630, 29 CFR Part 1614

**Document Applicant:**

Employers, Employees, Applicants, Attorneys and Practitioners, EEOC Staff

**Previous Revision:**

Yes. This document replaced a 1999 guidance document by the same name.

The contents of this document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.

| | | |
|---|---|---|
| | NOTICE | Number 915.002 |
| EEOC | | |
| | | October 17, 2002 |

1. SUBJECT: EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act
2. PURPOSE: This enforcement guidance supersedes the enforcement guidance issued by the Commission on 03/01/99. Most of the original guidance remains the same, but limited changes have been made as a result of: (1) the Supreme Court's decision in US Airways, Inc. v. Barnett, 535 U.S., 122 S. Ct. 1516 (2002), and (2) the Commission's issuance of new regulations under section 501 of the Rehabilitation Act. The major changes in response to the Barnett decision are found on pages 4-5, 44-45, and 61-62. In addition, minor changes were made to certain footnotes and the Instructions for Investigators as a result of the Barnett decision and the new section 501 regulations.
3. EFFECTIVE DATE: Upon receipt.
4. EXPIRATION DATE: As an exception to EEOC Order 205.001, Appendix B, Attachment 4, . a(5), this Notice will remain in effect until rescinded or superseded.
5. ORIGINATOR: ADA Division, Office of Legal Counsel.
6. INSTRUCTIONS: File after Section 902 of Volume II of the Compliance Manual.

# Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act

## Table of Contents

---

# INTRODUCTION

This Enforcement Guidance clarifies the rights and responsibilities of employers and individuals with disabilities regarding reasonable accommodation and undue hardship. Title I of the ADA requires an employer to provide reasonable accommodation to qualified individuals with disabilities who are employees or applicants for employment, except when such accommodation would cause an undue hardship. This Guidance sets forth an employer's legal obligations regarding reasonable accommodation; however, employers may provide more than the law requires.

This Guidance examines what "reasonable accommodation" means and who is entitled to receive it. The Guidance addresses what constitutes a request for reasonable accommodation, the form and substance of the request, and an employer's ability to ask questions and seek documentation after a request has been made.

The Guidance discusses reasonable accommodations applicable to the hiring process and to the benefits and privileges of employment. The Guidance also covers different types of reasonable accommodations related to job performance, including job restructuring, leave, modified or part-time schedules, modified workplace policies, and reassignment. Questions concerning the relationship between the ADA and the Family and Medical Leave Act (FMLA) are examined as they affect leave and modified schedules. Reassignment issues addressed include who is entitled to reassignment and the extent to which an employer must search for a vacant position. The Guidance also examines issues concerning the interplay between reasonable accommodations and conduct rules.

The final section of this Guidance discusses undue hardship, including when requests for schedule modifications and leave may be denied.

# GENERAL PRINCIPLES

**Reasonable Accommodation**

Title I of the Americans with Disabilities Act of 1990 (the "ADA")[(1)] requires an employer[(2)] to provide reasonable accommodation to qualified individuals with disabilities who are employees or applicants for employment, unless to do so would cause undue hardship. "In general, an accommodation is any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities."[(3)] There are three categories of "reasonable accommodations":

> "(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; or
>
> (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."[(4)]

The duty to provide reasonable accommodation is a fundamental statutory requirement because of the nature of discrimination faced by individuals with disabilities. Although many individuals with disabilities can apply for and perform jobs without any reasonable accommodations, there are workplace barriers that keep others from performing jobs which they could do with some form of accommodation. These barriers may be physical obstacles (such as inaccessible facilities or equipment), or they may be procedures or rules (such as rules concerning when work is performed, when breaks are taken, or how essential or marginal functions are performed). Reasonable accommodation removes workplace barriers for individuals with disabilities.

Reasonable accommodation is available to qualified applicants and employees with disabilities.[(5)] Reasonable accommodations must be provided to qualified employees regardless of whether they work part- time or full-time, or are considered "probationary." Generally, the individual with a disability must inform the employer that an accommodation is needed.[(6)]

There are a number of possible reasonable accommodations that an employer may have to provide in connection with modifications to the work environment or adjustments in how and when a job is performed. These include:

- making existing facilities accessible;
- job restructuring;
- part-time or modified work schedules;
- acquiring or modifying equipment;
- changing tests, training materials, or policies;
- providing qualified readers or interpreters; and
- reassignment to a vacant position.[(7)]

A modification or adjustment is "reasonable" if it "seems reasonable on its face, i.e., ordinarily or in the run of cases;"[(8)] this means it is "reasonable" if it appears to be "feasible" or "plausible."[(9)]An accommodation also must be effective in meeting the needs of the individual.[(10)] In the context of job performance, this means that a

reasonable accommodation enables the individual to perform the essential functions of the position. Similarly, a reasonable accommodation enables an applicant with a disability to have an equal opportunity to participate in the application process and to be considered for a job. Finally, a reasonable accommodation allows an employee with a disability an equal opportunity to enjoy the benefits and privileges of employment that employees without disabilities enjoy.

Example A: An employee with a hearing disability must be able to contact the public by telephone. The employee proposes that he use a TTY.[(11)] to call a relay service operator who can then place the telephone call and relay the conversation between the parties. This is "reasonable" because a TTY is a common device used to facilitate communication between hearing and hearing-impaired individuals. Moreover, it would be effective in enabling the employee to perform his job.

Example B: A cashier easily becomes fatigued because of lupus and, as a result, has difficulty making it through her shift. The employee requests a stool because sitting greatly reduces the fatigue. This accommodation is reasonable because it is a common-sense solution to remove a workplace barrier being required to stand when the job can be effectively performed sitting down. This "reasonable" accommodation is effective because it addresses the employee's fatigue and enables her to perform her job.

Example C: A cleaning company rotates its staff to different floors on a monthly basis. One crew member has a psychiatric disability. While his mental illness does not affect his ability to perform the various cleaning functions, it does make it difficult to adjust to alterations in his daily routine. The employee has had significant difficulty adjusting to the monthly changes in floor assignments. He asks for a reasonable accommodation and proposes three options: staying on one floor permanently, staying on one floor for two months and then rotating, or allowing a transition period to adjust to a change in floor assignments. These accommodations are reasonable because they appear to be feasible solutions to this employee's problems dealing with changes to his routine. They also appear to be effective because they would enable him to perform his cleaning duties.

There are several modifications or adjustments that are not considered forms of reasonable accommodation.[(12)] An employer does not have to eliminate an essential function, i.e., a fundamental duty of the position. This is because a person with a disability who is unable to perform the essential functions, with or without

reasonable accommodation,[(13)] is not a "qualified" individual with a disability within the meaning of the ADA. Nor is an employer required to lower production standards -- whether qualitative or quantitative[(14)] -- that are applied uniformly to employees with and without disabilities. However, an employer may have to provide reasonable accommodation to enable an employee with a disability to meet the production standard. While an employer is not required to eliminate an essential function or lower a production standard, it may do so if it wishes.

An employer does not have to provide as reasonable accommodations personal use items needed in accomplishing daily activities both on and off the job. Thus, an employer is not required to provide an employee with a prosthetic limb, a wheelchair, eyeglasses, hearing aids, or similar devices if they are also needed off the job. Furthermore, an employer is not required to provide personal use amenities, such as a hot pot or refrigerator, if those items are not provided to employees without disabilities. However, items that might otherwise be considered personal may be required as reasonable accommodations where they are specifically designed or required to meet job-related rather than personal needs.[(15)]

**Undue Hardship**

The only statutory limitation on an employer's obligation to provide "reasonable accommodation" is that no such change or modification is required if it would cause "undue hardship" to the employer.[(16)] "Undue hardship" means significant difficulty or expense and focuses on the resources and circumstances of the particular employer in relationship to the cost or difficulty of providing a specific accommodation. Undue hardship refers not only to financial difficulty, but to reasonable accommodations that are unduly extensive, substantial, or disruptive, or those that would fundamentally alter the nature or operation of the business.[(17)] An employer must assess on a case-by-case basis whether a particular reasonable accommodation would cause undue hardship. The ADA's "undue hardship" standard is different from that applied by courts under Title VII of the Civil Rights Act of 1964 for religious accommodation.[(18)]

# REQUESTING REASONABLE ACCOMMODATION

1. How must an individual request a reasonable accommodation?

When an individual decides to request accommodation, the individual or his/her representative must let the employer know that s/he needs an adjustment or change at work for a reason related to a medical condition. To request accommodation, an individual may use "plain English" and need not mention the ADA or use the phrase "reasonable accommodation."[(19)]

Example A: An employee tells her supervisor, "I'm having trouble getting to work at my scheduled starting time because of medical treatments I'm undergoing." This is a request for a reasonable accommodation.

Example B: An employee tells his supervisor, "I need six weeks off to get treatment for a back problem." This is a request for a reasonable accommodation.

Example C: A new employee, who uses a wheelchair, informs the employer that her wheelchair cannot fit under the desk in her office. This is a request for reasonable accommodation.

Example D: An employee tells his supervisor that he would like a new chair because his present one is uncomfortable. Although this is a request for a change at work, his statement is insufficient to put the employer on notice that he is requesting reasonable accommodation. He does not link his need for the new chair with a medical condition.

While an individual with a disability may request a change due to a medical condition, this request does not necessarily mean that the employer is required to provide the change. A request for reasonable accommodation is the first step in an informal, interactive process between the individual and the employer. In some instances, before addressing the merits of the accommodation request, the employer needs to determine if the individual's medical condition meets the ADA definition of "disability,"[(20)] a prerequisite for the individual to be entitled to a reasonable accommodation.

2. May someone other than the individual with a disability request a reasonable accommodation on behalf of the individual?

   Yes, a family member, friend, health professional, or other representative may request a reasonable accommodation on behalf of an individual with a disability.[(21)] Of course, the individual with a disability may refuse to accept an accommodation that is not needed.

Example A: An employee's spouse phones the employee's supervisor on Monday morning to inform her that the employee had a medical emergency due to multiple sclerosis, needed to be hospitalized, and thus requires time off. This discussion constitutes a request for reasonable accommodation.

Example B: An employee has been out of work for six months with a workers' compensation injury. The employee's doctor sends the employer a letter, stating that the employee is released to return to work, but with certain work restrictions. (Alternatively, the letter may state that the employee is released to return to a light duty position.) The letter constitutes a request for reasonable accommodation.

3. Do requests for reasonable accommodation need to be in writing?

   No. Requests for reasonable accommodation do not need to be in writing. Individuals may request accommodations in conversation or may use any other mode of communication.[(22)] An employer may choose to write a memorandum or letter confirming the individual's request. Alternatively, an employer may ask the individual to fill out a form or submit the request in written form, but the employer cannot ignore the initial request. An employer also may request reasonable documentation that the individual has an ADA disability and needs a reasonable accommodation. (See Question 6).

4. When should an individual with a disability request a reasonable accommodation?

   An individual with a disability may request a reasonable accommodation at any time during the application process or during the period of employment. The ADA does not preclude an employee with a disability from requesting a reasonable accommodation because s/he did not ask for one when applying for a job or after receiving a job offer. Rather, an individual with a disability should request a reasonable accommodation when s/he knows that there is a workplace barrier that is preventing him/her, due to a disability, from effectively competing for a position, performing a job, or gaining equal access to a benefit of employment.[(23)] As a practical matter, it may be in an employee's interest to request a reasonable accommodation before performance suffers or conduct problems occur.

5. What must an employer do after receiving a request for reasonable accommodation?

   The employer and the individual with a disability should engage in an informal process to clarify what the individual needs and identify the appropriate reasonable accommodation.[(24)] The employer may ask the individual relevant questions that will enable it to make an informed decision about the request. This includes asking what type of reasonable accommodation is needed.[(25)]

   The exact nature of the dialogue will vary. In many instances, both the disability and the type of accommodation required will be obvious, and thus there may be little or no need to engage in any discussion. In other situations, the employer may need to ask questions concerning the nature of the disability and the individual's functional limitations in order to identify an effective accommodation. While the individual with a disability does not have to be able to specify the precise accommodation, s/he does need to describe the problems posed by the workplace barrier. Additionally, suggestions from the individual with a disability may assist the employer in determining the type of reasonable accommodation to provide. Where the individual or the employer are not familiar with possible accommodations, there are extensive public and private resources to help the employer identify reasonable accommodations once the specific limitations and workplace barriers have been ascertained.[(26)]

6. May an employer ask an individual for documentation when the individual requests reasonable accommodation?

   Yes. When the disability and/or the need for accommodation is not obvious, the employer may ask the individual for reasonable documentation about his/her disability and functional limitations. [(27)] The employer is entitled to know that the individual has a covered disability for which s/he needs a reasonable accommodation.

   Reasonable documentation means that the employer may require only the documentation that is needed to establish that a person has an ADA disability, and that the disability necessitates a reasonable accommodation. Thus, an employer, in response to a request for reasonable accommodation, cannot ask for documentation that is unrelated to determining the existence of a disability and the necessity for an accommodation. This means that in most situations an employer cannot request a person's complete medical records because they

are likely to contain information unrelated to the disability at issue and the need for accommodation. If an individual has more than one disability, an employer can request information pertaining only to the disability that requires a reasonable accommodation.

An employer may require that the documentation about the disability and the functional limitations come from an appropriate health care or rehabilitation professional. The appropriate professional in any particular situation will depend on the disability and the type of functional limitation it imposes. Appropriate professionals include, but are not limited to, doctors (including psychiatrists), psychologists, nurses, physical therapists, occupational therapists, speech therapists, vocational rehabilitation specialists, and licensed mental health professionals.

In requesting documentation, employers should specify what types of information they are seeking regarding the disability, its functional limitations, and the need for reasonable accommodation. The individual can be asked to sign a limited release allowing the employer to submit a list of specific questions to the health care or vocational professional.[(28)]

As an alternative to requesting documentation, an employer may simply discuss with the person the nature of his/her disability and functional limitations. It would be useful for the employer to make clear to the individual why it is requesting information, i.e., to verify the existence of an ADA disability and the need for a reasonable accommodation.

Example A: An employee says to an employer, "I'm having trouble reaching tools because of my shoulder injury." The employer may ask the employee for documentation describing the impairment; the nature, severity, and duration of the impairment; the activity or activities that the impairment limits; and the extent to which the impairment limits the employee's ability to perform the activity or activities (i.e., the employer is seeking information as to whether the employee has an ADA disability).

Example B: A marketing employee has a severe learning disability. He attends numerous meetings to plan marketing strategies. In order to remember what is discussed at these meetings he must take detailed notes but, due to his disability, he has great difficulty writing. The employee tells his supervisor about his disability and requests a laptop computer to use in the meetings.

Since neither the disability nor the need for accommodation are obvious, the supervisor may ask the employee for reasonable documentation about his impairment; the nature, severity, and duration of the impairment; the activity or activities that the impairment limits; and the extent to which the impairment limits the employee's ability to perform the activity or activities. The employer also may ask why the disability necessitates use of a laptop computer (or any other type of reasonable accommodation, such as a tape recorder) to help the employee retain the information from the meetings.[(29)]

Example C: An employee's spouse phones the employee's supervisor on Monday morning to inform her that the employee had a medical emergency due to multiple sclerosis, needed to be hospitalized, and thus requires time off. The supervisor can ask the spouse to send in documentation from the employee's treating physician that confirms that the hospitalization was related to the multiple sclerosis and provides information on how long an absence may be required from work.[(30)]

If an individual's disability or need for reasonable accommodation is not obvious, and s/he refuses to provide the reasonable documentation requested by the employer, then s/he is not entitled to reasonable accommodation.[(31)] On the other hand, failure by the employer to initiate or participate in an informal dialogue with the individual after receiving a request for reasonable accommodation could result in liability for failure to provide a reasonable accommodation.[(32)]

7. May an employer require an individual to go to a health care professional of the employer's (rather than the employee's) choice for purposes of documenting need for accommodation and disability?

   The ADA does not prevent an employer from requiring an individual to go to an appropriate health professional of the employer's choice if the individual provides insufficient information from his/her treating physician (or other health care professional) to substantiate that s/he has an ADA disability and needs a reasonable accommodation. However, if an individual provides insufficient documentation in response to the employer's initial request, the employer should explain why the documentation is insufficient and allow the individual an opportunity to provide the missing information in a timely manner. Documentation is insufficient if it does not specify the existence of an ADA disability and explain the need for reasonable accommodation.[(33)]

Any medical examination conducted by the employer's health professional must be job-related and consistent with business necessity. This means that the examination must be limited to determining the existence of an ADA disability and the functional limitations that require reasonable accommodation.[(34)] If an employer requires an employee to go to a health professional of the employer's choice, the employer must pay all costs associated with the visit(s).

8. Are there situations in which an employer cannot ask for documentation in response to a request for reasonable accommodation?

   Yes. An employer cannot ask for documentation when: (1) both the disability and the need for reasonable accommodation are obvious, or (2) the individual has already provided the employer with sufficient information to substantiate that s/he has an ADA disability and needs the reasonable accommodation requested.

   Example A: An employee brings a note from her treating physician explaining that she has diabetes and that, as a result, she must test her blood sugar several times a day to ensure that her insulin level is safe in order to avoid a hyperglycemic reaction. The note explains that a hyperglycemic reaction can include extreme thirst, heavy breathing, drowsiness, and flushed skin, and eventually would result in unconsciousness. Depending on the results of the blood test, the employee might have to take insulin. The note requests that the employee be allowed three or four 10-minute breaks each day to test her blood, and if necessary, to take insulin. The doctor's note constitutes sufficient documentation that the person has an ADA disability because it describes a substantially limiting impairment and the reasonable accommodation needed as a result. The employer cannot ask for additional documentation.

   Example B: One year ago, an employer learned that an employee had bipolar disorder after he requested a reasonable accommodation. The documentation provided at that time from the employee's psychiatrist indicated that this was a permanent condition which would always involve periods in which the disability would remit and then intensify. The psychiatrist's letter explained that during periods when the condition flared up, the person's manic moods or depressive episodes could be severe enough to create serious problems for the individual in caring for himself or working, and that medication controlled the frequency and severity of these episodes.

Now, one year later, the employee again requests a reasonable accommodation related to his bipolar disorder. Under these facts, the employer may ask for reasonable documentation on the need for the accommodation (if the need is not obvious), but it cannot ask for documentation that the person has an ADA disability. The medical information provided one year ago established the existence of a long-term impairment that substantially limits a major life activity.

Example C: An employee gives her employer a letter from her doctor, stating that the employee has asthma and needs the employer to provide her with an air filter. This letter contains insufficient information as to whether the asthma is an ADA disability because it does not provide any information as to its severity (i.e., whether it substantially limits a major life activity). Furthermore, the letter does not identify precisely what problem exists in the workplace that requires an air filter or any other reasonable accommodation. Therefore, the employer can request additional documentation.

9. Is an employer required to provide the reasonable accommodation that the individual wants?

   The employer may choose among reasonable accommodations as long as the chosen accommodation is effective.[(35)] Thus, as part of the interactive process, the employer may offer alternative suggestions for reasonable accommodations and discuss their effectiveness in removing the workplace barrier that is impeding the individual with a disability.

   If there are two possible reasonable accommodations, and one costs more or is more burdensome than the other, the employer may choose the less expensive or burdensome accommodation as long as it is effective (i.e., it would remove a workplace barrier, thereby providing the individual with an equal opportunity to apply for a position, to perform the essential functions of a position, or to gain equal access to a benefit or privilege of employment). Similarly, when there are two or more effective accommodations, the employer may choose the one that is easier to provide. In either situation, the employer does not have to show that it is an undue hardship to provide the more expensive or more difficult accommodation. If more than one accommodation is effective, "the preference of the individual with a disability should be given primary consideration. However, the employer providing the accommodation has the ultimate discretion to choose between effective accommodations."[(36)]

Example A: An employee with a severe learning disability has great difficulty reading. His supervisor sends him many detailed memoranda which he often has trouble understanding. However, he has no difficulty understanding oral communication. The employee requests that the employer install a computer with speech output and that his supervisor send all memoranda through electronic mail which the computer can then read to him. The supervisor asks whether a tape recorded message would accomplish the same objective and the employee agrees that it would. Since both accommodations are effective, the employer may choose to provide the supervisor and employee with a tape recorder so that the supervisor can record her memoranda and the employee can listen to them.

Example B: An attorney with a severe vision disability requests that her employer provide someone to read printed materials that she needs to review daily. The attorney explains that a reader enables her to review substantial amounts of written materials in an efficient manner. Believing that this reasonable accommodation would be too costly, the employer instead provides the attorney with a device that allows her to magnify print so that she can read it herself. The attorney can read print using this device, but with such great difficulty it significantly slows down her ability to review written materials. The magnifying device is ineffective as a reasonable accommodation because it does not provide the attorney with an equal opportunity to attain the same level of performance as her colleagues. Without an equal opportunity to attain the same level of performance, this attorney is denied an equal opportunity to compete for promotions. In this instance, failure to provide the reader, absent undue hardship, would violate the ADA.

10. How quickly must an employer respond to a request for reasonable accommodation?

    An employer should respond expeditiously to a request for reasonable accommodation. If the employer and the individual with a disability need to engage in an interactive process, this too should proceed as quickly as possible.[(37)] Similarly, the employer should act promptly to provide the reasonable accommodation. Unnecessary delays can result in a violation of the ADA.[(38)]

    Example A: An employer provides parking for all employees. An employee who uses a wheelchair requests from his supervisor an accessible parking space, explaining that the spaces are so narrow that there is insufficient room for his

van to extend the ramp that allows him to get in and out. The supervisor does not act on the request and does not forward it to someone with authority to respond. The employee makes a second request to the supervisor. Yet, two months after the initial request, nothing has been done. Although the supervisor never definitively denies the request, the lack of action under these circumstances amounts to a denial, and thus violates the ADA.

Example B: An employee who is blind requests adaptive equipment for her computer as a reasonable accommodation. The employer must order this equipment and is informed that it will take three months to receive delivery. No other company sells the adaptive equipment the employee needs. The employer notifies the employee of the results of its investigation and that it has ordered the equipment. Although it will take three months to receive the equipment, the employer has moved as quickly as it can to obtain it and thus there is no ADA violation resulting from the delay. The employer and employee should determine what can be done so that the employee can perform his/her job as effectively as possible while waiting for the equipment.

11. May an employer require an individual with a disability to accept a reasonable accommodation that s/he does not want?

    No. An employer may not require a qualified individual with a disability to accept an accommodation. If, however, an employee needs a reasonable accommodation to perform an essential function or to eliminate a direct threat, and refuses to accept an effective accommodation, s/he may not be qualified to remain in the job.[(39)]

# REASONABLE ACCOMMODATION AND JOB APPLICANTS

12. May an employer ask whether a reasonable accommodation is needed when an applicant has not asked for one?

    An employer may tell applicants what the hiring process involves (e.g., an interview, timed written test, or job demonstration), and may ask applicants whether they will need a reasonable accommodation for this process.

During the hiring process and before a conditional offer is made, an employer generally may not ask an applicant whether s/he needs a reasonable accommodation for the job, except when the employer knows that an applicant has a disability -- either because it is obvious or the applicant has voluntarily disclosed the information -- and could reasonably believe that the applicant will need a reasonable accommodation to perform specific job functions. If the applicant replies that s/he needs a reasonable accommodation, the employer may inquire as to what type. [(40)]

After a conditional offer of employment is extended, an employer may inquire whether applicants will need reasonable accommodations related to anything connected with the job (i.e., job performance or access to benefits/privileges of the job) as long as all entering employees in the same job category are asked this question. Alternatively, an employer may ask a specific applicant if s/he needs a reasonable accommodation if the employer knows that this applicant has a disability -- either because it is obvious or the applicant has voluntarily disclosed the information -- and could reasonably believe that the applicant will need a reasonable accommodation. If the applicant replies that s/he needs a reasonable accommodation, the employer may inquire as to what type.[(41)]

13. Does an employer have to provide a reasonable accommodation to an applicant with a disability even if it believes that it will be unable to provide this individual with a reasonable accommodation on the job?

    Yes. An employer must provide a reasonable accommodation to a qualified applicant with a disability that will enable the individual to have an equal opportunity to participate in the application process and to be considered for a job (unless it can show undue hardship). Thus, individuals with disabilities who meet initial requirements to be considered for a job should not be excluded from the application process because the employer speculates, based on a request for reasonable accommodation for the application process, that it will be unable to provide the individual with reasonable accommodation to perform the job. In many instances, employers will be unable to determine whether an individual needs reasonable accommodation to perform a job based solely on a request for accommodation during the application process. And even if an individual will need reasonable accommodation to perform the job, it may not be the same type or degree of accommodation that is needed for the application process. Thus, an employer should assess the need for

accommodations for the application process separately from those that may be needed to perform the job. [(42)]

Example A: An employer is impressed with an applicant's resume and contacts the individual to come in for an interview. The applicant, who is deaf, requests a sign language interpreter for the interview. The employer cancels the interview and refuses to consider further this applicant because it believes it would have to hire a full-time interpreter. The employer has violated the ADA. The employer should have proceeded with the interview, using a sign language interpreter (absent undue hardship), and at the interview inquired to what extent the individual would need a sign language interpreter to perform any essential functions requiring communication with other people.

Example B: An individual who has paraplegia applies for a secretarial position. Because the office has two steps at the entrance, the employer arranges for the applicant to take a typing test, a requirement of the application process, at a different location. The applicant fails the test. The employer does not have to provide any further reasonable accommodations for this individual because she is no longer qualified to continue with the application process.

# REASONABLE ACCOMMODATION RELATED TO THE BENEFITS AND PRIVILEGES OF EMPLOYMENT [(43)]

The ADA requires employers to provide reasonable accommodations so that employees with disabilities can enjoy the "benefits and privileges of employment" equal to those enjoyed by similarly-situated employees without disabilities. Benefits and privileges of employment include, but are not limited to, employer-sponsored: (1) training, (2) services (e.g., employee assistance programs (EAP's), credit unions, cafeterias, lounges, gymnasiums, auditoriums, transportation), and (3) parties or other social functions (e.g., parties to celebrate retirements and birthdays, and company outings).[(44)] If an employee with a disability needs a reasonable accommodation in order to gain access to, and have an equal opportunity to participate in, these benefits and privileges, then the employer must provide the accommodation unless it can show undue hardship.

14. Does an employer have to provide reasonable accommodation to enable an employee with a disability to have equal access to information communicated in the workplace to non-disabled employees?

    Yes. Employers provide information to employees through different means, including computers, bulletin boards, mailboxes, posters, and public address systems. Employers must ensure that employees with disabilities have access to information that is provided to other similarly-situated employees without disabilities, regardless of whether they need it to perform their jobs.

    Example A: An employee who is blind has adaptive equipment for his computer that integrates him into the network with other employees, thus allowing communication via electronic mail and access to the computer bulletin board. When the employer installs upgraded computer equipment, it must provide new adaptive equipment in order for the employee to be integrated into the new networks, absent undue hardship. Alternative methods of communication (e.g., sending written or telephone messages to the employee instead of electronic mail) are likely to be ineffective substitutes since electronic mail is used by every employee and there is no effective way to ensure that each one will always use alternative measures to ensure that the blind employee receives the same information that is being transmitted via computer.

    Example B: An employer authorizes the Human Resources Director to use a public address system to remind employees about special meetings and to make certain announcements. In order to make this information accessible to a deaf employee, the Human Resources Director arranges to send in advance an electronic mail message to the deaf employee conveying the information that will be broadcast. The Human Resources Director is the only person who uses the public address system; therefore, the employer can ensure that all public address messages are sent, via electronic mail, to the deaf employee. Thus, the employer is providing this employee with equal access to office communications.

15. Must an employer provide reasonable accommodation so that an employee may attend training programs?

    Yes. Employers must provide reasonable accommodation (e.g., sign language interpreters; written materials produced in alternative formats, such as braille, large print, or on audio- cassette) that will provide employees with disabilities

with an equal opportunity to participate in employer-sponsored training, absent undue hardship. This obligation extends to in-house training, as well as to training provided by an outside entity. Similarly, the employer has an obligation to provide reasonable accommodation whether the training occurs on the employer's premises or elsewhere.

Example A: XYZ Corp. has signed a contract with Super Trainers, Inc., to provide mediation training at its facility to all of XYZ's Human Resources staff. One staff member is blind and requests that materials be provided in braille. Super Trainers refuses to provide the materials in braille. XYZ maintains that it is the responsibility of Super Trainers and sees no reason why it should have to arrange and pay for the braille copy.

Both XYZ (as an employer covered under Title I of the ADA) and Super Trainers (as a public accommodation covered under Title III of the ADA)[(45)] have obligations to provide materials in alternative formats. This fact, however, does not excuse either one from their respective obligations. If Super Trainers refuses to provide the braille version, despite its Title III obligations, XYZ still retains its obligation to provide it as a reasonable accommodation, absent undue hardship.

Employers arranging with an outside entity to provide training may wish to avoid such problems by specifying in the contract who has the responsibility to provide appropriate reasonable accommodations. Similarly, employers should ensure that any offsite training will be held in an accessible facility if they have an employee who, because of a disability, requires such an accommodation.

Example B: XYZ Corp. arranges for one of its employees to provide CPR training. This three-hour program is optional. A deaf employee wishes to take the training and requests a sign language interpreter. XYZ must provide the interpreter because the CPR training is a benefit that XYZ offers all employees, even though it is optional.

# TYPES OF REASONABLE ACCOMMODATIONS RELATED TO JOB PERFORMANCE[(46)]

Below are discussed certain types of reasonable accommodations related to job performance.

**Job Restructuring**

Job restructuring includes modifications such as:

- reallocating or redistributing marginal job functions that an employee is unable to perform because of a disability; and
- altering when and/or how a function, essential or marginal, is performed.[(47)]

An employer never has to reallocate essential functions as a reasonable accommodation, but can do so if it wishes.

16. If, as a reasonable accommodation, an employer restructures an employee's job to eliminate some marginal functions, may the employer require the employee to take on other marginal functions that s/he can perform?

    Yes. An employer may switch the marginal functions of two (or more) employees in order to restructure a job as a reasonable accommodation.

    Example: A cleaning crew works in an office building. One member of the crew wears a prosthetic leg which enables him to walk very well, but climbing steps is painful and difficult. Although he can perform his essential functions without problems, he cannot perform the marginal function of sweeping the steps located throughout the building. The marginal functions of a second crew member include cleaning the small kitchen in the employee's lounge, which is something the first crew member can perform. The employer can switch the marginal functions performed by these two employees.

**Leave**

Permitting the use of accrued paid leave, or unpaid leave, is a form of reasonable accommodation when necessitated by an employee's disability.[(48)] An employer does not have to provide paid leave beyond that which is provided to similarly-situated employees. Employers should allow an employee with a disability to exhaust accrued paid leave first and then provide unpaid leave.[(49)] For example, if employees get 10 days of paid leave, and an employee with a disability needs 15 days of leave, the employer should allow the individual to use 10 days of paid leave and 5 days of unpaid leave.

An employee with a disability may need leave for a number of reasons related to the disability, including, but not limited to:

- obtaining medical treatment (e.g., surgery, psychotherapy, substance abuse treatment, or dialysis); rehabilitation services; or physical or occupational therapy;
- recuperating from an illness or an episodic manifestation of the disability;
- obtaining repairs on a wheelchair, accessible van, or prosthetic device;
- avoiding temporary adverse conditions in the work environment (for example, an air-conditioning breakdown causing unusually warm temperatures that could seriously harm an employee with multiple sclerosis);
- training a service animal (e.g., a guide dog); or
- receiving training in the use of braille or to learn sign language.

17. May an employer apply a "no-fault" leave policy, under which employees are automatically terminated after they have been on leave for a certain period of time, to an employee with a disability who needs leave beyond the set period?

    No. If an employee with a disability needs additional unpaid leave as a reasonable accommodation, the employer must modify its "no-fault" leave policy to provide the employee with the additional leave, unless it can show that: (1) there is another effective accommodation that would enable the person to perform the essential functions of his/her position, or (2) granting additional leave would cause an undue hardship. Modifying workplace policies, including leave policies, is a form of reasonable accommodation.[(50)]

18. Does an employer have to hold open an employee's job as a reasonable accommodation?

    Yes. An employee with a disability who is granted leave as a reasonable accommodation is entitled to return to his/her same position unless the employer demonstrates that holding open the position would impose an undue hardship.[(51)]

    If an employer cannot hold a position open during the entire leave period without incurring undue hardship, the employer must consider whether it has a vacant, equivalent position for which the employee is qualified and to which

the employee can be reassigned to continue his/her leave for a specific period of time and then, at the conclusion of the leave, can be returned to this new position.[(52)]

Example: An employee needs eight months of leave for treatment and recuperation related to a disability. The employer grants the request, but after four months the employer determines that it can no longer hold open the position for the remaining four months without incurring undue hardship. The employer must consider whether it has a vacant, equivalent position to which the employee can be reassigned for the remaining four months of leave, at the end of which time the employee would return to work in that new position. If an equivalent position is not available, the employer must look for a vacant position at a lower level. Continued leave is not required as a reasonable accommodation if a vacant position at a lower level is also unavailable.

19. Can an employer penalize an employee for work missed during leave taken as a reasonable accommodation?

    No. To do so would be retaliation for the employee's use of a reasonable accommodation to which s/he is entitled under the law.[(53)] Moreover, such punishment would make the leave an ineffective accommodation, thus making an employer liable for failing to provide a reasonable accommodation.[(54)]

    Example A: A salesperson took five months of leave as a reasonable accommodation. The company compares the sales records of all salespeople over a one-year period, and any employee whose sales fall more than 25% below the median sales performance of all employees is automatically terminated. The employer terminates the salesperson because she had fallen below the required performance standard. The company did not consider that the reason for her lower sales performance was her five-month leave of absence; nor did it assess her productivity during the period she did work (i.e., prorate her productivity).

    Penalizing the salesperson in this manner constitutes retaliation and a denial of reasonable accommodation.

    Example B: Company X is having a reduction-in-force. The company decides that any employee who has missed more than four weeks in the past year will be terminated. An employee took five weeks of leave for treatment of his

disability. The company cannot count those five weeks in determining whether to terminate this employee.[(55)]

20. When an employee requests leave as a reasonable accommodation, may an employer provide an accommodation that requires him/her to remain on the job instead?

    Yes, if the employer's reasonable accommodation would be effective and eliminate the need for leave.[(56)] An employer need not provide an employee's preferred accommodation as long as the employer provides an effective accommodation.[(57)] Accordingly, in lieu of providing leave, an employer may provide a reasonable accommodation that requires an employee to remain on the job (e.g., reallocation of marginal functions or temporary transfer) as long as it does not interfere with the employee's ability to address his/her medical needs. The employer is obligated, however, to restore the employee's full duties or to return the employee to his/her original position once s/he no longer needs the reasonable accommodation.

    Example A: An employee with emphysema requests ten weeks of leave for surgery and recuperation related to his disability. In discussing this request with the employer, the employee states that he could return to work after seven weeks if, during his first three weeks back, he could work part-time and eliminate two marginal functions that require lots of walking. If the employer provides these accommodations, then it can require the employee to return to work after seven weeks.

    Example B: An employee's disability is getting more severe and her doctor recommends surgery to counteract some of the effects. After receiving the employee's request for leave for the surgery, the employer proposes that it provide certain equipment which it believes will mitigate the effects of the disability and delay the need for leave to get surgery. The employer's proposed accommodation is not effective because it interferes with the employee's ability to get medical treatment.

21. How should an employer handle leave for an employee covered by both the ADA and the Family and Medical Leave Act (FMLA)?[(58)]

    An employer should determine an employee's rights under each statute separately, and then consider whether the two statutes overlap regarding the

appropriate actions to take.[(59)]

Under the ADA, an employee who needs leave related to his/her disability is entitled to such leave if there is no other effective accommodation and the leave will not cause undue hardship. An employer must allow the individual to use any accrued paid leave first, but, if that is insufficient to cover the entire period, then the employer should grant unpaid leave. An employer must continue an employee's health insurance benefits during his/her leave period only if it does so for other employees in a similar leave status. As for the employee's position, the ADA requires that the employer hold it open while the employee is on leave unless it can show that doing so causes undue hardship. When the employee is ready to return to work, the employer must allow the individual to return to the same position (assuming that there was no undue hardship in holding it open) if the employee is still qualified (i.e., the employee can perform the essential functions of the position with or without reasonable accommodation).

If it is an undue hardship under the ADA to hold open an employee's position during a period of leave, or an employee is no longer qualified to return to his/her original position, then the employer must reassign the employee (absent undue hardship) to a vacant position for which s/he is qualified.

Under the FMLA, an eligible employee is entitled to a maximum of 12 weeks of leave per 12 month period. The FMLA guarantees the right of the employee to return to the same position or to an equivalent one.[(60)] An employer must allow the individual to use any accrued paid leave first, but if that is insufficient to cover the entire period, then the employer should grant unpaid leave. The FMLA requires an employer to continue the employee's health insurance coverage during the leave period, provided the employee pays his/her share of the premiums.

Example A: An employee with an ADA disability needs 13 weeks of leave for treatment related to the disability. The employee is eligible under the FMLA for 12 weeks of leave (the maximum available), so this period of leave constitutes both FMLA leave and a reasonable accommodation. Under the FMLA, the employer could deny the employee the thirteenth week of leave. But, because the employee is also covered under the ADA, the employer cannot deny the request for the thirteenth week of leave unless it can show undue hardship. The

employer may consider the impact on its operations caused by the initial 12-week absence, along with other undue hardship factors.[(61)]

Example B: An employee with an ADA disability has taken 10 weeks of FMLA leave and is preparing to return to work. The employer wants to put her in an equivalent position rather than her original one. Although this is permissible under the FMLA, the ADA requires that the employer return the employee to her original position. Unless the employer can show that this would cause an undue hardship, or that the employee is no longer qualified for her original position (with or without reasonable accommodation), the employer must reinstate the employee to her original position.

Example C: An employee with an ADA disability has taken 12 weeks of FMLA leave. He notifies his employer that he is ready to return to work, but he no longer is able to perform the essential functions of his position or an equivalent position. Under the FMLA, the employer could terminate his employment,[(62)] but under the ADA the employer must consider whether the employee could perform the essential functions with reasonable accommodation (e.g., additional leave, part-time schedule, job restructuring, or use of specialized equipment). If not, the ADA requires the employer to reassign the employee if there is a vacant position available for which he is qualified, with or without reasonable accommodation, and there is no undue hardship.

## Modified or Part-Time Schedule

22. Must an employer allow an employee with a disability to work a modified or part-time schedule as a reasonable accommodation, absent undue hardship?

    Yes.[(63)] A modified schedule may involve adjusting arrival or departure times, providing periodic breaks, altering when certain functions are performed, allowing an employee to use accrued paid leave, or providing additional unpaid leave. An employer must provide a modified or part-time schedule when required as a reasonable accommodation, absent undue hardship, even if it does not provide such schedules for other employees.[(64)]

    Example A: An employee with HIV infection must take medication on a strict schedule. The medication causes extreme nausea about one hour after ingestion, and generally lasts about 45 minutes. The employee asks that he be

allowed to take a daily 45-minute break when the nausea occurs. The employer must grant this request absent undue hardship.

For certain positions, the time during which an essential function is performed may be critical. This could affect whether an employer can grant a request to modify an employee's schedule.[(65)] Employers should carefully assess whether modifying the hours could significantly disrupt their operations -- that is, cause undue hardship -- or whether the essential functions may be performed at different times with little or no impact on the operations or the ability of other employees to perform their jobs.

If modifying an employee's schedule poses an undue hardship, an employer must consider reassignment to a vacant position that would enable the employee to work during the hours requested. [(66)]

Example B: A day care worker requests that she be allowed to change her hours from 7:00 a.m. - 3:00 p.m. to 10:00 a.m. - 6:00 p.m. because of her disability. The day care center is open from 7:00 a.m. - 7:00 p.m. and it will still have sufficient coverage at the beginning of the morning if it grants the change in hours. In this situation, the employer must provide the reasonable accommodation.

Example C: An employee works for a morning newspaper, operating the printing presses which run between 10 p.m. and 3 a.m. Due to her disability, she needs to work in the daytime. The essential function of her position, operating the printing presses, requires that she work at night because the newspaper cannot be printed during the daytime hours. Since the employer cannot modify her hours, it must consider whether it can reassign her to a different position.

23. How should an employer handle requests for modified or part-time schedules for an employee covered by both the ADA and the Family and Medical Leave Act (FMLA)?[(67)]

    An employer should determine an employee's rights under each statute separately, and then consider whether the two statutes overlap regarding the appropriate actions to take.

    Under the ADA, an employee who needs a modified or part-time schedule because of his/her disability is entitled to such a schedule if there is no other effective accommodation and it will not cause undue hardship. If there is undue

hardship, the employer must reassign the employee if there is a vacant position for which s/he is qualified and which would allow the employer to grant the modified or part-time schedule (absent undue hardship).[(68)] An employee receiving a part-time schedule as a reasonable accommodation is entitled only to the benefits, including health insurance, that other part-time employees receive. Thus, if non- disabled part-time workers are not provided with health insurance, then the employer does not have to provide such coverage to an employee with a disability who is given a part-time schedule as a reasonable accommodation.

Under the FMLA, an eligible employee is entitled to take leave intermittently or on a part-time basis, when medically necessary, until s/he has used up the equivalent of 12 workweeks in a 12- month period. When such leave is foreseeable based on planned medical treatment, an employer may require the employee to temporarily transfer (for the duration of the leave) to an available alternative position, with equivalent pay and benefits, for which the employee is qualified and which better suits his/her reduced hours.[(69)] An employer always must maintain the employee's existing level of coverage under a group health plan during the period of FMLA leave, provided the employee pays his/her share of the premium.[(70)]

Example: An employee with an ADA disability requests that she be excused from work one day a week for the next six months because of her disability. If this employee is eligible for a modified schedule under the FMLA, the employer must provide the requested leave under that statute if it is medically necessary, even if the leave would be an undue hardship under the ADA.

## Modified Workplace Policies

24. Is it a reasonable accommodation to modify a workplace policy?

Yes. It is a reasonable accommodation to modify a workplace policy when necessitated by an individual's disability-related limitations,[(71)] absent undue hardship. But, reasonable accommodation only requires that the employer modify the policy for an employee who requires such action because of a disability; therefore, the employer may continue to apply the policy to all other employees.

Example: An employer has a policy prohibiting employees from eating or drinking at their workstations. An employee with insulin-dependent diabetes explains to her employer that she may occasionally take too much insulin and, in order to avoid going into insulin shock, she must immediately eat a candy bar or drink fruit juice. The employee requests permission to keep such food at her workstation and to eat or drink when her insulin level necessitates. The employer must modify its policy to grant this request, absent undue hardship. Similarly, an employer might have to modify a policy to allow an employee with a disability to bring in a small refrigerator, or to use the employer's refrigerator, to store medication that must be taken during working hours.

Granting an employee time off from work or an adjusted work schedule as a reasonable accommodation may involve modifying leave or attendance procedures or policies. For example, it would be a reasonable accommodation to modify a policy requiring employees to schedule vacation time in advance if an otherwise qualified individual with a disability needed to use accrued vacation time on an unscheduled basis because of disability- related medical problems, barring undue hardship.[(72)] Furthermore, an employer may be required to provide additional leave to an employee with a disability as a reasonable accommodation in spite of a "no-fault" leave policy, unless the provision of such leave would impose an undue hardship.[(73)]

In some instances, an employer's refusal to modify a workplace policy, such as a leave or attendance policy, could constitute disparate treatment as well as a failure to provide a reasonable accommodation. For example, an employer may have a policy requiring employees to notify supervisors before 9:00 a.m. if they are unable to report to work. If an employer would excuse an employee from complying with this policy because of emergency hospitalization due to a car accident, then the employer must do the same thing when the emergency hospitalization is due to a disability.[(74)]

## Reassignment [(75)]

The ADA specifically lists "reassignment to a vacant position" as a form of reasonable accommodation.[(76)] This type of reasonable accommodation must be provided to an employee who, because of a disability, can no longer perform the essential functions of his/her current position, with or without reasonable accommodation, unless the employer can show that it would be an undue hardship.[(77)]

An employee must be "qualified" for the new position. An employee is "qualified" for a position if s/he: (1) satisfies the requisite skill, experience, education, and other job-related requirements of the position, and (2) can perform the essential functions of the new position, with or without reasonable accommodation.[(78)] The employee does not need to be the best qualified individual for the position in order to obtain it as a reassignment.

There is no obligation for the employer to assist the individual to become qualified. Thus, the employer does not have to provide training so that the employee acquires necessary skills to take a job.[(79)] The employer, however, would have to provide an employee with a disability who is being reassigned with any training that is normally provided to anyone hired for or transferred to the position.

Example A: An employer is considering reassigning an employee with a disability to a position which requires the ability to speak Spanish in order to perform an essential function. The employee never learned Spanish and wants the employer to send him to a course to learn Spanish. The employer is not required to provide this training as part of the obligation to make a reassignment. Therefore, the employee is not qualified for this position.

Example B: An employer is considering reassigning an employee with a disability to a position in which she will contract for goods and services. The employee is qualified for the position. The employer has its own specialized rules regarding contracting that necessitate training all individuals hired for these positions. In this situation, the employer must provide the employee with this specialized training.

Before considering reassignment as a reasonable accommodation, employers should first consider those accommodations that would enable an employee to remain in his/her current position. Reassignment is the reasonable accommodation of last resort and is required only after it has been determined that: (1) there are no effective accommodations that will enable the employee to perform the essential functions of his/her current position, or (2) all other reasonable accommodations would impose an undue hardship.[(80)] However, if both the employer and the employee voluntarily agree that transfer is preferable to remaining in the current position with some form of reasonable accommodation, then the employer may transfer the employee.

"Vacant" means that the position is available when the employee asks for reasonable accommodation, or that the employer knows that it will become

available within a reasonable amount of time. A "reasonable amount of time" should be determined on a case-by-case basis considering relevant facts, such as whether the employer, based on experience, can anticipate that an appropriate position will become vacant within a short period of time.[(81)] A position is considered vacant even if an employer has posted a notice or announcement seeking applications for that position. The employer does not have to bump an employee from a job in order to create a vacancy; nor does it have to create a new position.[(82)]

Example C: An employer is seeking a reassignment for an employee with a disability. There are no vacant positions today, but the employer has just learned that another employee resigned and that that position will become vacant in four weeks. The impending vacancy is equivalent to the position currently held by the employee with a disability. If the employee is qualified for that position, the employer must offer it to him.

Example D: An employer is seeking a reassignment for an employee with a disability. There are no vacant positions today, but the employer has just learned that an employee in an equivalent position plans to retire in six months. Although the employer knows that the employee with a disability is qualified for this position, the employer does not have to offer this position to her because six months is beyond a "reasonable amount of time." (If, six months from now, the employer decides to advertise the position, it must allow the individual to apply for that position and give the application the consideration it deserves.)

The employer must reassign the individual to a vacant position that is equivalent in terms of pay, status, or other relevant factors (e.g., benefits, geographical location) if the employee is qualified for the position. If there is no vacant equivalent position, the employer must reassign the employee to a vacant lower level position for which the individual is qualified. Assuming there is more than one vacancy for which the employee is qualified, the employer must place the individual in the position that comes closest to the employee's current position in terms of pay, status, etc.[(83)] If it is unclear which position comes closest, the employer should consult with the employee about his/her preference before determining the position to which the employee will be reassigned. Reassignment does not include giving an employee a promotion. Thus, an employee must compete for any vacant position that would constitute a promotion.

25. Is a probationary employee entitled to reassignment?

Employers cannot deny a reassignment to an employee solely because s/he is designated as "probationary." An employee with a disability is eligible for reassignment to a new position, regardless of whether s/he is considered "probationary," as long as the employee adequately performed the essential functions of the position, with or without reasonable accommodation, before the need for a reassignment arose.

The longer the period of time in which an employee has adequately performed the essential functions, with or without reasonable accommodation, the more likely it is that reassignment is appropriate if the employee becomes unable to continue performing the essential functions of the current position due to a disability. If, however, the probationary employee has never adequately performed the essential functions, with or without reasonable accommodation, then s/he is not entitled to reassignment because s/he was never "qualified" for the original position. In this situation, the employee is similar to an applicant who applies for a job for which s/he is not qualified, and then requests reassignment. Applicants are not entitled to reassignment.

Example A: An employer designates all new employees as "probationary" for one year. An employee has been working successfully for nine months when she becomes disabled in a car accident. The employee, due to her disability, is unable to continue performing the essential functions of her current position, with or without reasonable accommodation, and seeks a reassignment. She is entitled to a reassignment if there is a vacant position for which she is qualified and it would not pose an undue hardship.

Example B: A probationary employee has been working two weeks, but has been unable to perform the essential functions of the job because of his disability. There are no reasonable accommodations that would permit the individual to perform the essential functions of the position, so the individual requests a reassignment. The employer does not have to provide a reassignment (even if there is a vacant position) because, as it turns out, the individual was never qualified -- i.e., the individual was never able to perform the essential functions of the position, with or without reasonable accommodation, for which he was hired.

26. Must an employer offer reassignment as a reasonable accommodation if it does not allow any of its employees to transfer from one position to another?

Yes. The ADA requires employers to provide reasonable accommodations to individuals with disabilities, including reassignment, even though they are not available to others. Therefore, an employer who does not normally transfer employees would still have to reassign an employee with a disability, unless it could show that the reassignment caused an undue hardship. And, if an employer has a policy prohibiting transfers, it would have to modify that policy in order to reassign an employee with a disability, unless it could show undue hardship.[(84)]

27. Is an employer's obligation to offer reassignment to a vacant position limited to those vacancies within an employee's office, branch, agency, department, facility, personnel system (if the employer has more than a single personnel system), or geographical area?

    No. This is true even if the employer has a policy prohibiting transfers from one office, branch, agency, department, facility, personnel system, or geographical area to another. The ADA contains no language limiting the obligation to reassign only to positions within an office, branch, agency, etc.[(85)] Rather, the extent to which an employer must search for a vacant position will be an issue of undue hardship.[(86)] If an employee is being reassigned to a different geographical area, the employee must pay for any relocation expenses unless the employer routinely pays such expenses when granting voluntary transfers to other employees.

28. Does an employer have to notify an employee with a disability about vacant positions, or is it the employee's responsibility to learn what jobs are vacant?

    The employer is in the best position to know which jobs are vacant or will become vacant within a reasonable period of time.[(87)] In order to narrow the search for potential vacancies, the employer, as part of the interactive process, should ask the employee about his/her qualifications and interests. Based on this information, the employer is obligated to inform an employee about vacant positions for which s/he may be eligible as a reassignment. However, an employee should assist the employer in identifying appropriate vacancies to the extent that the employee has access to information about them. If the employer does not know whether the employee is qualified for a specific position, the employer can discuss with the employee his/her qualifications.[(88)]

An employer should proceed as expeditiously as possible in determining whether there are appropriate vacancies. The length of this process will vary depending on how quickly an employer can search for and identify whether an appropriate vacant position exists. For a very small employer, this process may take one day; for other employers this process may take several weeks.[(89)] When an employer has completed its search, identified whether there are any vacancies (including any positions that will become vacant in a reasonable amount of time), notified the employee of the results, and either offered an appropriate vacancy to the employee or informed him/her that no appropriate vacancies are available, the employer will have fulfilled its obligation.

29. Does reassignment mean that the employee is permitted to compete for a vacant position?

    No. Reassignment means that the employee gets the vacant position if s/he is qualified for it. Otherwise, reassignment would be of little value and would not be implemented as Congress intended.[(90)]

30. If an employee is reassigned to a lower level position, must an employer maintain his/her salary from the higher level position?

    No, unless the employer transfers employees without disabilities to lower level positions and maintains their original salaries.[(91)]

31. Must an employer provide a reassignment if it would violate a seniority system?

    Generally, it will be "unreasonable" to reassign an employee with a disability if doing so would violate the rules of a seniority system.[(92)] This is true both for collectively bargained seniority systems and those unilaterally imposed by management. Seniority systems governing job placement give employees expectations of consistent, uniform treatment expectations that would be undermined if employers had to make the type of individualized, case-by-case assessment required by the reasonable accommodation process.[(93)]

    However, if there are "special circumstances" that "undermine the employees' expectations of consistent, uniform treatment," it may be a "reasonable accommodation," absent undue hardship, to reassign an employee despite the existence of a seniority system. For example, "special circumstances" may exist where an employer retains the right to alter the seniority system unilaterally, and has exercised that right fairly frequently, thereby lowering employee

expectations in the seniority system.[(94)] In this circumstance, one more exception (i.e., providing the reassignment to an employee with a disability) may not make a difference.[(95)] Alternatively, a seniority system may contain exceptions, such that one more exception is unlikely to matter.[(96)] Another possibility is that a seniority system might contain procedures for making exceptions, thus suggesting to employees that seniority does not automatically guarantee access to a specific job.

# OTHER REASONABLE ACCOMMODATION ISSUES [(97)]

32. If an employer has provided one reasonable accommodation, does it have to provide additional reasonable accommodations requested by an individual with a disability?

    The duty to provide reasonable accommodation is an ongoing one.[(98)] Certain individuals require only one reasonable accommodation, while others may need more than one. Still others may need one reasonable accommodation for a period of time, and then at a later date, require another type of reasonable accommodation. If an individual requests multiple reasonable accommodations, s/he is entitled only to those accommodations that are necessitated by a disability and that will provide an equal employment opportunity.

    An employer must consider each request for reasonable accommodation and determine: (1) whether the accommodation is needed, (2) if needed, whether the accommodation would be effective, and (3) if effective, whether providing the reasonable accommodation would impose an undue hardship. If a reasonable accommodation turns out to be ineffective and the employee with a disability remains unable to perform an essential function, the employer must consider whether there would be an alternative reasonable accommodation that would not pose an undue hardship. If there is no alternative accommodation, then the employer must attempt to reassign the employee to a vacant position for which s/he is qualified, unless to do so would cause an undue hardship.

33. Does an employer have to change a person's supervisor as a form of reasonable accommodation?

    No. An employer does not have to provide an employee with a new supervisor as a reasonable accommodation. Nothing in the ADA, however, prohibits an employer from doing so. Furthermore, although an employer is not required to change supervisors, the ADA may require that supervisory methods be altered as a form of reasonable accommodation.[(99)] Also, an employee with a disability is protected from disability-based discrimination by a supervisor, including disability-based harassment.

    Example: A supervisor frequently schedules team meetings on a day's notice often notifying staff in the afternoon that a meeting will be held on the following morning. An employee with a disability has missed several meetings because they have conflicted with previously-scheduled physical therapy sessions. The employee asks that the supervisor give her two to three days' notice of team meetings so that, if necessary, she can reschedule the physical therapy sessions. Assuming no undue hardship would result, the supervisor must make this reasonable accommodation.

34. Does an employer have to allow an employee with a disability to work at home as a reasonable accommodation?

    An employer must modify its policy concerning where work is performed if such a change is needed as a reasonable accommodation, but only if this accommodation would be effective and would not cause an undue hardship.[(100)] Whether this accommodation is effective will depend on whether the essential functions of the position can be performed at home. There are certain jobs in which the essential functions can only be performed at the work site -- e.g., food server, cashier in a store. For such jobs, allowing an employee to work at home is not effective because it does not enable an employee to perform his/her essential functions. Certain considerations may be critical in determining whether a job can be effectively performed at home, including (but not limited to) the employer's ability to adequately supervise the employee and the employee's need to work with certain equipment or tools that cannot be replicated at home. In contrast, employees may be able to perform the essential functions of certain types of jobs at home (e.g., telemarketer, proofreader).[(101)] For these types of jobs, an employer may deny a request to

work at home if it can show that another accommodation would be effective or if working at home will cause undue hardship.

35. Must an employer withhold discipline or termination of an employee who, because of a disability, violated a conduct rule that is job-related for the position in question and consistent with business necessity?

    No. An employer never has to excuse a violation of a uniformly applied conduct rule that is job-related and consistent with business necessity. This means, for example, that an employer never has to tolerate or excuse violence, threats of violence, stealing, or destruction of property. An employer may discipline an employee with a disability for engaging in such misconduct if it would impose the same discipline on an employee without a disability.

36. Must an employer provide a reasonable accommodation for an employee with a disability who violated a conduct rule that is job- related for the position in question and consistent with business necessity?

    An employer must make reasonable accommodation to enable an otherwise qualified employee with a disability to meet such a conduct standard in the future, barring undue hardship, except where the punishment for the violation is termination.[(102)] Since reasonable accommodation is always prospective, an employer is not required to excuse past misconduct even if it is the result of the individual's disability.[(103)] Possible reasonable accommodations could include adjustments to starting times, specified breaks, and leave if these accommodations will enable an employee to comply with conduct rules.[(104)]

    Example: An employee with major depression is often late for work because of medication side-effects that make him extremely groggy in the morning. His scheduled hours are 9:00 a.m. to 5:30 p.m., but he arrives at 9:00, 9:30, 10:00, or even 10:30 on any given day. His job responsibilities involve telephone contact with the company's traveling sales representatives, who depend on him to answer urgent marketing questions and expedite special orders. The employer disciplines him for tardiness, stating that continued failure to arrive promptly during the next month will result in termination of his employment. The individual then explains that he was late because of a disability and needs to work on a later schedule. In this situation, the employer may discipline the employee because he violated a conduct standard addressing tardiness that is job-related for the position in question and consistent with business necessity.

The employer, however, must consider reasonable accommodation, barring undue hardship, to enable this individual to meet this standard in the future. For example, if this individual can serve the company's sales representatives by regularly working a schedule of 10:00 a.m. to 6:30 p.m., a reasonable accommodation would be to modify his schedule so that he is not required to report for work until 10:00 a.m.

37. Is it a reasonable accommodation to make sure that an employee takes medication as prescribed?

    No. Medication monitoring is not a reasonable accommodation. Employers have no obligation to monitor medication because doing so does not remove a workplace barrier. Similarly, an employer has no responsibility to monitor an employee's medical treatment or ensure that s/he is receiving appropriate treatment because such treatment does not involve modifying workplace barriers.[(105)]

    It may be a form of reasonable accommodation, however, to give an employee a break in order that s/he may take medication, or to grant leave so that an employee may obtain treatment.

38. Is an employer relieved of its obligation to provide reasonable accommodation for an employee with a disability who fails to take medication, to obtain medical treatment, or to use an assistive device (such as a hearing aid)?

    No. The ADA requires an employer to provide reasonable accommodation to remove workplace barriers, regardless of what effect medication, other medical treatment, or assistive devices may have on an employee's ability to perform the job.[(106)]

    However, if an employee with a disability, with or without reasonable accommodation, cannot perform the essential functions of the position or poses a direct threat in the absence of medication, treatment, or an assistive device, then s/he is unqualified.

39. Must an employer provide a reasonable accommodation that is needed because of the side effects of medication or treatment related to the disability, or because of symptoms or other medical conditions resulting from the underlying disability?

Yes. The side effects caused by the medication that an employee must take because of the disability are limitations resulting from the disability. Reasonable accommodation extends to all limitations resulting from a disability.

Example A: An employee with cancer undergoes chemotherapy twice a week, which causes her to be quite ill afterwards. The employee requests a modified schedule -- leave for the two days a week of chemotherapy. The treatment will last six weeks. Unless it can show undue hardship, the employer must grant this request.

Similarly, any symptoms or related medical conditions resulting from the disability that cause limitations may also require reasonable accommodation. **(107)**

Example B: An employee, as a result of insulin-dependent diabetes, has developed background retinopathy (a vision impairment). The employee, who already has provided documentation showing his diabetes is a disability, requests a device to enlarge the text on his computer screen. The employer can request documentation that the retinopathy is related to the diabetes but the employee does not have to show that the retinopathy is an independent disability under the ADA. Since the retinopathy is a consequence of the diabetes (an ADA disability), the request must be granted unless undue hardship can be shown.

40. Must an employer ask whether a reasonable accommodation is needed when an employee has not asked for one?

    Generally, no. As a general rule, the individual with a disability -- who has the most knowledge about the need for reasonable accommodation -- must inform the employer that an accommodation is needed.**(108)**

    However, an employer should initiate the reasonable accommodation interactive process**(109)** without being asked if the employer: (1) knows that the employee has a disability, (2) knows, or has reason to know, that the employee is experiencing workplace problems because of the disability, and (3) knows, or has reason to know, that the disability prevents the employee from requesting a reasonable accommodation. If the individual with a disability states that s/he

does not need a reasonable accommodation, the employer will have fulfilled its obligation.

Example: An employee with mental retardation delivers messages at a law firm. He frequently mixes up messages for "R. Miller" and "T. Miller." The employer knows about the disability, suspects that the performance problem is a result of the disability, and knows that this employee is unable to ask for a reasonable accommodation because of his mental retardation. The employer asks the employee about mixing up the two names and asks if it would be helpful to spell the first name of each person. When the employee says that would be better, the employer, as a reasonable accommodation, instructs the receptionist to write the full first name when messages are left for one of the Messrs. Miller.

41. May an employer ask whether a reasonable accommodation is needed when an employee with a disability has not asked for one?

    An employer may ask an employee with a known disability whether s/he needs a reasonable accommodation when it reasonably believes that the employee may need an accommodation. For example, an employer could ask a deaf employee who is being sent on a business trip if s/he needs reasonable accommodation. Or, if an employer is scheduling a luncheon at a restaurant and is uncertain about what questions it should ask to ensure that the restaurant is accessible for an employee who uses a wheelchair, the employer may first ask the employee. An employer also may ask an employee with a disability who is having performance or conduct problems if s/he needs reasonable accommodation.[(110)]

42. May an employer tell other employees that an individual is receiving a reasonable accommodation when employees ask questions about a coworker with a disability?

    No. An employer may not disclose that an employee is receiving a reasonable accommodation because this usually amounts to a disclosure that the individual has a disability. The ADA specifically prohibits the disclosure of medical information except in certain limited situations, which do not include disclosure to coworkers.[(111)]

An employer may certainly respond to a question from an employee about why a coworker is receiving what is perceived as "different" or "special" treatment by emphasizing its policy of assisting any employee who encounters difficulties in the workplace. The employer also may find it helpful to point out that many of the workplace issues encountered by employees are personal, and that, in these circumstances, it is the employer's policy to respect employee privacy. An employer may be able to make this point effectively by reassuring the employee asking the question that his/her privacy would similarly be respected if s/he found it necessary to ask the employer for some kind of workplace change for personal reasons.

Since responding to specific coworker questions may be difficult, employers might find it helpful before such questions are raised to provide all employees with information about various laws that require employers to meet certain employee needs (e.g., the ADA and the Family and Medical Leave Act), while also requiring them to protect the privacy of employees. In providing general ADA information to employees, an employer may wish to highlight the obligation to provide reasonable accommodation, including the interactive process and different types of reasonable accommodations, and the statute's confidentiality protections. Such information could be delivered in orientation materials, employee handbooks, notices accompanying paystubs, and posted flyers. Employers may wish to explore these and other alternatives with unions because they too are bound by the ADA's confidentiality provisions. Union meetings and bulletin boards may be further avenues for such educational efforts.

As long as there is no coercion by an employer, an employee with a disability may voluntarily choose to disclose to coworkers his/her disability and/or the fact that s/he is receiving a reasonable accommodation.

# UNDUE HARDSHIP ISSUES [(112)]

An employer does not have to provide a reasonable accommodation that would cause an "undue hardship" to the employer. Generalized conclusions will not suffice to support a claim of undue hardship. Instead, undue hardship must be based on an individualized assessment of current circumstances that show that a specific

reasonable accommodation would cause significant difficulty or expense.[(113)] A determination of undue hardship should be based on several factors, including:

- the nature and cost of the accommodation needed;
- the overall financial resources of the facility making the reasonable accommodation; the number of persons employed at this facility; the effect on expenses and resources of the facility;
- the overall financial resources, size, number of employees, and type and location of facilities of the employer (if the facility involved in the reasonable accommodation is part of a larger entity);
- the type of operation of the employer, including the structure and functions of the workforce, the geographic separateness, and the administrative or fiscal relationship of the facility involved in making the accommodation to the employer;
- the impact of the accommodation on the operation of the facility.[(114)]

The ADA's legislative history indicates that Congress wanted employers to consider all possible sources of outside funding when assessing whether a particular accommodation would be too costly.[(115)] Undue hardship is determined based on the net cost to the employer. Thus, an employer should determine whether funding is available from an outside source, such as a state rehabilitation agency, to pay for all or part of the accommodation.[(116)] In addition, the employer should determine whether it is eligible for certain tax credits or deductions to offset the cost of the accommodation. Also, to the extent that a portion of the cost of an accommodation causes undue hardship, the employer should ask the individual with a disability if s/he will pay the difference.

If an employer determines that one particular reasonable accommodation will cause undue hardship, but a second type of reasonable accommodation will be effective and will not cause an undue hardship, then the employer must provide the second accommodation.

An employer cannot claim undue hardship based on employees' (or customers') fears or prejudices toward the individual's disability.[(117)] Nor can undue hardship be based on the fact that provision of a reasonable accommodation might have a negative impact on the morale of other employees. Employers, however, may be

able to show undue hardship where provision of a reasonable accommodation would be unduly disruptive to other employees's ability to work.

Example A: An employee with breast cancer is undergoing chemotherapy. As a consequence of the treatment, the employee is subject to fatigue and finds it difficult to keep up with her regular workload. So that she may focus her reduced energy on performing her essential functions, the employer transfers three of her marginal functions to another employee for the duration of the chemotherapy treatments. The second employee is unhappy at being given extra assignments, but the employer determines that the employee can absorb the new assignments with little effect on his ability to perform his own assignments in a timely manner. Since the employer cannot show significant disruption to its operation, there is no undue hardship.[(118)]

Example B: A convenience store clerk with multiple sclerosis requests that he be allowed to go from working full-time to part- time as a reasonable accommodation because of his disability. The store assigns two clerks per shift, and if the first clerk's hours are reduced, the second clerk's workload will increase significantly beyond his ability to handle his responsibilities. The store determines that such an arrangement will result in inadequate coverage to serve customers in a timely manner, keep the shelves stocked, and maintain store security. Thus, the employer can show undue hardship based on the significant disruption to its operations and, therefore, can refuse to reduce the employee's hours. The employer, however, should explore whether any other reasonable accommodation will assist the store clerk without causing undue hardship.

43. Must an employer modify the work hours of an employee with a disability if doing so would prevent other employees from performing their jobs?

    No. If the result of modifying one employee's work hours (or granting leave) is to prevent other employees from doing their jobs, then the significant disruption to the operations of the employer constitutes an undue hardship.

    Example A: A crane operator, due to his disability, requests an adjustment in his work schedule so that he starts work at 8:00 a.m. rather than 7:00 a.m., and finishes one hour later in the evening. The crane operator works with three other employees who cannot perform their jobs without the crane operator. As a result, if the employer grants this requested accommodation, it would have to require the other three workers to adjust their hours, find other work for them

to do from 7:00 to 8:00, or have the workers do nothing. The ADA does not require the employer to take any of these actions because they all significantly disrupt the operations of the business. Thus, the employer can deny the requested accommodation, but should discuss with the employee if there are other possible accommodations that would not result in undue hardship.

Example B: A computer programmer works with a group of people to develop new software. There are certain tasks that the entire group must perform together, but each person also has individual assignments. It is through habit, not necessity, that they have often worked together first thing in the morning.

The programmer, due to her disability, requests an adjustment in her work schedule so that she works from 10:00 a.m. - 7:00 p.m. rather than 9:00 a.m. - 6:00 p.m. In this situation, the employer could grant the adjustment in hours because it would not significantly disrupt the operations of the business. The effect of the reasonable accommodation would be to alter when the group worked together and when they performed their individual assignments.

44. Can an employer deny a request for leave when an employee cannot provide a fixed date of return?

    Providing leave to an employee who is unable to provide a fixed date of return is a form of reasonable accommodation. However, if an employer is able to show that the lack of a fixed return date causes an undue hardship, then it can deny the leave. In certain circumstances, undue hardship will derive from the disruption to the operations of the entity that occurs because the employer can neither plan for the employee's return nor permanently fill the position. If an employee cannot provide a fixed date of return, and an employer determines that it can grant such leave at that time without causing undue hardship, the employer has the right to require, as part of the interactive process, that the employee provide periodic updates on his/her condition and possible date of return. After receiving these updates, employers may reevaluate whether continued leave constitutes an undue hardship.

    In certain situations, an employee may be able to provide only an approximate date of return.[(119)] Treatment and recuperation do not always permit exact timetables. Thus, an employer cannot claim undue hardship solely because an employee can provide only an approximate date of return. In such situations, or in situations in which a return date must be postponed because of unforeseen

medical developments, employees should stay in regular communication with their employers to inform them of their progress and discuss, if necessary, the need for continued leave beyond what might have been granted originally.[(120)]

Example A: An experienced chef at a top restaurant requests leave for treatment of her disability but cannot provide a fixed date of return. The restaurant can show that this request constitutes undue hardship because of the difficulty of replacing, even temporarily, a chef of this caliber. Moreover, it leaves the employer unable to determine how long it must hold open the position or to plan for the chef's absence. Therefore, the restaurant can deny the request for leave as a reasonable accommodation.

Example B: An employee requests eight weeks of leave for surgery for his disability. The employer grants the request. During surgery, serious complications arise that require a lengthier period of recuperation than originally anticipated, as well as additional surgery. The employee contacts the employer after three weeks of leave to ask for an additional ten to fourteen weeks of leave (i.e., a total of 18 to 22 weeks of leave). The employer must assess whether granting additional leave causes an undue hardship.

45. Does a cost-benefit analysis determine whether a reasonable accommodation will cause undue hardship?

    No. A cost-benefit analysis assesses the cost of a reasonable accommodation in relation to the perceived benefit to the employer and the employee. Neither the statute nor the legislative history supports a cost-benefit analysis to determine whether a specific accommodation causes an undue hardship.[(121)] Whether the cost of a reasonable accommodation imposes an undue hardship depends on the employer's resources, not on the individual's salary, position, or status (e.g., full-time versus part-time, salary versus hourly wage, permanent versus temporary).

46. Can an employer claim undue hardship solely because a reasonable accommodation would require it to make changes to property owned by someone else?

    No, an employer cannot claim undue hardship solely because a reasonable accommodation would require it to make changes to property owned by someone else. In some situations, an employer will have the right under a lease

or other contractual relationship with the property owner to make the type of changes that are needed. If this is the case, the employer should make the changes, assuming no other factors exist that would make the changes too difficult or costly. If the contractual relationship between the employer and property owner requires the owner's consent to the kinds of changes that are required, or prohibits them from being made, then the employer must make good faith efforts either to obtain the owner's permission or to negotiate an exception to the terms of the contract. If the owner refuses to allow the employer to make the modifications, the employer may claim undue hardship. Even in this situation, however, the employer must still provide another reasonable accommodation, if one exists, that would not cause undue hardship.

Example A: X Corp., a travel agency, leases space in a building owned by Z Co. One of X Corp.'s employees becomes disabled and needs to use a wheelchair. The employee requests as a reasonable accommodation that several room dividers be moved to make his work space easily accessible. X Corp.'s lease specifically allows it to make these kinds of physical changes, and they are otherwise easy and inexpensive to make. The fact that X Corp. does not own the property does not create an undue hardship and therefore it must make the requested accommodation.

Example B: Same as Example A, except that X Corp.'s lease requires it to seek Z Co.'s permission before making any physical changes that would involve reconfiguring office space. X Corp. requests that Z Co. allow it to make the changes, but Z Co. denies the request. X Corp. can claim that making the physical changes would constitute an undue hardship. However, it must provide any other type of reasonable accommodation that would not involve making physical changes to the facility, such as finding a different location within the office that would be accessible to the employee.

An employer should remember its obligation to make reasonable accommodation when it is negotiating contracts with property owners.[(122)] Similarly, a property owner should carefully assess a request from an employer to make physical changes that are needed as a reasonable accommodation because failure to permit the modification might constitute "interference" with the rights of an employee with a disability.[(123)] In addition, other ADA provisions may require the property owner to make the modifications.[(124)]

# BURDENS OF PROOF

In US Airways, Inc. v. Barnett, 535 U.S., 122 S. Ct. 1516 (2002), the Supreme Court laid out the burdens of proof for an individual with a disability (plaintiff) and an employer (defendant) in an ADA lawsuit alleging failure to provide reasonable accommodation. The "plaintiff/employee (to defeat a defendant/employer's motion for summary judgment) need only show that an 'accommodation' seems reasonable on its face, i.e., ordinarily or in the run of cases."[(125)] Once the plaintiff has shown that the accommodation s/he needs is "reasonable," the burden shifts to the defendant/employer to provide case-specific evidence proving that reasonable accommodation would cause an undue hardship in the particular circumstances.[(126)]

The Supreme Court's burden-shifting framework does not affect the interactive process triggered by an individual's request for accommodation.[(127)] An employer should still engage in this informal dialogue to obtain relevant information needed to make an informed decision.

# INSTRUCTIONS FOR INVESTIGATORS

When assessing whether a Respondent has violated the ADA by denying a reasonable accommodation to a Charging Party, investigators should consider the following:

- Is the Charging Party "otherwise qualified" (i.e., is the Charging Party qualified for the job except that, because of disability, s/he needs a reasonable accommodation to perform the position's essential functions)?
- Did the Charging Party, or a representative, request a reasonable accommodation (i.e., did the Charging Party let the employer know that s/he needed an adjustment or change at work for a reason related to a medical condition)? [see Questions 1-4]
    - Did the Respondent request documentation of the Charging Party's disability and/or functional limitations? If yes, was the documentation provided? Did the Respondent have a legitimate reason for requesting documentation? [see Questions 6-8]

- What specific type of reasonable accommodation, if any, did the Charging Party request?
- Was there a nexus between the reasonable accommodation requested and the functional limitations resulting from the Charging Party's disability? [see Question 6]
- Was the need for reasonable accommodation related to the use of medication, side effects from treatment, or symptoms related to a disability? [see Questions 36-38]

- For what purpose did the Charging Party request a reasonable accommodation:
  - for the application process? [see Questions 12-13]
  - in connection with aspects of job performance? [see Questions 16-24, 32-33]
  - in order to enjoy the benefits and privileges of employment? [see Questions 14-15]
- Should the Respondent have initiated the interactive process, or provided a reasonable accommodation, even if the Charging Party did not ask for an accommodation? [see Questions 11, 39]
- What did the Respondent do in response to the Charging Party's request for reasonable accommodation (i.e., did the Respondent engage in an interactive process with the Charging Party and if so, describe both the Respondent's and the Charging Party's actions/statements during this process)? [see Questions 5-11]
- If the Charging Party asked the Respondent for a particular reasonable accommodation, and the Respondent provided a different accommodation, why did the Respondent provide a different reasonable accommodation than the one requested by the Charging Party? Why does the Respondent believe that the reasonable accommodation it provided was effective in eliminating the workplace barrier at issue, thus providing the Charging Party with an equal employment opportunity? Why does the Charging Party believe that the reasonable accommodation provided by the Respondent was ineffective? [see Question 9]

- What type of accommodation could the Respondent have provided that would have been "reasonable" and effective in eliminating the workplace barrier at issue, thus providing the Charging Party with an equal employment opportunity?
- Does the charge involve allegations concerning reasonable accommodation and violations of any conduct rules? [see Questions 34-35]
- If the Charging Party alleges that the Respondent failed to provide a reassignment as a reasonable accommodation [see generally Questions 25-30 and accompanying text]:
    - did the Respondent and the Charging Party first discuss other forms of reasonable accommodation that would enable the Charging Party to remain in his/her current position before discussing reassignment?
    - did the Respondent have any vacant positions? [see Question 27]
    - did the Respondent notify the Charging Party about possible vacant positions? [see Question 28]
    - was the Charging Party qualified for a vacant position?
    - if there was more than one vacant position, did the Respondent place the Charging Party in the one that was most closely equivalent to the Charging Party's original position?
    - if the reassignment would conflict with a seniority system, are there "special circumstances" that would make it "reasonable" to reassign the Charging Party? [see Question 31]
- If the Respondent is claiming undue hardship [see generally Questions 42-46 and accompanying text]:
    - what evidence has the Respondent produced showing that providing a specific reasonable accommodation would entail significant difficulty or expense?
    - if a modified schedule or leave is the reasonable accommodation, is undue hardship based on the impact on the ability of other employees to do their jobs? [see Question 42]
    - if leave is the reasonable accommodation, is undue hardship based on the amount of leave requested? [see Question 43]

- if there are "special circumstances" that would make it "reasonable" to reassign the Charging Party, despite the apparent conflict with a seniority system, would it nonetheless be an undue hardship to make the reassignment? [see Question 31]
- is undue hardship based on the fact that providing the reasonable accommodation requires changes to property owned by an entity other than the Respondent? [see Question 46]
- if the Respondent claims that a particular reasonable accommodation would result in undue hardship, is there another reasonable accommodation that Respondent could have provided that would not have resulted in undue hardship?

- Based on the evidence obtained in answers to the questions above, is the Charging Party a qualified individual with a disability (i.e., can the Charging Party perform the essential functions of the position with or without reasonable accommodation)?

# APPENDIX
# RESOURCES FOR LOCATING REASONABLE ACCOMMODATIONS

U.S. Equal Employment Opportunity Commission
1-800-669-3362 (Voice)
1-800-800-3302 (TT)

The EEOC's Publication Center has many free documents on the Title I employment provisions of the ADA, including both the statute, 42 U.S.C. . 12101 et seq. (1994), and the regulations, 29 C.F.R. . 1630 (1997). In addition, the EEOC has published a great deal of basic information about reasonable accommodation and undue hardship. The two main sources of interpretive information are: (1) the Interpretive Guidance accompanying the Title I regulations (also known as the "Appendix" to the regulations), 29 C.F.R. pt. 1630 app. .. 1630.2(o), (p), 1630.9 (1997) , and (2) A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act III, 8 FEP Manual (BNA) 405:6981, 6998-7018 (1992). The Manual includes a 200-page Resource Directory, including federal and state

agencies, and disability organizations that can provide assistance in identifying and locating reasonable accommodations.

The EEOC also has discussed issues involving reasonable accommodation in the following guidances and documents: (1) Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations at 5, 6-8, 20, 21-22, 8 FEP Manual (BNA) 405:7191, 7192-94, 7201 (1995); (2) Enforcement Guidance: Workers' Compensation and the ADA at 15-20, 8 FEP Manual (BNA) 405:7391, 7398-7401 (1996); (3) Enforcement Guidance: The Americans with Disabilities Act and Psychiatric Disabilities at 19-28, 8 FEP Manual (BNA) 405:7461, 7470-76 (1997); and (4) Fact Sheet on the Family and Medical Leave Act, the Americans with Disabilities Act, and Title VII of the Civil Rights Act of 1964 at 6-9, 8 FEP Manual (BNA) 405:7371, 7374-76 (1996).

Finally, the EEOC has a poster that employers and labor unions may use to fulfill the ADA's posting requirement.

All of the above-listed documents, with the exception of the ADA Technical Assistance Manual and Resource Directory and the poster, are also available through the Internet at https://www.eeoc.gov.

U.S. Department of Labor
(To obtain information on the Family and Medical Leave Act)
To request written materials:
1-800-959-3652 (Voice)
1-800-326-2577 (TT)
To ask questions: (202) 219-8412 (Voice)

Internal Revenue Service
(For information on tax credits and deductions for providing certain reasonable accommodations)

(202) 622-6060 (Voice)

Job Accommodation Network (JAN)
1-800-232-9675 (Voice/TT)

http://janweb.icdi.wvu.edu/.

A service of the President's Committee on Employment of People with Disabilities. JAN can provide information, free-of-charge, about many types of reasonable accommodations.

ADA Disability and Business Technical Assistance Centers (DBTACs) 1-800-949-4232 (Voice/TT)

The DBTACs consist of 10 federally funded regional centers that provide information, training, and technical assistance on the ADA. Each center works with local business, disability, governmental, rehabilitation, and other professional networks to provide current ADA information and assistance, and places special emphasis on meeting the needs of small businesses. The DBTACs can make referrals to local sources of expertise in reasonable accommodations.

Registry of Interpreters for the Deaf
(301) 608-0050 (Voice/TT)

The Registry offers information on locating and using interpreters and transliteration services.

RESNA Technical Assistance Project
(703) 524-6686 (Voice)
(703) 524-6639 (TT)
http://www.resna.org/hometa1.htm

RESNA, the Rehabilitation Engineering and Assistive Technology Society of North America, can refer individuals to projects in all 50 states and the six territories offering technical assistance on technology-related services for individuals with disabilities. Services may include:

- information and referral centers to help determine what devices may assist a person with a disability (including access to large data bases containing information on thousands of commercially available assistive technology products),
- centers where individuals can try out devices and equipment,
- assistance in obtaining funding for and repairing devices, and

- equipment exchange and recycling programs.

# INDEX

*The index applies to the print version. Since page numbering does not exist in HTML files, page numbers have been removed.*

Landlord/Tenant and reasonable accommodation

Last chance agreements and reasonable accommodation (See also "Firm choice")

Marginal functions and reasonable accommodation

Medical treatment and reasonable accommodation

Employer monitoring of medical treatment

Failure to obtain medical treatment

Leave

Side effects of medical treatment and need for reasonable accommodation

Medication and reasonable accommodation

Employer monitoring of medication

Failure to use medication

Side effects of medication and need for reasonable accommodation

Personal use items and reasonable accommodation

Production standards and reasonable accommodation

Public accommodation and employer; who provides reasonable accommodation

"Reasonable accommodation" (definition of)

Reasonable accommodation (effectiveness of)

Reasonable accommodation (how many must employer provide)

Reasonable accommodation (types of)

Access to equipment and computer technology

Changing tests and training materials

Job restructuring

Leave

Alternatives to leave

Approximate versus fixed date of return

Family and Medical Leave Act (FMLA)

Holding open an employee's position

"No-fault" leave policies

Penalizing employees who take leave

Marginal functions (modifying how they are performed; elimination or substitution of)

Modified or part-time schedule

Family and Medical Leave Act (FMLA)

Modifying method of performing job function

Modifying workplace policies

Readers

Reassignment

Employee must be qualified for vacant position

Equivalent position

Interactive process between employer and employee

Relationship between reassignment and general transfer policies

Salary for new position

Seniority systems and reassignment

Vacant position

When must reassignment be offered

Who is entitled to reassignment

Disruption to operations

Factors to assess

Landlord/Tenant

Leave

Work environment and reasonable accommodation

---

## Footnotes

1. 42 U.S.C. §§ 12101-12117, 12201-12213 (1994) (codified as amended).

The analysis in this guidance applies to federal sector complaints of non-affirmative action employment discrimination arising under section 501 of the Rehabilitation Act of 1973. 29 U.S.C. § 791(g) (1994). It also applies to complaints of non-affirmative action employment discrimination arising under section 503 and employment discrimination under section 504 of the Rehabilitation Act. 29 U.S.C. §§ 793(d), 794(d) (1994).

The ADA's requirements regarding reasonable accommodation and undue hardship supercede any state or local disability antidiscrimination laws to the extent that they offer less protection than the ADA. See 29 C.F.R. § 1630.1(c)(2) (1997).

2. In addition to employers, the ADA requires employment agencies, labor organizations, and joint labor-management committees to provide reasonable accommodations. See 42 U.S.C. § 12112(a), (b)(5)(A) (1994).

3. 29 C.F.R. pt. 1630 app. § 1630.2(o) (1997).

4. 29 C.F.R. § 1630.2(o)(1)(i-iii) (1997) (emphasis added). The notices that employers and labor unions must post informing applicants, employees, and members of labor organizations of their ADA rights must include a description of the reasonable accommodation requirement. These notices, which must be in an accessible format, are available from the EEOC. See the Appendix.

5. All examples used in this document assume that the applicant or employee has an ADA "disability."

Individuals with a relationship or association with a person with a disability are not entitled to receive reasonable accommodations. See Den Hartog v. Wasatch Academy, 129 F.3d 1076, 1084, 7 AD Cas. (BNA) 764, 772 (10th Cir. 1997).

6. See 29 C.F.R. pt. 1630 app. § 1630.9 (1997); see also H.R. Rep. No. 101-485, pt. 3, at 39 (1990) [hereinafter House Judiciary Report]; H.R. Rep. No. 101-485, pt. 2, at 65 (1990) [hereinafter House Education and Labor Report]; S. Rep. No. 101-116, at 34 (1989)[hereinafter Senate Report].

For more information concerning requests for a reasonable accommodation, see Questions 1-4, infra. For a discussion of the limited circumstance under which an employer would be required to ask an individual with a disability whether s/he needed a reasonable accommodation, see Question 40, infra.

7. 42 U.S.C. § 12111(9) (1994); 29 C.F.R. § 1630.2(o)(2)(i-ii) (1997).

8. US Airways, Inc. v. Barnett, 535 U.S., 122 S. Ct. 1516, 1523 (2002).

9. Id.

Some courts have said that in determining whether an accommodation is "reasonable," one must look at the costs of the accommodation in relation to its benefits. See, e.g., Monette v. Electronic Data Sys. Corp., 90 F.3d 1173, 1184 n.10, 5 AD Cas. (BNA) 1326, 1335 n.10 (6th Cir. 1996); Vande Zande v. Wisconsin Dept. of Admin., 44 F.3d 538, 543, 3 AD Cas. (BNA) 1636, 1638-39 (7th Cir. 1995). This "cost/benefit" analysis has no foundation in the statute, regulations, or legislative history of the ADA. See 42 U.S.C. § 12111(9), (10) (1994); 29 C.F.R. § 1630.2(o), (p) (1997); see also Senate Report, supra note 6, at 31-35; House Education and Labor Report, supra note 6, at 57-58.

10. See US Airways, Inc. v. Barnett, 535 U.S., 122 S. Ct. 1516, 1522 (2002). The Court explained that "in ordinary English the word 'reasonable' does not mean 'effective.' It is the word 'accommodation,' not the word 'reasonable,' that conveys the need for effectiveness." Id.

11. A TTY is a device that permits individuals with hearing and speech impairments to communicate by telephone.

12. In US Airways, Inc. v. Barnett, the Supreme Court held that it was unreasonable, absent "special circumstances," for an employer to provide a reassignment that

conflicts with the terms of a seniority system. 535 U.S., 122 S. Ct. 1516, 1524-25 (2002). For a further discussion of this issue, see Question 31, infra.

13. "[W]ith or without reasonable accommodation" includes, if necessary, reassignment to a vacant position. Thus, if an employee is no longer qualified because of a disability to continue in his/her present position, an employer must reassign him/her as a reasonable accommodation. See the section on "Reassignment," infra pp. 37-38 and n.77.

14. 29 C.F.R. pt. 1630 app. § 1630.2(n) (1997).

15. 29 C.F.R. pt. 1630 app. § 1630.9 (1997).

16. See 42 U.S.C. § 12112 (b)(5)(A) (1994) (it is a form of discrimination to fail to provide a reasonable accommodation "unless such covered entity can demonstrate that the accommodation would impose an undue hardship . . ."); see also 42 U.S.C.

§ 12111(10) (1994) (defining "undue hardship" based on factors assessing cost and difficulty).

The legislative history discusses financial, administrative, and operational limitations on providing reasonable accommodations only in the context of defining "undue hardship." Compare Senate Report, supra note 6, at 31-34 with 35-36; House Education and Labor Report, supra note 6, at 57-58 with 67-70.

17. See 42 U.S.C. § 12111(10) (1994); 29 C.F.R. § 1630.2(p) (1997); 29 C.F.R. pt. 1630 app. § 1630.2(p) (1997).

18. See 29 C.F.R. pt. 1630 app. § 1630.15(d) (1997). See also Eckles v. Consolidated Rail Corp., 94 F.3d 1041, 1048-49, 5 AD Cas. (BNA) 1367, 1372-73 (7th Cir. 1996); Bryant v. Better Business Bureau of Maryland, 923 F. Supp. 720, 740, 5 AD Cas. (BNA) 625, 638 (D. Md. 1996).

19. See, e.g., Schmidt v. Safeway Inc., 864 F. Supp. 991, 997, 3 AD Cas. (BNA) 1141, 1146-47 (D. Or. 1994) ("statute does not require the plaintiff to speak any magic words. . . The employee need not mention the ADA or even the term 'accommodation.'"). See also Hendricks-Robinson v. Excel Corp., 154 F.3d 685, 694, 8 AD Cas. (BNA) 875, 882 (7th Cir. 1998) ("[a] request as straightforward as asking for continued employment is a sufficient request for accommodation"); Bultemeyer v. Ft. Wayne Community Schs., 100 F.3d 1281, 1285, 6 AD Cas. (BNA) 67, 71 (7th Cir.

1996) (an employee with a known psychiatric disability requested reasonable accommodation by stating that he could not do a particular job and by submitting a note from his psychiatrist); McGinnis v. Wonder Chemical Co., 5 AD Cas. (BNA) 219 (E.D. Pa. 1995) (employer on notice that accommodation had been requested because: (1) employee told supervisor that his pain prevented him from working and (2) employee had requested leave under the Family and Medical Leave Act).

Nothing in the ADA requires an individual to use legal terms or to anticipate all of the possible information an employer may need in order to provide a reasonable accommodation. The ADA avoids a formulistic approach in favor of an interactive discussion between the employer and the individual with a disability, after the individual has requested a change due to a medical condition. Nevertheless, some courts have required that individuals initially provide detailed information in order to trigger the employer's duty to investigate whether reasonable accommodation is required. See, e.g., Taylor v. Principal Fin. Group, Inc., 93 F.3d 155, 165, 5 AD Cas. (BNA) 1653, 1660 (5th Cir. 1996); Miller v. Nat'l Cas. Co., 61 F.3d 627, 629-30, 4 AD Cas. (BNA) 1089, 1090-91 (8th Cir. 1995).

20. See Questions 5 - 7, infra, for a further discussion on when an employer may request reasonable documentation about a person's "disability" and the need for reasonable accommodation.

21. Cf. Beck v. Univ. of Wis. Bd. of Regents, 75 F.3d 1130, 5 AD Cas. (BNA) 304 (7th Cir. 1996); Schmidt v. Safeway Inc., 864 F. Supp. 991, 997, 3 AD Cas. (BNA) 1141, 1146 (D. Or. 1994). But see Miller v. Nat'l Casualty Co., 61 F.3d 627, 630, 4 AD Cas. (BNA) 1089, 1091 (8th Cir. 1995) (employer had no duty to investigate reasonable accommodation despite the fact that the employee's sister notified the employer that the employee "was mentally falling apart and the family was trying to get her into the hospital").

The employer should be receptive to any relevant information or requests it receives from a third party acting on the individual's behalf because the reasonable accommodation process presumes open communication in order to help the employer make an informed decision. See 29 C.F.R. §§ 1630.2(o), 1630.9 (1997); 29 C.F.R. pt. 1630 app. §§ 1630.2(o), 1630.9 (1997).

22. Although individuals with disabilities are not required to keep records, they may find it useful to document requests for reasonable accommodation in the event there is a dispute about whether or when they requested accommodation.

Employers, however, must keep all employment records, including records of requests for reasonable accommodation, for one year from the making of the record or the personnel action involved, whichever occurs later. If a charge is filed, records must be preserved until the charge is resolved. 29 C.F.R. § 1602.14 (1997).

23. Cf. Masterson v. Yellow Freight Sys., Inc., Nos. 98-6126, 98-6025, 1998 WL 856143 (10th Cir. Dec. 11, 1998) (fact that an employee with a disability does not need a reasonable accommodation all the time does not relieve employer from providing an accommodation for the period when he does need one).

24. See 29 C.F.R. § 1630.2(o)(3) (1997); 29 C.F.R. pt. 1630 app. §§ 1630.2(o), 1630.9 (1997); see also Haschmann v. Time Warner Entertainment Co., 151 F.3d 591, 601, 8 AD Cas. (BNA) 692, 700 (7th Cir. 1998); Dalton v. Subaru-Isuzu, 141 F.3d 667, 677, 7 AD Cas. (BNA) 1872, 1880-81 (7th Cir. 1998). The appendix to the regulations at § 1630.9 provides a detailed discussion of the reasonable accommodation process.

Engaging in an interactive process helps employers to discover and provide reasonable accommodation. Moreover, in situations where an employer fails to provide a reasonable accommodation (and undue hardship would not be a valid defense), evidence that the employer engaged in an interactive process can demonstrate a "good faith" effort which can protect an employer from having to pay punitive and certain compensatory damages. See 42 U.S.C. § 1981a(a)(3) (1994).

25. The burden-shifting framework outlined by the Supreme Court in US Airways, Inc. v. Barnett, 535 U.S., 122 S. Ct. 1516, 1523 (2002), does not affect the interactive process between an employer and an individual seeking reasonable accommodation. See pages 61-62, infra, for a further discussion.

26. See 29 C.F.R. pt. 1630 app. § 1630.9 (1997). The Appendix to this Guidance provides a list of resources to identify possible accommodations.

27. 29 C.F.R. pt. 1630 app. § 1630.9 (1997); see also EEOC Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations at 6, 8 FEP Manual (BNA) 405:7191, 7193 (1995) [hereinafter Preemployment Questions and Medical Examinations]; EEOC Enforcement Guidance: The Americans with Disabilities Act and Psychiatric Disabilities at 22-23, 8 FEP Manual (BNA) 405:7461, 7472-73 (1997) [hereinafter ADA and Psychiatric Disabilities]. Although the latter Enforcement Guidance focuses on psychiatric disabilities, the legal standard under which an employer may request documentation applies to disabilities generally.

When an employee seeks leave as a reasonable accommodation, an employer's request for documentation about disability and the need for leave may overlap with the certification requirements of the Family and Medical Leave Act (FMLA), 29 C.F.R. §§ 825.305-.306, 825.310-.311 (1997).

28. Since a doctor cannot disclose information about a patient without his/her permission, an employer must obtain a release from the individual that will permit his/her doctor to answer questions. The release should be clear as to what information will be requested. Employers must maintain the confidentiality of all medical information collected during this process, regardless of where the information comes from. See Question 42 and note 111, infra.

29. See Question 9, infra, for information on choosing between two or more effective accommodations.

30. This employee also might be covered under the Family and Medical Leave Act, and if so, the employer would need to comply with the requirements of that statute.

31. See Templeton v. Neodata Servs., Inc., No. 98-1106, 1998 WL 852516 (10th Cir. Dec. 10, 1998); Beck v. Univ. of Wis. Bd. of Regents, 75 F.3d 1130, 1134, 5 AD Cas. (BNA) 304, 307 (7th Cir. 1996); McAlpin v. National Semiconductor Corp., 921 F. Supp. 1518, 1525, 5 AD Cas. (BNA) 1047, 1052 (N.D. Tex. 1996).

32. See Hendricks-Robinson v. Excel Corp., 154 F.3d 685, 700, 8 AD Cas. (BNA) 875, 887 (7th Cir. 1998).

33. If an individual provides sufficient documentation to show the existence of an ADA disability and the need for reasonable accommodation, continued efforts by the employer to require that the individual see the employer's health professional could be considered retaliation.

34. Employers also may consider alternatives like having their health professional consult with the individual's health professional, with the employee's consent.

35. See 29 C.F.R. pt. 1630 app. § 1630.9 (1997); see also Stewart v. Happy Herman's Cheshire Bridge, Inc., 117 F.3d 1278, 1285-86, 6 AD Cas. (BNA) 1834, 1839 (11th Cir. 1997); Hankins v. The Gap, Inc., 84 F.3d 797, 800, 5 AD Cas. (BNA) 924, 926-27 (6th Cir. 1996); Gile v. United Airlines, Inc., 95 F.3d 492, 499, 5 AD Cas. (BNA) 1466, 1471 (7th Cir. 1996).

36. 29 C.F.R. pt. 1630 app. §1630.9 (1997).

37. See Dalton v. Subaru-Isuzu Automotive, Inc., 141 F.3d 667, 677, 7 AD Cas. (BNA) 1872, 1880 (7th Cir. 1998).

38. In determining whether there has been an unnecessary delay in responding to a request for reasonable accommodation, relevant factors would include: (1) the reason(s) for the delay, (2) the length of the delay, (3) how much the individual with a disability and the employer each contributed to the delay, (4) what the employer was doing during the delay, and (5) whether the required accommodation was simple or complex to provide.

39. See 29 C.F.R. pt. 1630 app. § 1630.9 (1997); see also Hankins v. The Gap, Inc., 84 F.3d 797, 801, 5 AD Cas. (BNA) 924, 927 (6th Cir. 1996).

40. 42 U.S.C. § 12112(d)(2)(A) (1994); 29 C.F.R. § 1630.13(a) (1997). For a thorough discussion of these requirements, see Preemployment Questions and Medical Examinations, supra note 27, at 6-8, 8 FEP Manual (BNA) 405:7193-94.

41. 42 U.S.C. § 12112(d)(3) (1994); 29 C.F.R. § 1630.14(b) (1997); see also Preemployment Questions and Medical Examinations, supra note 27, at 20, 8 FEP Manual (BNA) 405:7201.

42. See Question 12, supra, for the circumstances under which an employer may ask an applicant whether s/he will need reasonable accommodation to perform specific job functions.

43. The discussions and examples in this section assume that there is only one effective accommodation and that the reasonable accommodation will not cause undue hardship.

44. See 29 C.F.R. pt. 1630 app. § 1630.9 (1997).

45. 42 U.S.C. §§ 12181(7), 12182(1)(A), (2)(A)(iii) (1994).

46. The discussions and examples in this section assume that there is only one effective accommodation and that the reasonable accommodation will not cause undue hardship.

The types of reasonable accommodations discussed in this section are not exhaustive. For example, employees with disabilities may request reasonable

accommodations to modify the work environment, such as changes to the ventilation system or relocation of a work space.

See the Appendix for additional resources to identify other possible reasonable accommodations.

47. 42 U.S.C. § 12111(9)(B) (1994); 29 C.F.R. pt. 1630 app. §§ 1630.2(o), 1630.9 (1997); see Benson v. Northwest Airlines, Inc., 62 F.3d 1108, 1112-13, 4 AD Cas. (BNA) 1234, 1236-37 (8th Cir. 1995).

48. 29 C.F.R. pt. 1630 app. § 1630.2(o) (1997). See Cehrs v. Northeast Ohio Alzheimer's, 155 F.3d 775, 782, 8 AD Cas. (BNA) 825, 830-31 (6th Cir. 1998).

An employee who needs leave, or a part-time or modified schedule, as a reasonable accommodation also may be entitled to leave under the Family and Medical Leave Act. See Questions 21 and 23, infra.

49. See A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act, at 3.10(4), 8 FEP Manual (BNA) 405:6981, 7011 (1992) [hereinafter TAM].

50. 42 U.S.C. § 12111(9)(B) (1994); 29 C.F.R. § 1630.2(o)(2)(ii) (1997). See US Airways, Inc. v. Barnett, 535 U.S., 122 S. Ct. 1516, 1521 (2002). See also Question 24, infra. While undue hardship cannot be based solely on the existence of a no-fault leave policy, the employer may be able to show undue hardship based on an individualized assessment showing the disruption to the employer's operations if additional leave is granted beyond the period allowed by the policy. In determining whether undue hardship exists, the employer should consider how much additional leave is needed (e.g., two weeks, six months, one year?).

51. See Schmidt v. Safeway Inc., 864 F. Supp. 991, 996-97, 3 AD Cas. (BNA) 1141, 1145-46 (D. Or. 1994); Corbett v. National Products Co., 4 AD Cas. (BNA) 987, 990 (E.D. Pa. 1995).

52. See EEOC Enforcement Guidance: Workers' Compensation and the ADA at 16, 8 FEP Manual (BNA) 405:7391, 7399 (1996) [hereinafter Workers' Compensation and the ADA]. See also pp. 37-45, infra, for information on reassignment as a reasonable accommodation.

53. Cf. Kiel v. Select Artificials, 142 F.3d 1077, 1080, 8 AD Cas. (BNA) 43, 44 (8th Cir. 1998).

54. See Criado v. IBM, 145 F.3d 437, 444-45, 8 AD Cas. (BNA) 336, 341 (1st Cir. 1998).

55. But see Matthews v. Commonwealth Edison Co., 128 F.3d 1194, 1197-98, 7 AD Cas. (BNA) 1651, 1653-54 (7th Cir. 1997) (an employee who, because of a heart attack, missed several months of work and returned on a part-time basis until health permitted him to work full-time, could be terminated during a RIF based on his lower productivity). In reaching this decision, the Seventh Circuit failed to consider that the employee needed leave and a modified schedule as reasonable accommodations for his disability, and that the accommodations became meaningless when he was penalized for using them.

56. If an employee, however, qualifies for leave under the Family and Medical Leave Act, an employer may not require him/her to remain on the job with an adjustment in lieu of taking leave. See 29 C.F.R. § 825.702(d)(1) (1997).

57. See Question 9, supra.

58. For more detailed information on issues raised by the interplay between these statutes, refer to the FMLA/ADA Fact Sheet listed in the Appendix.

59. Employers should remember that many employees eligible for FMLA leave will not be entitled to leave as a reasonable accommodation under the ADA, either because they do not meet the ADA's definition of disability or, if they do have an ADA disability, the need for leave is unrelated to that disability.

60. 29 C.F.R. §§ 825.214(a), 825.215 (1997).

61. For further information on the undue hardship factors, see infra pp. 55-56.

62. 29 C.F.R. § 825.702(c)(4) (1997).

63. 42 U.S.C. §12111 (9) (B) (1994); see Ralph v. Lucent Technologies, Inc., 135 F.3d 166, 172, 7 AD Cas. (BNA) 1345, 1349 (1st Cir. 1998) (a modified schedule is a form of reasonable accommodation).

64. See US Airways, Inc. v. Barnett, 535 U.S., 122 S. Ct. 1516, 1521 (2002).

65. Certain courts have characterized attendance as an "essential function." See, e.g., Carr v. Reno, 23 F.3d 525, 530, 3 AD Cas. (BNA) 434, 438 (D.C. Cir. 1994); Jackson v. Department of Veterans Admin., 22 F.3d 277, 278-79, 3 AD Cas. (BNA) 483, 484 (11th Cir. 1994). Attendance, however, is not an essential function as defined by the ADA because it is not one of "the fundamental job duties of the employment position." 29 C.F.R. § 1630.2(n)(1) (1997) (emphasis added). As the regulations make clear, essential functions are duties to be performed. 29 C.F.R. § 1630.2(n)(2) (1997). See Haschmann v. Time Warner Entertainment Co., 151 F.3d 591, 602, 8 AD Cas. (BNA) 692, 701 (7th Cir. 1998); Cehrs v. Northeast Ohio Alzheimer's, 155 F.3d 775, 782-83, 8 AD Cas. (BNA) 825, 830-31 (6th Cir. 1998).

On the other hand, attendance is relevant to job performance and employers need not grant all requests for a modified schedule. To the contrary, if the time during which an essential function is performed is integral to its successful completion, then an employer may deny a request to modify an employee's schedule as an undue hardship.

66. Employers covered under the Family and Medical Leave Act (FMLA) should determine whether any denial of leave or a modified schedule is also permissible under that law. See 29 C.F.R. § 825.203 (1997).

67. For more detailed information on issues raised by the interplay between these statutes, refer to the FMLA/ADA Fact Sheet listed in the Appendix.

68. See infra pp. 37-45 for more information on reassignment, including under what circumstances an employer and employee may voluntarily agree that a transfer is preferable to having the employee remain in his/her current position.

69. 29 C.F.R. § 825.204 (1997); see also special rules governing intermittent leave for instructional employees at §§ 825.601, 825.602.

70. 29 C.F.R. §§ 825.209, 825.210 (1997).

71. 42 U.S.C. § 12111(9)(B) (1994); 29 C.F.R. § 1630.2(o)(2)(ii) (1997). See US Airways, Inc. v. Barnett, 535 U.S., 122 S. Ct. 1516, 1521 (2002).

72. See Dutton v. Johnson County Bd. of Comm'rs, 868 F. Supp. 1260, 1264-65, 3 AD Cas. (BNA) 1614, 1618 (D. Kan. 1994).

73. See 29 C.F.R. pt. 1630 app. § 1630.15(b), (c) (1997). See also Question 17, supra.

74. But cf. Miller v. Nat'l Casualty Co., 61 F.3d 627, 629-30, 4 AD Cas. (BNA) 1089, 1090 (8th Cir. 1995) (court refuses to find that employee's sister had requested reasonable accommodation despite the fact that the sister informed the employer that the employee was having a medical crisis necessitating emergency hospitalization).

75. For information on how reassignment may apply to employers who provide light duty positions, see Workers' Compensation and the ADA, supra note 52, at 20-23, 8 FEP Manual (BNA) 405:7401-03.

76. 42 U.S.C. § 12111(9)(B) (1994); 29 C.F.R. § 1630.2(o)(2)(ii) (1997). See Benson v. Northwest Airlines, Inc., 62 F.3d 1108, 1114, 4 AD Cas. (BNA) 1234, 1238 (8th Cir. 1995); Monette v. Electronic Data Sys. Corp., 90 F.3d 1173, 1187, 5 AD Cas. (BNA) 1326, 1338 (6th Cir. 1996); Gile v. United Airlines, Inc., 95 F.3d 492, 498, 5 AD Cas. (BNA) 1466, 1471 (7th Cir. 1996).

Reassignment is available only to employees, not to applicants. 29 C.F.R. pt. 1630 app. § 1630.2(o) (1997).

77. 29 C.F.R. pt. 1630 app. § 1630.2(o) (1997); see Haysman v. Food Lion, Inc., 893 F. Supp. 1092, 1104, 4 AD Cas. (BNA) 1297, 1305 (S.D. Ga. 1995).

Some courts have found that an employee who is unable to perform the essential functions of his/her current position is unqualified to receive a reassignment. See, e.g., Schmidt v. Methodist Hosp. of Indiana, Inc., 89 F.3d 342, 345, 5 AD Cas. (BNA) 1340, 1342 (7th Cir. 1996); Pangalos v. Prudential Ins. Co. of Am., 5 AD Cas. (BNA) 1825, 1826 (E.D. Pa. 1996). These decisions, however, nullify Congress' inclusion of reassignment in the ADA. An employee requires a reassignment only if s/he is unable to continue performing the essential functions of his/her current position, with or without reasonable accommodation. Thus, an employer must provide reassignment either when reasonable accommodation in an employee's current job would cause undue hardship or when it would not be possible. See Aka v. Washington Hosp. Ctr.,156 F.3d 1284, 1300-01, 8 AD Cas. (BNA) 1093, 1107-08 (D.C. Cir. 1998); Dalton v. Subaru-Isuzu Automotive, Inc., 141 F.3d 667, 678, 7 AD Cas. (BNA) 1872, 1880 (7th Cir. 1998); see also ADA and Psychiatric Disabilities, supra note 27, at 28, 8 FEP Manual (BNA) 405:7476; Workers' Compensation and the ADA, supra note 52, at 17-18, 8 FEP Manual (BNA) 405:7399-7400.

78. 29 C.F.R. § 1630.2(m) (1997); 29 C.F.R. pt. 1630 app. §§ 1630.2(m), 1630.2(o) (1997). See Stone v. Mount Vernon, 118 F.3d 92, 100-01, 6 AD Cas. (BNA) 1685, 1693

(2d Cir. 1997).

79. See Quintana v. Sound Distribution Corp., 6 AD Cas. (BNA) 842, 846 (S.D.N.Y. 1997).

80. See 29 C.F.R. pt. 1630 app. §1630.2(o) (1997); Senate Report, supra note 6, at 31; House Education and Labor Report, supra note 6, at 63.

81. For suggestions on what the employee can do while waiting for a position to become vacant within a reasonable amount of time, see note 89, infra.

82. See 29 C.F.R. pt. 1630 app. § 1630.2(o) (1997); see also White v. York Int'l Corp., 45 F.3d 357, 362, 3 AD Cas. (BNA) 1746, 1750 (10th Cir. 1995).

83. See 29 C.F.R. pt. 1630 app. § 1630.2(o) (1997).

84. See US Airways, Inc. v. Barnett, 535 U.S., 122 S. Ct. 1516, 1521, 1524 (2002); see also Aka v. Washington Hosp. Ctr., 156 F.3d 1284, 1304-05, 8 AD Cas. (BNA) 1093, 1110-11 (D.C. Cir. 1998); United States v. Denver, 943 F. Supp. 1304, 1312, 6 AD Cas. (BNA) 245, 252 (D. Colo. 1996). See also Question 24, supra.

85. 42 U.S.C. § 12111(9)(B) (1994); 29 C.F.R. § 1630.2(o)(2)(ii) (1997); see Hendricks-Robinson v. Excel Corp., 154 F.3d 685, 695, 8 AD Cas. (BNA) 875, 883 (7th Cir. 1998); see generally Dalton v. Subaru-Isuzu Automotive, Inc., 141 F.3d 667, 677-78, 7 AD Cas. (BNA) 1872, 1880-81 (7th Cir. 1998).

86. See Gile v. United Airlines, Inc., 95 F.3d 492, 499, 5 AD Cas. (BNA) 1466, 1472 (7th Cir. 1996); see generally United States v. Denver, 943 F. Supp. 1304, 1311-13, 6 AD Cas. (BNA) 245, 251-52 (D. Colo. 1996).

Some courts have limited the obligation to provide a reassignment to positions within the same department or facility in which the employee currently works, except when the employer's standard practice is to provide inter-department or inter-facility transfers for all employees. See, e.g., Emrick v. Libbey-Owens-Ford Co., 875 F. Supp. 393, 398, 4 AD Cas.(BNA) 1, 4-5 (E.D. Tex. 1995). However, the ADA requires modification of workplace policies, such as transfer policies, as a form of reasonable accommodation. See Question 24, supra. Therefore, policies limiting transfers cannot be a per se bar to reassigning someone outside his/her department or facility. \ Furthermore, the ADA requires employers to provide reasonable accommodations, including reassignment, regardless of whether such

accommodations are routinely granted to non-disabled employees. See Question 26, supra.

87. See Hendricks-Robinson v. Excel Corp., 154 F.3d 685, 695-96, 697-98, 8 AD Cas. (BNA) 875, 883, 884 (7th Cir. 1998) (employer cannot mislead disabled employees who need reassignment about full range of vacant positions; nor can it post vacant positions for such a short period of time that disabled employees on medical leave have no realistic chance to learn about them); Mengine v. Runyon, 114 F.3d 415, 420, 6 AD Cas. (BNA) 1530, 1534 (3d Cir. 1997) (an employer has a duty to make reasonable efforts to assist an employee in identifying a vacancy because an employee will not have the ability or resources to identify a vacant position absent participation by the employer); Woodman v. Runyon, 132 F.3d 1330, 1344, 7 AD Cas. (BNA) 1189, 1199 (10th Cir. 1997) (federal employers are far better placed than employees to investigate in good faith the availability of vacant positions).

88. See Dalton v. Subaru-Isuzu Automotive, Inc., 141 F.3d 667, 678, 7 AD Cas. (BNA)1872, 1881 (7th Cir. 1998) (employer must first identify full range of alternative positions and then determine which ones employee qualified to perform, with or without reasonable accommodation); Hendricks-Robinson v. Excel Corp., 154 F.3d 685, 700, 8 AD Cas. (BNA) 875, 886-87 (7th Cir. 1998) (employer's methodology to determine if reassignment is appropriate does not constitute the "interactive process" contemplated by the ADA if it is directive rather than interactive); Mengine v. Runyon, 114 F.3d 415, 419-20, 6 AD Cas. (BNA) 1530, 1534 (3d Cir. 1997) (once an employer has identified possible vacancies, an employee has a duty to identify which one he is capable of performing).

89. If it will take several weeks to determine whether an appropriate vacant position exists, the employer and employee should discuss the employee's status during that period. There are different possibilities depending on the circumstances, but they may include: use of accumulated paid leave, use of unpaid leave, or a temporary assignment to a light duty position. Employers also may choose to take actions that go beyond the ADA's requirements, such as eliminating an essential function of the employee's current position, to enable an employee to continue working while a reassignment is sought.

90. 42 U.S.C. § 12111(9)(b) (1994); 29 C.F.R. pt. 1630 app. § 1630.2(o) (1997). See Senate Report, supra note 6, at 31 ("If an employee, because of disability, can no longer perform the essential functions of the job that she or he has held, a transfer to another vacant job for which the person is qualified may prevent the employee

from being out of work and the employer from losing a valuable worker."). See Wood v. County of Alameda, 5 AD Cas. (BNA) 173, 184 (N.D. Cal. 1995) (when employee could no longer perform job because of disability, she was entitled to reassignment to a vacant position, not simply an opportunity to "compete"); cf. Aka v. Washington Hosp. Ctr., 156 F.3d 1284, 1304-05, 8 AD Cas. (BNA) 1093, 1110-11 (D.C. Cir. 1998) (the court, in interpreting a collective bargaining agreement provision authorizing reassignment of disabled employees, states that "[a]n employee who is allowed to compete for jobs precisely like any other applicant has not been "reassigned"); United States v. Denver, 943 F. Supp. 1304, 1310-11, 6 AD Cas. (BNA) 245, 250 (D. Colo. 1996) (the ADA requires employers to move beyond traditional analysis and consider reassignment as a method of enabling a disabled worker to do a job).

Some courts have suggested that reassignment means simply an opportunity to compete for a vacant position. See, e.g., Daugherty v. City of El Paso, 56 F.3d 695, 700, 4 AD Cas. (BNA) 993, 997 (5th Cir. 1995). Such an interpretation nullifies the clear statutory language stating that reassignment is a form of reasonable accommodation. Even without the ADA, an employee with a disability may have the right to compete for a vacant position.

91. 29 C.F.R. pt. 1630 app. § 1630.2(o) (1997).

92. See US Airways, Inc. v. Barnett, 535 U.S., 122 S. Ct. 1516, 1524-25 (2002).

93. Id.

94. Id. at 1525. In a lawsuit, the plaintiff/employee bears the burden of proof to show the existence of "special circumstances" that warrant a jury's finding that a reassignment is "reasonable" despite the presence of a seniority system. If an employee can show "special circumstances," then the burden shifts to the employer to show why the reassignment would pose an undue hardship. See id.

95. Id.

96. Id. The Supreme Court made clear that these two were examples of "special circumstances" and that they did not constitute an exhaustive list of examples. Furthermore, Justice Stevens, in a concurring opinion, raised additional issues that could be relevant to show special circumstances that would make it reasonable for an employer to make an exception to its seniority system. See id. at 1526.

97. The discussions and examples in this section assume that there is only one effective accommodation and that the reasonable accommodation will not cause an undue hardship.

98. See Ralph v. Lucent Technologies, Inc., 135 F.3d 166, 171, 7 AD Cas. (BNA) 1345, 1349 (1st Cir. 1998).

99. For a discussion on ways to modify supervisory methods, see ADA and Psychiatric Disabilities, supra note 27, at 26-27, 8 FEP Manual (BNA) 405:7475.

100. See 29 C.F.R. § 1630.2(o)(1)(ii), (2)(ii) (1997) (modifications or adjustments 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).

101. Courts have differed regarding whether "work-at-home" can be a reasonable accommodation. Compare Langon v. Department of Health and Human Servs., 959 F.2d 1053, 1060, 2 AD Cas. (BNA) 152, 159 (D.C. Cir. 1992); Anzalone v. Allstate Insurance Co., 5 AD Cas. (BNA) 455, 458 (E.D. La. 1995); Carr v. Reno, 23 F.3d 525, 530, 3 AD Cas. (BNA) 434, 437-38 (D.D.C. 1994), with Vande Zande v. Wisconsin Dep't of Admin., 44 F.3d 538, 545, 3 AD Cas. (BNA) 1636, 1640 (7th Cir. 1995). Courts that have rejected working at home as a reasonable accommodation focus on evidence that personal contact, interaction, and coordination are needed for a specific position. See, e.g., Whillock v. Delta Air Lines, 926 F. Supp. 1555, 1564, 5 AD Cas. (BNA) 1027 (N.D. Ga. 1995), aff'd, 86 F.3d 1171, 7 AD Cas. (BNA) 1267 (11th Cir. 1996); Misek-Falkoff v. IBM Corp., 854 F. Supp. 215, 227-28, 3 AD Cas. (BNA) 449, 457-58 (S.D.N.Y. 1994), aff'd, 60 F.3d 811, 6 AD Cas. (BNA) 576 (2d Cir. 1995).

102. See 29 C.F.R. § 1630.15(d) (1997).

103. See Siefken v. Arlington Heights, 65 F.3d 664, 666, 4 AD Cas. (BNA) 1441, 1442 (7th Cir. 1995). Therefore, it may be in the employee's interest to request a reasonable accommodation before performance suffers or conduct problems occur. For more information on conduct standards, including when they are job-related and consistent with business necessity, see ADA and Psychiatric Disabilities, supra note 27, at 29-32, 8 FEP Manual (BNA) 405:7476-78.

An employer does not have to offer a "firm choice" or a "last chance agreement" to an employee who performs poorly or who has engaged in misconduct because of alcoholism. "Firm choice" or "last chance agreements" involve excusing past

performance or conduct problems resulting from alcoholism in exchange for an employee's receiving substance abuse treatment and refraining from further use of alcohol. Violation of such an agreement generally warrants termination. Since the ADA does not require employers to excuse poor performance or violation of conduct standards that are job-related and consistent with business necessity, an employer has no obligation to provide "firm choice" or a "last chance agreement" as a reasonable accommodation. See Johnson v. Babbitt, EEOC Docket No. 03940100 (March 28, 1996). However, an employer may choose to offer an employee a "firm choice" or a "last chance agreement."

104. See ADA and Psychiatric Disabilities, supra note 27, at 31-32, 8 FEP Manual (BNA) 405:7477-78.

105. See Robertson v. The Neuromedical Ctr., 161 F.3d 292, 296 (5th Cir. 1998); see also ADA and Psychiatric Disabilities, supra note 27, at 27-28, 8 FEP Manual (BNA) 405:7475.

106. While from an employer's perspective it may appear that an employee is "failing" to use medication or follow a certain treatment, such questions can be complex. There are many reasons why a person would choose to forgo treatment, including expense and serious side effects.

107. See Vande Zande v. Wisconsin Dep't of Admin., 44 F.3d 538, 544, 3 AD Cas. (BNA) 1636, 1639 (7th Cir. 1995).

108. See 29 C.F.R. pt. 1630 app. § 1630.9 (1997); see also House Judiciary Report, supra note 6, at 39; House Education and Labor Report, supra note 6, at 65; Senate Report, supra note 6, at 34.

See, e.g., Taylor v. Principal Fin. Group, Inc., 93 F.3d 155, 165, 5 AD Cas. (BNA) 1653, 1659 (5th Cir. 1996); Tips v. Regents of Texas Tech Univ., 921 F. Supp. 1515, 1518 (N.D. Tex. 1996); Cheatwood v. Roanoke Indus., 891 F. Supp. 1528, 1538, 5 AD Cas. (BNA) 141, 147 (N.D. Ala. 1995); Mears v. Gulfstream Aerospace Corp., 905 F. Supp. 1075, 1080, 5 AD Cas. (BNA) 1295, 1300 (S.D. Ga. 1995), aff'd, 87 F.3d 1331, 6 AD Cas. (BNA) 1152 (11th Cir. 1996). But see Schmidt v. Safeway Inc., 864 F. Supp. 991, 997, 3 AD Cas. (BNA) 1141, 1146-47 (D. Or. 1994) (employer had obligation to provide reasonable accommodation because it knew of the employee's alcohol problem and had reason to believe that an accommodation would permit the employee to perform the job).

An employer may not assert that it never received a request for reasonable accommodation, as a defense to a claim of failure to provide reasonable accommodation, if it actively discouraged an individual from making such a request.

For more information about an individual requesting reasonable accommodation, see Questions 1-4, supra.

109. See Question 5, supra, for information on the interactive process.

110. 29 C.F.R. pt. 1630 app. § 1630.9 (1997).

111. 42 U.S.C. § 12112(d)(3)(B), (d)(4)(C) (1994); 29 C.F.R. § 1630.14(b)(1) (1997). The limited exceptions to the ADA confidentiality requirements are:
(1) supervisors and managers may be told about necessary restrictions on the work or duties of the employee and about necessary accommodations; (2) first aid and safety personnel may be told if the disability might require emergency treatment; and (3) government officials investigating compliance with the ADA must be given relevant information on request. In addition, the Commission has interpreted the ADA to allow employers to disclose medical information in the following circumstances: (1) in accordance with state workers' compensation laws, employers may disclose information to state workers' compensation offices, state second injury funds, or workers' compensation insurance carriers; and (2) employers are permitted to use medical information for insurance purposes. See 29 C.F.R. pt. 1630 app. §1630.14(b) (1997); Preemployment Questions and Medical Examinations, supra note 27, at 23, 8 FEP Manual (BNA) 405:7201; Workers' Compensation and the ADA, supra note 52, at 7, 8 FEP Manual (BNA) 405:7394.

112. The discussions and examples in this section assume that there is only one effective accommodation.

113. See 29 C.F.R. pt. 1630 app. §1630.15(d) (1996); see also Stone v. Mount Vernon, 118 F.3d 92, 101, 6 AD Cas. (BNA) 1685, 1693 (2d Cir. 1997) (an employer who has not hired any persons with disabilities cannot claim undue hardship based on speculation that if it were to hire several people with disabilities it may not have sufficient staff to perform certain tasks); Bryant v. Better Business Bureau of Greater Maryland, 923 F. Supp. 720, 735, 5 AD Cas. (BNA) 625, 634 (D. Md. 1996).

114. See 42 U.S.C. § 12111(10)(B) (1994); 29 C.F.R. § 1630.2(p)(2) (1997); 29 C.F.R. pt. 1630 app. § 1630.2(p) (1997); TAM, supra note 49, at 3.9, 8 FEP Manual (BNA)

405:7005-07.

115. See Senate Report, supra note 6, at 36; House Education and Labor Report, supra note 6, at 69. See also 29 C.F.R. pt. 1630 app. § 1630.2(p) (1997).

116. See the Appendix on how to obtain information about the tax credit and deductions.

117. See 29 C.F.R. pt. 1630 app. § 1630.15(d) (1997).

118. Failure to transfer marginal functions because of its negative impact on the morale of other employees also could constitute disparate treatment when similar morale problems do not stop an employer from reassigning tasks in other situations.

119. See Haschmann v. Time Warner Entertainment Co., 151 F.3d 591, 600-02, 8 AD Cas. (BNA) 692, 699-701 (7th Cir. 1998).

120. See Criado v. IBM, 145 F.3d 437, 444-45, 8 AD Cas. (BNA) 336, 341 (1st Cir. 1998).

121. The ADA's definition of undue hardship does not include any consideration of a cost-benefit analysis. See 42 U.S.C. § 12111(10) (1994); see also House Education and Labor Report, supra note 6, at 69 ("[T]he committee wishes to make clear that the fact that an accommodation is used by only one employee should not be used as a negative factor counting in favor of a finding of undue hardship.").

Furthermore, the House of Representatives rejected a cost-benefit approach by defeating an amendment which would have presumed undue hardship if a reasonable accommodation cost more than 10% of the employee's annual salary. See 136 Cong. Rec. H2475 (1990), see also House Judiciary Report, supra note 6, at 41; 29 C.F.R. pt. 1630 app. § 1630.15(d) (1997).

Despite the statutory language and legislative history, some courts have applied a cost-benefit analysis. See, e.g., Monette v. Electronic Data Sys. Corp., 90 F.3d 1173, 1184 n.10, 5 AD Cas. (BNA) 1326, 1335 n.10 (6th Cir. 1996); Vande Zande v. Wisconsin Dep't of Admin., 44 F.3d 538, 543, 3 AD Cas. (BNA) 1636, 1638-39 (7th Cir. 1995).

122. See 42 U.S.C. § 12112(b)(2) (1994); 29 C.F.R. § 1630.6 (1997) (prohibiting an employer from participating in a contractual relationship that has the effect of subjecting qualified applicants or employees with disabilities to discrimination).

123. See 42 U.S.C. § 12203(b) (1994); 29 C.F.R. § 1630.12(b) (1997).

124. For example, under Title III of the ADA a private entity that owns a building in which goods and services are offered to the public has an obligation, subject to certain limitations, to remove architectural barriers so that people with disabilities have equal access to these goods and services. 42 U.S.C.

§ 12182(b)(2)(A)(iv) (1994). Thus, the requested modification may be something that the property owner should have done to comply with Title III.

125. US Airways, Inc. v. Barnett, 535 U.S., 122 S. Ct. 1516, 1523 (2002).

126. Id.

127. See Questions 5-10 for a discussion of the interactive process.


# NEW YORK PAID SICK LEAVE

All private sector workers in New York State are now covered under the state's new sick and safe leave law, regardless of industry, occupation, part-time status, overtime exempt status, and seasonal status.

The law requires employers with five or more employees to provide their employees with paid sick and safe leave. Businesses with fewer than five employees and a net income of $1 million or less must provide unpaid sick and safe leave to employees.

## KEY DATES

- **September 30, 2020:** Covered employees in New York State will start to accrue leave at a rate of one hour for every 30 hours worked.
- **January 1, 2021:** Employees may start using accrued leave.

## AMOUNT OF LEAVE

Employees will receive an amount of sick leave depending on the size of their employer:

| Number of Employees | Employer Sick Leave Requirements |
|---|---|
| **0 - 4** | If net income is ***$1 million or less*** in the previous tax year, the employer is required to provide up to 40 hours of **unpaid** sick leave per calendar year. |
| **0 - 4** | If net income is ***greater than $1 million*** in the previous tax year, the employer is required to provide up to 40 hours of **paid** sick leave per calendar year. |
| **5 - 99** | Up to **40** hours of **paid** sick leave per calendar year. |
| **100+** | Up to **56** hours of **paid** sick leave per calendar year. |

*A January 1 – December 31 calendar year must be used for purposes of counting employees. Small employers who reported net income of less than $1million do not need to pay their employees sick leave, but must provide the additional allotted leave time. For other purposes, including use and accrual of leave, employers may set a calendar year to mean any 12-month period.*

## ACCRUALS

Employees begin accruing leave on September 30, 2020. Leave must be accrued at a rate not less than one hour for every thirty hours worked.

## PERMITTED USES

After January 1, 2021, employees may use accrued leave following a verbal or written request to their employer for the following reasons impacting the employee or a member of their family for whom they are providing care or assistance with care:

### Sick Leave

- For mental or physical illness, injury, or health condition, regardless of whether it has been diagnosed or requires medical care at the time of the request for leave; or
- For the diagnosis, care, or treatment of a mental or physical illness, injury or health condition; or need for medical diagnosis or preventive care.

### Safe Leave

- For an absence from work when the employee or employee's family member has been the victim of domestic violence as defined by the State Human Rights Law, a family offense, sexual offense, stalking, or human trafficking due to any of the following as it relates to the domestic violence, family offense, sexual offense, stalking, or human trafficking:
  - to obtain services from a domestic violence shelter, rape crisis center, or other services program;
  - to participate in safety planning, temporarily or permanently relocate, or take other actions to increase the safety of the employee or employee's family members;
  - to meet with an attorney or other social services provider to obtain information and advice on, and prepare for or participate in any criminal or civil proceeding;
  - to file a complaint or domestic incident report with law enforcement;
  - to meet with a district attorney's office;
  - to enroll children in a new school; or
  - to take any other actions necessary to ensure the health or safety of the employee or the employee's family member or to protect those who associate or work with the employee.

## WHO IS ELIGIBLE

All private-sector employees in New York State are covered, regardless of industry, occupation, part-time status, and overtime exempt status. Federal, state, and local government employees are **NOT** covered, but employees of charter schools, private schools, and not-for-profit corporations are covered.

## LEAVE INCREMENTS

Employers are permitted to require that leave be used in increments (e.g., 15 minutes, 1 hour, etc.) but may not set the minimum increment at more than 4 hours.

Employers are permitted to limit the leave taken in any year to the maximum amount required to be provided to such employee (e.g., 40 hours for midsized employers and 56 hours for large employers). Any limitations permitted by the law must be put into writing and either posted or given to employees.

Employers must notify employees in writing or by posting a notice in the worksite, prior to the leave being earned, of any restrictions in their leave policy affecting the employees' use of leave, including any limitations on leave increments.

## RATE OF PAY

Employees must be paid their normal rate of pay for any paid leave time under this law, or the applicable minimum wage rate, whichever is greater. No allowances or credits (e.g., tip credits) may be claimed for paid leave hours, and employers are prohibited from reducing an employee's rate of pay for sick leave hours only.

## ALTERNATIVE ACCRUAL SYSTEM

As an alternative to employees accruing 1 hour for every 30 hours worked, employers may choose to provide the full amount of sick leave required by this law at the beginning of each calendar year (e.g., a business with over a 100 employees could provide 56 hours of sick leave to each employee starting January 1 of each year or at the beginning of a twelve month period as determined by the employee. Such up-front sick leave is not subject to later revocation or reduction if, for instance, the employee works fewer hours than anticipated by the employer).

## EXISTING POLICIES

If an employer, including those covered by a collective bargaining agreement, has an existing leave policy (sick leave or other time off) that meets or exceeds the accrual, carryover, and use requirements, this law does not present any further obligations on that employer.

## COLLECTIVE BARGAINING AGREEMENTS

Collective bargaining agreements that are entered into after September 30, 2020 are not required to provide the sick leave described above so long as the agreement provides for comparable benefits/paid days off for employees and specifically acknowledges the provisions of Labor Law 196-b. For the purposes of collective bargaining agreements, the Department of Labor considers leave time which has fewer restrictions on its use to be comparable to that required by this law, regardless of the label of such leave (e.g., annual or vacation time) and multiple leave benefits which meet the use requirements of this law may be combined to satisfy the "comparable benefit" requirement. To satisfy the requirements of this law, any agreement entered into after September 30, 2020 must specifically reference Labor Law Section 196-b.

## RETALIATION

An employer cannot retaliate against an employee in any way for exercising their rights to use sick leave. Furthermore, employees must be restored to their position of employment as it had been prior to any sick leave taken. Employees who believe that they have been retaliated against for exercising their sick leave rights should contact the Department of Labor's Anti-Retaliation Unit at **888-52-LABOR** or **LSAsk@labor.ny.gov.Recordkeeping**.

Employers must keep payroll records for six years which must include the amount of sick leave accrued and used by each employee on a weekly basis.

Upon the request of an employee, employers are required provide, within three business days, a summary of the amounts of sick leave accrued and used by the employee in the current calendar year and/or any previous calendar year.

## RECORDKEEPING

Employers must keep payroll records for six years which must include the amount of sick leave accrued and used by each employee on a weekly basis.

Upon the request of an employee, employers are required provide, within three business days, a summary of the amounts of sick leave accrued and used by such employee in the current calendar year and/or any previous calendar year.

For more information about New York State's Paid Sick Leave,
including additional FAQs, regulations, and more, please visit **ny.gov/paidsickleave**.


The New York State Department of Labor is an Equal Opportunity Employer/Program. Auxiliary aids and services are available upon request to individuals with disabilities.
A proud partner of the American JobCenternetwork
NEW YORK STATE DEPARTMENT OF LABOR | Department of Labor

April 2019

# NYC Commission on Human Rights Legal Enforcement Guidance on Discrimination on the Basis of Disability


Bill de Blasio, Mayor | Carmelyn P. Malalis, Commissioner/Chair

**Central Office:** 22 Reade Street, New York, NY 10007

NYC.gov/HumanRights | @NYCCHR

# Table of Contents

# NYC Commission on Human Rights Legal Enforcement Guidance on Discrimination on the Basis of Disability

## Introduction

In New York City, approximately one million residents, or 11.2 percent of the City's population, live with a disability.[1] Many of us will have at least one disability during our lifetimes and count people living with disabilities among our neighbors, colleagues, family members, and friends.

Fostering environments of inclusivity and accessibility allow people with disabilities to be full participants in New York City life, engage with their communities, access fundamental services, enter and remain in the workforce, and meet their most basic and critical needs. Our city is at its best when it draws on the abilities of all its residents. Providing reasonable accommodations and creating accessible spaces also benefits all New Yorkers, including business owners,

[1] Mayor's Office for People with Disabilities, AccessibleNYC: An Annual Report on the State of People with Disabilities Living in New York City (2017), http://www1.nyc.gov/assets/mopd/downloads/pdf/accessiblenyc_2017.pdf.

residents, and employees, because providing equal access for people with disabilities is an investment that will yield long-lasting economic and societal gains. New York City is dedicated to advancing accessibility and giving all New Yorkers a chance to thrive. The New York City Commission on Human Rights is committed to ensuring that New Yorkers with disabilities are able to live, work, and enjoy all that New York City has to offer, without discrimination.

The New York City Human Rights Law ("NYCHRL") prohibits discrimination by most employers,[2] housing providers,[3] and public

---

[2] The NYCHRL prohibits unlawful discriminatory practices in employment and covers entities including employers, labor organizations, employment agencies, joint labor-management committee controlling apprentice training programs, or any employee or agent thereof. N.Y.C. Admin. Code § 8-107(1). Under the NYCHRL:

> The term "employer" does not include any employer with fewer than four persons in his or her employ ... [N]atural persons employed as independent contractors to carry out work in furtherance of an employer's business enterprise who are not themselves employers shall be counted as persons in the employ of such employer.

N.Y.C. Admin. Code § 8-102(5).

"The term 'employment agency' includes any person undertaking to procure employees or opportunities to work." N.Y.C. Admin. Code § 8-102(2).

"The term 'labor organization' includes any organization which exists and is constituted for the purpose, in whole or in part, of collective bargaining or of dealing with employers concerning grievances, terms and conditions of employment, or of other mutual aid or protection in connection with employment." N.Y.C. Admin. Code § 8-102(3).

[3] The NYCHRL prohibits unlawful discriminatory practices in housing, and covers entities including the "owner, lessor, lessee, sublessee, assignee, or managing agent of, or other person having the right to sell, rent or lease or approve the sale, rental or lease of a housing accommodation, constructed or to be constructed, or an interest therein, or any agent or employee thereof." N.Y.C. Admin. Code § 8-107(5). Covered entities also include real estate brokers, real estate

salespersons, or employees or agents thereof. *Id.* The NYCHRL defines the term “housing accommodation” to include “any building, structure, or portion thereof which is used or occupied or is intended, arranged or designed to be used or occupied, as the home, residence or sleeping place of one or more human beings. Except as otherwise specifically provided, such term shall include a publicly-assisted housing accommodation.” N.Y.C. Admin. Code § 8-102(10). However, the NYCHRL exempts from coverage:

> the rental of a housing accommodation, other than a publicly-assisted housing accommodation, in a building which contains housing accommodations for not more than two families living independently of each other, if the owner [or] members of the owner’s family reside in one of such housing accommodations, and if the available housing accommodation has not been publicly advertised, listed, or otherwise offered to the general public; or (2) to the rental of a room or rooms in a housing accommodation, other than a publicly-assisted housing accommodation, if such rental is by the occupant of the housing accommodation or by the owner of the housing accommodation and the owner or members of the owner’s family reside in such housing accommodation.

N.Y.C. Admin. Code § 8-107(5)(4).

accommodations.[4] The NYCHRL also prohibits discriminatory harassment[5] and bias-based profiling by law enforcement.[6] Pursuant to Local Law No. 85 (2005) ("Local Civil Rights Restoration Act of 2005"), the NYCHRL must be construed "independently from similar or identical provisions of New York State or federal statutes," such that "similarly worded provisions of federal and state civil rights laws [are] a floor below which the City's Human Rights law cannot fall, rather than a ceiling above which the local law cannot rise."[7] In

---

[4] The NYCHRL prohibits unlawful discriminatory practices in public accommodations, and covers entities including any person who is the owner, franchisor, franchisee, lessor, lessee, proprietor, manager, superintendent, agent or employee of any place or provider of public accommodation. N.Y.C. Admin. Code § 8-107(4). The NYCHRL defines the term "place or provider of public accommodation" to include:

providers, whether licensed or unlicensed, of goods, services, facilities, accommodations, advantages or privileges of any kind, and places, whether licensed or unlicensed, where goods, services, facilities, accommodations, advantages or privileges of any kind are extended, offered, sold, or otherwise made available. Such term shall not include any club which proves that it is in its nature distinctly private . . . [or] a corporation incorporated under the benevolent orders law or described in the benevolent orders law but formed under any other law of this state, or a religious corporation incorporated under the education law or the religious corporation law [which] shall be deemed to be in its nature distinctly private.

N.Y.C. Admin. Code § 8-102(9).

[5] N.Y.C. Admin. Code §§ 8-602 – 8-604.

[6] N.Y.C. Admin. Code § 14-151.

[7] Local Law No. 85 § 1 (2005); N.Y.C. Admin. Code § 8-130(a) ("The

addition, exemptions to the NYCHRL must be construed "narrowly in order to maximize deterrence of discriminatory conduct."[8]

The provisions of the NYCHRL that prohibit discrimination on the basis of disability are generally broader than the Americans with Disabilities Act ("ADA") and the Fair Housing Act ("FHA"). The NYCHRL defines disability as any physical, medical, mental, or psychological impairment,[9] or a history or record of such impairment,[10] and includes a full range of sensory, mental, physical,

---

provisions of this title shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York state civil and human rights laws, including those laws with provisions worded comparably to provisions of this title, have been so construed.").

[8] Local Law No. 35 (2016); N.Y.C. Admin. Code § 8-130(b).

[9] The term "physical, medical, mental, or psychological impairment" means:

[a]n impairment of any system of the body; including, but not limited to: the neurological system; the musculoskeletal system; the special sense organs and respiratory organs, including, but not limited to, speech organs; the cardiovascular system; the reproductive system; the digestive and genito-urinary systems; the hemic and lymphatic systems; the immunological systems; the skin; and the endocrine system; or … [a] mental or psychological impairment.

N.Y.C. Admin. Code § 8-102(16)(b).

In the case of alcoholism, drug addiction or other substance abuse, the term "disability" applies to a person who "is recovering or has recovered" and "currently is free of such abuse." *Id.*

[10] N.Y.C. Admin. Code § 8-102(16)(a).

mobility, developmental, learning, and psychological disabilities—whether they are visible and apparent or not.

The NYCHRL creates four general causes of action related to disability discrimination. First, it prohibits covered entities from discriminating against an individual based on disability or perceived disability. As such, under the NYCHRL, both temporary or short-term injuries, as well as chronic conditions, may qualify as disabilities even if the impairments, when treated, permit the aggrieved individual to perform physical activities without limitation, and/or the conditions do not substantially limit the individual's major life activities.[11] Second, it

---

[11] *See e.g., Weissman v. Dawn Joy Fashions, Inc.*, 214 F.3d 224, 233 (2d Cir. 2000) (stating that "disability" is "more broadly defined" under the NYCHRL than it is under the ADA); *Debell v. Maimonides Med. Ctr.*, No. 09-CV-3491, 2011 WL 4710818, at *6 (E.D.N.Y. Sept. 30, 2011) (finding that a reasonable jury could conclude that plaintiff with psoriasis had a disability within the meaning of the NYCHRL, even though plaintiff failed to establish a cognizable disability under the ADA); *Primmer v. CBS Studios, Inc.*, 667 F. Supp. 2d 248 (S.D.N.Y. 2009) (stating that the major difference in the analysis of disability discrimination under the NYCHRL and the ADA is that the definition of "disability" under the former is considerably broader than the ADA definition, in that it does not require showing that the disability substantially limits a major life activity); *Attis v. Solow Realty Dev. Co.*, 522 F. Supp. 2d 623, 631–32 (S.D.N.Y. 2007) (finding that "any medically diagnosable impairment" is sufficient to constitute a disability under the NYCHRL); *Sussle v. Sirina Prot. Sys. Corp.*, 269 F. Supp. 2d 285, 316 (S.D.N.Y. 2003) (finding that employee's failure to establish that he suffered from a disability within meaning of ADA did not necessarily vitiate his claims under the NYCHRL, inasmuch as the definition of "disability" enumerated in the NYCHRL was broader

requires that covered entities provide reasonable accommodations to individuals with disabilities to enable them "to satisfy the essential requisites of a job or enjoy the right or rights in question provided that the disability is known or should have been known by the covered entity."[12] Third, it prohibits discrimination based on one's "association" or relationship with an individual with an actual or perceived disability.[13] Fourth, in December 2017, the City Council passed Local Law No. 59 (2018), which will go into effect on October 15, 2018, and which creates a separate cause of action against covered entities that "refuse or otherwise fail to engage in a cooperative dialogue[14] within a reasonable time with a person who has requested an accommodation or who the covered entity has notice may require such an accommodation."[15]

---

than the ADA definition); *Hazeldine v. Beverage Media, Ltd.*, 954 F. Supp. 697, 707 (S.D.N.Y. 1997) (finding that unlike the ADA, the NYCHRL only requires that an individual's disability impair a bodily system, and does not require a substantial limitation of the individual's major life activities).

[12] N.Y.C. Admin. Code § 8-107(15)(a).

[13] N.Y.C. Admin. Code § 8-107(20).

[14] The term "cooperative dialogue" means the process by which a covered entity 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. Local Law No. 59 (2018).

[15] *Id.*

The New York City Commission on Human Rights (the "Commission") is the City agency charged with enforcing the NYCHRL. Individuals interested in vindicating their rights under the NYCHRL can choose to file a complaint with the Commission's Law Enforcement Bureau within one (1) year of the discriminatory act or file a complaint in court within three (3) years of the discriminatory act.

This document serves as the Commission's legal enforcement guidance on the NYCHRL's protections as they apply to discrimination based on disability or perceived disability, including obligations of covered entities to provide reasonable accommodations for individuals with disabilities.[16] This document is not intended to serve as an exhaustive list of all forms of disability-related discrimination claims under the NYCHRL.

[16] While this document specifically reflects the Commission's interpretation of the NYCHRL, the Commission has included references to related federal authority where it is persuasive and instructive.

# Violations of the NYCHRL: Prohibitions on Disability Discrimination

## Disparate Treatment

Disparate treatment occurs when a covered entity treats an individual less favorably than others because of a protected characteristic.[17] Treating an individual less well than others because of their disability, or perceived disability, in employment, housing, and public accommodations is a violation of the NYCHRL.[18]

To establish disparate treatment under the NYCHRL, an individual must show they were treated less well or subjected to an adverse action, motivated, at least in part, by discriminatory animus. An individual may demonstrate this through direct evidence of discrimination or indirect evidence that gives rise to an inference of discrimination.[19] If a showing of discrimination relies on indirect evidence, the covered entity may respond to the indirect evidence of discrimination by putting forward a non-discriminatory justification for

---

[17] *Raytheon Co. v. Hernandez*, 540 U.S. 44, 52 (2003).

[18] The NYCHRL also applies in several other contexts such as licensing, real estate, credit, and discriminatory harassment.

[19] Examples of direct evidence could include explicit statements by a covered entity that an adverse action was based on a protected status, or explicitly discriminatory policies. *See In re Comm'n on Human Rights ex rel. Stamm v. E&E Bagels,* OATH Index No. 803/14, Dec. & Order, 2016 WL 1644879, at *4 (Apr. 21, 2016).

the alleged conduct. If the covered entity does so, the burden shifts back to the aggrieved individual to show that the proffered non-discriminatory motive was pretextual, false, or misleading, or that discrimination at least partly motivated the conduct.[20]

## **1.** Treating People Less Well Because of Disability

Adverse treatment may be overt, such as refusing to accept a rental application for an apartment because the applicant has a disability; deciding not to hire an applicant because of their disability; or firing an employee because of their disability. However, discriminatory conduct on the basis of disability often manifests itself in less direct ways. For example, holding an employee to a different standard because of their disability, in the absence of a reasonable accommodation, or acting on assumptions about what an applicant or employee with a disability can or cannot do in making decisions about hiring, assignments, or promotions may be discriminatory conduct. Similarly, not making repairs on a unit because of an assumption that a tenant with a disability is less likely to make a complaint is discriminatory. Such

---

[20] *See Bennett v. Health Mgmt. Sys., Inc.*, 92 A.D.3d 29, 40-41 (1st Dep't 2011) ("A plaintiff's response to a defendant's showing of nondiscriminatory reasons for its actions can take a variety of forms. In some cases, the plaintiff may present evidence of pretext and independent evidence of the existence of an improper discriminatory motive. In other cases, the plaintiff may leave unchallenged one or more of the defendant's proffered reasons for its actions, and may instead seek only to show that discrimination was just one of the motivations for the conduct. In addition, evidence of an unlawful motive in the mixed motive context need not be direct, but can be circumstantial—as with proof of any other fact….").

forms of discrimination are actionable under the NYCHRL because they subject individuals with disabilities to worse treatment. These actions contribute to the exclusion of individuals with disabilities from jobs, housing, and places of public accommodation, and violate the NYCHRL.

### **a.** Employment

It is unlawful to fire or refuse to hire or promote an individual or to discriminate in the terms and conditions of employment because of an employee's actual or perceived disability.[21] Examples of terms and conditions of employment include salary; work assignments; employee benefits; and keeping the workplace free from harassment.

#### ***Examples of Disparate Treatment***

- An employer seeks to offset the cost of providing a reasonable accommodation to an employee with a disability by lowering his salary or paying him less than other employees in similar positions.
- An employee who is deaf is often left out of conversations and discussions with her hearing co-workers, impacting her ability to get the information necessary to do her job. This behavior is impacting her professional development and well-being. When she brings this to the attention of her supervisors, the employer dismisses her concerns, tells her that "it's not a big deal," she just needs to be more patient, and promises that they will interpret the "important stuff" for her.

[21] N.Y.C. Admin. Code § 8-107(1).

- An employer assigns an employee who has a speech disability to a seat at the back of the office so that customers do not hear or see him, and prevents him from engaging with clients in a public-facing role, even though he is perfectly capable of communicating with clients.

## **b.** Housing

It is unlawful to refuse to sell, rent, or lease housing or to misrepresent the availability of housing to someone because of their actual or perceived disability.[22] It is also unlawful to set different terms, conditions, or privileges for the sale, rental, or lease of housing, such as different housing services or facilities, because of an individual's actual or perceived disability.[23]

### *Examples of Disparate Treatment*

- A landlord has a general "no pets" policy and requires that all tenants with service animals or emotional support animals pay an additional security deposit, take out renter's insurance, and only use the freight elevator to enter and leave the building, even if the landlord has no reason to believe that a particular service animal or emotional support animal is likely to cause more than the usual amount of wear and tear associated with normal use of the apartment building. A landlord may require a tenant to pay for damage or wear and tear caused by a service animal or emotional support animal, beyond wear and tear that is

[22] N.Y.C. Admin. Code § 8-107(5)(a)(1).

[23] N.Y.C. Admin. Code § 8-107(5)(a)(1)(b).

attributable to normal use, but cannot demand any additional deposits, insurance, or requirements up front.
- A tenant with a child who has autism moves into a building. Upon moving in, the tenant notifies the landlord that her child can have episodes in which he may cause noise. The landlord posts a sign in the lobby of the building alerting all other residents to the child's disability and asking that they notify him if they have any noise complaints.

## **c.** Public Accommodations

It is unlawful for providers of public accommodations, their employees, or their agents to directly or indirectly deny any person, or communicate an intent to deny any person, the services, advantages, facilities, or privileges of a public accommodation because of their actual or perceived disability, or to make their patronage feel unwelcome.[24]

### *Examples of Disparate Treatment*

- A customer who relies on a wheelchair visits a grocery store deli counter. The deli employee ignores the customer until the customer complains that she has been waiting longer than anyone else. In response, the employee says, "You'll just have to wait until I'm done helping all the normal customers and then I'll get to you."
- A patient visits a hospital for a pre-surgical consultation with his doctor. The patient has a disability that affects his speech, causing him to speak in a slow and deliberate manner. During

[24] N.Y.C. Admin. Code § 8-107(4).

the consultation, the patient has a number of questions about the procedure. His doctor says, “I don’t have time for this. Either you want the surgery or not. Next time bring someone with you who can translate for you.”

- A restaurant employee denies entry to a customer with a dog that the customer makes clear is a service dog.

When a customer seeks to enter a restaurant or other place of public accommodation, the business’s employees may ask the customer: (1) whether the animal is a service animal required because of a disability; and (2) what work or task has the animal been trained to perform. Employees cannot ask about the customer’s disability; require medical documentation; require a special identification card or training documentation for the animal; or ask that the animal demonstrate its ability to perform the work or task.[25]

## **2.** Harassment

Disparate treatment can manifest as harassment when the incident or behavior creates an environment or reflects or fosters a culture or atmosphere of stereotyping, degradation, humiliation, bias, or objectification. Harassment related to an individual’s actual or perceived disability is a form of discrimination, and may consist of a single or isolated incident, or a pattern of repeated acts or behavior. Under the NYCHRL, harassment related to disability covers a broad range of conduct and occurs generally when an individual is treated less well on account of their disability. The severity or pervasiveness

[25] *See* 35 C.F.R. 35.136(f); U.S. Dep’t of Justice, Civil Rights Div., Disability Rights Section, ADA 2010 Revised Requirements: Service Animals (July 12, 2014), https://www.ada.gov/service_animals_2010.pdf.

of the harassment is only relevant to damages.[26] Harassment may include comments, gestures, jokes, or pictures that target an individual based on their disability, and can occur in the context of employment, housing, and public accommodations, such as schools, hospitals, or public transportation.

***Examples of Harassment***

- A student is being bullied in class because of his learning disability. The school leadership has been notified of the bullying but has done nothing to address it.
- A supervisor yelled and cursed at his employee who has cerebral palsy, calling her a "spaz" and complaining that he would not have hired her if he knew her disability was "this bad."

## **3.** Discriminatory Policies

Any policy that negatively singles out individuals with disabilities is unlawful disparate treatment under the NYCHRL unless the covered entity can demonstrate a legitimate non-discriminatory justification for the distinction. Policies that categorically exclude individuals on account of their disability and without an individualized assessment are unlawful. This includes policies that exclude workers with disabilities from specific job categories or positions without an individualized assessment of the candidate and the essential requisites of the job, deny housing to individuals with disabilities, deny

[26] *Goffe v. NYU Hosp. Ctr.*, 201 F. Supp. 3d 337, 351 (E.D.N.Y. 2016) ("the federal severe or pervasive standard of liability no longer applies to NYCHRL claims, and the severity or pervasiveness of conduct is relevant only to the scope of damages…").

entrance to individuals with disabilities to certain public accommodations, or impose conditions on people on account of their disability. Using safety concerns as a pretext for discrimination or as a way to reinforce stereotypes and assumptions about people with disabilities is unlawful. An employer may, however, require a doctor's note stating that an individual who had been out on leave related to a disability is able to return to work with or without a reasonable accommodation, if an employer has a reasonable belief that an employee's ability to perform the essential requisites of the job will be impaired or that they will pose a direct threat to themselves or the safety of others due to a medical condition.[27]

### *Examples of Discriminatory Policies*

- An employer has a policy that requires employees to be "100% healed" or "fully healed" to return to work, and refuses to provide certain types of accommodations. This policy is unlawful under the NYCHRL, as an employer cannot require an employee with a disability to have no medical restrictions if the employee is able to perform his job with or without a reasonable accommodation. Similarly, a policy that categorically prohibits "light duty" work assignments and fails to provide an exception for reasonable accommodations would be discriminatory.[28]

---

[27] *See* U.S. Equal Emp. Opportunity Comm'n, Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans With Disabilities Act (ADA) (July 27, 2000), https://www.eeoc.gov/policy/docs/guidance-inquiries.html#9.

[28] As with any reasonable accommodation request, "light duty" assignments must be awarded unless allowing such an assignment would amount to an undue hardship for the employer. The NYCHRL

- An apartment complex for seniors institutes a rule requiring all users of electric or motorized wheelchairs and scooters to obtain liability insurance coverage. This policy imposes a condition on some people because of their disability, and is therefore unlawful under the NYCHRL. Nonetheless, as with any damage caused by a tenant during their residency, a housing provider may require that a tenant with an electric or motorized wheelchair pay for any damage such equipment causes in common areas of the building, beyond normal wear and tear.
- A day care center has a policy of refusing admission to children who need medication administered throughout the course of the day. This policy categorically excludes children with certain disabilities from a public accommodation, and is therefore unlawful under the NYCHRL.[29]

---

does not require that an employer create a superfluous position to accommodate an individual with disabilities. However, an employer's ability to reassign duties among its staff is relevant to an assessment of undue hardship.

[29] *See* N.Y. STATE OFFICE OF CHILDREN AND FAMILY SERVS., THE BUREAU OF EARLY CHILDHOOD SERVS., POLICY STATEMENT, ID NUMBER 06-3 (Mar. 28, 2006) https://ocfs.ny.gov/main/childcare/policies/06-3.pdf ("The ADA may require that a day care program give medications to children with disabilities, in some circumstances, in order to make reasonable accommodations to enable such children be able to attend the program. The practical ramification of the ADA in New York State is that day care providers should be prepared to obtain, in a timely fashion, the required training in order to administer at least certain basic types of medications if required by children with disabilities where such administration will enable the child to attend the day care program. If a provider would be in violation of the ADA by refusing to administer medication to a child with a disability, and

## **4.** Actions Based on Stereotypes and Assumptions

It is unlawful under the NYCHRL for covered entities to act on stereotypes or assumptions, without regard to individual ability or circumstance. Judgments and stereotypes about individuals with disabilities, including their physical and mental capabilities, are pervasive in our society and cannot be used as pretext for unlawful discriminatory decisions in employment, housing, and public accommodations.

### ***Examples of Actions Based on Stereotypes and Assumptions***

- A landlord decides not to rent an apartment to an otherwise qualified applicant who has a mental health disability because of unfounded speculation that the individual poses a danger.
- A landlord decides not to rent an apartment to an otherwise qualified applicant who has a mobility disability because of assumptions regarding the applicant's need for accommodations and a belief that it will "cost too much." However, if a housing provider and an applicant engage in a cooperative dialogue[30] and the housing provider determines that it will pose an undue

---

either has such children already in the program or parents or guardians seek to enroll such children, the provider must take steps in a timely manner to become authorized to administer medications in accordance with OCFS regulations, modify its health care plan with the approval of a health care consultant to provide for the administration of medications, and administer any medication required by the ADA.").

[30] *See* Local Law No. 59 (2018).

hardship[31] to provide an accommodation that the housing applicant will need, it may lawfully determine that it cannot rent that apartment to the applicant.

- An employer decides not to hire an otherwise qualified applicant who uses a mobility device because of assumptions regarding the applicant's abilities to travel to off-site meetings, events, and conferences.
- An employer decides not to hire an otherwise qualified applicant whose recent bout with cancer is now in remission because the employer believes that that the condition will recur and cause the employee to miss work.
- A gym asks an individual with a mobility disability to sign extra waivers that other patrons do not sign because of a fear that the individual poses a liability.
- A pool does not allow an individual with a disability to swim unless a lifeguard is on duty because of assumptions regarding the individual's capabilities, but does not impose this restriction on other patrons.

[31] *See* N.Y.C. Admin. Code § 8-102(18).

# Neutral Policies That Have a Discriminatory Impact

While the central question in a disparate treatment case is whether the protected trait, at least in part, motivated the covered entity's decision or actions, disparate impact claims involve policies or practices that are facially neutral, but disproportionately or more harshly impact one group. Unless such policies or practices bear a significant relationship to a significant business objective of the covered entity, they are unlawful under the NYCHRL.[32] Therefore, under a disparate impact theory of discrimination, a facially neutral policy or practice may be found to be unlawful discrimination even without evidence of the covered entity's subjective intent to discriminate.[33] For example, a policy that imposes a penalty without exception on employees for exceeding a permissible amount of sick leave may appear facially neutral, but it may disparately impact individuals with disabilities, which may result in a finding that the policy is unlawful under the NYCHRL. By contrast, a policy that allows for the possibility of additional sick leave as a reasonable accommodation for individuals with disabilities would not run afoul of the NYCHRL.

The NYCHRL explicitly creates a disparate impact cause of action. The law also explicitly makes disparate impact applicable to discrimination claims beyond the employment context,[34] applying to claims of discrimination in housing, public accommodations, and other covered contexts.

---

[32] N.Y.C. Admin. Code § 8-107(17)(2).

[33] *Raytheon Co. v. Hernandez*, 540 U.S. 44, 52–53 (2003).

[34] *Levin v. Yeshiva Univ.*, 96 N.Y.2d 484, 492–93 (2001).

The standard for establishing a *prima facie* case of disparate impact under the NYCHRL is lower than the standard for analogous claims under federal laws such as the ADA or Title VII, or the New York State Human Rights Law.[35] Under the NYCHRL, a complainant must show that a facially neutral policy or practice has a disparate impact on a protected group.[36] Once such a showing has been made, the covered entity has an opportunity to plead and prove as an affirmative defense that either: (1) the policy or practice complained of bears a significant relationship to a significant business objective; or (2) the policy or practice does not contribute to the disparate impact.[37] However, this defense is defeated if the complainant produces substantial evidence of an available alternative policy or practice with less disparate impact, and the covered entity is unable to establish that an alternative policy or practice would not serve its business objective as well as the complained-of policy or practice.[38] "Significant

---

[35] *Teasdale v. N.Y.C. Fire Dep't, FDNY, 574 F. App'x 50, 52 (2d Cir. 2014).*

[36] N.Y.C. Admin. Code § 8-107(17)(1); *see* N.Y.C. Admin. Code § 8-107(17)(2)(b) ("The mere existence of a statistical imbalance between a covered entity's challenged demographic composition and the general population is not alone sufficient to establish a *prima facie* case of disparate impact violation, unless the general population is shown to be the relevant pool for comparison, the imbalance is shown to be statistically significant, and there is an identifiable policy or practice, or group of policies or practices, that allegedly causes the imbalance.").

[37] N.Y.C. Admin. Code § 8-107(17)(2)(b).

[38] *Id.*

business objective" includes, but is not limited to, successful performance of the job.[39]

Covered entities should modify policies and practices that could have a disparate impact on individuals with disabilities or ensure that there is a mechanism by which covered entities can provide modifications or exceptions to such policies and practices as reasonable accommodations. Written policies that express limitations or prohibitions, such as a "maximum leave policy" in an employee handbook or a "no pets" policy in a lease, should be clear about the availability of and the process for seeking and granting an exception or modification to the policy as a reasonable accommodation. In determining whether a covered entity's facially neutral policy or practice has a discriminatory impact, the Commission will consider all written policies, including employee handbooks and manuals, and whether and how staff are trained to address requests for accommodation.

### *Examples of Neutral Policies with Disparate Impact in Employment, Housing, and Public Accommodations*

- Employment

  ***"No fault" absence or maximum leave policies***: Maximum leave or "no fault" absence policies generally establish the maximum amount of leave an employer will provide or allow. They may take different forms, such as establishing a flat limit for both extended and intermittent time, or limiting unplanned absences. For example, an employer covered under the Family Medical Leave Act (FMLA) grants employees a maximum of

[39] *Id.*

twelve weeks of leave per year. If an employee has exhausted her twelve weeks of FMLA leave, [40] but requires fifteen additional days of leave due to her disability, the employer must engage in a cooperative dialogue[41] with the employee to determine if she needs to take additional leave as a reasonable accommodation and can only deny that request if it would pose an undue hardship.

***Use of form warning letters***: Employers sometimes rely on "form letters" to communicate with employees who are nearing the end of leave provided under an employer's leave program, that instruct employees to return to work by a certain date or face termination or other discipline. Such warning letters should let employees know that if they need additional leave as a reasonable accommodation for a disability, they should ask for it as soon as possible so that the employer may consider whether it can grant an extension without causing undue hardship.

***Short-term or on-call scheduling***: Employers often have short-term or on-call scheduling for their employees, where employees do not have regular work hours and are subject to shift cancellations and last-minute changes to their hours. Such policies prevent employees from having stable, predictable schedules, and may have a disparate impact on employees with disabilities or employees who are caretakers for individuals with disabilities.[42] While New York City's Fair Work Week legislation applies to workers in the fast food and retail sectors, requiring

---

[40] *See* Family Medical Leave Act, 29 U.S.C. § 2612(a)(1).

[41] *See infra* Part IV(a) for a discussion of the cooperative dialogue process.

[42] N.Y.C. Admin. Code § 8-107(20).

advance notice of schedule changes, stable schedules, and a pathway to full-time hours,[43] short-term or on-call scheduling remains common in many other industries. If an employee requests advanced notice for schedule changes or a stable schedule to accommodate their disability, the employer must engage in a cooperative dialogue with the employee about their request.

- Housing

  ***"No pets" policies***: A landlord with a "no pets" policy must have a process, even if informal, for seeking and obtaining an exemption or modification of the policy to allow a tenant to live with his or her service or emotional support animal.[44]

  ***Policies prohibiting physical modification of units***: While a landlord may generally not allow residents to modify their units, landlords must have a process, even if informal, for residents with disabilities to seek and obtain an exemption to the policy to allow them to request reasonable physical accommodations to their private living space, as well as to common use spaces.[45]

- Public Accommodations

  ***"No outside food" policies***: A place of public accommodation that does not allow people to bring outside food into its facility may need to make an exception for a person who, for example, has diabetes and needs to eat frequently to control their glucose

---

[43] Local Law No. 107 (2017).

[44] *See* 24 C.F.R. § 100.204(b); *Bronk v. Ineichen*, 54 F.3d 425, 429 (7th Cir. 1995).

[45] *See* 42 U.S.C. 3604(f)(3)(A).

level, or has severe food allergies and may not be able to avail themselves of food options in the facility.[46]

***"No motorized devices" policies***: A covered entity that prohibits use of motorized devices on its premises must allow people with disabilities who use mobility devices such as wheelchairs and electric scooters to enter the premises unless a particular type of device cannot be accommodated because of legitimate safety requirements.[47] Entities such as small convenience stores or small offices, where it may not be feasible to accommodate certain types of mobility devices, are required to serve a person with a disability using one of these devices in an alternate manner if possible, such as providing curbside service or meeting the person at an alternate location.

---

[46] *See* U.S. Dep't of Justice, Civil Rights Div., Disability Rights Section, ADA Update: A Primer for State and Local Governments (June 8, 2015), https://www.ada.gov/regs2010/titleII_2010/titleII_primer.pdf.

[47] *See* U.S. Dep't of Justice, Civil Rights Div., Disability Rights Section, ADA Requirements: Wheelchairs, Mobility Aids, and Other Power-Driven Mobility Devices (Jan. 31, 2014), https://www.ada.gov/opdmd.pdf.

# Associational Discrimination

## **1.** Associational Disparate Treatment Claims

The NYCHRL's anti-discrimination protections extend to prohibit unlawful discriminatory practices based on a person's relationship to or association with a person with an actual or perceived disability.[48] The law does not require a familial relationship for an individual to be protected by the association provision; the relevant inquiry is whether the covered entity was motivated by the individual's relationship or association with a person who has a disability.

To establish a disparate treatment claim of associational discrimination based on disability under the NYCHRL, a complainant must show that: (1) the covered entity knew of the individual's relationship or association with a person with an actual or perceived disability; (2) the individual suffered an independent injury, separate from any injury the person with the disability may have suffered;[49] and (3) the covered entity treated the individual less well and was at least

---

[48] N.Y.C. Admin. Code § 8-107(20).

[49] N.Y.C. Admin. Code § 8-107(20); *see Bartman v. Shenker*, 5 Misc. 3d 856, 860 (Sup. Ct. N.Y. Cty. 2004); *Jing Zhang v. Jenzabar, Inc.*, No. 12 Civ. 2988, 2015 WL 1475793, at *12 (E.D.N.Y. Mar. 30, 2015) ("To maintain a claim for association discrimination, [plaintiff] must simply allege that it suffered an independent injury because of its relationship with [a person] who alleges unlawful discriminatory practices related to her terms, conditions, or privileges of employment.").

in part motivated by discriminatory animus.[50] A complainant may show this through direct evidence of discrimination. Alternatively, if a complainant provides evidence that would support an inference of discrimination, the burden shifts to the respondent to advance a legitimate, non-discriminatory reason for its actions. If it is able to do so, the burden shifts back to the complainant to demonstrate that discriminatory animus was at least a factor in the adverse action.[51]

The prohibition against associational disability discrimination prevents covered entities from taking adverse actions against individuals who associate with people who have disabilities based on unfounded stereotypes and assumptions. This means that a covered entity may not take adverse action based on unfounded concerns about the known disability of a family member or anyone else with whom the applicant, employee, or customer has a relationship or association.

***Examples of Associational Disparate Treatment Claims***

---

[50] *See In re Comm'n on Human Rights ex rel. Blue v. Jovic*, OATH Index No. 1624/16, Dec. & Order, 2017 WL 2491797, at *9 (May 26, 2017) *aff'd sub nom. Jovic v. N.Y.C. Comm'n on Human Rights*, Index No. 100838/2017 (Sup. Ct. N.Y. Cty. Feb. 14, 2018).

[51] *Id.*; *see Manon v. 878 Educ., LLC*, No. 13 Civ. 3476, 2015 WL 997725, at *6 (S.D.N.Y. Mar. 4, 2015) (holding that a complainant need not establish that but for her association with a person with a disability, the adverse action would not have occurred; rather, the NYCHRL standard for associational disability discrimination is far less onerous; a complainant need only point to a medical impairment and establish that discrimination was a motivating factor in the adverse action).

- An employer refuses to hire an individual who has a child with a disability based on an assumption that the applicant will be away from work excessively or otherwise be unreliable.
- An employer fires an employee who volunteers helping people who are HIV-positive or have AIDS out of fear that the employee will contract the disease.
- A landlord refuses to work with a broker who is assisting a client who uses a wheelchair in renting an apartment in the landlord's building because the landlord assumes that he will have to install a ramp.
- A landlord refuses to rent to an applicant whose child has a mental health disability based on an assumption that the child may cause a disturbance to other residents.

## **2.** Associational Reasonable Accommodations Claims

A covered entity's failure to provide reasonable accommodations to an individual with a disability can cause injuries to people beyond the individual. For example, caretakers, parents, children, or other persons related to or associated with an individual with a disability and who also have a relationship to the covered entity—*e.g.* as the co-tenant of the individual with a disability—may suffer independent injuries as a direct result of the covered entity's failure to provide a reasonable accommodation. Such injuries may include, but are not limited to, emotional distress and other damages associated with having to live without the accommodation. Therefore, if an individual with a disability is unlawfully denied a reasonable accommodation, their relative or associate may also have an associational claim for failure to accommodate under the NYCHRL.[52]

---

[52] *In re Comm'n on Human Rights ex rel. Blue v. Jovic*, OATH Index

To establish a claim of associational discrimination for failure to accommodate under the NYCHRL, a complainant must show that: (1) the covered entity knew of the complainant's relationship or association with a person with an actual or perceived disability; (2) the complainant suffered a direct, independent injury as a result of the respondent's failure to provide a reasonable accommodation;[53] (3) a

---

No. 1624/16, Dec. & Order, 2017 WL 2491797, at *10 (May 26, 2017) *aff'd sub nom. Jovic v. N.Y.C. Comm'n on Human Rights*, Index No. 100838/2017 (Sup. Ct. N.Y. Cty. Feb. 14, 2018); *see In re Comm'n on Human Rights ex rel. Torres v. Prince Mgmt. Corp.*, OATH Index No. 301/98, R&R, 1997 WL 1129224 (Aug. 14, 1997), *adopted*, Dec. & Order, 1997 WL 34613064 (Oct. 27, 1997) (mother awarded damages for independent injury arising from failure to accommodate children with disabilities); *accord Loeffler v. Staten Island Univ. Hosp.*, 582 F.3d 268, 278 (2d Cir. 2009) (reinstating NYCHRL claim of children who suffered a direct, independent injury because of the need to provide sign-language interpretation services to their parent with disabilities when hospital failed to provide reasonable accommodation). "A claim of associational discrimination under § 8-107(20) of the NYCHRL based on a failure to provide a reasonable accommodation is essentially the same as a claim for failure to accommodate under § 8-107(15) ..." *In re Comm'n on Human Rights ex rel. Blue v. Jovic*, OATH Index No. 1624/16, Dec. & Order, 2017 WL 2491797, at *10 (May 26, 2017) *aff'd sub nom. Jovic v. N.Y.C. Comm'n on Human Rights*, Index No. 100838/2017 (Sup. Ct. N.Y. Cty. Feb. 14, 2018).

[53] *See In re Comm'n on Human Rights ex rel. Blue v. Jovic*, OATH Index No. 1624/16, Dec. & Order, 2017 WL 2491797, at *10 (May 26, 2017) *aff'd sub nom. Jovic v. N.Y.C. Comm'n on Human Rights*, Index No. 100838/2017 (Sup. Ct. N.Y. Cty. Feb. 14, 2018).

reasonable accommodation would enable the complainant to use or enjoy a housing accommodation or public accommodation or to perform the essential functions of their job; and (4) the covered entity has failed to provide an accommodation.[54]

### *Example Associational Reasonable Accommodations Claims*

- A tenant who lives with her daughter requested that the landlord replace her bathtub as a reasonable accommodation for her daughter's disability. The landlord's failure to provide a reasonable accommodation caused the tenant to strain her back while helping her daughter in and out of the bathtub and created tensions in her relationship with her daughter, due to difficulties involved in bathing her safely. Therefore, the tenant has a cognizable associational reasonable accommodation claim.[55]

---

[54] *See id.*; *Nieblas-Love v. N.Y.C. Hous. Auth.*, 165 F. Supp. 3d 51 (S.D.N.Y. 2016) (discussing failure to provide reasonable accommodation in the employment context).

[55] *In re Comm'n on Human Rights ex rel. Blue v. Jovic*, OATH Index No. 1624/16, Dec. & Order, 2017 WL 2491797, at *11 (May 26, 2017), *aff'd sub nom. Jovic v. N.Y.C. Comm'n on Human Rights*, Index No. 100838/2017 (Sup. Ct. N.Y. Cty. Feb. 14, 2018).

# Postings, Applications, and Selection Processes

Declaring, printing, or circulating any statement, advertisement, or publication that directly or indirectly discriminates or expresses an intent to discriminate based on an individual's disability or perceived disability is a violation of the NYCHRL.[56] Therefore, covered entities should work to ensure that their postings, applications, interviews, and other selection processes do not directly or indirectly discriminate against individuals with disabilities.

## Employment

### **1.** Job Postings and Advertisements

Under the NYCHRL, it is unlawful for an employer to "declare, print or circulate or cause to be declared, printed or circulated any statement, advertisement or publication" which "expresses, directly or indirectly, any limitation, specification or discrimination" against individuals with disabilities, or "any intent to make any such limitation, specification or discrimination."[57] Job postings or advertisements that state physical requirements or specifications that are unrelated to the essential requisites of the job may violate the NYCHRL by directly or indirectly expressing a limitation or specification that discriminates against individuals with disabilities.

---

[56] N.Y.C. Admin. Code §§ 8-107(1)(d), 8-107(4)(a)(2), 8-107(5)(a)(2).

[57] N.Y.C. Admin. Code § 8-107(1)(d).

Employers should be careful to word job postings in a way that conveys the essential requisites of the job without implicitly excluding individuals with disabilities. In specifying essential requisites of the job, job postings should focus on required performance outcomes or deliverables rather than the method by which outcome are achieved, unless the method is in fact essential to the job. For example, employers might list the ability to "draft letters and memoranda" rather than the ability to type, since writing duties may be accomplished with accommodations such as dictation software. Furthermore, employers are encouraged to include on their advertisements a statement that informs applicants that they can request a reasonable accommodation for interviews and to satisfy the essential requisites of the job.

## **2.** Applications

Under the NYCHRL, it is unlawful for an employer to "use any form of application for employment or to make any inquiry in connection with prospective employment, which expresses, directly or indirectly, any limitation, specification or discrimination" against individuals with disabilities, or "any intent to make any such limitation, specification or discrimination."[58] Therefore, application forms that include inquiries about an applicant's disability may violate the NYCHRL, although there are some circumstances where such inquiries are allowed, as described in this section. To avoid improper inquiries about disability, applications should seek information about an applicant's skills related to the essential requisites of the job. An application may include a yes or no question about an applicant's ability to perform those functions with or without an accommodation.

---

[58] N.Y.C. Admin. Code § 8-107(1)(d).

### *Example of an Employer's Unlawful Job Application*

- An employer's job application includes various questions related to applicants' medical history and disabilities, such as asking whether applicants would consent to a physical examination or an HIV test if they were hired and asking them to explain their physical/mental restrictions or impairments. This job application violates the NYCHRL by indirectly expressing a limitation, specification, or discrimination on the basis of disability.[59]

There are, however, certain circumstances in which an employer may inquire about an applicant's disability status. For example, if an employer is participating in an affirmative action program for individuals with disabilities or applying for a Work Opportunity Tax Credit,[60] the employer may ask applicants to voluntarily self-identify

---

[59] *See In re Comm'n on Human Rights v. A Nanny on the Net,* OATH Index Nos. 1364/14 & 1365/14, Dec. & Order, 2017 WL 694027, at *4 (Feb. 10, 2017) (Questions deemed unlawful on the employer's application form included: "Do you have any problems with: Drug or alcohol abuse? Emotional illness? Eating disorder? If yes, when? How was it resolved? How did this affect you?"; "Do you take any frequent medication? If yes, please list."; "Do you have any physical/mental restrictions or impairments or congenital defects? If yes, explain"; "Do you suffer from depression? If yes, are you currently, or have you ever taken any medication for depression?").

[60] The Work Opportunity Tax Credit (WOTC) is a federal tax credit available to employers for hiring individuals from certain targeted groups who have consistently faced significant barriers to employment, including veterans with disabilities, and individuals with

their eligibility for the program on the employment application for purposes of qualifying for the program. Additionally, some federal, state, or local laws or regulations may require inquiries into disability status to determine eligibility in certain employment programs, such as those applicable to veterans with disabilities. Inquiries about disabilities may be necessary under such laws to identify applicants with disabilities in order to provide them with required special services.[61] In any such instance, the employer must state clearly on the application that the information requested is used solely in connection with its affirmative action obligations or efforts; that the information is being requested on a voluntary basis; and that it will be kept confidential. The employer may request information or documentation of the disability needed to qualify for the program. Employers are advised to ensure that any medical or disability-related information is kept confidential and in medical files separate from an employee's general personnel file to avoid unnecessarily disclosing the applicant's private medical documents and to ensure that managers and other employees are not accidentally given access to the information.[62]

---

disabilities who are completing or have completed rehabilitative services by specified providers. *See* U.S. Dep't of Labor, Emp't & Training Admin., *Work Opportunity Tax Credit*, https://doleta.gov/business/incentives/opptax/ (last visited Oct. 25, 2017).

[61] *See* U.S. Equal Emp. Opportunity Comm'n & U.S. Dep't Of Justice, Civil Rights Div., Americans with Disabilities Act: Questions and Answers (May 2002), https://www.ada.gov/archive/q&aeng02.htm.

[62] *See, e.g.*, 29 C.F.R. § 1630.14.

## **3.** Interviews

The NYCHRL prohibits employers from making any inquiries in connection with prospective employment that directly or indirectly express any limitation, specification, or discrimination based on an individual's disability, or any intent to make any such limitation, specification or discrimination.[63] Examples of inquiries that may express discrimination based on an individual's disability include asking an individual whether they currently have, or have ever had, a disability; inquiring about the nature or severity of the disability; or asking for medical documentation regarding a disability. Employers should focus their interview questions instead on the ability of the applicant to perform the essential requisites of the job. For example, while it may be unlawful for the employer to ask a job applicant if he has a disability, it is not unlawful for an employer to ask a job applicant whether he can perform the essential requisites of the job, with or without an accommodation. Employers are also required to provide reasonable accommodations for applicants during the interview process.[64]

Employers should be cautious about asking applicants about gaps in work history, as this may lead to inquiries relating to an applicant's disability.[65] It may also lead to inquiries relating to an applicant's relationship or association with an individual with a disability for whom

---

[63] N.Y.C. Admin. Code § 8-107(1)(d).

[64] *See infra* Part III(a), discussing reasonable accommodations in the pre-employment context.

[65] This line of questioning could potentially violate the NYCHRL's prohibition on inquiries for the purpose of obtaining information about an applicant's criminal history. *See* N.Y.C. Admin. Code §§ 8-107(10) – 8-107(11).

the applicant may be a caregiver.[66] Employers should instead focus their interview questions on what skills and experiences applicants bring to the table.

## **4.** Selection Processes After Interviews

Employers cannot use qualification standards, employment tests, or other selection criteria that intentionally screen out individuals with disabilities, or unintentionally screen out or tend to screen out individuals with disabilities, unless the standard, test, or other selection criteria, as used by the employer bears a significant relationship to a significant business objective of the covered entity.[67] As such, selection criteria should be focused on the essential requisites of the job. Selection criteria that do not concern an essential job function do not bear a significant relationship to a significant business objective. Employers are also required to provide reasonable accommodations for applicants during pre-employment testing.[68]

### ***Example of Lawful Pre-Employment Test***

- Applicants for an accounting position may be required to take a test of accounting knowledge. However, the employer must provide reasonable accommodations if necessary, such as providing screen reading software for a visually impaired

---

[66] *See supra* Part II(c), discussing associational disability claims.

[67] N.Y.C. Admin. Code § 8-107(17), *see infra* Part II(b), discussing neutral policies that have a disparate impact.

[68] *See infra* Part III(a), discussing reasonable accommodations in the pre-employment context.

applicant, to ensure that all applicants are fairly assessed on the essential requisites of the job.

Requiring the passage or completion of a medical exam, inquiry, or test prior to a conditional offer of employment is a violation of the NYCHRL because it expresses or implies a limitation based on an individual's disability.[69] Employers may only require the passage or completion of a medical exam, inquiry, or test if the requirement is applied consistently to all prospective employees, after a conditional offer of employment, regardless of the existence of an actual or perceived disability. Even if a medical exam, inquiry, or test does not occur until after a conditional offer, such medical exam, inquiry, or test may still be unlawful if it is used to screen out applicants with disabilities where the exclusionary criteria is not job-related and consistent with business necessity, and performance of the essential job functions could be accomplished with a reasonable accommodation.[70] For example, a medical examination for a physically demanding job that involves danger to the prospective employee or to the public, such as a firefighter, may be related to the applicant's ability to perform the essential requisites of the job. In contrast, a medical examination for an attorney position would likely not be related to an applicant's ability to perform the essential requisites of the job. Employers are advised to ensure that any medical information obtained by the employer is kept confidential and in separate medical files to avoid unnecessarily disclosing an applicant's private medical documents and to ensure that managers and other employees are not accidentally given access to the information.

---

[69] *See* N.YC. Admin. Code § 8-107(1)(d); *see also* 42 U.S.C. §12112(d)(3).

[70] *See* 29 C.F.R. § 1630.14(b)(3).

## **5.** Procedures Related to Current Employees

The NYCHRL prohibits discrimination against current employees with disabilities in compensation, terms, conditions, or privileges of employment,[71] and prohibits most policies or practices that result in a disparate impact to the detriment of individuals with disabilities.[72] Therefore, employers should generally not ask employees with disabilities questions about their disabilities or ask them to undergo disability-related medical examinations, except under one of three circumstances: 1) when an employer has reason to believe that an employee's ability to perform the essential requisites of the job is impaired by a medical condition; or 2) the employer is concerned that an employee will pose a direct threat[73] to the safety and security of themselves, other employees, or the public due to the medical condition;[74] or (3) the employer is engaging in a cooperative dialog to

---

[71] N.Y.C. Admin. Code § 8-107(1)(a)(2).

[72] N.Y.C. Admin. Code § 8-107(17)(a).

[73] The Equal Employment Opportunity Commission (EEOC) regulations implementing the ADA define a "direct threat" as "a significant risk of substantial harm to the health or safety of others that *cannot be eliminated or reduced by reasonable accommodation*." 41 C.F.R. § 60-741.2(e). The regulations further state that "[t]he determination that an individual with a disability poses a direct threat shall be based on an individualized assessment of the individual's present ability to perform safely the essential functions of the job" and in determining whether an individual would pose a direct threat, factors to be considered include: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm. *Id.*

[74] *See* U.S. Equal Emp. Opportunity Comm'n, Enforcement Guidance:

determine whether a reasonable accommodation should be provided for the employee.

Employers may make disability-related inquiries or require a medical exam when an employee who has been on leave for a medical condition seeks to return to work, if an employer has a reasonable belief that an employee's ability to perform essential requisites of the job may be impaired by a medical condition or that they may pose a direct threat due to a medical condition. Any inquiries or examination, however, must be limited in scope to what is needed to make an assessment of the employee's ability to work.[75]

Employers that require all employees to undergo periodic medical examinations in the regular course of business may only do so in limited circumstances. Specifically, such periodic medical examinations must be narrowly focused on the employee's ability to perform the essential requisites of the job.[76] Such periodic medical examinations must be administered to all employees in the same manner and cannot be administered in such a way that they target employees with disabilities.

---

Disability-Related Inquiries and Medical Examinations of Employees Under the Americans With Disabilities Act (ADA) (July 27, 2000), https://www.eeoc.gov/policy/docs/guidance-inquiries.html#9.

[75] See *id.*

[76] *See id.* Any medical information obtained by the employer during periodic medical examinations or in any other context, such as a request for reasonable accommodations, should be kept confidential and in separate medical files to avoid unnecessarily disclosing an applicant's private medical documents and to ensure that managers and other employees are not accidentally given access to the information.

### *Examples of Medical Examinations for Current Employees*

- A hazardous waste disposal company may require all its employees to undergo a yearly physical examination and regular medical monitoring based on specific exposures. Monitoring employees' potential health effects from exposure to toxic substances and their ability to safely work in sites with specific exposures are related to their ability to perform the essential requisites of the job.
- A police department cannot require all its employees to periodically undergo medical testing to determine whether they are HIV-positive because a diagnosis of that condition alone is not likely related to officers' abilities to safely perform the essential requisites of the job.

An employee has a mental health disability that has caused her to act erratically in the office and has raised significant and realistic concerns about the safety of other employees and customers. The employer determines that, to ensure the safety and security of their employees and members of the public, it will require that the employee take leave as an accommodation for her disability and require a doctor's note stating that the employee is able to return to work safely. The employee takes leave for several months to receive treatment and her medical provider determines that she is able to safely return to work part-time. The employer determines that a part-time position is not an undue hardship and the employee returns to work in a part-time position.

# Housing

## **1.** Postings

Under the NYCHRL, it is unlawful for a housing provider to "declare, print or circulate or cause to be declared, printed or circulated any statement, advertisement or publication" for "the purchase, rental or lease of . . . a housing accommodation or an interest therein" which "expresses, directly or indirectly, any limitation, specification or discrimination" against individuals with disabilities or "any intent to make any such limitation, specification or discrimination."[77]

### ***Examples of Unlawful Postings***

- An advertisement for an apartment that simply states, "no dogs" would be unlawful under the NYCHRL because it expresses a limitation, specification, or discrimination against individuals with service animals and emotional support animals.
- An advertisement for an apartment that states, "No HASA vouchers"[78] would be unlawful under the NYCHRL because it expresses a limitation, specification, or discrimination against individuals with HIV/AIDS. Such an advertisement would also

---

[77] N.Y.C. Admin. Code § 8-107(5)(a)(2).

[78] HASA is a program administered through the NYC Human Resources Administration that assists individuals living with AIDS or HIV illness to live healthier, more independent lives. *See* N.Y.C. Human Res. Admin., *HIV/AIDS Services*, https://www1.nyc.gov/site/hra/help/hiv-aids-services.page (last visited Mar. 6, 2018).

violate NYCHRL's prohibitions against discrimination in housing based on lawful source of income.[79]

## **2.** Applications and Interviews

Under the NYCHRL, it is unlawful for a housing provider to "use any form of application for the purchase, rental or lease" of "a housing accommodation or an interest therein or to make any record or inquiry in conjunction with the prospective purchase, rental or lease of such a housing accommodation or an interest therein which expresses, directly or indirectly, any limitation, specification or discrimination" against individuals with disabilities, or "any intent to make any such limitation, specification or discrimination."[80] Therefore, subject to exceptions described below, it is unlawful for applications or interviewers to ask housing applicants whether they have a disability, or whether a person intending to reside in the dwelling has a disability. Applications and interviews should instead focus inquiries on an applicant's ability to meet the requirements of the tenancy.

There are, however, a narrow set of circumstances in which a housing provider may inquire about a housing applicant's disability. For example, if a dwelling is legally available only to persons with a disability or to individuals with a particular type of disability, a housing provider may inquire about an applicant's disability status. Similarly, housing providers may make inquiries to determine if an applicant qualifies for housing where a disability is one of the characteristics that is necessary to qualify for the program, such as NYC Housing

---

[79] *See* N.Y.C. Admin. Code § 8-107(5)(a)(2).

[80] N.Y.C. Admin. Code § 8-107(1)(a)(3).

Connect.[81] The housing provider should not, however, ask applicants if they have other types of medical conditions. Additionally, if an applicant's disability and need for accessible features is not readily apparent, the housing provider may request reliable information or documentation of the disability needed to qualify for the housing. In other circumstances, however, it would be unlawful for housing providers to require medical documentation. Where a housing provider is permissibly inquiring about an individual's disability, the provider must provide an explanation for why they are requesting this information. Any medical information obtained by the housing provider should be kept confidential.

# Public Accommodations

## **1.** Postings

Under the NYCHRL, it is unlawful for a place or provider of public accommodation to "directly or indirectly make any declaration, publish, circulate, issue, display, post or mail any written or printed communication, notice or advertisement"[82] that communicates that the full and equal enjoyment of any of the accommodations would "be

---

[81] NYC Housing Connect has housing lotteries for affordable housing in New York City. Five percent of developments are set aside for tenants with mobility impairments and two percent are set aside for tenants with visual and hearing disabilities. *See Affordable/Low-Income Housing*,
NYC.gov, http://www1.nyc.gov/site/mopd/resources/affordable-low-income-housing.page (last visited Mar. 6, 2018).

[82] N.Y.C. Admin. Code § 8-107(4)(a)(2).

refused, withheld from, or denied to any person"[83] on account of their disability or that the patronage of an individual with a disability is "unwelcome, objectionable, not acceptable, undesired, or unsolicited."[84]

### *Example of an Unlawful Posting*

- A sign on the window of a restaurant that simply states "no dogs" would be unlawful under the NYCHRL because it expresses that the accommodations would be denied to a person with a service animal, or that an individual with a service animal would be unwelcome. Instead, the sign should say, for example, "Service animals welcome; unfortunately, no other animals allowed."

## **2.** Applications and Interviews

The NYCHRL prohibits a place or provider of public accommodation from "directly or indirectly making any declaration, or publishing, circulating, issuing, displaying, posting or mailing any written or printed communication, notice or advertisement" that communicates that the patronage of an individual with a disability is "unwelcome, objectionable, not acceptable, undesired, or unsolicited."[85] Therefore, where public accommodations have application and interview processes (for example, for programs, classes, or schools), applications or interviews that convey to applicants with disabilities that they are unwelcome, undesired, or unacceptable would violate the NYCHRL.

---

[83] N.Y.C. Admin. Code § 8-107(4)(a)(2)(a).

[84] N.Y.C. Admin. Code § 8-107(4)(a)(2)(b).

[85] N.Y.C. Admin. Code § 8-107(4)(a)(2).

### *Examples of Unlawful Applications and Interviews*

- A parent fills out a form to enroll her child in summer day camp. The form includes a question asking the parent to identify whether the child has a disability, allergies, and/or requires any medications. Under the question, the form states, “While our program is not equipped to provide services to children with disabilities, we will provide you with references to other programs that may better suit your needs.” This would be unlawful under the NYCHRL. A form that inquires about disabilities, allergies, and/or requirements regarding medication should clarify that such information is not being used to exclude anyone and recognize the duty to provide reasonable accommodations. For example, the form could say that the provider asks for medical information in order to accommodate the needs of all children to the best of their ability.
- An individual with a mobility disability asks to meet with a membership advisor to fill out an application for a gym membership. The employee discourages the individual from applying based on assumptions they have made about the individual’s abilities. This would be unlawful under the NYCHRL because it communicates that the individual is unwelcome. However, the membership advisor may inquire about whether the individual may need accommodations to provide the individual with access to the facilities or activities the gym offers.

# Reasonable Accommodations in Employment, Housing, and Public Accommodations Based on Disability

Under the NYCHRL, covered entities must make reasonable accommodations to enable individuals with disabilities "to satisfy the essential requisites of a job or enjoy the right or rights in question provided that the disability is known or should have been known by the covered entity."[86] Under the law, all accommodations are reasonable unless a covered entity shows that the requested accommodation would cause it an "undue hardship."[87] This standard is more protective than the ADA, FHA, and the New York State Human Rights Law and does not require that the employee, tenant, or customer prove that the reasonable accommodation is readily achievable, necessary, or does not pose an undue hardship.[88] Rather,

---

[86] N.Y.C. Admin. Code § 8-107(15)(a).

[87] N.Y.C. Admin. Code § 8-102(18); *see infra* Part IV(c)(i) for a discussion about undue hardship.

[88] The New York State Human Rights Law places the burden on employees seeking reasonable accommodations to show that "upon the provision of reasonable accommodations, the employee could perform the essential functions of his job." *See* N.Y. Exec. Law § 292(21-e); *Romanello v. Intesa Sanpaolo, S.P.A.*, 22 N.Y.3d 881, 884 (2013). Both the Fair Housing Act and the New York State Human Rights Law expect residents to show that modifications are "necessary," and even then, only obligate a landlord to "permit" reasonable modifications, not to provide them. *See* 42 U.S.C.A. § 3604(f)(3)(A); N.Y. Exec. Law § 296(18).

the employee, tenant, or customer must only establish their *prima facie* case: (1) that they have a disability; (2) that the covered entity knew or should have known about the disability; (3) that an accommodation would enable the employee, tenant, or customer to perform the essential requisites of the job or enjoy the rights in question; and (4) that the covered entity failed to provide an accommodation.[89] The burden then shifts to the covered entity to show that the proposed reasonable accommodation would cause them an undue hardship. Each interaction regarding a reasonable accommodation must be considered on a case-by-case basis given the needs of the individual and the unique circumstances of the covered entity. For example, covered entities may consider the duration that the accommodation is needed in determining whether the time and expense to provide the accommodation would cause an undue hardship. In addition, the type of service a public accommodation provides and the community it serves will be considered in determining whether a public accommodation was on notice that a reasonable accommodation should have been made to accommodate the needs of their served population. The covered entity is responsible for the cost of providing reasonable accommodations.

[89] *See In re Comm'n on Human Rights ex rel. Stamm v. E&E Bagels,* OATH Index No. 803/14, Dec. & Order, 2016 WL 1644879, at *6 (Apr. 21, 2016).

# Process for Requesting or Offering Reasonable Accommodations

## **1.** Initiating a Cooperative Dialogue

Under the NYCHRL, the first step in providing a reasonable accommodation to an individual with a disability is to begin a cooperative dialogue that assesses the needs of the individual.[90] Local Law No. 59 (2018), effective on October 15, 2018, makes it unlawful for a covered entity to fail to engage in a cooperative dialogue "with an individual who has requested an accommodation or who the covered entity has notice may require such an accommodation."[91]

The "cooperative dialogue" is "the process by which a covered entity and a person who is entitled to, or 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."[92] A cooperative dialogue involves an evaluation of the individual's needs and consideration of the possible accommodations for the individual that would allow them to perform the essential requisites of the job or

---

[90] Local Law No. 59 § 1 (2018); N.Y.C. Admin. Code § 8-102.

[91] N.Y.C. Admin. Code § 8-102.

[92] *Id.*

enjoy the right or rights in question, without creating an undue hardship for the covered entity.

When a covered entity learns, either directly or indirectly, that an individual requires an accommodation due to their disability, the covered entity has an affirmative obligation to engage in a cooperative dialogue with the individual. The NYCHRL imposes a duty on covered entities to provide reasonable accommodations not only when an individual's disability is known,[93] but also when the covered entity "*should have…known*" about the individual's disability,[94] regardless of whether the individual requested an accommodation. For example, if an employer has knowledge that an employee's performance at work is diminished or that their behavior at work could lead to an adverse employment action and has a reasonable basis to believe that the issue is related to a disability, the employer must initiate a cooperative dialogue with the employee to explore whether the employee needs an accommodation to continue performing the essential requisites of the job. In doing so, the employer should not ask the employee if the employee has a disability,[95] but may ask if there is anything going on that the employer can help with, inform the employee that various types of support are available, including reasonable accommodations, to enable employees to satisfy the essential requisites of the job, and remind them of workplace policies and procedures for requesting a reasonable accommodation. The employer should do so as a way to

---

[93] By contrast, the New York State Human Rights Law discusses reasonable accommodations in the context of "known physical or mental limitations," and "known disabilities." *See* N.Y. Exec. Law § 296(3)(a).

[94] N.Y.C. Admin. Code § 8-107(15)(a).

[95] *See infra* Part III for a discussion on prohibited disability-related inquiries.

open the conversation and invite the employee to feel comfortable in making a request. If an employee chooses not to disclose that they have a disability in that conversation, the employer has met their obligation to initiate a cooperative dialogue.

If a covered entity approaches an individual to initiate a cooperative dialogue and the individual does not reveal that they have a disability in that conversation, the individual does not waive their opportunity to reveal their disability and initiate a cooperative dialogue with the covered entity at a later time. In addition, it is unlawful to terminate an employee for failing to disclose their disability status or need for a reasonable accommodation prior to the offer of employment or for failing to disclose such information during the interview process.[96] Similarly, a housing provider is not permitted to penalize a prospective tenant for failing to volunteer information about their disability or need for a reasonable accommodation at the time of applying for housing.[97]

Covered entities should strive to create an environment in which individuals feel comfortable engaging in the process of requesting an accommodation by developing a transparent, clear, and fair process. In order to avoid situations in which covered entities are not sure whether employees, residents, or customers are aware of their right to request reasonable accommodations and engage in a cooperative dialogue, the NYCHRL encourages covered entities to provide notice or information to employees, residents, and customers detailing their right to be free from discrimination based on disability. For example, an employer should include procedures in an employee handbook

---

[96] *Hirschmann v. Hassapoyannes,* 11 Misc. 3d 265, 270 (Sup. Ct. N.Y. Cty. 2005).

[97] *Hirschmann v. Hassapoyannes*, 16 Misc. 3d 1014, 1018–20 (Sup. Ct. N.Y. Cty. 2007), *aff'd*, 52 A.D.3d 221, 859 N.Y.S.2d 150 (2008).

that identify staff who will respond to requests for accommodations, and a landlord should include procedures on their website about how and where an applicant or resident can request a reasonable accommodation.

## **2.** Engaging in a Cooperative Dialogue

The purpose of a cooperative dialogue is to ensure that covered entities understand the individualized
needs of the person with a disability and have the opportunity to explore the various ways in which they can meet those needs. Without this type of dialogue, individuals with disabilities and covered entities may not realize the full universe of available accommodations. The covered entity need not provide the specific accommodation sought by the individual making the request so long as they propose reasonable alternatives that meet the specific needs of the individual or that specifically address the impairment at issue.[98]

A cooperative dialogue involves a covered entity communicating in good faith with the individual requesting an accommodation in a transparent and expeditious manner, particularly given the time-sensitive nature of many of these requests. If a covered entity offers an accommodation and the individual with a disability reasonably determines that the first accommodation offered is not sufficient to meet their needs, the covered entity has not met their obligation to engage in the cooperative dialogue. In such circumstances, the covered entity must continue to engage in a conversation with the

---

[98] *See Cruz v. Schriro*, 51 Misc. 3d 1203(A) (Sup. Ct. N.Y. Cty. 2016) ("[A]n employer is not obligated to provide a disabled employee with the specific accommodation that the employee requests or prefers...").

individual to determine if there are other alternatives that would meet their needs. However, both parties must engage in the cooperative dialogue "in good faith" which means that an individual with a disability cannot simply reject an offered accommodation that would be sufficient to meet their needs because it is not their preferred accommodation. The covered entity should focus on understanding the need for the request and how the request can be accommodated. The dialogue may be in person, in writing, by phone, or via electronic means. If a covered entity does not have enough information to understand the individual's needs to offer an appropriate accommodation, it may ask for additional information about the specific impairment.

In evaluating whether or not a covered entity has engaged in a cooperative dialogue in good faith with an individual who requests an accommodation, the Commission will consider various factors, including, without limitation: (1) whether the covered entity has a policy informing employees, residents, or customers how to request accommodations based on disability;[99] (2) whether the covered entity responded to the request in a timely manner in light of the urgency and reasonableness of the request; and (3) whether the covered entity sought to obstruct or delay the cooperative dialogue or in any way intimidate or deter the individual from requesting the accommodation. An indeterminate delay may have the same effect as an outright denial.[100]

---

[99] It is a best practice for covered entities to have a written policy that they disseminate to all employees, residents, etc.

[100] *See Logan v. Matveevskii*, 57 F. Supp. 3d 234 (S.D.N.Y. 2014) (finding that under the Fair Housing Act, a refusal of a request for a reasonable accommodation can be actual or constructive, and therefore an indeterminate delay has the same effect as an outright

### a. Applicants for Employment, Housing, and Programs that Are Public Accommodations

As discussed in Part III, the NYCHRL expressly prohibits housing providers and employers from making any inquiries in connection with prospective employment or the prospective purchase, rental, or lease of a housing accommodation that express, directly or indirectly, any limitation, specification, or discrimination against an individual with a disability. Similarly, to the extent that public accommodations have applications or interviews for their programs, such as some drug treatment programs or schools, providers cannot communicate that applicants with disabilities are unwelcome, undesired, or unacceptable. However, when an individual makes a request for a reasonable accommodation during the application process, a covered entity is entitled to obtain information that is necessary to evaluate if the requested accommodation is being sought due to a disability.[101] If a disability is readily apparent—for example, if an individual requesting a ramp is in a wheelchair—formal medical documentation or additional information would not be necessary to evaluate the accommodation. Therefore, a covered entity may make inquiries that

---

denial).

[101] *See* U.S. Dep't of Hous. & Urban Dev. & U.S. Dep't of Justice, Joint Statement: Reasonable Accommodations Under the Fair Housing Act (May 17, 2004), https://www.hud.gov/sites/documents/DOC_7771.PDF; U.S. Equal Emp. Opportunity Comm'n, Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans With Disabilities Act (ADA) (July 27, 2000), https://www.eeoc.gov/policy/docs/guidance-inquiries.html.

will allow them to assess the individual needs of the requester and the reasonableness of the request as part of the cooperative dialogue.

### *Examples*

- An employer is impressed with an applicant's resume and contacts the applicant to schedule her for an interview. The applicant, who is deaf, requests a reasonable accommodation for her interview. The employer engages in a cooperative dialogue—by asking the applicant what she needs in order to be able to participate in the interview. The applicant explains that she will need a sign language interpreter. The employer identifies a service that provides sign language interpreters via Skype, and determines that the cost to contract with the service for the interview would not pose an undue hardship to the employer. The applicant agrees that a sign language interpreter via Skype would be sufficient for her to participate in the interview.
- A housing applicant with an apparent vision disability requests that the leasing agent provide her with assistance in filling out a rental application form as a reasonable accommodation for her disability. The applicant's disability and her need for the requested accommodation are readily apparent because she uses a walking cane to get around, so the housing provider should not make further inquiries or request medical documentation.[102] Asking the applicant to provide information relating to her apparent disability could constitute harassment.

---

[102] *See* U.S. Dep't of Hous. and Urban Dev. & U.S. Dep't of Justice, Joint Statement: Reasonable Accommodations Under the Fair Housing Act (May 17, 2004),

### b. Current Employees, Residents, and Participants in Programs/Clubs[103]

When an individual requests an accommodation, a covered entity may ask the individual to provide medical documentation that is sufficient to substantiate that the requester has a disability, identifies the functional limitation due to the disability, and explains the need for the requested accommodation.[104] Unless the exact diagnosis is necessary to determine what accommodation may be needed, a covered entity cannot require that the specific disability or diagnosis be disclosed and must only request information or medical documentation related to the impairment and need at issue. The covered entity may not ask for unrelated documentation, such as complete medical records.[105] Any information or documentation shared must be kept confidential.

---

https://www.hud.gov/sites/documents/DOC_7771.PDF.

[103] Under the NYCHRL, a "club" which "proves that it is in its nature distinctly private" is not included in the definition of "place or provider of public accommodation." *See* N.Y.C. Admin. Code § 8-102(9); *see* 47 R.C.N.Y. § 2-01.

[104] *See* U.S. Equal Emp. Opportunity Comm'n, Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans With Disabilities Act (ADA) (July 27, 2000), https://www.eeoc.gov/policy/docs/guidance-inquiries.html. An employer may not require an employee to provide medical confirmation of pregnancy, childbirth, or related medical condition, unless it is a pregnancy-related disability.

[105] *See* U.S. Equal Emp. Opportunity Comm'n, Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of

***Example***

- An employee who has exhausted all of his available sick leave calls his supervisor to inform him that he had a severe pain episode due to his sickle cell anemia, is in the hospital, and requires additional time off. Prior to this call, the supervisor was unaware of the employee's medical condition. The supervisor should initiate a cooperative dialogue with the employee to assess his individual needs and the accommodation requested. In doing so, the supervisor may ask the employee to provide information or medical documentation to substantiate that the employee has a disability and provide information on how long he may be absent from work.[106]

In some circumstances where an individual's disability and the need for the requested accommodation is readily apparent or otherwise known to the covered entity, or to the person making the decision regarding the request for an accommodation, making additional inquiries or asking for medical documentation about the requester's disability or the disability-related need for the accommodation may constitute harassment.[107]

---

Employees Under the Americans With Disabilities Act (ADA) (July 27, 2000), https://www.eeoc.gov/policy/docs/guidance-inquiries.html.

[106] See *id.*

[107] *See* U.S. Dep't of Hous. and Urban Dev. & U.S. Dep't of Justice, Joint Statement: Reasonable Accommodations Under the Fair Housing Act (May 17, 2004), https://www.hud.gov/sites/documents/DOC_7771.PDF; U.S. Equal Emp. Opportunity Comm'n, Enforcement Guidance: Disability-Related

***Example***

- An employee who has a disability that causes him to rely on a wheelchair approaches his supervisor with a request for an accommodation—that a temporary ramp be installed where there are steps to access the conference room. The supervisor is the decision-maker regarding the request for an accommodation. The supervisor should not ask the employee for additional information or medical documentation to prove that he has a disability. As his disability and need for a reasonable accommodation are apparent, asking for additional information or documentation could constitute harassment.

If the requester's disability is known or readily apparent to the provider, but the need for the accommodation is not readily apparent or known, the provider should only request information that is necessary to evaluate how the accommodation would ameliorate the effects of the person's disability.[108]

---

Inquiries and Medical Examinations of Employees Under the Americans With Disabilities Act (ADA) (July 27, 2000), https://www.eeoc.gov/policy/docs/guidance-inquiries.html.

[108] *See* U.S. Dep't of Hous. and Urban Dev. & U.S. Dep't of Justice, Joint Statement: Reasonable Accommodations Under the Fair Housing Act (May 17, 2004), https://www.hud.gov/sites/documents/DOC_7771.PDF; U.S. Equal Emp. Opportunity Comm'n, Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans With Disabilities Act (ADA) (July 27, 2000), https://www.eeoc.gov/policy/docs/guidance-inquiries.html.

***Example***

- A tenant informs the housing provider that he wishes to keep an emotional support dog in his unit, and asks for an exception to the "no pets" policy as a reasonable accommodation. The need for an emotional support animal is not apparent to the housing provider. The housing provider may therefore make inquiries of the tenant that will provide information that confirms that the dog ameliorates the effects of the tenant's disability.[109]

While covered entities may require medical documentation to support a request for an accommodation, they cannot require a specific *type* or *form* of documentation. Medical documentation should be considered broadly. For example, a covered entity should not reject a note from a medical professional simply because it is handwritten, because it is not printed on letterhead, because it is not provided by the individual's long-term care provider, or because it is from an alternative medicine professional where such medical professional is the appropriate specialist for the impairment at issue. Covered entities should focus on the content of the medical documentation and not its form. If a covered entity has reason to believe that the provided

---

[109] *See* U.S. Dep't of Hous. and Urban Dev. & U.S. Dep't of Justice, Joint Statement: Reasonable Accommodations Under the Fair Housing Act (May 17, 2004), https://www.hud.gov/sites/documents/DOC_7771.PDF; U.S. Equal Emp. Opportunity Comm'n, Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans With Disabilities Act (ADA) (July 27, 2000), https://www.eeoc.gov/policy/docs/guidance-inquiries.html.

documentation is insufficient, it should not reject the accommodation request, but should instead request additional documentation, or, upon the consent of the individual, speak with the health care provider who provided the documentation before denying the request based on insufficient documentation. A covered entity must allow an individual to submit sufficient supplemental written verification should an individual not want the covered entity speaking with their medical provider.

### **c.** Customers and Visitors to Public Accommodations

Places of public accommodation should make every effort to ensure that they are accessible and engage with customers in a cooperative dialogue to ensure they are providing reasonable accommodations. While the determination of whether a provider of public accommodation has failed to provide reasonable accommodations to individuals with disabilities involves an individualized assessment of the undue hardship to the covered entity, the Commission will generally consider the following factors in assessing reasonableness and the adequacy of the cooperative dialogue: the nature of the relationship between the covered entity and the individual (a longer-term relationship such as a regular client, student, member, or patient, or a shorter-term relationship, such as a one-time customer); whether the covered entity knew or should have known of the individual's disability; the nature and duration of the interaction; and the accommodation requested. For example, a deli would generally not be required to provide a qualified sign language interpreter for a customer who is deaf during a short and relatively simple conversation regarding a purchase. Instead, the deli should find an alternative way to effectively accommodate the customer, such as exchanging written notes. A hospital, by comparison, must provide a qualified sign language interpreter to a patient who is deaf as a

reasonable accommodation because, in order for a patient in a hospital setting to "enjoy the right or rights in question,"[110] they require in-depth, time-sensitive, and nuanced communications with medical personnel. A patient will therefore not be able to enjoy the right or rights in question without an interpreter. However, there are certain types of accommodations that all public accommodations must consider regardless of an individual customer's or member's need. For example, all public accommodations should evaluate whether it will be an undue hardship to install a ramp at the entrance of their facility; and hospitals should similarly be prepared to provide sign-language interpretation by video or in-person interpretation.

## **3.** Concluding the Cooperative Dialogue

A cooperative dialogue is ongoing until one of the following occurs: (1) a reasonable accommodation is granted; or (2) the covered entity reasonably arrives at the conclusion that: (a) there is no accommodation available that will not cause an undue hardship to the covered entity; (b) a reasonable accommodation was identified that meets the individual's needs but the individual did not accept it and no reasonable alternative was identified during the cooperative dialogue; or (c) in the case of an employer, that no accommodation exists that will allow the employee to perform the essential requisites of the job. In the context of employment and housing, Local Law No. 59 (2018) requires that "the covered entity shall provide any person requesting an accommodation who participated in the cooperative dialogue with a written final determination identifying any accommodation granted

[110] N.Y.C. Admin. Code § 8-107(15)(a).

or denied."[111] There is no such requirement in the public accommodations context.

If an individual with a disability rejects an accommodation offered by the covered entity, the covered entity should continue to engage with the individual to identify alternatives. However, if the individual rejects accommodations offered that would not cause an undue hardship to the covered entity and would meet the individual's needs and/or would allow the employee to perform the essential requisites of the job and is unable or unwilling to propose any alternative options that would address the individual's needs, the covered entity may conclude the cooperative dialogue. If there are two possible reasonable accommodations and one costs more or is more burdensome than the other, the covered entity may choose the less expensive or burdensome accommodation. If more than one accommodation is effective, the preference of the individual with the disability should be given primary consideration, but the covered entity has the ultimate discretion to choose between effective accommodations.[112]

---

[111] Local Law No. 59 § 2 (2018); N.Y.C. Admin. Code § 8-107(28)(d) ("Upon reaching a final determination at the conclusion of a cooperative dialogue pursuant to paragraphs (a) and (c) of this subdivision, the covered entity shall provide any person requesting an accommodation who participated in the cooperative dialogue with a written final determination identifying any accommodation granted or denied.").

[112] U.S. Equal Emp. Opportunity Comm'n, Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (Oct. 17, 2002), https://www.eeoc.gov/policy/docs/accommodation.html.

Once a conclusion is reached, either to offer an accommodation, or that no accommodation can be made, a covered entity must promptly notify the individual seeking an accommodation of the determination. Housing providers and employers must notify the individual in writing that the cooperative dialogue has concluded. As an individual's condition changes over time, an individual may make new requests for accommodations. Each time an individual makes a new request, the covered entity must engage in a cooperative dialogue with the individual. Where an accommodation proposed by an individual with a disability is immediately agreed to by a covered entity, the cooperative dialogue will consist solely of the individual with a disability making the request and the covered entity granting the accommodation; even in these circumstances, documentation of the final determination is still required in the cases of employers and housing providers.

## **4.** Cooperative Dialogue Sample Scenarios

### ***Examples in Employment***

- An employee has exhausted her paid sick leave and has been on unpaid leave as an accommodation to recover from surgery for four weeks. The employee notifies her employer that she will be able to return to work in one week. Her employer extends her leave by the additional week and requests documentation from the employee's doctor confirming that she is fit to return to work, and provides the employee with confirmation of the one-week extension by email to conclude the cooperative dialogue. The employee provides the documentation when she returns to the workplace the following week.
- An employee experiences complications related to multiple sclerosis and requires several months off to recuperate and complete intensive physical therapy at a rehabilitation facility.

The employee is eligible for twelve weeks of FMLA leave and uses all of it. At the conclusion of the twelve weeks, the employer asks the employee if she is able to return to work. She is not, and tells the employer that she needs approximately four more weeks. The employer determines that holding the employee's position for an additional period of approximately four weeks is not an undue hardship and tells the employee to check in with her in two weeks to share any updates on her expected return date. The employer memorializes this communication in writing and provides a copy to the employee to conclude the cooperative dialogue until the next conversation.

- An employer notices that an employee has been struggling to complete tasks that the employee previously had no trouble performing and appears tired and withdrawn. The employer hears from a co-worker that the employee is dealing with a health issue and approaches the employee and initiates a cooperative dialogue. The employer says, "I have noticed you are struggling to finish your tasks as quickly as usual, is there something I can do to help?" The employee says no. The problem persists, and the employer again approaches the employee and asks if he may need an accommodation, and reminds the employee of the accommodation request policy. The employer tells the employee that he will check in again in a week or so, and reiterates that he will work to accommodate or otherwise support the employee if there is anything going on. One week later, the employer tells the employee that the employee will be written up if the behavior does not improve and again asks if the employee needs assistance and offers to set up a meeting to discuss the issue. The employee declines, and after another week, the employer issues a disciplinary notice. The employer attempted to engage the employee in a cooperative dialogue because he believed the employee may have needed

accommodations based on a disability. Despite repeated attempts to engage the employee in a cooperative dialogue, the employee was not responsive. The employer does not need to provide the employee with written notice of the conclusion of the cooperative dialogue because the employer attempted to engage in a cooperative dialogue with the employee but he declined. Under these circumstances, the employer was justified in taking disciplinary action.

- An employee who works in a specific physically-demanding position is placed on light duty as an accommodation after an off-the-job injury causes a herniated disk in his back. His employer requires that he report to an employer-specified physician, at the employer's expense, every two weeks to determine whether he is able to return to regular duty. The physician reports to the employer regarding the employee's ability or inability to return to his regular duty and the employer keeps the employee on light duty until the physician determines he is able to return to regular duty. The physician provides the employer with a note updating the employer on the employee's status, and the employer communicates all updates to the employee in writing. This process serves as a periodic cooperative dialogue.
- An employee has a diagnosed anxiety disorder and informs his supervisor that a particular co-worker's behavior, which involves speaking very loudly and sometimes aggressively to him, exacerbates his condition. The employee has requested to be relocated to a different floor within the office to avoid interacting with this particular employee. The employer asks the employee to provide a doctor's note regarding the need for the accommodation, which the employee provides. Interactions with the co-worker are not required for the employee to successfully complete his job responsibilities as they work in different departments. The employer determines that relocating the

employee to another floor is not possible given office space constraints, but offers to relocate the employee to a space far from his co-worker on the same floor. The employee rejects the accommodation, insisting that he must be moved to a different floor. The employer again determines that moving the employee to a different floor would cause significant disruption for many other workers because of limited space. The employee decides to stay where he is. The employer sends the employee a note concluding the cooperative dialogue and stating that no accommodation was reached. The employer has met his obligation to engage in the cooperative dialogue and offer a reasonable accommodation.

- An employee is on medication for depression that causes excessive tiredness. The employee's supervisor has noticed the employee has fallen asleep on the job twice. After the second incident, the employee informs his supervisor that he is on medication for an illness that causes excessive tiredness. The supervisor asks what, if anything, they can do to help prevent him from falling asleep while working. The employee consults with his doctor who recommends that the employer adjust his schedule to allow for a later start time and space for the employee to rest during his breaks. The supervisor finds that adjusting the employee's schedule slightly and providing him with a quiet space to rest during his breaks is not an undue hardship. The employer provides the employee with a letter summarizing the accommodation and concluding the cooperative dialogue.
- An employee requests an accommodation of time off for gender confirmation surgery and recuperation related to a diagnosis of gender dysphoria.[113] The employee provides her employer with a

[113] Some transgender and gender non-conforming individuals have a

note from her doctor stating the date of the surgery and the anticipated recovery period. The employer allows the employee to use her accrued sick time for the surgery and recuperation. The employee returns to work and requests a schedule adjustment as an accommodation to go to twice-monthly voice training appointments with a speech therapist. The employer determines that a schedule adjustment of two hours twice a month is not an undue hardship, grants the request, and provides, via email, confirmation that the accommodation is granted and the cooperative dialogue has concluded.

- An employee with a hearing impairment requests an accommodation of a headset and amplifier that will enable him to communicate on office calls with increased volume when using his phone. The employer provides this accommodation at the employee's desk. However, the employee is regularly required to attend meetings in large conference rooms, where the employee requires the use of an assistive listening device to participate. The employee should not have to request an accommodation every time a meeting is scheduled; instead, either the employer should ask if there is any other equipment the employee needs to participate in meetings in the conference room or the employee can raise the need for additional equipment for the conference room meetings.

---

diagnosis of gender dysphoria, which qualifies as a disability under the NYCHRL. *See* N.Y.C. Comm'n on Human Rights, *Legal Enforcement Guidance on Discrimination on the Basis of Gender Identity or Expression: Local Law No. 3 (2002); N.Y.C. Admin. Code § 8-102(23)*, 10 n.17 (revised June 26, 2016), http://www1.nyc.gov/assets/cchr/downloads/pdf/publications/GenderID_InterpretiveGuide_2015.pdf.

- A maintenance worker with a mobility impairment is unable to perform some of the more physically-demanding aspects of her job, including lifting or pushing items, and standing for long periods of time. She requests that another worker be assigned to her worksites to assist her with the more physical aspects of the job. Her employer cannot afford to pay for another worker to assist her, because typically workers are placed on small worksites alone and not in pairs. The employer instead offers to provide the worker with additional time to complete her tasks by giving her a lighter schedule, which would also result in a pay cut. The worker rejects this proposal. The worker then requests that she be given a desk job at the company instead, but none are available. Neither the employer nor the worker is able to propose any additional options that might accommodate the worker's needs without imposing an undue hardship. As a result, the employer has met its obligation to engage in the cooperative dialogue and informs the worker in writing that they cannot accommodate her request.

### *Examples in Housing*

- A landlord receives complaints about a long-time resident's potential hoarding tendencies. The resident's neighbors are complaining about an odor and have also seen glimpses inside the apartment when he opens the door. The landlord approaches the resident, notifies him of the other residents' complaints, and asks if she can inspect the apartment. The resident says no. The landlord states that she will need to inspect the apartment, but offers to give the resident a reasonable amount of time to prepare and asks if the resident may need a reasonable accommodation to prepare the apartment for inspection. This

constitutes an appropriate initiation of a cooperative dialogue with the tenant.

- A tenant with an emotional support animal consistently pays her rent late. The landlord approaches the tenant to inquire if there is a reason why the rent is late so frequently. The tenant replies that her depression and anxiety occasionally result in her being unable to get out of bed for days at a time and she cannot get to the mailbox to send in the rent. The landlord offers several options to the tenant to make the rent payment easier: the tenant can pay the rent online, the landlord can offer to have someone pick up the check each month from the tenant's apartment, or the landlord agrees to waive any incidental late fees as an accommodation. The tenant decides that it is easiest for her pay her rent online, and the landlord provides instructions on how to do so. The landlord sends the tenant a note saying that they reached a reasonable accommodation and the cooperative dialogue has concluded.

### *Examples in Public Accommodations*

- A parent is hard of hearing and requests a Computer Assisted Real-time Translation (CART)[114] system for PTA meetings at his child's school. The school communicates with the parent to create a process for ensuring that a CART system will be provided at all meetings he intends to attend. The parent agrees to notify the parent coordinator one week in advance of each meeting he will attend to provide the school with adequate time

[114] CART instantly transforms speech into text. *See* Job Accommodation Network, *CART Services*, http://soar.askjan.org/Solution/307 (last visited Mar. 19, 2018).

to confirm a CART system is in place for the meeting. The school has satisfied its obligation to engage in the cooperative dialogue.

- A deli has aisles that are too narrow to accommodate individuals with certain mobility assistive devices. When a customer using a walker enters the deli to make a few purchases, the manager offers to have a deli employee collect the items and bring them to the customer at the front. The customer agrees and is able to pay for her purchases at the register near the entrance. While the cooperative dialogue ultimately allowed the customer to receive services in this particular instance, this does not preclude future claims based on failure to accommodate if the deli does not proactively assess the feasibility of making the store actually accessible, now that it has been put on notice.
- A government program that administers rental subsidies to people with disabilities requires that the recipients find an apartment within a specified period of time before the subsidy expires. A program recipient with a mobility disability is unable to visit apartments to find a placement without assistance. The government program offers to provide the recipient with assistance in securing housing and additional time to do so. The program recipient agrees to the accommodation. The program has met its obligation to engage in the cooperative dialogue.

# Failure to Engage in the Cooperative Dialogue in Employment, Housing, and Public Accommodations

Pursuant to Local Law No. 59 (2018), a covered entity's failure to engage in a cooperative dialogue with an individual requesting an accommodation is an independent violation of the NYCHRL.[115] Without engaging in a cooperative dialogue, a covered entity will be unable to completely assess the individual needs of the person requesting an accommodation.

### *Examples of Failure to Engage in a Cooperative Dialogue*

- An employee injures herself on the job. Her employer removes the employee from her position and puts her on unpaid leave, without engaging with the employee to determine whether unpaid leave was an appropriate accommodation for the employee's specific condition.[116]
- A landlord ignores his tenant's repeated requests that grab bars be installed in her shower as an accommodation for her disability.

---

[115] Local Law No. 59 (2018).

[116] *See Miloscia v. B.R. Guest Holdings, LLC*, 33 Misc. 3d 466, 476 (Sup. Ct. N.Y. Cty. 2011), *aff'd in part, modified in part*, 94 A.D.3d 563 (1st Dep't 2012).

# Failure to Provide Reasonable Accommodations for Disabilities in Employment, Housing, and Public Accommodations

The NYCHRL requires covered entities to provide reasonable accommodations for an individual's disability that will allow the individual to enjoy the right or rights in question or perform the essential requisites of the job, so long as the covered entity knew or should have known of the individual's disability. Reasonable accommodation is defined as such accommodation that can be made that shall not cause undue hardship in the conduct of the covered entity's business.[117]

To establish discrimination on the basis of a covered entity's failure to provide a reasonable accommodation, the aggrieved individual must show that: (1) they have a disability; (2) the covered entity knew or should have known of the disability; (3) an accommodation would enable the individual to enjoy the right or rights in question, or perform the essential requisites of their job; and (4) the covered entity failed to provide a reasonable accommodation.[118] The covered entity may then, as a defense, establish that the potential accommodation poses an undue hardship and no other accommodation was available that would not pose an undue hardship on the covered entity and that would allow the individual to enjoy the rights in question.[119] Although a

---

[117] *See* N.Y.C. Admin. Code § 8-102(18).

[118] *See* N.Y.C. Admin. Code § 8-107(15); *In re Comm'n on Human Rights ex rel. Stamm v. E&E Bagels,* OATH Index No. 803/14, Dec. & Order, 2016 WL 1644879, at *6 (Apr. 21, 2016).

[119] *See infra* Part IV(d), discussing defenses to claims of failure to

failure to provide a reasonable accommodation is its own distinct claim under the NYCHRL, depending on the specific facts of the case, a failure to accommodate could also implicate a disparate treatment claim.

## Defenses to a Claim of Failure to Provide Reasonable Accommodations for Covered Entities

If a covered entity fails to provide an accommodation, it may defend its decision by asserting that there is no accommodation available that will meet the needs of the individual with the disability that does not pose an undue hardship, or, in the employment context, would allow the employee to perform the essential functions of the job. It is not a defense to a reasonable accommodation claim that the covered entity engaged in a cooperative dialogue.[120]

When the Commission's Law Enforcement Bureau is investigating a covered entity based on a claim of failure to provide a reasonable accommodation, the covered entity is strongly encouraged to immediately cooperate with the LEB's investigation, which may resolve through negotiation to find an accommodation that meets the complainant's needs and does not pose an undue hardship to the covered entity. Such negotiation could serve to mitigate penalties and damages.

---

provide reasonable accommodations.

[120] Local Law No. 59 (2018).

## **1.** Undue Hardship

"Reasonable accommodation" is defined in the NYCHRL as an accommodation that can be made that does not cause undue hardship in the conduct of the covered entity's business. The concepts of "reasonable accommodation" and "undue hardship" are inextricably intertwined in the NYCHRL. All accommodations are presumed reasonable unless the covered entity shows that they pose an undue hardship.[121] The covered entity has the burden to prove undue hardship by showing the unavailability of a reasonable accommodation.[122] Evidence of undue hardship is assessed by a preponderance of the evidence standard.[123]

There is no accommodation—whether indefinite leave or any other need created by a disability—that is categorically excluded from the universe of reasonable accommodations under the NYCHRL because

---

[121] N.Y.C. Admin. Code § 8-102(18) ("The term 'reasonable accommodation' means such accommodation that can be made that shall not cause undue hardship in the conduct of the covered entity's business."); *see Phillips v. City of N.Y.*, 66 A.D.3d 170, 185 (1st Dep't 2009) ("Under the City HRL . . . the concepts of 'reasonable accommodation' and 'undue hardship' are inextricably intertwined. An accommodation under Administrative Code § 8–102(18) cannot be considered unreasonable unless the covered entity proves that the accommodation would cause undue hardship."), *overruled on other grounds by Jacobsen v. N.Y.C. Health & Hosps. Corp.*, 22 N.Y.3d 824 (2014).

[122] N.Y.C. Admin. Code § 8-102(18).

[123] *See In re Comm'n on Human Rights ex rel. Agosto v. Am. Construction Assocs.*, OATH Index No. 1964/15, Am. Dec. & Order, 2017 WL 1335244, at *5 (Apr. 5, 2017).

a covered entity must assess on a case-by-case basis whether a particular accommodation would cause undue hardship.[124]

In making a determination of undue hardship, the NYCHRL sets forth the following non-exhaustive list of factors:

a) the nature and cost of the accommodation;
b) the overall financial resources of the facility or the facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
c) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
d) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.[125]

A covered entity cannot refuse to provide an accommodation just because it involves cost. Instead, there will be a consideration of the overall resources available to the business or agency, including the entity as a whole, outside resources, and tax incentives. Furthermore, as undue hardship is assessed on a case-by-case basis, a specific

---

[124] *Phillips v. City of N.Y.,* 66 A.D.3d 170, 182 (1st Dep't 2009), *overruled on other grounds by Jacobsen v. N.Y.C. Health & Hosps. Corp.,* 22 N.Y.3d 824 (2014); *Forgione v. City of N.Y.,* No. 11 Civ. 5248, 2012 WL 4049832, at *9 (E.D.N.Y. Sept. 13, 2012).

[125] N.Y.C. Admin. Code § 8-102(18).

cost may result in undue hardship for one covered entity, but may not for another.[126] If a covered entity asserts that providing an accommodation will cause an undue hardship, it will be expected to disclose to the Commission financial documents to allow for an assessment of the alleged financial hardship. Without relevant financial information, it will be very challenging to make this assessment, which could result in a finding that the proposed accommodation is not an undue hardship because the requisite financial showing to establish otherwise was not made. Further, failure to provide relevant financial information may result in an adverse inference against the covered entity with respect to the determination of civil penalties.

A covered entity need not provide the specific accommodation sought; rather, a covered entity may propose reasonable alternatives that meet the specific needs of the person with the disability or that specifically address the limitation at issue.[127] Moreover, a covered

---

[126] *See* EEOC, ENFORCEMENT GUIDANCE: REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT, (Oct. 17, 2002), https://www.eeoc.gov/policy/docs/accommodation.html ("Undue hardship means significant difficulty or expense and focuses on the resources and circumstances of the particular employer in relationship to the cost or difficulty of providing a specific accommodation.").

[127] *In re Comm'n on Human Rights ex rel. Stamm v. E&E Bagels,* OATH Index No. 803/14, Dec. & Order, 2016 WL 1644879, at *6 (Apr. 21, 2016).

[127] *Phillips v. City of N.Y.*, 884 N.Y.S.2d 369, 378 (1st Dep't 2009), *overruled on other grounds by Jacobsen v. N.Y.C. Health & Hosps. Corp.*, 22 N.Y.3d 824 (2014).

entity is not required to substantially change its business processes or structure to afford an accommodation; if such a change is required, it will likely cause an undue hardship. Similarly, a covered entity will not be required to take extraordinary financial measures, such as closing business operations, or changing compensation practices, to afford an accommodation. Where it is clearly established that the necessary accommodation will pose an undue hardship on the covered entity due to expense, a covered entity may explore the possibility of seeking third party funding, through a grant or other means, or assist the individual in applying for a grant to obtain the accommodation, or present the possibility of having the individual pay for part or all of the accommodation.[128] Covered entities should immediately cooperate with any investigation to determine what may or may not be reasonable given the unique situations of the individual seeking the accommodation and the covered entity's ability to provide an accommodation.

Requests for accommodations that require physical changes or accommodations to a space may constitute an undue hardship if, for example, they would be architecturally infeasible.[129] In addition, if a

---

[128] *See In re Russell v. Chae Choe*, OATH Index No. 09-1021033, Dec. & Order, 2009 WL 6958753 (Dec. 10, 2009) (holding respondent liable for failure to accommodate where removal of a tub and installation of a shower would not cost the respondent any money, since United Cerebral Palsy of New York had agreed to bear the cost).

[129] *See, e.g., In re Comm'n on Human Rights ex rel. Rose v. Riverbay Corp.*, OATH Index No. 1831/10, Dec. & Order, 2010 WL 8625897, at *2 (Nov. 1, 2010) (". . . the Commission interprets the New York City Human Rights Law as requiring that housing providers, public accommodations and employers (where applicable), make the main

physical change or accommodation is needed for a limited period of time because a tenant has a temporary disability, the period of time for which the accommodation is needed will be considered in determining whether the time and expense to provide the accommodation would cause an undue hardship.

If a housing provider is required to make a reasonable accommodation for a tenant's disability, the housing provider is generally prohibited from passing, directly or indirectly, any portion of the cost of providing the reasonable accommodations onto the tenant through any fee, rent increase, or other charge.[130] Furthermore, once

---

entrance to a building accessible unless doing so creates an undue hardship, or is architecturally infeasible. Only then, should an alternative entrance be considered . . . [The NYCHRL] requires that every entrance or exit available to an able-bodied person be made accessible for a disabled person, assuming it would be architecturally feasible and not cause an undue hardship").

[130] *See Phillips v. City of N.Y.*, 66 A.D.3d 170,177 n.5 (1st Dep't 2009) ("the City HRL . . . requires the housing provider to make the change, and does not shift the cost to the person with a disability (unless the housing provider demonstrates undue hardship)"), *overruled on other grounds by Jacobsen v. N.Y.C. Health & Hosps. Corp.*, 22 N.Y.3d 824 (2014); *see also In re Comm'n on Human Rights ex rel. Blue v. Jovic*, OATH Index No. 1624/16, Dec. & Order, 2017 WL 2491797, at *18 (May 26, 2017) *aff'd sub nom. Jovic v. N.Y.C. Comm'n on Human Rights*, Index No. 100838/2017 (Sup. Ct. N.Y. Cty. Feb. 14, 2018) ("Consistent with §§ 8-102(18) and 8-107(15)(a) of the NYCHRL, Respondent . . . shall bear the full cost of providing the reasonable accommodation and is prohibited from passing directly or indirectly any portion of that expense onto Complainants through any fee, rent increase, or other charge.").

an accommodation is made, under the NYCHRL, a housing provider cannot require a tenant to restore the housing back to its original condition at the end of the tenancy or pass the cost of doing so onto the tenant.

### *Examples of Undue Hardship*

- An employee of a small business with six other employees has a disability that prevents him from being at the office. He works as the only receptionist and administrative assistant for the office. He asks his employer if he can work remotely as an accommodation, which is the only accommodation that will allow him to continue working with his condition. The employer considers the employee's job functions, which include greeting visitors to the office, answering the phone and directing calls, making copies, filing documents, preparing materials for meetings, ordering supplies, and maintaining an orderly and organized office space. The employer determines that the majority of the employee's job functions require that he be present in the office and that it would be a financial undue hardship to hire additional staff to cover those responsibilities, given the size of the business. The employer memorializes his determination in writing and provides it to the employee to conclude the cooperative dialogue.
- An employee who works at a small real estate office requests an accommodation of specialized equipment and a license to use a service that will cost approximately $5,000 per year. The employer determines that they do not have the financial resources to pay for an accommodation at that expense and would have to take out a loan to cover the cost. They explore other alternative accommodations but none adequately provide the services the employee needs. The employer informs the

employee that the full cost would pose an undue hardship but offers to split the cost with the employee instead. The employee agrees to the arrangement, and the employer sends an email to the employee memorializing the agreement and concluding the cooperative dialogue.

- A tenant who, due to a mobility limitation, can no longer regularly use the stairs in his building, requests to be relocated from his third-floor apartment to a first-floor apartment in a building with four floors and eight total units. His landlord denies the request because the first-floor apartments rent for several hundred dollars more per month than the tenant's third-floor apartment and the landlord cannot afford to offer the apartment at the tenant's current rent, because he would lose several thousand dollars per year in rental income, and the tenant cannot afford the higher rent. The landlord has an available apartment at a neighboring building on a lower floor that rents for $50 more per month, and the landlord offers the apartment to the tenant at his current rent. The tenant does not wish to relocate and rejects the offer. The landlord has appropriately denied the original request based on a more than *de minimis* loss in rental income that he cannot absorb and offered an alternative arrangement that the tenant is free to accept or reject. The landlord leaves the tenant a note concluding the cooperative dialogue by stating that the tenant has rejected the offer of an apartment at a neighboring building and therefore the cooperative dialogue has concluded.

## **2.** Essential Requisites of the Job

In employment cases where the need for a reasonable accommodation is placed at issue, the employer may raise the affirmative defense that the person aggrieved by the alleged discriminatory practice could not, even with a reasonable accommodation, satisfy the essential requisites of the job or enjoy the right or rights in question.[131] This means that even when the accommodation does not create an undue hardship for the employer, if it would not enable the employee to perform the basic duties and responsibilities required of the job, the employer may deny the accommodation. The employer has the burden to prove that the employee could not, with reasonable accommodation, satisfy the essential requisites of the job.[132] An employer can establish this by appropriately engaging in the cooperative dialogue with the employee and arriving at this conclusion.

In raising this defense, an employer must show that there are no comparable positions available for which the employee is qualified that would accommodate the employee, and that a lesser position or an unpaid leave of absence is either not acceptable to the employee or would pose an undue hardship.[133]

---

[131] N.Y.C. Admin. Code § 8-107(15)(b).

[132] *Phillips v. City of N.Y.,* 66 A.D.3d 170, 183 (1st Dep't 2009), *overruled on other grounds by Jacobsen v. N.Y.C. Health & Hosps. Corp.,* 22 N.Y.3d 824 (2014).

[133] *See infra* Part V(a) for a discussion on when an employer may offer an alternative position or unpaid leave as a reasonable accommodation.

***Example***

- An employee is injured in a car accident after working successfully for six months. The employee, due to her disability, is no longer able to perform the essential requisites of her current position, with or without a reasonable accommodation. The employee seeks a reassignment. A position for which the employee is qualified will become vacant in four weeks. If it would not pose an undue hardship to the employer, the employer must offer this position to the employee. The employer may place the employee on a paid or unpaid leave consistent with its existing policies until the position becomes vacant.

Essential requisites of a job, or essential functions of a job, are *not* synonymous with *all* the functions of the job. In evaluating whether certain functions of a job are considered "essential," factors including, but not limited to, the following will be considered:

- Whether the position exists for performance of that particular function;
- Whether other employees perform that function and/or whether it can be reassigned;
- Whether the function is highly specialized so that the employee in the position is hired for their specific expertise or ability to perform it;
- Whether removal or reassignment of the function would fundamentally alter the position;
- How much time is spent performing the function;
- Whether there are consequences associated with failing to perform the function;
- Whether the function is merely a requirement "on paper" or is actually required of employees; and

- Whether the function is critical to one's job performance.[134]

In making this determination, no one factor is dispositive, and a fact-specific inquiry will be conducted into both the employer's description of a job and how the job is actually performed in practice.[135] A job description or job posting, while informative, is not considered an absolute list of essential job functions; rather, the specific day-to-day essential functions that the employee performs will be considered.

***Example***

- An employee's schizophrenia requires him to take medication that makes him drowsy and sluggish in the morning and often results in late arrival at work. Because his employer allows all employees to have flexible start times and work late as needed, and the employee is able to perform his job duties with modified hours, his request that he work through lunch and/or work late to make up time lost due to late arrivals would not cause undue hardship to the employer, and thus was reasonable.[136]

---

[134] *See* 29 C.F.R. § 1630.2(n).

[135] *McMillan v. City of N.Y.*, 711 F.3d 120, 126 (2d Cir. 2013).

[136] *Id.* at 123.

## **3.** Requested Accommodation Implicates Other City, State, or Federal Law

In some instances, a requested accommodation may conflict with federal, state or local law or regulations. In such circumstances, the covered entity must make inquiries about the possibility of a waiver from the requirements of other laws that would allow it to make the requested accommodation. If a waiver is unavailable, the potential conflict of providing an accommodation that would violate another law may be an undue hardship.

### *Examples*

- Establishments that sell or prepare food must allow service animals in public areas.[137]
- The NYC Landmarks Preservation Commission has a long history of approving proposals for work that accommodates barrier-free access at landmark properties, including ramps, lifts, and associated fixtures, such as signage, push plates, and free-standing hardware. If a covered entity's building is landmarked and an individual with a disability requests a reasonable accommodation, the covered entity must contact the Landmark Preservation Commission regarding guidance on whether and

[137] The N.Y.C. Health Code exempts service animals from its prohibitions of live animals in food service establishments. N.Y.C. Health Code § 81.25. *See also* U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., DISABILITY RIGHTS SECTION, ADA 2010 REVISED REQUIREMENTS: SERVICE ANIMALS (July 12, 2014), https://www.ada.gov/service_animals_2010.pdf.; N.Y. State Public Health Law § 1352-e (recognizing that service animals are not covered by restrictions applicable to pets).

how accessibility renovations can be made so that all New Yorkers and visitors can utilize the building.[138]

# Types of Accommodations Based on Disability

The following section is intended to provide an illustrative, non-exhaustive list of a range of possible accommodations available to individuals with disabilities.

## Employment

A reasonable accommodation in employment enables an individual with a disability to apply for a job, interview for a job, perform a job, or have equal access to the workplace and employee benefits. In considering accommodations for current employees, an employer's first obligation is to accommodate an employee so that they may remain in their current position. When that is not possible, an employer may then consider whether the employee could be reassigned to a vacant position. In considering alternative positions, an employer may consider the qualifications necessary for the position and whether the pay, status, and benefits are equivalent to the employee's current position. When a comparable position is

[138] N.Y.C. Landmarks Pres. Comm'n, *Fact Sheet: Barrier-Free Access for Historic Buildings* (Nov. 3, 2016), http://www1.nyc.gov/assets/lpc/downloads/pdf/pubs/Barrier-Free%20Access.pdf.

unavailable, an employer may then explore alternative positions that are not comparable. In circumstances in which no other accommodation can be made, a paid or unpaid leave of absence—consistent with policies for other forms of leave (including whether benefits are continued beyond other statutory requirements to maintain benefits) that do not treat individuals with disabilities less well than other employees on leave—may be offered as a temporary accommodation. However, in some circumstances, leaves of absence may be the preferred accommodation or the only accommodation available.

## **1.** Hiring

An employer's obligation to provide reasonable accommodations is not limited to current employees, but equally applies to applicants and interviewees. Employers must provide reasonable accommodations to enable applicants to apply for jobs and be considered for job openings, unless the accommodation poses an undue hardship. For example, employers should make their online application processes accessible to individuals with visual impairments or provide alternative means to apply for jobs, and prepare printed internal job information posted on employee bulletin boards in large print and in a location that is accessible. Employers may tell applicants what the hiring process involves—for example, an interview, a timed written test, or a presentation—and may ask applicants whether they will need a reasonable accommodation for any part of the process.

### ***Examples***

- Providing an applicant who is deaf with a sign language interpreter for his interview.

- Administering a typing test for an administrative position in a wheelchair-accessible location for an applicant who uses a wheelchair.
- Assisting an applicant who is blind in completing application forms.
- Providing an applicant who has dyslexia with additional time for his pre-employment test.

## **2.** Physical Space, Assistants, Technology, and Service Animals

Often, a reasonable accommodation will involve making the workplace more accessible for individuals with disabilities. Reasonable accommodations may include obtaining equipment, making changes to existing equipment, providing an assistant, allowing a service animal in a business setting, or making non-structural or structural changes to workspaces or support facilities such as restrooms and cafeterias. While employers should provide equipment that is specifically needed to perform a job, they are not obligated to provide equipment that an employee uses in daily life, such as glasses, a cane, or a hearing aid, that are readily transportable to the workplace.

Employment activities should take place in integrated settings and employees with disabilities should not be segregated into particular facilities or parts of facilities, unless the segregated setting itself is a form of reasonable accommodation.[139] In existing facilities, structural

[139] For example, a segregated setting may be a reasonable accommodation for an employee with a disability that requires a quieter workspace with less noise or fewer distractions.

changes may be necessary to the extent that they will allow an employee with a disability to perform the essential requisites of the job, including access to work stations and support facilities such as restrooms and cafeterias. Non-structural changes may also be explored if they achieve the same result.

Individuals with speech disabilities, or sensory disabilities such as those relating to vision or hearing, should be able to communicate effectively with others in the workspace. In some employment contexts, an interpreter, reader, or note-taker may be an effective accommodation for an employee. In other contexts, technology or equipment such as assistive listening systems and devices, screen-reader software, magnification software and optical readers, or other electronic and information technology that is accessible may enable more effective communication. In assessing accommodations, the employer should engage in a cooperative dialogue with the employee to assess their specific needs in relation to their job tasks.

***Examples***

- Purchasing a talking calculator for an employee with a vision disability.
- Allowing an employee who has epilepsy to bring her service dog to the office.
- Purchasing a teletypewriter, telecommunications device, text telephone, or video phone for an employee with a hearing and/or speech disability to communicate over the telephone.
- Providing telephone headsets, speaker phones, and adaptive light switches for employees with manual disabilities.

- Providing a quieter workspace or making other changes to reduce noisy distractions for an employee with a mental health disability.
- Installing a cup dispenser at the water fountain to allow an employee who uses a wheelchair to access the water fountain.
- Providing a part-time assistant to support an employee with quadriplegia with clerical duties, such as retrieving items on shelves or filing.

## **3.** Work Restructuring or Reassignment

Job restructuring may be a reasonable accommodation for an employee with a disability, and may involve reallocating or redistributing some of the non-essential functions of a job. For example, an employer may reassign work at an office among coworkers, eliminate non-essential tasks, reassign visits to accessible sites, or allow work in settings other than the traditional office setting.

If an employee develops their disability after being on the job and can no longer perform some or all of the essential requisites of the job, an employer must consider reassignment of the employee to a vacant position within the organization, if doing so does not constitute an undue hardship.[140]

---

[140] The new position should be one that the employee is qualified to perform and that pays a comparable salary. Reassignment does not require the employer to violate a bona fide seniority system or collective bargaining agreement under which someone else is entitled to the vacant position. Reassignment should be considered only if there are no reasonable accommodations available that would allow the employee to perform the essential functions of his/her current job.

## **4.** Leave

One type of reasonable accommodation for an employee's disability is allowing the use of accrued paid leave or unpaid leave so that the employee can return to work after the leave and perform the essential requisites of the job. In some circumstances, it may be an accommodation of last resort, or it may be the only or preferred option for the employee. Employers should allow employees to exhaust accrued paid leave first and then provide unpaid leave. Leave for disability must be administered consistently with policies for other forms of leave (including whether benefits are continued beyond any other statutory requirements to maintain benefits) that do not treat individuals with disabilities less well than other employees on leave. The use of leave may be a reasonable accommodation for a number of reasons related to the disability, including but not limited to receiving medical treatment, rehabilitation services, or physical or occupational therapy; recuperating from an illness or an episodic manifestation of the disability; getting repairs on a wheelchair or prosthetic device; avoiding temporary adverse conditions in the work environment such as an air conditioning breakdown causing unusually warm temperatures that might exacerbate symptoms; or receiving training in the use of Braille or learning sign language.[141]

In some circumstances when an employee requests leave as a reasonable accommodation, the employee, or the employee's doctor, may be able to provide a definitive date on which the employee can return to work, but in some instances, only an approximate date or

---

[141] *See* U.S. Equal Emp. Emp't Opportunity Comm'n, Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (Oct. 17, 2002), https://www.eeoc.gov/policy/docs/accommodation.html.

range of dates can be provided. A projected return date or range of return dates may need to be modified in light of changed circumstances, such as when an employee's recovery takes longer than expected. In order to determine if such accommodations cause an undue hardship, they must be evaluated on a case-by-case basis.[142] Leave as a reasonable accommodation includes the employee's right to return to his or her original position in circumstances where keeping that job open for the employee does not impose undue hardship. In many instances, an employer can reassign work tasks, schedule additional workers to cover shifts, or hire a temporary or part-time employee to minimize any hardship. However, if an employer determines that holding the job for the employee on leave will cause an undue hardship, then it must consider whether there are alternatives that permit the employee to complete the leave and return to work in a different position.

Another type of reasonable accommodation is allowing a change in an employee's regular work schedule or establishing a flexible leave policy. For example, a modified work schedule may involve moving an employee from a 9am to 5pm shift to an 11am to 7pm shift to accommodate the employee's disability. This type of accommodation may be effective for an employee who requires regular medical appointments for treatment for their disability or an employee whose disability is affected by eating or sleeping schedules. A flexible work schedule may also be a reasonable accommodation for an employee's disability, allowing an employee to vary their arrival or departure times. Additionally, allowing an employee to work from

---

[142] *See* U.S. EQUAL EMP. EMP'T OPPORTUNITY COMM'N, EMPLOYER-PROVIDED LEAVE AND THE AMERICANS WITH DISABILITIES ACT (May 9, 2016), https://www1.eeoc.gov//eeoc/publications/ada-leave.cfm?renderforprint=1.

home may be a reasonable accommodation for an employee with a disability. While many employers rely on policies that require employees to "earn the privilege" of working from home, if an employee requests to work from home as an accommodation, the employer cannot rely on such policies and must instead do an individualized analysis of the employee's actual work tasks to see whether they can perform them from home on the schedule requested by the employee.

## Housing

A reasonable accommodation in housing enables[143] an individual with a disability an equal opportunity to apply for, obtain recertification for, use, and enjoy a dwelling, including public and common use spaces.[144] This may involve a structural change to the physical space, or an exception or adjustment to a policy or practice. In considering accommodations for tenants or residents with disabilities, a housing provider's first obligation is to accommodate a resident so that they

---

[143] Unlike state law, the NYCHRL requires housing providers to grant reasonable accommodations that would enable a resident equal use and enjoyment of their housing unit. This is a distinctly broader standard than the state law which requires the accommodation be "necessary" to use and enjoy the apartment. *See In re Comm'n on Human Rights ex rel. L.D. v. Riverbay Corp.*, OATH Index No. 1300/11, Rep. & Rec. 2011 WL 126879737, at *12 (Aug. 26, 2011), *aff'd* Dec. & Order, 2012 WL 1657555 (Jan. 9, 2012).

[144] Unlike state law, the NYCHRL does not make a distinction between modifications in common areas and non-common areas in apartment buildings. *See* N.Y. Exec. Law § 296(18).

may remain in their current unit.[145] When that is not possible, a housing provider may then consider whether the resident may be relocated to an accessible unit, or other potential accommodations that may allow the resident to equally use and enjoy their home.[146]

## **1.** Physical Space and Technology

A reasonable accommodation will often involve making the housing accommodation more accessible for individuals with disabilities, either through alterations to the existing physical space and structures, or through the installation and/or use of technology, at the housing provider's expense.[147]

---

[145] Although the vast majority of housing examples here speak to rental scenarios, it is important to note the breadth of the definition of housing provider under the NYCHRL, which also applies to condominium and cooperative living situations.

[146] If a tenant is in a rent-stabilized or rent-controlled unit, the housing provider should make every reasonable effort to relocate the tenant to another rent-stabilized or rent-controlled unit.

[147] Unlike the Fair Housing Act, under which housing providers are only responsible for the cost of reasonable physical accommodations in buildings built after March 13, 1991, all housing providers are responsible for the cost of reasonable physical accommodations to their buildings under the NYCHRL (although condo and coop boards are only responsible for the cost of accommodations in common areas). *See In re Comm'n on Human Rights ex rel. Blue v. Jovic*, OATH Index No. 1624/16, Dec. & Order, 2017 WL 2491797, at *17 (May 26, 2017) ) *aff'd sub nom. Jovic v. N.Y.C. Comm'n on Human Rights*, Index No. 100838/2017 (Sup. Ct. N.Y. Cty. Feb. 14, 2018).

If the main entrance to a building is not accessible to a resident who resides in the building, the housing provider must explore how to make the entrance accessible.[148] This may involve building a ramp; installing an electric door that opens automatically; installing a lift; installing intercoms or doorbells that light up instead of make sound; or issuing hard keys to individuals, such as the visually impaired, who have greater difficulty accessing doors with electronic key fobs. Under the NYCHRL, it is a best practice for housing providers to make every entrance or exit accessible to the extent that such alternations do not pose an undue hardship, where a tenant has made such a request.[149] If a main entrance cannot be made accessible because doing so poses an undue hardship, the housing provider must consider whether an alternative entrance could be made accessible. However, it is impermissible for a housing provider to determine that a front entrance cannot be made accessible due to aesthetic concerns unrelated to legal restrictions such as Landmarks Preservation.

Apartment units and common spaces may be configured in a way that makes it extremely difficult or impossible for a resident with a disability to navigate or perform day-to-day activities such as bathing, cooking, or sleeping. In such circumstances, housing providers must provide alterations such as installing grab bars to a bathtub, installing a roll-in

---

[148] Some factors that may be considered in determining whether an entrance is a main entrance include the location of security, mailboxes, and the lobby area, access to elevators and other amenities in the building, and the area the residents consider the main entrance.

[149] *In re Comm'n on Human Rights ex rel. Rose v. Riverbay Corp.*, OATH Index No. 1831/10, Dec. & Order, 2010 WL 8625897, at *2 n.1 (Nov. 1, 2010).

shower, or adjusting the location of appliances or other fixtures unless such alterations pose an undue hardship.

***Examples***

- Installing a flashing light function to a doorbell may be an effective accommodation for an individual who is deaf or hard of hearing.
- Replacing door knobs with lever hardware may be an effective accommodation for an individual with a disability affecting their dexterity.
- Constructing a ramp at the main entrance to the building and/or to access the building's elevator may be an effective accommodation for an individual with a mobility disability.
- Replacing a bathtub or shower stall with a roll-in shower may be an effective accommodation for an individual with a mobility disability.
- Re-configuring the furniture in the apartment lobby to allow for an accessible path to the elevator may be an effective accommodation for an individual who uses a wheelchair.
- Replacing a complicated latch on a gate surrounding the swimming pool with a lever or loop handle may be an effective accommodation for an individual with a manual disability.

When a housing accommodation has an elevator outage, it is a best practice for the housing provider to give notice of the disruption and provide a timeframe for the disruption to all residents. Reasonable accommodations in such circumstances may include relocating a resident to the ground floor if an apartment of suitable size to meet the resident's needs is available; relocating a resident to another building if the housing provider has multiple buildings on one site;

relocating a resident to another complex; paying any reasonable moving expenses; paying for a hotel or other residential option; providing services (*i.e*., grocery delivery or mail delivery to the individual); providing assistance to navigate the stairs; or providing rent abatement if the resident cannot safely stay in the apartment.

## **2.** Policies and Practices

Housing accommodations may also provide reasonable accommodations by making exceptions or changes to their policies and practices.

### ***Examples***

- Permitting a live-in personal care attendant or live-in aide to live with a resident with a disability who might need 24-hour assistance or waiving any guest fees due to this need.
- Accepting a reference from a housing applicant's social worker or employer if an applicant does not have a rental history due to their disability.
- Changing the method by which a housing provider communicates with a resident with a disability or provides information, such as providing more frequent reminders of rent due for someone with a mental health disability who needs such reminders or informing an individual designated by the resident (*e.g.* family member or social worker), in addition to the resident, of new policies.
- Doing a home visit to fill out forms for voucher recertification for a resident with a mobility disability.

## **3.** Service Animals and Emotional Support Animals

Housing providers are required to reasonably accommodate persons with disabilities who rely on service animals or emotional support animals by providing exceptions to "no pet" or "no dog" policies. A service animal is an animal that does work or performs tasks for an individual with a disability. For example, a dog that guides an individual with a visual impairment is a service animal. An emotional support animal is an animal that provides emotional support or other assistance that ameliorates the symptoms of a disability.[150] If housing providers have "no pets" policies, charge pet fees, or have breed, weight, or size restrictions on pets, they must make exceptions to these policies in situations in which a resident requests to keep a service animal or emotional support animal in their housing unit due to a disability, unless doing so would cause the housing provider an undue hardship.

City, state, and federal laws may prohibit certain animals.[151] Unless an exception is made to the prohibition, it will be an undue hardship to

---

[150] Unlike under state law, under the NYCHRL a person need only show that the presence of the emotional support animal in some way alleviates symptoms of their disability in order to justify their request for the accommodation. They need not show that the animal is "necessary" to their use and enjoyment of the residential unit. *In re Comm'n on Human Rights ex rel. L.D. v. Riverbay Corp.*, OATH Index No. 1300/11, Rep. & Rec. 2011 WL 126879737, at *11-12 (Aug. 26, 2011), ***aff'd*** Dec. & Order, 2012 WL 1657555 (Jan. 9, 2012).

[151] The New York City Health Code enumerates a list of animals that are prohibited within the City of New York. N.Y. Rules, Tit. 24, Health Code, § 161.01, *available at*

permit a prohibited animal as a service or emotional support animal. However, it will rarely cause an undue hardship for a resident to keep a service or emotional support animal as an exception to a building's "no pet" policy. The possibility of potential incidental property damage is rarely an undue hardship. Where a particular animal creates legitimate health or safety concerns, the housing provider and the resident must engage in a cooperative dialogue to determine what other accommodation may be available.[152]

When a resident's disability and/or the need for the requested animal is not apparent,[153] the housing provider may ask that the resident

---

http://www1.nyc.gov/assets/doh/downloads/pdf/about/healthcode/health-code-article161.pdf.

[152] *See infra* IV(a) for a discussion on cooperative dialogue. If the animal poses a direct threat (*i.e.*, a significant risk of substantial harm) to the health or safety of other individuals that cannot be eliminated or reduced to an acceptable level by another reasonable accommodation, the housing provider may deny the request. In evaluating whether an animal poses a direct threat, the housing provider should consider the health and safety of other individual(s) and whether those concerns may be addressed by an accommodation, or if the animal has caused substantial physical damage to the property of others that cannot be reduced or eliminated by another reasonable accommodation. The housing provider must base such determinations upon consideration of the behavior of the particular animal at issue and not on speculation or fear about the types of harm or damage an animal may cause.

[153] *See infra* Part IV(a)(ii)(1), discussing how in circumstances where an applicant's disability and the need for the requested accommodation is readily apparent or otherwise known to the covered entity, making additional inquiries or asking for medical

provide a statement from a health professional[154] indicating: (1) that the person has a disability; and (2) information that an animal is able to perform tasks, or provide emotional support or other assistance, that would ameliorate one or more symptoms or effects of the disability. If a resident requests an accommodation for a service animal or emotional support animal, and if both the resident's disability and the need for the requested animal are apparent or otherwise known to the housing provider, the housing provider may not inquire about the individual's disability or the need for the animal. For example, if a resident who is blind requests an accommodation for his service animal who guides him, the housing provider may not inquire about the resident's disability or the animal's training, or require medical documentation to justify the need for the service animal.

A housing provider may not require individuals to provide medical records or details of a disability beyond that which is minimally sufficient to demonstrate the existence of a disability and the relationship between the disability and the requested accommodation.[155]

---

documentation about the requester's disability or the disability-related need for the accommodation may constitute harassment.

[154] "Health professional" means a person who provides medical care, therapy, or counseling to persons with disabilities, including, but not limited to, doctors, physician assistants, psychiatrists, psychologists, or social workers.

[155] However, if the animal is a dog or cat, once the animal has been selected, the housing provider may request copies of the license, tag, or rabies certificate and other vaccination information as required by New York State law, and a photograph of the animal. If the housing

### **4.** Relocation

Where a reasonable accommodation is not possible given certain structural limitations of the building, the housing provider must consider alternative accommodations. Alternatives may include a temporary or permanent relocation of the resident, to a different apartment building within the housing provider's control, or to a different apartment within the same building. For example, if an elevator is not functioning, and will not be repaired for a long period of time, and it prevents a resident who uses a wheelchair from being able to enter and exit their apartment, the housing provider must consider whether temporarily relocating the resident to a unit on a lower floor or in another building is possible. However, relocation, particularly to a different building, is generally an accommodation of last resort. A resident is not required to relocate if a physical modification to their unit is available and does not pose an undue hardship on the housing provider.

## Public Accommodations

### **1.** Physical Space and Technology

Places and providers of public accommodations are required to provide reasonable accommodations for people with disabilities to allow equal and independent access. These types of accommodations can include alterations to the existing physical space and structures or the use of assistive technology.

---

provider requests such information, the resident must provide it.

***Examples***

- A bank may install ATMs with Braille on the keypads and glare-free screens to accommodate individuals with visual impairments.
- A theater may install closed captioning in certain seat sections to accommodate individuals with hearing disabilities during performances.
- A clothing store may alter the height at which they mount mirrors and shelves so they can be accessible for individuals using wheelchairs.

## **2.** Policies and Practices

Places of public accommodation must also provide reasonable accommodations by making exceptions or changes to their policies and practices that would allow for equal and independent access for individuals with disabilities.

***Examples***

- A museum may provide a sign language interpreter for a lecture as an accommodation for participants who are deaf.
- A fitness facility may waive a guest fee for an aide or nurse who is required to be with an individual with a disability while he exercises.
- A restaurant that does not have menus available in Braille or large print may have its waiter read a menu to a customer who is blind or has low vision.
- A college may appoint a note-taker to a student with a disability to take notes for her classes.

- A doctor's office may schedule an appointment at a specific time that will reduce or eliminate waiting for a patient whose disability is aggravated by waiting in a crowded waiting room.
- A restaurant may allow an individual with a service animal to access the restaurant with their animal.

Allergies or fear of animals by fellow patrons, staff members, or providers of public accommodations generally will not be a basis for denying access or refusing service to people using service animals. For example, if a person who is allergic to dogs and a person who uses a service dog must spend time in the same room or facility, they should both be accommodated by providing services to them, if possible, in different locations within the facility. Otherwise, individuals with disabilities who use service animals cannot be isolated from other patrons. An individual with a disability cannot be asked to remove their service animal from the premises unless: (1) the animal is out of control and the handler does not take effective action to control it; or (2) the animal is not housebroken or otherwise creates a nuisance. When there is a legitimate reason to ask that a service animal be removed, staff must offer the person with the disability the opportunity to obtain the goods or service without the animal's presence.[156]

"[S]ervice animals should be harnessed, leashed, or tethered, unless these devices interfere with the animal's work or the individual's disability prevents them from using these devices. In that case, the

---

[156] *See* U.S. Dep't of Justice, Civil Rights Div., Disability Rights Section, ADA 2010 Revised Requirements: Service Animals (July 12, 2014), https://www.ada.gov/service_animals_2010.pdf.

individual must maintain control of the animal through voice, signal, or other effective controls."[157]

When it is not apparent whether the animal is a service animal, only limited inquiries are allowed. Staff may ask two questions: (1) is the service animal required because of a disability; and (2) what work or task has the service animal been trained to perform. Staff cannot ask about the person's disability, require medical documentation, require a special identification card or training documentation for the animal, or ask that the service animal demonstrate its ability to perform a specific task.[158]

# Retaliation

The NYCHRL prohibits retaliation against an individual for opposing discrimination. The purpose of the retaliation provision is to enable individuals to speak out against discrimination and to freely exercise their rights under the NYCHRL. Freedom from retaliation helps ensure that individuals needing accommodations will request them and promotes a culture where people are not afraid to exercise their rights. Retaliating against an individual because they opposed discrimination based on disability or perceived disability is a violation of the NYCHRL.

---

[157] U.S. Dep't of Justice, Civil Rights Div., Disability Rights Section, ADA 2010 Revised Requirements: Service Animals (July 12, 2014), https://www.ada.gov/service_animals_2010.pdf.

[158] *See* U.S. Dep't of Justice, Civil Rights Div., Disability Rights Section, ADA 2010 Revised Requirements: Service Animals (July 12, 2014), https://www.ada.gov/service_animals_2010.pdf.

A covered entity may not retaliate against an individual because they engaged in protected activity, including: (1) oppose a discriminatory practice prohibited by the NYCHRL; (2) raise an internal complaint regarding a practice prohibited under the NYCHRL; (3) make a charge or file a complaint with the Commission or any other enforcement agency; or (4) testify, assist, or participate in an investigation, proceeding, or hearing related to an unlawful practice under NYCHRL.[159] In order to establish a prima facie claim for retaliation, an individual must show that: (1) the individual engaged in a protected activity; (2) the covered entity was aware of the activity; (3) the individual suffered an adverse action; and (4) there was a causal connection between the protected activity and the adverse action.[160]

When an individual opposes what they believe in good faith to be unlawful discrimination, it is illegal to retaliate against the individual even if the conduct they opposed is not ultimately determined to violate the NYCHRL. For example, if an employee experiences adverse action for raising concerns to their employer about the treatment of a colleague with disabilities, even if the treatment of the colleague does not amount to discrimination, the employee may have a claim for retaliation.[161]

An action taken against an individual that is reasonably likely to deter them from engaging in such activities is considered unlawful retaliation. The action need not rise to the level of a final action or a materially adverse change to the terms and conditions of

---

[159] N.Y.C. Admin. Code § 8-107(7).

[160] *Id.*

[161] *See, e.g., Albunio v. City of N.Y.*, 16 N.Y.3d 472 (2011).

employment, housing, or participation in a program to be retaliatory under the NYCHRL.[162] The action could be as severe as termination, demotion, removal of job responsibilities, or eviction, but could also be relocating an employee to a less desirable part of the workspace, shifting an employee's schedule, failing to grant an accommodation, or failing to make repairs in a resident's unit.

An individual needing an accommodation for their disability must be able to seek assistance and engage in the cooperative dialogue with covered entities without fear of adverse consequences for making the request. While a request for a reasonable accommodation itself is not protected activity under the NYCHRL,[163] if a request for a reasonable accommodation leads to an adverse action, there may be a claim for disparate treatment under the NYCHRL.[164]

Claims for disability discrimination under the NYCHRL may be based on a failure to provide a reasonable accommodation.[165] Therefore, it would be retaliation for a covered entity to take an adverse action against an individual with a disability for making a complaint alleging a failure to provide a reasonable accommodation.[166]

---

[162] N.Y.C. Admin. Code § 8-107(7).

[163] *McKenzie v. Meridian Cap. Grp.*, 35 A.D.3d 676, 677 (2d Dep't 2006) (dismissing claim that plaintiff was fired in retaliation for requesting additional leave time to accommodate her disability because plaintiff failed to allege "that her request was made in opposition to a practice forbidden by" the NYCHRL).

[164] *See* N.Y.C. Admin. Code §§ 8-107(1) – 8-107(5).

[165] N.Y.C. Admin. Code § 8-107(15)(a).

[166] *See Serdans v. N.Y. Presbyterian Hosp.*, 112 A.d.3d 449, 450 (1st Dep't 2013).

### *Examples of Retaliation*

- An employee is diagnosed with cancer and speaks to her employer about a reasonable accommodation that would allow her to attend regular appointments for treatment. Her employer fails to engage in a cooperative dialogue and ignores her request. The employee submits an internal complaint with Human Resources regarding her employer's failure to accommodate. When the employer learns of the employee's complaint, he demotes her.
- A tenant informs his landlord of his need to keep an emotional support animal in his apartment as a reasonable accommodation for his disability. While the landlord routinely approves such requests, she denies the request because the tenant had testified on behalf of another tenant's case alleging discrimination.

It is a best practice for covered entities to implement internal anti-discrimination policies to educate employees, residents, and program participants of their rights and obligations under the NYCHRL with respect to individuals with disabilities, and regularly train staff on these issues. Covered entities should create procedures for employees, residents, and program participants to internally report violations of the law without fear of adverse action and train those in supervisory capacities on how to handle those claims when they witness discrimination or instances are reported to them by subordinates. Covered entities that engage with the public should implement a policy for interacting with the public in a respectful, non-discriminatory manner consistent with the NYCHRL, and ensuring that members of the public do not face discrimination.

# Discriminatory Harassment

The NYCHRL prohibits discriminatory harassment or violence motivated by a person's actual or perceived disability.[167] Discriminatory harassment occurs when someone uses force or threatens to use force against a victim because of the victim's actual or perceived disability. Discriminatory harassment also occurs when someone damages or destroys another person's property because of their disability.

### *Examples of Discriminatory Harassment*

- An individual who uses a cane due to a mobility disability is walking home from work. Two men who are approaching him on the sidewalk point at him and laugh, yelling insults such as "deformed" and "gimp." When the individual ignores them and continues on his way, one of the men kicks his cane out of his hand, while the other pushes him to the ground.
- An individual who uses a wheelchair is seated in an accessible area at the end of an aisle in a movie theater. Another patron is seated next to her. When he sees her, he gets up and stands over her, and says, "Can you find somewhere else to park yourself? You're blocking the aisle. Move your stupid chair out of the way or I'll push you out of here myself," and hits the wheel of her wheelchair.

[167] N.Y.C. Admin. Code §§ 8-602 – 8-604.

# Appendices

**Cooperative Dialogue**

**Sample Reasonable Accommodation Request Form (Employment)**

**Sample Grant or Denial of Reasonable Accommodation Request Form (Employment)**

**Sample Letter to Employee on Leave**

**Service Animal One-Pager**

**Sample Sign Notifying Public How to Request Accommodation in Public Accommodations**

**Sample Service Animals Welcome Sign**

**Sample Reasonable Accommodation Policy**

# Cooperative Dialogue

## Step 1

A covered entity's obligation to engage in a cooperative dialogue is triggered when it learns, either directly or indirectly, that an individual requires an accommodation due to their disability.

The covered entity may learn direct of the accommodation need if, for example, the individual reveals to the covered entity that they have a disability, or requests an accommodation. The covered entity may learn indirectly of the accommodation need if, for example, the employer (1) has knowledge that an employee's performance at work is diminished or that their behavior at work could lead to an adverse employment action, and (2) has a reasonable basis to believe that the issue is related to a disability.

## Step 2

After the covered entity learns, directly or indirectly that an individual requires an accommodation, due to their disability, the covered entity must initiate a cooperative dialogue with the individual.

If the covered entity approaches the individual to initiate a cooperative dialogue and the individual does not reveal that they have a need for an accommodation related to a disability, the covered entity has met their obligation to initiate a cooperative dialogue and need not do anything further.

If, however, individual reveals that they have a need for an accommodation for a disability, the covered entity must proceed to Step 3.

## Step 3

The covered entity must communicate in good faith with the individual in a transparent and expeditious manner. The entity evaluates the individual's needs and considers the possible accommodations for the individual that would allow them to perform the essential requisites of the job or enjoy the right or rights in question, without creating an undue hardship on the covered entity.

## Step 4

Once a conclusion is reached, either to offer an accommodation, or that no accommodation can be made, the covered entity must promptly notify the individual seeking an accommodation of the determination. In the case of housing providers and employers, this notice must be provided in writing to conclude the cooperative dialogue.

## Continuing Obligation

As an individual's condition changes over time, an individual may make new requests for accommodations. Each time an individual makes a new request, the covered entity must engage in a cooperative dialogue with the individual.

# Sample Reasonable Accommodation Request Form (Employment)

This form and all information must be kept confidential.

## Applicant/Employee Information

Print Full Name: _____

☐ **Job Applicant** ☐ **Current Employee** ☐ **Other**

Home or Work Address: _____

_____

_____

Phone Number: _____

## Employee Information

(Complete this section if you currently employed with [EMPLOYER] even if you are currently on leave.)

Title: _____

Email: _____

Office Telephone Number: _____

Division: _____

Supervisor Name and Phone Number: _____

_____

Location: _____

## Applicant Information

(Complete this section only if you are a job applicant)

Position/Title Sought: _____

Division/Unit (if known): _____

Location of Position (if known): _____

Part(s) of employment process for which an accommodation is requested: _____

_____

_____

☐ **Completing Job Application**

Job Vacancy Notice Number (if known): _____

Interview: _____

Interview Date: _____

At Work: _____

Other (please specify): _____

_____

_____

[Employer] Contact Person (if known): _____

Phone Number: _____

Identify the limitation(s) that impacts your ability to complete your assigned tasks or complete the application process. Please be specific. (Attach additional sheets of paper if necessary).

Is the condition for which you are requesting an accommodation?

☐ **Permanent** ☐ **Temporary** ☐ **Unknown**

If temporary, anticipated date accommodation(s) no longer needed:

Describe the nature of the accommodation requested and how the accommodation will assist you to perform the essential functions of the job held or desired, or to enjoy the benefits and privileges of employment. Please be specific. (Attach additional sheets and present supporting documentation as appropriate.)

If equipment is requested, please specify preferred brand, model number and vendor, if known.

_____

_____

**You may be required to provide verification by a health professional or a disability service provider (e.g. ACCESS-VR, NYS Commission for the Blind and Visually Impaired).**

**This CONFIDENTIAL documentation should be provided to** [identify the individual handling accommodation requests].

Medical verification/documentation should, to the extent possible:

- ✓ Be written on the official letterhead of the qualified health professional or health professional's organization.
- ✓ Identify the health professional's credentials. E.g., M.D., D.O.
- ✓ Be dated and signed by the health professional.
- ✓ Describe the limitations in detail as they currently exist and only in relation to the job.
- ✓ State whether the duration of the limitation is permanent or temporary or unknown.
- ✓ If temporary, specify the date the limitation is expected to no longer require accommodation.

I certify that I have read and understood the information provided in this request, and that it is true to the best of my knowledge, information and belief.

Requestor's Signature/Authorized Agent's Signature:

_____

Date: _____

## DO NOT WRITE IN THIS SECTION

To be completed by staff supervising the employment application process or supervising an employee requesting a reasonable accommodation. After completing, supervisors must provide a copy of the entire form to the employee or applicant, and immediately send a copy to the [individual handling accommodation requests].

Name and Title of Supervisor or Staff supervising application process:

_____

Unit/Division: _____

Location: _____

Email and Phone Number: _____

_____

Date Request Received: _____

☐ Supporting Documentation Included: _____

_____

_____

_____

_____

☐ Supporting Documentation Not Included: _____

_____

_____

_____

_____

Date: _____

Signature: _____

To be completed by [xxxx]: _____

Date Request Received by [xxxx]: _____

Date Supporting Documentation Received by [xxxx] (if any):

_____

Signature: _____

# Sample Grant or Denial of Reasonable Accommodation Request Form (Employment)

To be completed by: _____

Date: _____

Name of Individual requesting reasonable accommodation:

_____

Specific Accommodation Requested: _____

_____

_____

_____

Decision:

☐ Reasonable Accommodation Granted as Requested

☐ Alternative Accommodation Granted

Describe Alternative Accommodation Granted: _____

_____

_____

_____

Request for reasonable accommodation denied because (you may check more than one box):

☐ Employee's Request Determined Not to be Related to a Disability

☐ Accommodation Would Not Meet Requested Need

☐ Accommodation Would Cause Undue Hardship

☐ Documentation of Need for the Accommodation Inadequate

☐ Accommodation Would Require Removal of an Essential Requisite of the Job

☐ Accommodation Would Pose Direct Threat

☐ Other (Please specify): _____

_____

_____

_____

_____

If the individual proposed one type of reasonable accommodation, which is being denied, and rejected an offer of a different type of reasonable accommodation, explain both the reasons for denial of the requested accommodation and reason why chosen accommodation would be effective.

Deciding Official: _____

Name (print): _____

Telephone: _____

Email: _____

Signature: _____

Date Granted or Denied: _____

**This serves as documentation of the conclusion of the cooperative dialogue.**

# Sample Letter to Employee on Leave

[Date]

[Addressee]

Re: Leave of Absence

Dear [Employee],

I write regarding your leave of absence from [employer]. When we last spoke on [date], you informed me that you would be visiting your doctor on [date] and would be able to update me as to your ability to return to work following that appointment.

As you know, [employer] has a policy of allowing employees up to [xx] weeks of disability-related leave from work. According to our records, you have now been on leave since [date]. Therefore, your available leave will expire on [date]. In order to maintain your status as an employee, we need to hear from you regarding your plans and ability to return to work. If you need a modification of your job duties or workspace in order to return to work, or if you need an extension of your leave beyond the [xx] weeks allowed by our policy, please contact me at [phone] or [email] to discuss a possible reasonable accommodation. We may ask that you submit a note from your medical provider specifying what accommodations you need and/or when you will be able to return to work.

If we do not hear from you at all by [date], we will unfortunately be left with no option but to terminate your employment. When you receive this letter, please contact me at [phone] or [email] to discuss your employment status and future plans.

Sincerely,

[XX]

# Service Animal One-Pager

# SERVICE ANIMAL

## Definition of a Service Animal

Service Animal is defined as a dog that has been partnered with a person who has a disability and has been trained or is being trained, by a qualified person, to aid or guide a person with a disability.

## Allowed Questions

Questions allowed:
Staff may ask TWO questions.

- Is the dog a service animal required because of a disability?
- What work or task has the Service Animal been trained to perform?

## Questions Not Allowed

Questions NOT Allowed:

- Staff cannot ask about the person's disability.
- Require medical documentation.
- Require a special identification card or training documentation for the dog.
- Require that the animal demonstrate its ability to perform the work or task.

## Enforcement of the Law

**Denied Access:** You have the right to file a complaint with the New York City Commission on Human Rights please call 311.

## Where Service Animals Are Allowed

Under the ADA, State and Local Governments, businesses, and nonprofit organizations that serve the public generally must allow service animals to accompany people with disabilities in all areas of the facility where the public is normally allowed to go.

## Reasons for Denied Service

A person with a disability can be asked to remove their Service Animal from the premises if:

- The Service Animal is out of control and the handler does not take effective action to control it.
- The Service Animal is not housebroken.

When there is a legitimate reason to ask that a Service Animal be removed, staff must offer the person with the disability the opportunity to obtain goods or services without the animal's presence.

Visit Us On Facebook & Twitter

NYC Mayor's Office for People with Disabilities



NYC Commission on Human Rights
Bill de Blasio, Mayor | Carmelyn P. Malalis, Commissioner/Chair
NYC.gov/HumanRights | @NYCCHR

## Definition of a Service Animal

Service Animal is defined as a dog that has been partnered with a person who has a disability and has been trained or is being trained, by a qualified person, to aid or guide a person

with a disability.

## Allowed Questions

Questions allowed:

Staff may ask TWO questions.

- Is the dog a service animal required because of a disability?
- What work or task has the Service Animal been trained to perform?

## Questions Not Allowed

Questions NOT Allowed:

- Staff cannot ask about the person’s disability.
- Require medical documentation.
- Require a special identification card or training documentation for
- the dog.
- Require that the animal demonstrate its ability to perform the work or task.

## Enforcement of the Law

**Denied Access:** You have the right to file a complaint with the New York City Commission on Human Rights please call 311.

## Where Service Animals Are Allowed

Under the ADA, State and Local Governments, businesses, and nonprofit organizations that serve the public generally must allow service animals to accompany people with disabilities in all areas of the facility where the public is normally allowed to go.

## Reasons for Denied Service

A person with a disability can be asked to remove their Service Animal from the premises if:

- The Service Animal is out of control and the handler does not take effective action to control it.
- The Service Animal is not housebroken.

When there is a legitimate reason to ask that a Service Animal be removed, staff must offer the person with the disability the opportunity to obtain goods or services without the animal’s presence.

Visit Us On Facebook & Twitter

NYC Mayor's Office for People with Disabilities

Sample Sign Notifying Public How to Request Accommodation in Public Accommodations

# If you need help accessing certain spaces or any merchandise in the [store, bar, restaurant] due to a disability, please ask one of our staff and we will assist you as quickly as possible.



NYC Commission on Human Rights
Bill de Blasio, Mayor | Carmelyn P. Malalis, Commissioner/Chair
NYC.gov/HumanRights | @NYCCHR

Sample Service Animals Welcome Sign

# Service animals welcome; unfortunately, no pets allowed.



NYC Commission on Human Rights
Bill de Blasio, Mayor | Carmelyn P. Malalis, Commissioner/Chair
NYC.gov/HumanRights | @NYCCHR

# Sample Reasonable Accommodation Policy

## Reasonable Accommodation Policy

[Landlord] is committed to granting reasonable accommodations to its rules, policies, practices or services where such accommodations enable people with disabilities the equal opportunity to use and enjoy their dwellings as required by federal, state and local law. A reasonable accommodation may include an exception to a rule or policy or physical change to a unit or common area. A disability-related reasonable accommodation exists when there is an identifiable relationship, or nexus, between the requested accommodation and the individual's disability. No accommodation is on its face unreasonable. An accommodation is reasonable unless it causes undue hardship.

## Reasonable Accommodation Requests

[Landlord] accepts reasonable accommodation requests from persons with disabilities and those acting on their behalf. Individuals who would like to request a reasonable accommodation may use, but are not required to use, [landlord]'s "Application for Reasonable Accommodation" Form. Reasonable Accommodation Application Forms are available [place where available]. If you require assistance in completing the Form, or wish to make the request orally, please contact the [job title] at [contact information]. You may also make a Reasonable Accommodation Request orally to [name and job title] at [contact information].

We will make a decision on your request within [timeframe – NYCCHR recommends no longer than ten] calendar days following the receipt of all required documentation. If the request is of a time-sensitive nature, please let us know and we will make our best efforts

to expedite the decision-making process. If we grant the request, we will let you know in writing by sending you a dated letter.

In the event we need additional information to make a determination, we will advise you of the specific information needed within [timeframe – NYCCHR recommends no longer than ten] calendar days of your request. It is [landlord]'s policy to seek only the information needed to determine if a reasonable accommodation should be granted under federal, state or local law. [Landlord] will never require individuals to provide medical records or to provide details of a disability beyond that which is minimally sufficient to demonstrate the existence of a disability and the relationship between the disability and the requested accommodation.

If we deny the request, we will provide you with a dated letter stating all the reasons for our denial. If an individual with a disability believes a request for reasonable accommodation has been unreasonably delayed, denied unlawfully, or that he or she has otherwise been discriminated against on the basis of a disability, then he or she may file a complaint by writing or calling any of the following:

New York City Commission on Human Rights
22 Reade Street
New York, NY 10007
(718) 722-3131
NYC.gov/HumanRights

US Department of Housing and Urban Development Office of Fair Housing and Equal Opportunity
26 Federal Plaza, Rm 3532
New York, NY 10278
(212) 542-7519
http://hud.gov/complaints

New York State Division of Human Rights
1 Fordham Plaza, 4th Fl.
Bronx, NY 10458
(718) 741-8400
https://dhr.ny.gov/complaint

## Service Animals and Emotional Support Animals

One type of reasonable accommodation is allowing a person with a disability to keep a service animal or an emotional support animal. A service animal is an animal that does work or performs tasks for an individual with a disability. For example, a dog that guides an individual with a visual impairment is a service animal. An emotional support animal is an animal that provides emotional support or other assistance that ameliorates the symptoms of a disability. [Landlord] is committed to ensuring that individuals with disabilities may keep such animals to the extent required by federal, state, and local law.

Except as provided under this Reasonable Accommodation Policy, [landlord] prohibits residents from having animals. For that reason, individuals with disabilities must request a reasonable accommodation to have a service animal or an emotional support animal live with them. Residents who have been allowed a reasonable accommodation to keep a service animal or an emotional support animal are *not* in violation of [landlord]'s rules and regulations. [Landlord] encourages, but does not require, residents to make an accommodation request before, or as soon as reasonably possible after, their service animal or emotional support animal moves into the residence. However, the fact that the animal is already living with the individual in the residence or the fact that the individual has been issued a violation for having an animal is not a factor that will be considered in reviewing a request for a reasonable accommodation.

[Landlord] does not place any breed or weight restrictions on the animals which it allows, and does not require animals to wear any item that identifies the animal as an assistance animal. [Landlord] does not require that assistance animals complete behavioral training. [Landlord] does not require individuals to indemnify [landlord] or pay a fee to have an assistance animal.

If service animal or emotional support animal is a dog or cat, once the animal has been selected, the individual must submit a photograph of the animal. If the animal is a dog, the individual must also submit information that the animal has been vaccinated as required by New York State law. For purposes of this requirement, evidence that the dog has a current license will be sufficient evidence that the dog has been vaccinated.

In the event the service animal or emotional support animal passes away or is no longer living, and the individual who has received a reasonable accommodation to [LANDLORD]'s no pet policy obtains a new service animal or emotional support animal, the individual must provide a photograph of the new animal and proof of vaccination as required above.

## **3.** Service Animals

A service animal is an animal that does work or performs tasks for an individual with a disability. For example, a dog that guides an individual with a visual impairment is a service animal. If a person's disability is apparent, or otherwise known to [landlord], and if the work or task that the animal performs is apparent or otherwise known, for example, a dog that guides an individual with a visual impairment, [landlord] will not inquire about the individual's disability or the animal's training. Otherwise, [landlord] may require that the resident provide:

**a.** A statement from a health professional (“Health professional” means a person who provides medical care, therapy, or counseling to persons with disabilities, including, but not limited to, doctors; physician assistants; psychiatrists; psychologists; or social workers.) indicating that the person has a disability; and

**b.** Information that an animal is able to do work or perform tasks that would ameliorate one or more symptoms or effects of the disability.

[Landlord] will not require that the animal demonstrate its work or task or require that the animal be registered with, or certified by, any organization.

## Emotional Support Animals

An emotional support animal is an animal that provides emotional support or other assistance that ameliorates the symptoms of a disability. When a resident requests a reasonable accommodation for an emotional support animal, [landlord] may require a statement from a health or social service professional indicating:

**a.** That the applicant has a disability; and

**b.** That the animal would provide emotional support or other assistance that would ameliorate one or more symptoms or effects of the disability.

[Landlord] will *not* require information about how an emotional support animal assists with the “activities of daily living.”

If an animal both provides emotional support or other assistance that ameliorates one or more effects of a disability and does work or performs tasks for the benefit of a person with a disability, [landlord]

may require compliance with either the service animal or emotional support animal requirements above, but not both.

## Conduct of Approved Service and Emotional Support Animals

In most cases [landlord] requires that service and emotional support animals be leashed or harnessed in the elevators and common areas unless doing so would interfere with the animal's work, or the person's disability prevents use of these devices. Service and emotional support animals that cannot be leashed for the aforementioned reasons must be otherwise under the control of their handler at all times.

If an assistance animal poses a direct threat to the health or safety of other individuals, or if the animal causes substantial physical damage to the property of others that cannot be reduced or eliminated by another reasonable accommodation, [landlord] maintains its right to pursue legal action to abate a nuisance or to enforce the terms and conditions of the lease.

## Approved Tags

Upon approval of an individual's request, [landlord] will provide them with a tag for the animal ("Approved Tag") to indicate that the animal is permitted to be on [landlord]'s premises. Use of the tag is optional. The purpose of the Approved Tag is to notify [landlord]'s staff that the animal has been approved as an accommodation. If an individual opts not to use the tag, [landlord] may stop them in order to verify that they are approved to have an animal. If the animal is wearing an Approved Tag, [landlord] will not stop the individual for the purpose of determining if the assistance animal is on the approved animal list.

In any event, [landlord]’s right to confirm that an animal is an approved assistance animal will not be used to harass or annoy any individual. Only employees that have the specific job duty of checking whether an animal is an approved animal will stop any individual for this purpose. Employees will not stop individuals who are with an animal that the employee recognizes as a service or emotional support animal.

## Damage Caused by Service or Emotional Support Animals

Residents will be responsible for the cost of any damage caused by their service animal or emotional support animal in the same manner in which they would be responsible for any damage caused by themselves to their unit or the building.

Residents will not be charged any additional security deposit up front for their service animal or emotional support animal.

## **Sample Form A:** Application for Reasonable Accommodation

Please complete this form to request an accommodation. If you require assistance completing the form or wish to make the request orally, please contact [job title] at [contact information]. [landlord] will keep a record of reasonable accommodation requests relating to requests for assistance animals. The reasonable accommodation policy is available on [landlord]'s website and in writing at [address].

Applicant Name (please print):

_____

Address: _____

_____

_____

Telephone Number: _____

Shareholder or leaseholder name (If different from the person requesting a reasonable accommodation.):

_____

Your relationship to the shareholder or leaseholder

_____

1. Please describe the reasonable accommodation you are requesting: _____

   _____

   _____

   _____

   _____

2. Please explain why this reasonable accommodation is needed. You should explain the connection between the disability (physical or mental impairment) you live with and the accommodation you are requesting. Beyond that, you do not need to provide detailed information about the nature or severity of the disability: _____
_____
_____
_____

3. If you are requesting permission to have a service or emotional support animal in your apartment, unless it is clear or obvious that the animal is a service animal, please answer the following questions. (Please note: if an assistance animal provides you service and emotional support you do not need to provide information about both categories.)

   a. Type of animal (for example, dog or cat):
   _____

   b. Is the animal required because of a disability?
   ☐ **Yes** or ☐ **No**

   c. Does the animal for which you are making a reasonable accommodation request perform work or do tasks for you because of your disability? ☐ **Yes** or ☐ **No**

   d. If the answer to 3(c) is YES:

      i. Please explain what work or tasks the animal does for you: _____
      _____
      _____
      _____

ii. Please provide a statement from a health or social service professional indicating:

- that you have a disability (*i.e*., you have a physical or mental impairment); and
- explaining that an animal is able to do work or perform tasks to ameliorate symptoms or effects of the disability.

e. If the answer to 3(c) is NO: does the animal for which you are making a reasonable accommodation request provide emotional support or ameliorate (improve) one or more symptoms or effects of your disability? ☐ **Yes** or ☐ **No**

f. If the answer to 3(e) is yes, please submit a statement from a health or social service professional stating that:

- you have a disability (*i.e*., you have a physical or mental impairment); and
- the animal would provide emotional support or other assistance that would ameliorate (improve) one or more symptoms or effects of your disability and how the animal ameliorates (improves) the symptoms or effects.

4. If you are requesting a physical change to the interior of your unit, please describe the modifications you are requesting.

_____

_____

_____

_____

_____

5. If you are requesting a physical change to the exterior of your unit or to a public or common use area, please describe the modification you are requesting. _____
   _____
   _____
   _____
   _____
   _____

6. If you are requesting a different accommodation, please describe it here: _____
   _____
   _____
   _____
   _____
   _____

Signature: _____

Date: _____

You will receive a response to your request in 10 calendar days. If your request is not granted, you will receive a written explanation and what additional information, if any, we need to make a decision about your request.

If an individual with a disability believes that they have been denied a reasonable accommodation or otherwise discriminated against on the basis of disability they have the right to file a lawsuit in court or contact one of the following agencies to file a complaint:

New York City Commission on Human Rights
22 Reade Street
New York, NY 10007
(718) 722-3131
NYC.gov/HumanRights

US Department of Housing and Urban Development Office of Fair Housing and Equal Opportunity
26 Federal Plaza, Rm 3532
New York, NY 10278
(212) 542-7519
http://hud.gov/complaints

New York State Division of Human Rights
1 Fordham Plaza, 4th Fl.
Bronx, NY 10458
(718) 741-8400
https://dhr.ny.gov/complaint

**Sample Form B:** Service and Emotional Support Animal Requests

## Sample Health Professional Form

Resident Name: _____

Address: _____

_____

_____

Telephone Number: _____

I, _____ (applicant name) intend to request that the [landlord] permit me to keep an assistance animal as a reasonable accommodation for my disability. In connection with that application, I am requesting that you complete this form regarding my disability.

Applicant Signature: _____

Date: _____

Name of Applicant: _____

Relationship to Tenant: _____

**To be Completed by Health Professional**
("Health professional" means a person who provides medical care, therapy or counseling to persons with disabilities, including, but not

limited to, doctors; physician assistants; psychiatrists; psychologists; or social workers.)

Name (please print): _____

Address: _____

_____

_____

Telephone Number: _____

A disability within the meaning of the New York City Human Rights Law is any physical, medical, mental or psychological impairment, or a history or record of such impairment. Does the individual identified above have a disability? ☐ **Yes** or ☐ **No**

Does or would a service or emotional animal be able to do work or perform tasks to ameliorate symptoms or effects of the individual's disability? ☐ **Yes** or ☐ **No**

If Yes, please describe: _____

_____

_____

For animals that do not perform work or do tasks for the individual, would the animal provide emotional support or other assistance that would ameliorate one or more symptoms or effects of the disability? ☐ **Yes** or ☐ **No**

If YES, please describe:_____

_____

_____

If you would like to submit additional supporting materials (other than medical records), please provide them with this form.

Name: _____

Signature: _____

Title: _____

Date: _____

---

## Sample Animal Registration Form

This form must be completed before or as soon as reasonably possible after an assistance animal moves into the residence.

Thank you for your cooperation!

### Background

Tenant Name: _____

Apartment Number: _____

Service/Emotional Support Animal Name: _____

Animal Type: _____

## Vaccinations

*** For dogs only**: Attach documentation of vaccination to this form. Documentation can consist of proof of vaccination from veterinarian or proof of current dog license.

## Emergency Contacts

Emergency Contact #1

Name: _____

Phone Number: _____

Address: _____

_____

Emergency Contact #2

Name: _____

Phone Number: _____

Address: _____

_____

## Tenant Acknowledgement of Rules and Request for Approval

Please initial and sign below where indicated after reviewing your lease and reading the Assistance Animal Policy and Guidelines included with this registration form.

_____ (Initial) I have read the above Reasonable Accommodation Policy regarding Service and Emotional Support Animals and agree to follow it.

_____ (Initial) I have provided a photograph of my animal to Resident Services.

I hereby request permission to have an assistance animal.

Tenant Signature: _____

Date: _____

Print Name: _____

Apartment Number: _____

Management Signature of Approval:

_____

Management Signature: _____

Date: _____

Print Name: _____

Title: _____

Consumer and Worker Protection

Bill de Blasio
Mayor

Lorelei Salas
Commissioner

# Paid Safe and Sick Leave Law:
## Frequently Asked Questions

**COVID-19 Alert**

*Update about Workplace Laws During COVID-19*, available at **nyc.gov/workers**, includes a summary of City labor laws for employers and employees as you deal with the impact of COVID-19 on your workplace.

| | |
|---|---|
| The Department of Consumer and Worker Protection (DCWP) Office of Labor Policy & Standards (OLPS) enforces NYC's Earned Safe and Sick Time Act (Paid Safe and Sick Leave Law) referred to in FAQs as the Law.<br><br>These FAQs provide general information and guidance for employees and employers. They are not intended to serve as individualized legal advice.[1] For specific questions, you should contact your legal advisor. | To contact OLPS:<br><br>• Email PSSL@dca.nyc.gov<br>• Call 311 (212-NEW-YORK outside NYC) and say "Paid Safe and Sick Leave"<br>• Use Live Chat, available at nyc.gov/BusinessToolbox *(employer inquiries only)*<br>• Visit nyc.gov/workers[2] |

## Sections



[1] OLPS will update FAQs as appropriate. Please note the date at the bottom of FAQs and check nyc.gov/workers to make sure you have the most current FAQs.
[2] Visit nyc.gov/workers for the law and rules, helpful sample documents, and information about other labor laws enforced by DCWP.

## I. GENERAL QUESTIONS

### 1. When do employers have to start complying with the Law?

The Law went into effect on April 1, 2014. The Law was amended twice:

- **May 5, 2018**: Safe leave provisions took effect.
- **September 30, 2020**: Amendments to expand safe and sick leave and to bring the Law in line with New York State law requirements took effect.

### 2. What is sick leave?

Sick leave is time off work for health reasons. Covered employees can use sick leave for the care and treatment of themselves or a family member.

### 3. What is safe leave?

Safe leave is time off work for safety reasons. Covered employees can use safe leave to seek assistance or to take other safety measures if the employee or a family member is the victim of any act or threat of domestic violence, unwanted sexual contact, stalking, or human trafficking.

### 4. Who is considered a family member under the Law?

The Law has a broad definition of family member that includes the following:

- Child (biological, adopted, or foster child; legal ward; child of an employee standing *in loco parentis*)
- Spouse (current or former, and regardless of whether they reside together)
- Domestic Partner (current or former, and regardless of whether they reside together)[3]
- Parent
- Child or parent of an employee's spouse or domestic partner
- Grandchild or grandparent
- Sibling (half, adopted, or step sibling)
- Any other individual related by blood to the employee
- Any other individual whose close association with the employee is the equivalent of a family relationship

### 5. Which employers must provide safe and sick leave?

Private, nonprofit, and household employers that employ workers in NYC must provide safe and sick leave.

**Employers with 4 or fewer employees:**

- must provide up to 40 hours of *unpaid* safe and sick leave if the employer's net income is less than $1 million in the previous tax year.
- (*as of January 1, 2021*) must provide up to 40 hours of *paid* safe and sick leave if the employer's net income is $1 million or more in the previous tax year.

[3] A "domestic partner" is a person with a domestic partnership registered under Section 3-240 of the New York City Administrative Code. For more information about the requirements and procedure for registering as domestic partners, visit the Office of City Clerk website at cityclerk.nyc.gov

**Employers with 5 or more employees regardless of net income:**

- must provide up to *40 hours* of paid safe and sick leave if the employer employs up to 100 employees.
- (*as of January 1, 2021*) must provide up to *56 hours* of paid safe and sick leave if the employer employs 100 or more employees.
    - Employees may accrue up to 56 hours of paid safe and sick leave as of September 30, 2020 but are not entitled to use hours 41-56 until January 1, 2021.

**Employers of domestic workers:**

- must provide up to *40 hours* of paid safe and sick leave if the employer employs up to 100 employees.
- (*as of January 1, 2021*) must provide up to *56 hours* of paid safe and sick leave if the employer employs 100 or more employees.

### 6. Are nonprofit employers covered by the Law?

Yes. Nonprofit employers are covered by the Law and must comply with its requirements.

### 7. How is employer size determined?

Employers should count all employees who work for pay on a full-time, part-time, seasonal, or temporary basis.

**Employers that have operated for less than one year:**

- Employers should count the number of employees performing work for pay per week. If the number fluctuates, employer size may be determined for the current Calendar Year based on the average number of employees per week who worked during the 80 days immediately preceding the date the employee used safe and sick leave.

**Employers that have operated for one year or more:**

- Employers should count the number of employees working for the employer per week at the time the employee used safe and sick leave. If the number of employees fluctuated between less than five employees and five or more employees three times in the most recent calendar quarter, employer size may be determined for the current Calendar Year based on the average number of employees per week during the previous Calendar Year.

### 8. What does "Calendar Year" mean?

Under the Law, "Calendar Year" means any consecutive 12-month period of time as determined by an employer. Most employers will find it helpful to use the same "Calendar Year" that they use for calculating wages and benefits, such as: tax year, fiscal year, contract year, the year running from an employee's anniversary date of employment, or the year running from January 1 to December 31.

*Note*: Employers must include their Calendar Year in the written Notice they must give employees. See Section III, starting with FAQ 12.

### 9. If the employer is part of a chain business and/or has multiple locations, which employees count toward the number of employees?

If a business has multiple locations and the owner or principal of the multiple locations owns at least 30% of each location and each location is either engaged in the same business or operates under a franchise agreement as defined under New York State law, then the total number of employees should include employees at all locations in New York City as long as the multiple locations collectively employ at least five employees.[4]

**Scenarios:**

**Kenny, an employer, owns 50% of each of three pizzerias in New York City. Each location employs four employees. Would Kenny have to provide paid or unpaid safe and sick leave?**
Kenny must provide *paid* safe and sick leave to his employees. Kenny should count all 12 employees toward the number of employees.

**Silvia owns 25% of one fast food restaurant, which is operated under a franchise agreement with a franchisor. There are 50 other locations of this franchise in New York City. Silvia employs four workers at her restaurant. Would Silvia have to provide paid or unpaid safe and sick leave?**
Silvia must provide *unpaid* safe and sick leave to her employees. Silvia owns less than 30% of one franchise, the restaurant is not part of a group of locations that share a common owner or principal who owns at least 30% of each establishment, and Silvia employs fewer than five employees.

*Possible exception as of January 1, 2021:*
If Silvia's net income is $1 million or more in the previous tax year, then, starting January 1, 2021, Silvia must provide *paid* safe and sick leave to her employees.

### 10. Do employees who do not live in New York City count toward the number of employees?

Yes. The Law applies to employees *employed* in New York City. For counting purposes, it does not matter where the employees live.

### 11. Does an employer based outside of New York City have to provide safe and sick leave to employees who work in New York City?

Yes. Employers located outside New York City must provide safe and sick leave to employees who work in New York City.

[4] Go to ag.ny.gov and search "Franchisors and Franchisees" or consult Section 681 of the New York State General Business Law for more information.

**Scenarios:**

**Sara owns a trucking company based in Buffalo. Her drivers make regular deliveries and pickups in New York City. Are Sara's drivers working in New York City for purposes of the Law?**
Yes. Making deliveries or pickups in New York City is performing work in New York City.

**Boss Trucking Company is based in Cleveland. Its drivers drive through New York City without stopping to make deliveries or pickups. Are Boss's drivers working in New York City for purposes of the Law?**
No. Drivers who pass through New York City without stopping to make pickups, deliveries, or otherwise work in New York City are not considered to be working in New York City for purposes of the Law, which does not apply to employees who do not work in New York City.

### 12. Can an employee have more than one employer?

Yes. Two or more employers may be a "joint employer" of an employee, with each having some control over the employee's work or working conditions. Joint employers may be separate and distinct individuals or entities with separate owners, managers, and facilities.

*Example*: A general contractor and its subcontractor may be joint employers of employees on the same construction project.

### 13. If employers are joint employers, which employer is responsible for compliance with the Law?

Generally, each joint employer is responsible, jointly and severally, for compliance with all applicable provisions of the Law and payment of any relief and penalties for violations of the Law.

*Example*: If a franchisor employer exercises some control over the work or working conditions of a franchisee's employees, both the franchisee and franchisor may be considered joint employers of the employees under the Law and have an obligation to ensure that its requirements are met.

### 14. What factors are considered in determining whether an employer is a joint employer?

Whether an employer is a joint employer of the employee is based on an assessment of the employer's exercise of control over the work or working conditions of an employee. Factors that are considered include but are not limited to whether:

i. The employer established policies or practices related to the employment, supervision, and/or working conditions of the employee.
ii. The employer has the power to hire and fire the employee.
iii. The employer supervises and controls the employee's work schedule or conditions of employment.
iv. The employer determines the rate and method of payment.
v. The employer maintains the employee's employment records.

vi. The employee uses the employer's premises and equipment.
vii. The employee performs discrete work that is integral to the employer's production or work.
viii. The employee works exclusively or predominantly for the employer.
ix. The employer provides training to the employee.

### 15. How should joint employers count the employees they jointly employ?

Every employer that is a joint employer must count each employee jointly employed in determining the number of employees who work for pay.

*Example*: An employer who jointly employs three workers and also has three employees under its sole control has six employees for the purposes of the Law and must provide paid safe and sick leave to each employee.

*Example:* An employer employs four workers through a temporary help firm as well as three permanent workers who are employed directly and under the employer's sole control. That employer has seven employees for purposes of the Law and must provide paid safe and sick leave.

### 16. If an employee has two or more joint employers, does the employee accrue separate leave balances with each employer for the same work?

No. If an employee is employed by two or more joint employers, all of the employee's work for each of the joint employers will be considered as a single employment for purposes of accrual and use of safe and sick leave under the Law.

**Scenario:**

**Maria is a garment worker employed by a contractor (ABC Corp.) that contracts with a manufacturer (XYZ Corp.) to assemble garments. ABC Corp. and XYZ Corp. are joint employers of Maria. How is Maria covered by the Law?**

All of the hours Maria works assembling garments for both ABC Corp. and XYZ Corp. are counted as a single employment and, together, her joint employers must provide safe and sick leave, which she accrues at a rate of 1 hour for every 30 hours she works.

Maria *does not* maintain two different balances of accrued safe and sick leave, one each with ABC Corp. and XYZ Corp.

### 17. What is a temporary help firm?

A temporary help firm is an organization that recruits and hires its own employees and assigns those employees to perform work or services for another organization to:

i. support or supplement the other organization's workforce;
ii. provide assistance in special work situations, such as employee absences, skill shortages, or seasonal workloads; or
iii. perform special assignments or projects.

A placement firm that does not hire employees on its own behalf would not meet the definition of temporary help firm.

## II. EMPLOYEES COVERED BY THE LAW

### 1. Which employees are covered by the Law?

Most employees who work in New York City are covered by the Law, including:

- Full-time employees
- Part-time employees
- Domestic workers
- Temporary and seasonal employees
- Per diem and on-call employees
- Transitional jobs program employees
- Undocumented employees
- Employees who are family members but not owners
- Employees who live outside of New York City but work in New York City
- Owners who are considered employees under New York State Labor Law

### 2. Which employees are not covered by the Law?

The Law does not apply to:

- Government employees (federal, State of New York, City of New York)
- Participants in federal work-study programs[5]
- Employees whose work is compensated by qualified scholarship programs as defined in 26 U.S.C. § 117[6]
- Hourly professional employees who:
  i. are licensed by the New York State Education Department under Sections 6732, 7902, or 8202 of the New York State Education Law;
  ii. call in for work assignments, at will, to determine their work schedule with the ability to reject or accept any assignment referred to them; and
  iii. are paid an average hourly wage which is at least four times the federal minimum wage for hours worked during the Calendar Year.
- Independent contractors who do not meet the definition of an employee under New York State Labor Law[7]
- Certain employees subject to a collective bargaining agreement
- Participants in Work Experience Programs (WEP) under Section 336-c of the New York State Social Services Law
- Owners who do not meet the definition of an employee under New York State Labor Law

### 3. Does the Law cover domestic workers?

Yes, the Law has always covered domestic workers. However, under new amendments that took effect on September 30, 2020, domestic workers are now covered the same as private or nonprofit employees working for employers with 5 or more employees.

---

[5] Information about federal work-study programs is available on the U.S. Department of Education website ed.gov
[6] For more information, see the Internal Revenue Code.
[7] Go to labor.ny.gov and search for "Independent Contractors."

Specifically:

- Domestic workers accrue safe and sick leave at the rate of 1 hour for every 30 hours worked, up to a maximum of 40 hours per year (or, effective January 1, 2021, up to a maximum of 56 hours per year if their employer employs 100 or more employees).
- Domestic workers may use safe and sick leave as it is accrued.

Domestic workers are workers who provide care, companionship, housekeeping, or any other domestic service in a home, whether employed by an agency or a household.

*Examples*: Domestic workers include nannies, housekeepers and house cleaners, and home health aides. They may be solely employed or jointly employed, e.g., by a household employer and an agency employer.

Domestic workers who are also entitled to days of rest under New York State Labor Law have these days of rest count toward fulfillment of the City Law requirements only if the days of rest are made available on the same terms and conditions as required by City Law. If they are not, then the days of rest are additional days for worker use apart from what City Law provides.

### 4. Does the Law apply to undocumented workers?

Yes. All covered workers have the same rights and protections under the Law, regardless of immigration status.

In addition, DCWP will answer questions and process safe and sick leave complaints without regard to immigration status. DCWP will not ask about workers' immigration status during the course of any DCWP investigation.

### 5. Does the Law apply to employees who are based outside New York City but who work in New York City on an occasional basis?

Yes. For employees who work in New York City on an occasional basis, the employer must calculate safe and sick leave accruals based on the hours that the employee spends working in New York City.

### 6. Does the Law apply to supervisors, managers, and salaried employees?

Yes.

### 7. Does the Law apply to independent contractors?

No. The Law applies to employees only.

Whether a worker is an employee or independent contractor depends on several factors. These include how much supervision, direction, and control the employer has over the services being provided.

Workers may meet the legal standard for classification as employees even if they are considered independent contractors by their employers.

*Example*: Just because an employer issues a 1099 tax form to a worker, has a worker sign a contract stating that the worker is an independent contractor, or rents a workspace to a worker

(such as a chair in a salon), that does not necessarily mean the worker is actually an independent contractor.

### 8. If a worker believes that an employer misclassified the worker as an independent contractor instead of as an employee and, therefore, did not provide safe and sick leave as required by the Law, can the worker file a complaint with DCWP?

Yes. Workers who believe they have been misclassified as independent contractors may file a complaint with DCWP. As part of its investigation, DCWP will make a determination as to whether a worker is covered by the Law.

### 9. Does the Law apply to employees who telecommute?

Yes. Employees who telecommute are *covered* by the Law for the hours when they are physically working in New York City (on-site or by telecommuting), even if the employer is physically located outside New York City.

Employees are *not covered* for the hours when they are not physically working in New York City, even if the employer is physically located in New York City.

### 10. Does an employer have to provide safe and sick leave to employees who also work for other unrelated employers?

Yes. Assuming that the employee is eligible to accrue safe and sick leave from both employers, both employers must provide the employee with safe and sick leave. This is true even if the employee works for employers that are not joint employers.

### 11. Does the Law apply to industrial homeworkers?

Employees who manufacture industrial goods in their home for an employer are *covered* by the Law if they perform their work from a New York City residence, even if the employer is physically located outside New York City.

Employees are *not covered* by the Law if they perform their work from a residence outside New York City, even if the employer is physically located in New York City.

### 12. Does the Law apply to employees covered by collective bargaining agreements?

It depends.

The Law *does not apply* to employees covered by a valid collective bargaining agreement that was in effect on April 1, 2014 (or in effect before the effective date of subsequent amendments to the Law) until that collective bargaining agreement expires. For employees covered by a collective bargaining agreement, the Law does not apply if:

i. the collective bargaining agreement expressly waives the Law's provisions; and
ii. the agreement provides a comparable benefit to employees, such as paid time off.

If both of these conditions are not in place, the Law *does apply* to these employees.

*Exception:* For employees in the construction or grocery industries covered by a collective bargaining agreement that came into effect after April 1, 2014 (or after the effective date of subsequent amendments to the Law), the Law does not apply if the collective bargaining

agreement expressly waives the Law's provisions. The agreement does not have to provide a comparable benefit to these employees.

## III. RIGHT TO AND NOTICE OF SAFE AND SICK LEAVE

### 1. For what purposes can a covered employee use sick leave?

Employees can use sick leave to take time off from work when:

- They have a mental or physical illness, injury, or health condition; need to get a medical diagnosis, care, or treatment of a mental or physical illness, injury, or health condition; or need to get preventive medical care.
- They must care for a family member who needs medical diagnosis, care, or treatment of a mental or physical illness, injury, or health condition, or who needs preventive medical care.
- Their employer's business closes due to a public health emergency or they need to care for a child whose school or child care provider closed due to a public health emergency.

### 2. Can an employee use sick leave for doctor, dentist, or eye doctor appointments?

Yes. Employees may use sick leave for appointments when they require treatment for a condition or for preventive medical care.

### 3. What is preventive medical care?

Preventive medical care is routine health care that includes screenings, checkups, and patient counseling to prevent illnesses, disease, or other health problems.[8]

### 4. For what purposes can a covered employee use safe leave?

Covered employees can use safe leave if they or a family member may be the victim of any act or threat of domestic violence, unwanted sexual contact, stalking, or human trafficking, and they need to take actions necessary to restore the physical, psychological, or economic health or safety of themselves or family members, or to protect those who associate or work with the employee, including to:

- Obtain services from a domestic violence shelter, rape crisis center, or other services program.
- Participate in safety planning, relocate, or take other actions to protect the employee's safety or that of the employee's family members, including enrolling children in a new school.
- Meet with an attorney or social service provider to obtain information and advice related to custody; visitation; matrimonial issues; orders of protection; immigration; housing; discrimination in employment, housing, or consumer credit.
- File a domestic incident report with law enforcement or meet with a district attorney's office.
- Attend civil or criminal court dates related to any act or threat of domestic violence, unwanted sexual contact, stalking, or human trafficking.

[8] For examples of preventive care for adults, women, and children, visit the federal website HealthCare.gov

### 5. Can an employee use safe leave even if the employee has not reported a crime to the police and/or if the crime has not been proven?

Yes. The Law does not require an employee to prove that a crime has occurred or been reported in order to use safe leave. Employees may use safe leave if they or a family member may be the victim of acts or threats of acts that may constitute the specified crimes under New York State Penal Law.

### 6. What is a family offense matter?

Family offense matters include:

- any threat or act of physical violence between family members;
- any threat or act of sexual assault or abuse by a family member;
- any threat or act of theft of money, property, or items of value among members of the same household.

### 7. What is human trafficking?

Human trafficking includes threats or acts that may constitute sex trafficking and labor trafficking.

A victim of sex trafficking has been coerced into prostitution involuntarily due to narcotic substances or other drugs; to pay a real or perceived debt; because someone withheld or destroyed government or immigration identification like visas or passports; through violence, threats, or lies; or any other coercive means defined in the New York State Penal Law.

A victim of labor trafficking has been coerced into labor to pay a real or perceived debt; because someone withheld or destroyed government or immigration identification like visas or passports; through violence, threats, or lies; or any other coercive means defined in the New York State Penal Law.

### 8. What is a sexual offense?

A sexual offense is any act, or threat of an act, that may constitute rape, sexual abuse, sexual assault, or other sex offense under the New York State Penal Law.

### 9. What is stalking?

Victims of stalking have experienced any act, or threat of an act, that may constitute the crime of stalking as defined by the New York State Penal Law. The crime of stalking may include:

- two or more acts with no legitimate purpose which cause victims to fear for the safety of themselves or loved ones;
- verbal, nonverbal, written, direct, or indirect threats which cause victims to fear for their safety or the safety of loved ones;
- a course of conduct, including following, telephoning, or contacting the victim or victim's family member, meant to cause reasonable fear of harm to the victim or victim's family's property, employment, or person.

The perpetrator of the crime of stalking may be known to the victim or may be a stranger.

Actions that have a legitimate purpose—for example, letters from a debt collector seeking payment on a valid debt—do not constitute stalking without other facts suggesting the sender's intent to cause harm.

### 10. What are some examples of safe leave?

**Someone from Ruby's neighborhood has been following her. Recently, someone broke into her apartment while she and her 10-year-old son were out. No one was physically harmed, but Ruby suspects that it was the person who has been following her and she doesn't feel safe staying in her neighborhood anymore. She has decided to move in with her mom in another school district. Ruby needs to take a day off from work to enroll her son in his new school and to move their belongings to storage and her mom's apartment. May Ruby use safe leave?**
Yes. Ruby is taking time off from work to move and to enroll her son in a new school because the acts against her are some of the acts that can constitute the crime of stalking. Stalking and threats or acts that may constitute stalking are covered by the Law; covered employees may use safe leave to relocate and to enroll children in a new school. Ruby's employer must provide safe leave.

**Warren was mugged one early Sunday morning, a workday, after dropping off his partner at the airport. He needs to take a couple of hours off to go to the police station to identify suspects. Is the time Warren needs to take off safe leave?**
No. Although Warren was the victim of a violent crime, it was not an act or threat of domestic violence, unwanted sexual contact, stalking, or human trafficking. His employer is not required to provide him with leave under the Law. The Law, however, does not prohibit his employer from giving him time off to handle the police matter.

**Francisco needs to take a half-day to go to court to obtain a restraining order against his son-in-law who used to live with him and assaulted Francisco. Is the time Francisco needs to take off from work safe leave?**
Yes. Francisco is attending a court proceeding to protect himself and his family after a family offense matter. His employer must provide safe leave.

**Jennifer, a salesclerk, is pickpocketed on the subway on her way to work and her wallet is stolen. She believes the perpetrator may have watched her withdrawing money from the ATM and followed her into the subway station. She immediately files a report with a law enforcement officer, causing her to be an hour late to work. Can Jennifer use safe leave for this time?**
No. Pickpocketing is not an act or threat of domestic violence, unwanted sexual contact, stalking, or human trafficking. Although in this case Jennifer may have been followed into the subway station, it's unlikely that the one-time incident, without evidence of a pattern or practice, constituted "stalking."

**Donna, a paralegal, has been receiving counseling from her pastor after a domestic violence incident involving her ex-boyfriend. She needs to take the afternoon off work to attend a counseling session. May Donna use safe leave for this time?**
Yes. Donna was the victim of a family offense matter and is meeting with her pastor in order to improve her psychological health. This would be considered a permissible use of safe leave.

### 11. Does safe leave provide more time off for employees, over and above sick leave?

No. The Law does not require employers to provide separate safe and sick leave to employees. Instead, employers must provide at least one form of leave that employees can use for either safe or sick leave purposes.

### 12. Are employers required to give employees notice of their right to safe and sick leave?

Yes. Employers must give covered employees a written Notice of Employee Rights. Employers must also post the Notice in the workplace in an area that is visible and accessible to employees. The Notice must be posted by January 1, 2021.

Employers must give a written Notice of Employee Rights to employees when they begin employment or when their rights change. Employees have a right to be given a Notice in English and, if available on the DCWP website, their primary language.

*Note:* Under the new amendments that took effect September 30, 2020, the following employers must provide an updated Notice of Employee Rights to employees by January 1, 2021:

- Employers with 100 or more employees
- Employers of domestic workers

The Notice of Employee Rights must include information about:

- Accrual and use of safe and sick leave
- Employer's Calendar Year
- Right to be free from retaliation
- Right to file a complaint

The Notice of Employee Rights is available at nyc.gov/workers.

DCWP encourages employees to keep copies of all Notices provided to employees.

### 13. Can employees file a complaint with DCWP if their employer does not provide a Notice of Employee Rights or other information about safe and sick leave?

Yes. Covered employees who have not received a Notice of Employee Rights or other information about safe and sick leave and who are not being provided with safe and sick leave as required by Law may file a complaint with DCWP.

### 14. For an employer based outside New York City whose employees work in New York City, when must the employer provide employees with the Notice of Employee Rights?

Employers must give Notice of the right to safe and sick leave to an employee once that employee begins to perform work for that employer while physically located in New York City.

### 15. In what language must an employer provide the Notice of Employee Rights?

An employer must provide the employee with the Notice of Employee Rights in English and in the language that the employer customarily uses to communicate with that employee. If available on the DCWP website, the employer must also provide the Notice in the employee's primary language and the language spoken by at least 5% of employees.

### 16. How should employers provide the Notice of Employee Rights to employees?

Employers must use a delivery method that reasonably ensures that employees receive the Notice.

*Example*: An employer may provide the Notice to each employee personally, or by regular mail or by email, or may provide the Notice to the employee by including it in new hire materials given directly to the employee. An employer cannot post the Notice at the workplace in lieu of individually providing the Notice to all covered employees.

### 17. Should an employer save a signed copy of the Notice of Employee Rights or an email receipt for the Notice?

Yes. The Law requires employers to keep or maintain records establishing the date the Notice was provided to an employee and proof that the Notice was received by the employee. Saving signed copies of the Notice or email receipts is a good way to document that employers gave employees the required Notice.

### 18. Does the Notice of Employee Rights have to be posted in the workplace?

Yes. Under the new amendments that took effect September 30, 2020, employers must post the Notice in the workplace in an area accessible to employees. The Notice must be posted by January 1, 2021. However, an employer cannot post the Notice at the workplace in lieu of individually providing the Notice to all covered employees.

### 19. Must an employer with safe and sick leave policies that meet or exceed the requirements of the Law give the required Notice of Employee Rights to employees?

Yes. An employer must give employees the Notice of Employee Rights so that employees are aware of their rights under the Law.

### 20. Do employers have to give employees regular information about how much safe and sick leave they have?

Yes. Employers must tell employees how much safe and sick leave they have accrued, used, and have available for use regularly. As of September 30, 2020, this information must appear on pay stubs or other documentation provided to employees each pay period.

## IV. USE OF SAFE AND SICK LEAVE

### 1. Can employees use safe and sick leave for the care of adult children?

Yes. The Law allows covered employees to use sick leave to care for a child, regardless of age.

### 2. Can parents use safe and sick leave following the birth of their child?

A mother can use accrued sick leave during any period of sickness or disability following the birth of her child. The other parent can use accrued leave to care for the mother during this period. Parents also can use leave to care for a child's need for medical diagnosis, care, or treatment of an illness, injury, or health condition, or preventive medical care.

However, under City Law, parents cannot use sick leave to "bond" with a newborn or newly adopted child. The federal Family and Medical Leave Act (FMLA) allows leave for bonding purposes as does New York State's Paid Family Leave Law.

Under New York State's Paid Family Leave Law, employees in New York State have access to paid leave to:

- bond with a newborn, adopted, or foster child;
- care for a close relative with a serious health condition; or
- assist loved ones when a family member is deployed abroad in active military service.

### 3. How much safe and sick leave do employers have to give employees?

Depending on their size and/or net income, employers must give covered employees up to 40 hours (or 56 hours as of January 1, 2021) of safe and sick leave every Calendar Year. Employees may use accrued leave for safe or sick leave purposes.

**Employers with 4 or fewer employees:**

- must provide up to 40 hours of *unpaid* safe and sick leave if the employer's net income is less than $1 million in the previous tax year.
- (*as of January 1, 2021*) must provide up to 40 hours of *paid* safe and sick leave if the employer's net income is $1 million or more in the previous tax year.

**Employers with 5 or more employees regardless of income:**

- must provide up to *40 hours* of paid safe and sick leave if the employer employs up to 100 employees.
- (*as of January 1, 2021*) must provide up to *56 hours* of paid safe and sick leave if the employer employs 100 or more employees.

**Employers of domestic workers:**

- must provide up to *40 hours* of paid safe and sick leave if the employer employs up to 100 employees.
- (*as of January 1, 2021*) must provide up to *56 hours* of paid safe and sick leave if the employer employs 100 or more employees.

### 4. When do employees begin to accrue safe and sick leave?

Employees began to accrue leave on April 1, 2014 or on their first day of employment, whichever is later.

### 5. How does safe and sick leave accrual work?

Employees accrue safe and sick leave at the rate of 1 hour for every 30 hours worked, up to a maximum of 40 hours (or 56 hours as of January 1, 2021) of safe and sick leave each Calendar Year.

### 6. When can per diem or on-call employees use safe and sick leave?

Per diem or on-call employees who are covered by the Law can use safe and sick leave for:

i. hours they were scheduled to work; or
ii. hours they would have worked if they hadn't used leave.

For an absence from scheduled work, an employer should pay the employee what the employee would have earned if the employee had worked the scheduled shift.

Otherwise, the employer should base the amount of paid sick leave on the per diem hours the employee would have worked. This may be determined by:

- the hours the employee most recently worked for the employer in the past;
- the amount of work offered that the employee was unable to accept for a covered reason; or
- the number of hours worked by the person who filled the shift that day.

See the Rules for Safe and Sick Leave, Section 7-214(d).

**Scenarios:**

**Laura's employer calls to offer her a four-hour per diem shift that same day to cover for a regular employee who is out sick. Laura responds that she feels sick and cannot work. Is her employer required to allow her to use accrued safe and sick leave?**
Yes. Laura may use four hours of her accrued sick leave.

**Maisie works for Paulie's Pub. Maisie is no longer available to work a regular schedule but is a dependable last-minute substitute worker for evening shifts, which run from 5 p.m. to 8 p.m. on weekdays and 7 p.m. to 9 p.m. on weekends. Recently, Maisie has been called in to work between three to five days per week, on weekdays and weekends. If Maisie is needed to cover an evening shift, Paulie, her employer, will usually call her about 2 p.m. in advance of the shift. On Tuesday at 12 p.m., Maisie called Paulie to let him know he shouldn't call her to work because she has to accompany her son to the emergency room. Is Paulie's Pub required to allow Maisie to use safe and sick leave? How much?**
Yes. Maisie's employer must allow her to use at least three hours of sick leave.

**Viktor works for Clay Creations. He has accrued 20 hours of safe and sick leave over the course of his employment. In the past few weeks, Viktor has been called in to teach pottery classes one or two times per week, for two hours each class. In the most recent workweek he was called in for one two-hour class. Today, Viktor called his boss to say he will be unable to work for the next two weeks and needs to use his accrued leave because he needs to care for his partner who is recovering from emergency surgery. Is Clay Creations required to allow Viktor to use safe and sick leave? How much?**
Yes. Viktor's employer must allow him to use at least two hours of sick leave each week he is unable to work while caring for his partner for a total of at least four hours since Viktor most recently worked two hours in a week.

**Scenarios (continued):**

**Felice's employer offers her a per diem shift five days before the day of that shift. Felice accepts the offer. The day after Felice accepts the offer, she schedules her annual physical for the same day and time as the work shift. Her employer has a policy requiring that employees provide seven days advance notice of a foreseeable need to use safe and sick leave. Is her employer required to allow her to use leave for sick leave purposes?**
No. Felice was scheduled to work and did not comply with her employer's advance notice policy, so her employer is not required to grant her request for sick leave.

### 7. How do employees who are paid on a flat-rate basis (for example, paid by the piece) accrue safe and sick leave?

When employees are paid on a flat-rate basis, accrual of safe and sick leave is measured by the actual length of time spent performing work.

### 8. How do employees who are paid on a commission basis accrue safe and sick leave?

When employees are paid on a commission basis, accrual of safe and sick leave is measured by the actual length of time spent performing work.

### 9. How must an employer measure the use of safe and sick leave for employees with indeterminate shift lengths?

When employees have shifts of indeterminate length, the employer calculates safe and sick leave used based on the number of hours worked by the replacement employee for the same shift. If this method is not possible, the employer must base the number of hours of safe and sick leave on the hours worked by the employee when the employee most recently worked the same shift in the past.

### 10. Does an employee accrue safe and sick leave during a probationary period?

Yes. Covered employees begin to accrue safe and sick leave when they begin employment.

### 11. When can an employee start to use safe and sick leave?

**Before September 30, 2020:**

- Employees could start to use accrued sick leave on July 30, 2014 or 120 days after the start of their employment, whichever was later. They could start to use accrued safe leave on May 5, 2018 (when safe leave provisions took effect) or 120 days after the start of their employment, whichever was later.

**As of September 30, 2020:**

- Employees may use safe and sick leave as they accrue it. There is no longer a waiting period.

*Exception:* For employees who are able to accrue a maximum of 56 hours instead of 40 hours in a Calendar Year, employers do not have to allow them to *use* any accrued safe and sick leave over 40 hours until January 1, 2021.

*Example*: If an employee has accrued 40 hours of safe and sick leave by September 30, 2020 and continues to accrue leave, the employee can use up to 40 hours until December 31, 2020 but can only begin to use the additional accrued hours after January 1, 2021.

### 12. What happens to safe and sick leave that an employee has accrued but hasn't used at the end of the Calendar Year?

Employees can carry over to the next Calendar Year up to 40 or 56 hours of unused safe and sick leave. However, employers are only required to allow employees to *use* up to 40 or 56 hours of safe and sick leave per Calendar Year.

### 13. If an employee carries over 40 hours of unused safe and sick leave to a new Calendar Year, is an employer required to allow the employee to use 80 hours of safe and sick leave in the next Calendar Year?

No. Employers are only required to allow employees to use up to 40 or 56 hours of safe and sick leave per Calendar Year. If an employee accrues the maximum amount of 40 or 56 hours and uses fewer hours than the amount accrued during the course of a Calendar Year, then the employee can carry over to the next Calendar Year the remaining hours, up to a maximum of 40 or 56 hours, which will be available for immediate use.

*Example*: An employee accrues 40 hours of safe and sick leave in Calendar Year 1 and uses 20 hours of safe and sick leave in Calendar Year 1. She carries over to the next Calendar Year 20 hours, accrues 40 hours, and does not use any hours in Calendar Year 2. Her safe and sick leave balance at the end of Calendar Year 2 is 60 hours (20 hours from Calendar Year 1 plus 40 hours from Calendar Year 2). She may carry over to Calendar Year 3 only 40 of her 60 hours, and she accrues another 40 hours in Calendar Year 3. Her employer is only required to allow her to use 40 hours of her available 80 hours in Calendar Year 3.

### 14. Can an employer pay the employee for unused safe and sick leave instead of allowing the employee to carry it over?

Yes. An employer can choose—but is not required—to pay an employee for unused safe and sick leave at the end of the Calendar Year. An employer is not required to allow employees to carry over safe and sick leave if:

- The employer pays employees for the unused accrued safe and sick leave AND the employer frontloads the maximum of 40 or 56 hours, i.e., provides the employee with the maximum number of hours on the first day of the new Calendar Year. OR
- The employer frontloaded 40 or 56 hours of safe and sick leave at the beginning of the Calendar Year and will frontload 40 or 56 hours of safe and sick leave on the first day of the new Calendar Year.

An employer that switches from an accrual system to a frontloading system must pay out any unused accrued leave at the end of the year in which the safe and sick leave was accrued.

**Scenario:**

**Paulina has accrued 40 hours of safe and sick leave but hasn't used any of it. On the first day of the next Calendar Year, Paulina gets the flu. Can she use sick leave?**
Yes. Paulina can use 40 hours of safe and sick leave right away—she carries over to the new Calendar Year the 40 hours of earned leave. However, Paulina's employer does not have to let her use more than 40 hours of safe and sick leave in the new Calendar Year even though Paulina may accrue up to 40 additional hours of safe and sick leave in the new Calendar Year.

### 15. Can an employee agree with an employer to be paid for safe and sick leave as it is accrued instead of only at the end of the Calendar Year?

No. The purpose of the Law is to ensure that employees can use safe and sick leave for permissible purposes. Paying employees for unused safe and sick leave before the end of the Calendar Year could leave employees with no safe and sick leave on days when employees need to use safe and sick leave and would undercut the purpose of the Law.

### 16. What is the advantage of carrying over safe and sick leave?

When an employee carries over to a new Calendar Year unused safe and sick leave, the employee can use it right away instead of waiting to accrue safe and sick leave in the new Calendar Year.

### 17. Can an employer have a policy that frontloads 40 or 56 hours of safe and sick leave to the beginning of each Calendar Year to avoid calculating accruals?

Yes. An employer can have a policy that provides all employees with 40 or 56 hours of safe and sick leave at the beginning of each Calendar Year. This option may be attractive to employers who prefer not to track the accrual of safe and sick leave for each covered employee. However, if the employer has not calculated employees' use and accruals, the employer cannot change the policy in the new Calendar Year since employees are entitled to carry over unused safe and sick leave and use those hours at the beginning of the new Calendar Year.

### 18. Can an employer frontload accrual for part-time employees?

Yes. At the beginning of each Calendar Year, an employer can provide part-time employees with the hours of safe and sick leave they would accrue based on the hours they are anticipated to work at the accrual rate of 1 hour of safe and sick leave for every 30 hours the employee is anticipated to work. However, if the employer frontloads fewer than 40 or 56 hours, the employer must still track the employee's hours worked and accrual of safe and sick leave because a part-time worker may work more hours than anticipated.

**If the employee works more hours than anticipated:**

- The employer must allow the employee to accrue leave at the rate of 1 hour for every 30 hours worked until the total amount of frontloaded plus accrued safe and sick leave in a Calendar Year equals 40 or 56 hours. Employers who frontloaded fewer than 40 or 56 hours in a Calendar Year must allow a part-time employee to:

    - Use up to 40 or 56 hours of safe and sick leave in a Calendar Year if the employee accrued it. OR
    - Carry over to the new Calendar Year up to 40 or 56 hours of unused safe and sick leave. This carried over leave is in addition to the amount of frontloaded leave the employer expects the employee to earn in the new Calendar Year.

*Reminder*: If the employer has not calculated employees' use and accruals, the employer cannot change the policy in the new Calendar Year since employees are entitled to carry over unused safe and sick leave and use those hours at the beginning of the new Calendar Year.

### 19. If an employer wants to frontload safe and sick leave for a full-time employee at the time of hire, must the employer frontload 40 or 56 hours of safe and sick leave if the employee is not projected to accrue 40 or 56 hours of safe and sick leave in the remainder of the employer's Calendar Year?

No. As long as the employer tracks accruals of safe and sick leave for the newly hired employee for the remainder of the Calendar Year, the employer would not need to frontload 40 or 56 hours. To avoid tracking accruals, however, the employer would need to frontload the full 40 or 56 hours.

### 20. Can an employer have a policy that permits employees to donate unused safe and sick leave to other employees?

Yes. An employer can have a policy that allows employees to donate unused safe and sick leave to other employees, as long as the policy is voluntary.

### 21. How is safe and sick leave accrued for employees who are exempt from overtime requirements under New York State's Minimum Wage Law or other New York State law?

If an exempt employee works 40 hours or more in a week, safe and sick leave still accrues based on a 40-hour workweek but not beyond the 40 hours. If an exempt employee works less than 40 hours in a week, safe and sick leave accrues based on the employee's normal workweek.

### 22. How does safe and sick leave accrue for employees who are not exempt from overtime requirements under New York State's Minimum Wage Law or other New York State law?

For employees who are not exempt from the overtime provisions of New York State's Minimum Wage Law or other New York State law, safe and sick leave accrues during all hours worked, including overtime hours worked.

### 23. Does safe and sick leave accrual and carryover need to be based on the Calendar Year, or can employers use other dates, such as the date of hire?

Employers must base accrual and carryover for all employees on the Calendar Year unless the employer has a more generous policy that allows employees to accrue leave at a faster rate than the Law requires.

### 24. Do employees who leave and return (seasonal, rehires, etc.) get to keep their accrued safe and sick leave?

If the employee is rehired within six months, the employer must reinstate previously accrued safe and sick leave, unless the employer paid the employee for unused safe and sick leave when the employee left and the employee agreed to be paid out.

### 25. Can an employee who returns to the same employer within six months of separating access previously accrued safe and sick leave?

Yes. Unless the employer paid the employee for unused safe and sick leave when the employee left and the employee agreed to be paid out, the employee may access previously accrued safe and sick leave.

### 26. What is required of an employer who rehires an employee after a break in employment of more than six months?

If the employee's break in employment is more than six months, the Law does not require the employer to reinstate unused safe and sick leave. The employee would have a zero balance of accrued safe and sick leave on the first day of employment but would begin to accrue leave immediately.

### 27. If an employee is transferred to another division or location of the same employer in New York City, is the employee entitled to keep the safe and sick leave the employee accrued at the previous location?

Yes. The employee gets to keep and can use all previously accrued safe and sick leave.

### 28. If a covered business is sold to another employer, what happens to an employee's safe and sick leave?

The employee will retain unused safe and sick leave if the employer sells, transfers, or otherwise assigns the business to another employer and the employee continues to work in New York City.

### 29. When must a successor employer provide employees with its safe and sick leave policies?

A successor employer must provide employees with its written safe and sick leave policies at the time of sale or acquisition or as soon as practicable thereafter. The policy must comply with the other notice requirements in the Law.

### 30. Do employers have to pay unused safe and sick leave to employees who leave employment?

No. If an employee resigns, retires, is terminated, or is otherwise separated from employment, an employer is not required to pay the employee for unused safe and sick leave.

### 31. Can employers give employees more safe and sick leave than the amount required by the Law?

Yes. Employers may provide more generous leave than what is required by the Law.

### 32. Who decides how much safe and sick leave an employee can use?

As a general matter, it should be the employee who decides how much accrued safe and sick leave to use. However, employers can set a minimum daily increment of up to four hours.

### 33. Can an employer require an employee to use a minimum daily increment of safe and sick leave?

Yes. The Law allows employers to set a reasonable minimum increment for the use of safe and sick leave, but this minimum cannot be more than four hours per day unless otherwise permitted by state or federal law.

**Scenarios:**

**Papa's Pizzeria requires employees to use a minimum of four hours of safe and sick leave each day that an employee uses safe and sick leave. Petra has accrued more than four hours of safe and sick leave. She calls a half hour before she is scheduled to work to say she feels sick and will be one hour late. Petra wants to use one hour of leave for sick leave purposes. Can she?**
No. Papa's Pizzeria can require Petra to use four hours of safe and sick leave as the minimum increment.

**Juan Carlos has accrued only three hours of safe and sick leave while working for Papa's Pizzeria. Can Papa's Pizzeria require Juan Carlos to use a minimum of four hours of safe and sick leave?**
No. It would not be reasonable under these circumstances for Papa's Pizzeria to require Juan Carlos to use four hours of safe and sick leave as the minimum increment.

**Anya works at Bank XYZ from 8:00 a.m. to 4:00 p.m. on Mondays. She schedules a doctor's appointment for 9:00 a.m. on a Monday and notifies her employer of her intent to use leave for sick leave purposes and report to work after the appointment. Bank XYZ's written safe and sick leave policies require employees to use a four-hour minimum increment of safe and sick leave per day. If Anya reports to work at 11:30 a.m., how many hours of safe and sick leave may Bank XYZ require her to use?**
Even though Anya reported to work before 12:00 p.m., her employer can require her to use four hours of safe and sick leave.

### 34. If an employee uses more than four hours of safe and sick leave in a day, may the employer set fixed periods for further use of safe and sick leave after that increment?

Yes. The four-hour minimum daily increment only applies to the first four hours of safe and sick leave in a day. An employer may not require that an employee take subsequent time in four-hour increments. An employer may set fixed periods of 30 minutes or any smaller amount of time for the use of accrued safe and sick leave beyond the minimum increment and may require fixed start times for such intervals.

**Scenarios:**

**Anya is scheduled to work at Bank XYZ from 8:00 a.m. to 4:00 p.m. on Mondays. She schedules a doctor's appointment for 9:00 a.m. on a Monday and notifies her employer of her intent to use leave for sick leave purposes and report to work after the appointment. Bank XYZ's written safe and sick leave policies require employees to use a four-hour minimum increment of safe and sick leave per day and to use leave in half-hour intervals that start on the hour or half-hour. After her doctor's appointment, Anya arrives to work at 12:17 p.m. How much safe and sick leave may Bank XYZ require Anya to use and at what time must she begin work?**

Bank XYZ can require Anya to use four-and-a-half hours of her accrued safe and sick leave. Anya must begin work at 12:30 p.m.

**Varun is scheduled to work from 9:00 a.m. to 5:00 p.m. on Friday. He learns that his daughter has a hearing on an order of protection scheduled for 10:00 a.m. on a Friday and notifies his employer of his intent to use safe and sick leave and return to work the same day. The employer's written safe and sick leave policies require employees to use a four-hour minimum increment of safe and sick leave per day and to use leave in half-hour intervals that start on the hour or half-hour. If Varun wanted to leave work at 9:40 a.m. to go to the 10:00 a.m. hearing, the employer could require the employee to stop work at 9:30 a.m. When must Varun return to work?**

Varun must return to work at 1:30 p.m. because his employer requires that he use a four-hour minimum increment of safe and sick leave. If Varun arrives to work at 1:45 p.m., his employer can require him to use a half hour of time and begin work at 2:00 p.m. because the employer's safe and sick leave policies require employees to use safe and sick leave in half-hour intervals that start on the hour or half-hour.

### 35. If an employee gets sick in the middle of a scheduled vacation, can the employee use safe and sick leave?

No. The employee cannot use safe and sick leave for time spent on a vacation because the employee was not scheduled to work during the scheduled vacation.

### 36. Can employees use safe and sick leave during overtime that they were required to work?

Yes. An employer must allow an employee to use safe and sick leave for any mandatory overtime hours that an employee was scheduled to work.

### 37. Can an employee work additional hours or swap shifts instead of using safe and sick leave?

Yes, but only with the consent of the employer. An employee can voluntarily agree to work additional hours or swap shifts within the seven days before taking safe and sick leave, if the safe and sick leave was foreseeable, or within the seven days after taking safe and sick leave. An employer cannot require an employee to work additional hours or swap shifts to make up for having used safe and sick leave.

*Exception*: An adjunct professor at an institute of higher education may work additional hours at any time during the academic term.

### 38. Can an employer require an employee who wants to use safe and sick leave to find a replacement employee for the missed hours?

No. An employer cannot require that an employee find a replacement employee as a condition of using safe and sick leave.

### 39. Can an employer require an employee to telecommute or work from home instead of taking safe and sick leave?

No. An employer cannot require an employee to work from home or telecommute instead of taking safe and sick leave. But an employer can offer the employee the options of working from home or telecommuting. An employee may voluntarily agree to work from home or telecommute instead of using safe and sick leave.

### 40. Can an employer require employees to provide advance notice of the need to use safe and sick leave?

Yes. An employer may require an employee to provide reasonable notice of the employee's foreseeable need to use safe and sick leave. Employers cannot require advance notice when there is an unforeseeable need to use safe and sick leave, unless advance notice is practicable under the circumstances.

### 41. Are employers required to have written safe and sick leave policies?

Yes. Employers must distribute written safe and sick leave policies personally when an employee begins employment with the employer, within 14 days of the effective date of any policy change, and upon employee request. The written safe and sick leave policies must explain at a minimum:

- The amount of safe and sick leave provided by the employer
- *If the employer uses an accrual system*: when accrual of safe and sick leave starts, the rate of accrual, and the maximum number of hours an employee may accrue in a Calendar Year
- The procedures that an employee must follow to provide notice to the employer of a need to use safe and sick leave
- All requirements for written documentation or verification of the use of safe and sick leave

- Any reasonable minimum increment and/or subsequent fixed interval for the use of accrued safe and sick leave
- Any policy regarding consequences for employee's failure or delay to provide required documentation
- Any policy regarding employee discipline for misuse of safe and sick leave
- The employer's policy regarding carryover of unused safe and sick leave at the end of the Calendar Year
- *If the employer uses a term other than "safe/sick time" or "safe and sick time" to describe leave provided by the employer*: a statement that employees may use the leave for safe and sick leave purposes without any conditions prohibited by the Law
- A statement that the employer cannot require that employees, or a healthcare or service provider, disclose personal health information or the details of the matter for which an employee requests leave under the Law, and that the employer must keep information about an employee or an employee's family member obtained solely because of use of safe and sick leave confidential unless the employee consents to disclosure in writing or disclosure is required by law

An employer's written safe and sick leave policies must meet or exceed all of the requirements and restrictions under the Law. An employer may not distribute the Notice of Employee Rights as required by the Law in lieu of maintaining, distributing, or posting written safe and sick leave policies.

### 42. Can employers have other policies about time off that satisfy the requirements of the Law?

Yes. Employers can provide leave benefits that aren't called safe and sick leave benefits as long as the time off meets or exceeds all of the requirements of the Law and employees can use leave for the same safe and sick leave purposes permitted under the Law.

*Example*: Some employers give employees a bank of paid time off for any purpose: vacation, sick leave, personal leave, etc. These employers do not have to provide additional time designated specifically as safe and sick leave if employees can use the days in the bank for safe and sick leave purposes and the employer's written policies meet all of the Law's requirements.

If an employee has already accrued leave under a leave policy that was in existence prior to the effective date of the Law, accruals may still be subject to the requirements of New York State Labor Law § 198-c regarding benefits and wage supplements. For further guidance regarding leave policies under New York State Labor Law, contact the New York State Department of Labor, Division of Labor Standards.

### 43. When will an employer's written policies about time off meet the requirements of the Law?

A policy will meet or exceed the Law's requirements and, therefore, be permissible under the Law if it:

- Allows employees to take leave as unpaid or paid safe and sick leave (whichever type applies to the employer depending on its size and/or net income).
- Allows employees to accrue at least 1 hour of safe and sick leave for every 30 hours worked or provides employees with 40 or 56 hours of safe and sick leave at the beginning of the Calendar Year.
- Allows employees to use up to 40 or 56 hours of accrued safe and sick leave in a Calendar Year.
- Allows employees to use up to 40 or 56 hours of accrued safe and sick leave for the same reasons and under the same conditions that safe and sick leave can be used under the Law.
- Does not impose limitations, conditions, or requirements on the use of safe and sick leave beyond those allowable under the Law.
- Allows employees to carry over up to 40 or 56 hours of unused safe and sick leave to the next Calendar Year unless the employer uses a frontloading system and pays out employees for unused safe and sick leave at the end of each Calendar Year.
- Provides that employees are paid at least their regular hourly rate but no less than the New York State minimum wage for paid safe and sick leave.
- Allows employees to use safe and sick leave without retaliation, such as threats, discipline, demotion, reduction in hours, or termination.

### 44. How must an employer provide written safe and sick leave policies to employees?

Employers must distribute written safe and sick leave policies personally when an employee begins employment with the employer, within 14 days of the effective date of any policy change, and upon employee request. An employer may not distribute the Notice of Employee Rights in lieu of distributing or posting written safe and sick leave policies.

### 45. If an employer requires an employee to provide advance notice of the need to use safe and sick leave, must the employer explain this requirement in their written safe and sick leave policies?

Yes. An employer that requires advance notice must provide employees with a written policy explaining procedures for giving notice.

*Example*: An employer can require an employee to call a designated phone number at which an employee can leave a message. An employer's notice policy must be reasonable, taking into account whether the need for safe and sick leave is foreseeable or unforeseeable.

### 46. Can an employer make exceptions to its written safe and sick leave policies?

Yes. Employers can make exceptions to their written safe and sick leave policies for individual employees provided that they are more generous to the employee than the terms of the employer's written policy.

### 47. Can an employer provide a more generous leave policy to some employees and not others?

Yes. The Law provides minimum safe and sick leave requirements that apply to covered employees. The Law also expressly encourages employers to provide more generous leave benefits. As long as an employer gives all employees at least the benefits to which they are entitled under the Law, the employer is not prohibited from providing only one group of employees—for example, only full-time employees—with more generous leave benefits. However, employers must ensure that its policies do not violate any other laws or regulations that may apply, including anti-discrimination laws and regulations.

### 48. What is a foreseeable use of safe and sick leave? What amount of notice can an employer require for foreseeable uses of safe and sick leave?

A foreseeable use of safe and sick leave occurs when the employee is able to predict or know in advance that the employee will need to use safe and sick leave, such as a scheduled doctor's visit or court appointment.

If the need for safe and sick leave is foreseeable, the employer can require up to seven days' advance written notice of an employee's intention to use safe and sick leave, and the employer's written policy must describe how employees must provide notice.

### 49. What is an unforeseeable use of safe and sick leave? What policy can an employer have for unforeseeable uses of safe and sick leave?

An unforeseeable need for *sick leave* occurs when employees require time to care for, or obtain medical treatment for, themselves or a family member in a situation that was not reasonably anticipated.

*Example*: An employee wakes up in the morning with a fever and does not feel well enough to report for work that morning. This is an unforeseeable need for sick leave.

An unforeseeable need for *safe leave* occurs when employees require time to seek assistance or take other safety measures for themselves or a family member in a situation that was not reasonably anticipated.

*Example*: On her way to work, an employee believes she is being followed by her estranged ex-husband against whom she has a protective order and goes to the nearest police station rather than her office. This is an unforeseeable need for safe leave.

### 50. If an employee's need to use safe and sick leave is unforeseeable, when and how must an employee notify the employer?

If the need for safe and sick leave is unforeseeable, the employer may require an employee to give notice as soon as practicable. An employer must include in its written safe and sick leave policies the procedure for providing notice of an unforeseeable use of safe and sick leave, and the procedure must be reasonable.

*Example*: Reasonable procedures may include instructing the employee to call a designated phone number where the employee can leave a message, following a uniform call-in procedure, or using another reasonable and accessible means of communication to inform the employer. The procedures for providing notice of an unforeseeable need for safe and sick leave may not

include any requirement that an employee appear in person at a worksite or deliver any document to the employer prior to using the leave.

An employer must consider the individual facts and circumstances of each situation in determining at what point it is practicable for an employee to give notice.

### 51. Can an employer deny safe and sick leave or payment of safe and sick leave to an employee who does not provide notice of the need to use leave?

Yes. However, an employer cannot deny safe and sick leave or payment for safe and sick leave to an employee who fails to give reasonable notice if the employer did not distribute written safe and sick leave policies that describe the steps that an employee must take to provide notice of the need to use safe and sick leave. And the employer cannot deny safe and sick leave or payment for safe and sick leave if the notice the employer required was not reasonable under the circumstances.

**Scenarios:**

**Edda schedules a doctor's appointment a week ahead of time, but forgets to let her employer, Security Co., know about it until a day in advance. Security Co.'s reasonable written policy requires seven days' advance notice for foreseeable absences. Can Edda's employer deny use of safe and sick leave when the absence was foreseeable and Edda did not provide adequate notice in accordance with the employer's reasonable written policy?**
Yes. An employer can require employees to comply with notice policies and procedures if the absence is foreseeable and if notice is reasonable. If an employee does not comply with notice policies and there is no evidence of retaliation by the employer, an employer can deny use of safe and sick leave.

**Employer Manufacturing Inc. has a written policy requiring employees to provide at least three days' advance notice to use safe and sick leave. Theresa calls out of work one night because she needs to care for her granddaughter while her daughter files a police report on a family offense matter. Can the employer deny Theresa leave because of her failure to provide three days' advance notice of her need to use safe and sick leave?**
No. Theresa's need for safe and sick leave was unforeseeable, and she gave notice of the need to use leave for safe leave purposes as soon as practicable. Manufacturing Inc.'s safe and sick leave policies did not meet the Law's minimum requirements regarding unforeseeable uses of safe and sick leave.

### 52. Can an employer require an employee to disclose the reason for using safe and sick leave?

No. An employer cannot require an employee or the person providing documentation—for example, the employee's health care or social service provider—to disclose the reason for the use of safe and sick leave, except as required by law or with the employee's written consent.

The employer can:

- Require a note from a licensed medical provider after more than three consecutive workdays of sick leave, attesting to both the existence of a need for sick leave and the amount of work hours or days used as sick leave.
- Require documentation from a social service provider, legal service provider, or member of the clergy, or a copy of a police report, court record, or a notarized letter written by the employee indicating the need for safe leave after more than three consecutive days of safe leave.
- Ask for a date on which the employee is cleared to return to work.
- Ask the employee to submit written verification that the employee used safe and sick leave for safe and sick leave purposes.[9]

**Scenario:**

**Eun tells her supervisor that she needs three days of leave. She shows her supervisor a letter from her social worker stating that Eun was a victim of a human trafficking crime, and she needs time to handle housing and legal matters. Can Eun's supervisor require her to provide more information about her need to take safe leave?**
No. Eun has provided a letter from a social service provider explaining her need to take leave to handle matters related to being a victim of a human trafficking crime. Eun's employer may not request any more information about her need to take leave.

### 53. Can an employer require an employee using sick leave to provide documentation from a licensed health care provider?

Yes, but only if the employee uses more than three consecutive workdays* as sick leave and only if that requirement is part of written sick leave policies that the employee received prior to using the sick leave.

The employer can require the employee to provide written documentation signed by a licensed health care provider confirming both:

i. the need for the amount of sick leave taken; and
ii. that the use of sick leave was for a purpose authorized under the Law.

The Law prohibits employers from requiring the health care provider to specify the medical reason for sick leave, though disclosure may be required by other laws.

*"Workdays" means the days or parts of days the employee was scheduled to work had the employee not used sick leave.

[9] A model form that employers can use to verify use of safe and sick leave is available at nyc.gov/workers

### 54. Who pays for the documentation when the employer requires sick leave documentation after more than three days of use?

Employers must reimburse employees for fees charged by health care providers for sick leave documentation the employer requested.

### 55. Can an employer require an employee using safe leave to provide documentation?

Yes, but only if the employee uses more than three consecutive workdays of safe leave and only if that requirement is part of written safe leave policies that the employee received prior to using the safe leave.

Reasonable documentation may include a document from a social service provider, legal service provider, or member of the clergy, a copy of a police report, court record, or a notarized letter written by the employee indicating the need for safe leave. The documentation need only verify that there is a need to take safe leave.

*An employer may not require an employee to provide the specific details of any act or threat of domestic violence, unwanted sexual contact, stalking, or human trafficking for which the employee needs to take safe leave.*

### 56. Who pays for the documentation when the employer requires safe leave documentation after more than three days of use?

Employers must reimburse employees for all reasonable costs for safe leave documentation the employer requested.

### 57. How much time must an employer give an employee to submit written documentation if that employee used more than three consecutive days of safe and sick leave?

If an employer requires an employee to submit written documentation, the employee has seven days from the date the employee returns to work to submit the documentation.

### 58. Can an employer require documentation if the safe and sick leave is three consecutive workdays or less?

No. An employer can ask the employee to submit written verification that the employee used safe and sick leave for safe and sick leave purposes but *cannot require documentation when the employee uses three consecutive workdays or less for safe and sick leave*. A workday does not need to be a full day if the employee works part time.

**Scenario:**

**Bill's work schedule is three hours per day on Monday, Tuesday, Wednesday, and Friday. One week, he uses sick leave on each of these four days. Can his employer require documentation?**

Yes. Bill used sick leave for four consecutive workdays. His employer can require documentation from a licensed health care professional.

### 59. Can an employer require the employee to confirm in writing that the employee used safe and sick leave as permitted under the Law?

Yes. An employer can require the employee to confirm in writing that the employee used safe and sick leave for permitted purposes. However, the employer cannot require the employee to provide documentation from a medical or service provider if the employee did not use safe and sick leave for more than three consecutive workdays.

### 60. Can an employer require a second opinion to verify that the documentation is valid?

No. If the employee provides documentation, the employer cannot require a second opinion.

### 61. Can an employer require an employee to specify the nature of the health condition or the act or threat of domestic violence, unwanted sexual contact, stalking, or human trafficking matter causing the employee to use safe and sick leave?

The Law does not require disclosure. Under the Law:

- An employer cannot require employees or their health care providers to specify the nature of an employee's or employee's family member's injuries, illness, or condition, except as required by other laws.

- An employer cannot require an employee to provide the specific details of any act or threat of domestic violence, unwanted sexual contact, stalking, or human trafficking for which the employee needs to take safe leave.

As noted, disclosure may be required by other laws.

### 62. Do employers have to keep information about their employees' need to take safe and sick leave confidential?

Yes. An employer must keep information about an employee or an employee's family member obtained solely because of the Law confidential unless the employee consents to disclosure in writing or disclosure is required by other laws.

The employer may consider the information if an employee requests a "reasonable accommodation" as the victim of domestic violence, a sex offense, or stalking under the New York City Human Rights Law.[10]

### 63. Can an employer discipline an employee who misuses safe and sick leave?

Yes. An employer may take disciplinary action, up to and including termination, against an employee who uses safe and sick leave for purposes other than those provided for under the Law. However, a mistaken use of safe and sick leave does not qualify as misuse and is protected from retaliation.

[10] For more information about the Human Rights Law, visit the New York City Commission on Human Rights website nyc.gov/humanrights

### 64. What are signs of possible misuse of safe and sick leave?

Indications of using safe and sick leave for purposes other than those described in the Law include, but are not limited to, a pattern of:

- Using unscheduled safe and sick leave on or adjacent to weekends, regularly scheduled days off, holidays, vacation, or payday.
- Taking leave on days when other leave has been denied.
- Taking leave on days when the employee is scheduled to work a shift or perform duties perceived as undesirable.

Evidence that an employee engaged in an activity that is not consistent with permitted uses of safe and sick leave under the Law may also indicate misuse of safe and sick leave.

## V. HOW SAFE AND SICK LEAVE IS PAID

### 1. How much does an employer have to pay an employee for paid safe and sick leave?

When an employee uses paid safe and sick leave, the employer must pay the employee what the employee would have earned for the amount of time and the type of work the employee was scheduled to perform at the time the safe and sick leave is taken.

Under no circumstance can an employer pay an employee for safe and sick leave at less than the full minimum wage under New York State minimum wage laws and regulations.[11]

### 2. If an employee uses safe and sick leave during hours that would have been overtime if worked, does the employer have to pay the overtime rate of pay?

No. Employers are not required to pay the overtime rate of pay for safe and sick leave used.

### 3. How much does an employer have to pay an employee for paid safe and sick leave if the employee is paid a tipped wage, i.e., less than the legal minimum wage on the expectation they earn tips?

The employer must pay the employee at least the full minimum wage, without any allowance or credit for tips or otherwise, for each hour of safe and sick leave used.

### 4. Are employees entitled to tips they would have earned during safe and sick leave?

No. Employees are not entitled to lost tips or gratuities during use of safe and sick leave.

### 5. Does the employer have to consider the employee's bonus in calculating the employee's rate of pay for paid safe and sick leave?

No. If the amount of a bonus is wholly within the discretion of the employer, then the employer does not need to count the bonus when determining the employee's rate of pay for safe and sick leave purposes.

### 6. If an employee is paid in cash and supplements, as defined in section 220(5)(b) of New York State Labor Law, must the employer pay cash instead of supplements when the employee uses safe and sick leave?

No.

[11] For information about minimum wage rates, visit the New York State Department of Labor website labor.ny.gov and search "Minimum Wage."

### 7. Will the payment of cash instead of supplements, as defined in section 220(5)(b) of New York State Labor Law, relieve the employer from complying with the Law?

No. The employer must comply with the Law regardless of the manner in which the employee is paid.

### 8. If an employee has two different jobs for the same employer, or if an employee's rate of pay fluctuates for the same job, what should the rate of pay be for safe and sick leave used?

The rate of pay should be what the rate of pay would have been during the time that the employee was scheduled to work when the employee used the safe and sick leave.

**Scenario:**

**Diep works for a clothing store. She works as a cashier three hours in the morning for $10 per hour. The remaining five hours of the day she manages the store's back office for $15 per hour. Diep is scheduled to work eight hours on Saturday. She takes the day off for a safe leave matter. How much is the clothing store required to pay for her eight hours of safe and sick leave?**

The clothing store must pay Diep $10 per hour for the first three hours of leave ($30) and $15 per hour for the next five hours of leave ($75), for a total of $105.

### 9. An employee volunteers to work hours in addition to a normal schedule at a pay rate higher than the employee's regular hourly wage. If the employee uses safe and sick leave during these additional voluntary hours, how much should the employee be paid?

Employees who volunteer to work hours in addition to their normal schedule would be paid at their normal pay rate if they take safe and sick leave.

### 10. How much does an employer have to pay an employee for safe and sick leave if the employee's salary is paid by commission?

If an employee is paid by commission (whether base wage plus commission or commission only), the employer must pay the employee for safe and sick leave at an hourly rate that is the base wage or the minimum wage, whichever is greater.

### 11. How much does an employer have to pay an employee for paid safe and sick leave if the employee is paid at a flat rate regardless of the number of hours worked?

The employer must add together the employee's total earnings, including tips, commissions, and supplements, for the most recent workweek in which the employee *did not* take paid safe and sick leave, and divide the total by the number of hours the employee worked in that week, or 40 hours, whichever number is less. In doing this calculation, the employer should consider workdays to mean the days or parts of days the employee worked. In no event can the rate of pay for piecework be less than the minimum wage.

### 12. How should an employer determine the amount of safe and sick leave that must be paid when an employee has jobs, assignments, projects, or shifts of varying or indeterminate lengths?

For work or shifts of an indeterminate length (e.g., shift until "closing" instead of a specified end time or a job that lasts until the required work is completed), employers should base the hours of safe and sick leave used and paid on the hours worked by a replacement employee for the same shift. If there is no replacement employee, employers should base the hours of safe and sick leave on the hours worked by the employee or a similarly situated employee in the same or similar shift in the past.

### 13. How soon must employees be paid after they take paid safe and sick leave?

An employee must be paid no later than the payday for the next regular payroll period beginning after the employee took paid safe and sick leave. However, if the employer has asked for written documentation or verification of use of safe and sick leave from the employee, the employer is not required to pay for safe and sick leave until the employee has provided the requested documentation or verification.

An employer cannot delay payment of safe and sick leave beyond the next regular payroll period beginning after the employee took paid safe and sick leave if the employer's written safe and sick leave policies do not include the requirement that employees provide documentation for more than three consecutive workdays of safe and sick leave, the time and manner in which the employee must provide documentation, and the consequences for not providing it.

### 14. Can an employer deduct money from an employee's wages to cover the cost of paid safe and sick leave?

No. An employer required to provide paid safe and sick leave cannot require an employee to pay for all or part of that leave.

## VI. RETALIATION

### 1. Can an employer penalize an employee for using safe and sick leave?

No. Retaliation is illegal. No person—including but not limited to an employer—can retaliate against employees or prevent them from exercising or attempting to exercise rights under the Law, including by:

- Requesting and using safe and sick leave.
- Filing a complaint with DCWP for violations of the Law.
- Communicating with any person, including coworkers, about any violation of the Law.
- Participating in an administrative or judicial action regarding any violation of the Law.
- Informing another person of that person's rights under the Law.

### 2. What is retaliation?

Retaliation is any act that penalizes an employee for, or is reasonably likely to deter an employee from, exercising rights under the Law. It can include threats, intimidation, discipline, discharge, demotion, suspension, harassment, discrimination, reduction in hours or pay, informing another employer of an employee's exercise of rights under the Law, blacklisting, and maintenance or application of an absence control policy that counts safe and sick leave as an absence that may lead to or result in an adverse action.

Retaliatory acts include actions related to an employee's perceived immigration status or work authorization.

An employee does not have to explicitly refer to a specific section of the Law in order to be protected from retaliation. The Law's anti-retaliation provision applies even if the employee mistakenly but in good faith asserts or exercises rights under the Law. And retaliation can be shown when an employee's exercise or attempted exercise of rights motivated the employer to take the retaliatory action, even if other factors may also have motivated the employer.

**Scenario:**

**Cara has been working for Great Supermarket for three years and never received a Notice of Employee Rights or her employer's written safe and sick leave policies. She asks her manager about whether she can be paid for a week off because she needs oral surgery. Her manager tells her no, and they have a short verbal disagreement. The next day, Cara is fired and told it's because of insubordination the previous day. Could this be retaliation?**
Yes. Cara attempted to exercise her right to paid safe and sick leave, and her employer punished her with termination because of that attempt. Her request to use sick leave motivated her employer to fire her.

## VII. EMPLOYER RECORDS

### 1. What records must an employer keep?

Employers should keep their current and past written safe and sick leave policies.

Employers must keep and maintain records—including employment, payroll, and timekeeping records—documenting their compliance with the requirements of the Law, specifically those records that show, for each employee:

- Name, address, phone number, start date of employment, end date of employment (if applicable), rate of pay, and whether the employee is exempt from the overtime requirements of New York State Labor Law and related regulations
- Hours worked each week (unless the employee is exempt from the overtime requirements of New York State Labor Law and related regulations and has a regular workweek of 40 or more hours)
- Date and time of each instance of safe and sick leave used, and the amount paid for each instance
- Any change in the material terms of employment specific to the employee
- Date that the Notice of Employee Rights was provided to the employee and proof that it was received by the employee

### 2. How long must employers keep records required under the Law?

Employers must keep and maintain records for at least three years, unless otherwise required under other laws.

### 3. When must employers make records available to DCWP?
An employer under investigation by DCWP must provide requested records within 14 days of DCWP's Notice of Investigation.

### 4. What are the consequences of an employer's failure to maintain or produce records following a request by DCWP?
An employer's failure to maintain or produce a record that is required to be maintained under the Law may subject the employer to civil penalties and, if relevant to a material fact alleged by DCWP in an enforcement proceeding, may create a reasonable inference that the fact is true.

### 5. Can an employer maintain electronic records?
Yes. An employer can keep electronic records as long as the employer is able to produce the records in a manner in which they can be readily inspected or examined by DCWP and as long as employees' or their family members' health or other sensitive information obtained solely because of the Law is kept confidential, unless the employee permits disclosure or disclosure is required by other laws.

### 6. If an employer provides employees with leave benefits that exceed the Law's requirements, must the employer maintain records?
Yes. Employers must maintain records documenting compliance with the Law, including if the employer complies with the Law by providing even more benefits than what the Law requires.

### 7. Are the Law's recordkeeping requirements the same as those in other state laws (e.g., New York State Labor Law) or federal laws (e.g., Internal Revenue Code) that apply to employers?
No. The City Law requires employers to maintain records documenting compliance with the City Law for three years. Employers must comply with other laws and rules that apply to their businesses and their recordkeeping practices.

## VIII. COMPLAINTS AND ENFORCEMENT

### 1. Can employees file complaints with DCWP?
Yes. Employees can file complaints with DCWP if they believe their rights under the Law have been violated. The complaint form is available online at nyc.gov/workers or by contacting 311 (212-NEW-YORK outside NYC).

Employees can also call 311 and ask to be transferred to a DCWP representative to assist them in filing a complaint over the phone.

### 2. Is there a deadline for employees to file complaints with DCWP?
Employees must file their complaint within two years of the date they knew or should have known of the violation(s) they allege.

### 3. Does DCWP have to investigate all complaints?
Yes. The Law requires DCWP to investigate all complaints it receives.

### 4. Must employers respond to complaints?
Yes. If an employee files a complaint with DCWP, DCWP will contact the employer to request documents, information, and other responses to the investigation. The employer has 14 days to respond.

### 5. What does DCWP do with complaints?
DCWP investigates complaints to identify any potential violations of the Law. This generally involves collecting information from the employee, the employer, and any other parties that may have relevant information. If, as a result of its investigation, DCWP believes a violation has occurred, DCWP works with the employer to come into compliance and attempts to resolve the case without further enforcement proceedings, including court proceedings.

If DCWP and the employer are unable to reach a resolution, DCWP may pursue appropriate remedies by initiating a proceeding at the New York City Office of Administrative Trials and Hearings (OATH).

### 6. Does DCWP keep employees' identities confidential?
Yes. DCWP keeps the identity of complainants *and witnesses*—including people who provide information to DCWP who are not complainants—confidential unless disclosing their identity is necessary to resolve the investigation or is otherwise required by law. DCWP will notify complainants before disclosing their identity whenever possible.

### 7. Does my immigration status affect my ability to file a complaint?
No. All workers have the same rights and protections under the Law, regardless of immigration status. DCWP does not collect any information about a complainant's immigration status to pursue a complaint.

### 8. Does DCWP conduct routine, unannounced inspections of employers?
No. The Law allows DCWP to conduct on-site employer visits upon 30 days' notice, unless the employer agrees to a lesser amount of time. In general, inspections will be conducted at a mutually agreeable time of day.

*Exceptions:*
DCWP may conduct on-site inspections without 30 days' notice in certain limited circumstances. These include circumstances when DCWP has reason to believe:

- An employer will destroy or falsify records.
- An employer is about to declare bankruptcy or is otherwise disposing of its assets.
- An employer is the subject of a labor-related government investigation or enforcement action.
- The employer is engaging in retaliation.

If the employer does not respond to two attempts by DCWP to arrange a mutually agreeable time of day, DCWP may set a time for an inspection upon two days' advance notice.

### 9. Can DCWP conduct safe and sick leave investigations on its own initiative?
Yes. The Law authorizes DCWP to conduct an investigation on its own initiative when it has reason to believe that an employer's practices warrant investigation. DCWP does not need to have an employee complaint in order to begin an investigation.

### 10. Can DCWP issue subpoenas?

Yes. DCWP may issue subpoenas to investigate an employer's compliance with the Law. When a subpoena is issued, DCWP must give 30 days' written notice that the employer must provide DCWP with access to its records. DCWP may give less than this amount of notice in the limited circumstances described in FAQ 8 in this section.

### 11. Can DCWP issue violations for failing to respond to an investigation?

Yes. DCWP may bring a proceeding at OATH against an employer who fails to respond to an investigation, or fails to provide information, records, or access to records requested by DCWP in connection with an investigation. An employer will have opportunities to comply by producing the requested information or records, and will face reduced or no civil penalties if it does so before the first scheduled appearance date at OATH.

### 12. After DCWP brings a proceeding at OATH, do employers still have an opportunity to settle?

Yes. DCWP and the employer may settle at any point after an enforcement proceeding is filed at OATH.

### 13. What happens if an employer chooses not to settle violations and have charges heard before OATH?

An Administrative Law Judge (ALJ) from OATH's Trials Division hears testimony from DCWP, the employer, and any witnesses. Under the Law, the ALJ may order an employer to provide an employee whose rights have been violated with the following:

- Three times the wages that should have been paid for each time the employee took safe and sick leave but wasn't paid or $250, whichever is greater
- $500 for each time the employee was unlawfully denied safe and sick leave requested by the employee or was required to find a replacement worker, or each time the employee was required to work additional hours to make up for safe and sick leave taken without mutual consent of the employer and the employee
- Full compensation, including lost wages and benefits, damages of $500 to $2,500, and appropriate equitable relief for each time the employer retaliated against the employee for taking safe and sick leave

Following a trial, OATH issues recommended decisions that are reviewed by DCWP's Commissioner who has the authority to issue a final decision.

### 14. What are the maximum penalties for violations of the Law?

In addition to the monetary relief that an employer may be required to pay to employees whose rights were violated, the Law also provides the following civil penalties for violations of the Law:

- Up to $500 for failure to timely or fully respond to DCWP's request for information or documents before the first scheduled appearance date
- Up to $500 per employee for each first-time violation
- Up to $750 per employee for each second violation within two years of a prior violation
- Up to $1,000 per employee for each subsequent violation that occurs within two years of any previous violation
- Up to $50 for each employee who was not given the required Notice of Employee Rights

### 15. What happens if the employer has an official or unofficial policy or practice of not providing or refusing to allow the use of safe and sick leave as required under the Law?

The finding that an employer has such a policy or practice constitutes a violation of the Law for each and every employee affected by the policy. For each employee who was affected by such a policy, the employer may be liable for payment of both monetary relief and civil penalties. In other words, there is no need to show that each employee was specifically denied safe and sick leave in at least one instance.

### 16. What happens if an employer does not allow accrual of safe and sick leave as required by the Law?

The relief granted to each and every employee affected by the policy or practice will include either:

i. addition of 40 hours of leave to the employee's safe and sick leave balance; or
ii. (*if the number of hours denied to the employee is known*) addition of the number of hours of leave the employee should have accrued to the employee's safe and sick leave balance, provided that the balance does not exceed 80 hours.

### 17. Does the Law authorize employees to bring an action in court to enforce their rights?

No. The Law does not give employees the right to initiate actions in court to enforce their rights under the Law. However, employees retain any other rights they may have under other local, state, or federal laws.

### 18. Can anyone besides DCWP bring an action in court to enforce employees' rights under the Law?

Yes. The Law authorizes the New York City Law Department (or its designee) to file cases against employers in state court. Such cases may be brought to:

- mandate the employer's compliance with the Law;
- obtain injunctions; and
- force the employer to stop any acts or practices that are unlawful under the Law.

The Law also authorizes the New York City Law Department (or its designee) to file cases in state court against employers that have a pattern or practice of violating the Law. Such cases may be brought to seek:

- monetary relief;
- civil penalties;
- injunctive relief; and
- any other appropriate relief.

In exercising this authority, the New York City Law Department (or its designee) has the power to issue subpoenas to employers for information, records, and testimony.

## IX. OTHER FEDERAL AND STATE LAWS RELATED TO LEAVE

### 1. Does New York State also require employers to provide safe and sick leave?

Yes. As of September 30, 2020, New York State requires covered employers to provide paid or unpaid safe and sick leave to covered employees.

**Employers with 4 or fewer employees:**

- must provide up to 40 hours of *unpaid* safe and sick leave if the employer had a net income of less than $1 million in the previous tax year.
- must provide up to 40 hours of *paid* safe and sick leave if the employer had a net income of $1 million or more in the previous tax year.

**Employers with 5 or more employees regardless of income:**

- must provide up to *40 hours* of paid safe and sick leave.

**Employers with 100 or more employees regardless of income:**

- must provide up to *56 hours* of paid safe and sick leave.

### 2. Is there a difference between the City Law and the State Law?

Yes. The two laws are similar but not identical, and you should consult your legal advisor with any specific questions.

In general, similarities include:

- the amount of leave employees must get based on the employer's size and/or net income; and
- the reasons employees can use leave.

Many other important elements are the same in both laws.

The City Law must remain as good as or better than the State Law. In fact, the City Law specifically provides that any future standards in the State Law that surpass those in the City Law will be automatically adopted and incorporated in the City Law.

### 3. If the City Law and the State Law are so similar, who enforces safe and sick leave laws in New York City?

DCWP and the New York State Department of Labor have overlapping enforcement authority when it comes to safe and sick leave benefits for covered employees in New York City.

### 4. Are there leave benefits under the Family Medical Leave Act (FMLA) and Americans with Disabilities Act (ADA) (federal laws) and New York State Human Rights Law?

No. These federal and state laws do not require employers to give time off with pay.

### 5. Is the City Law the same as the federal Family and Medical Leave Act (FMLA)?

No. Although both laws have to do with leave, FMLA provides qualified employees with 12 weeks of job-protected unpaid leave for specific purposes. FMLA only applies to employers that meet certain criteria, and only eligible employees are entitled to take FMLA leave.[12]

### 6. Is the City Law the same as the New York State Paid Family Leave Law (PFL)?

No. PFL provides qualified employees with 8 weeks of partially paid leave to:

- Bond with a newly born, adopted, or fostered child.
- Care for a close relative with a serious health condition.
- Assist loved ones when a family member is deployed abroad on active military service.

The length and monetary amount of leave change every year.[13]

### 7. Can an employee's use of safe and sick leave be counted toward leave under other laws?

Yes. An employee's use of safe and sick leave may be counted toward concurrent leave under state or federal law, such as FMLA.

### 8. What about overlapping jurisdiction between federal and state laws and City Law—which would take precedence?

Federal and state laws take precedence when they require employers to do more than the City Law does.

*Examples*:

- Depending on the facts in a particular situation, under FMLA, an employer may be required to provide intermittent time off in increments of time that are less than four hours.

- Depending on the facts in a particular situation, under ADA or New York State Human Rights Law, an employer may be required to provide a leave of absence to an employee with a disability that is longer than the amount of safe and sick leave an employer must provide under the City Law. In addition, when an employer is asked to provide leave under federal or state law that goes beyond what the employee is entitled to under the City Law, the employer may be able to ask the employee to provide more information about a medical condition or disability than the employee would be required to provide under the City Law.

It will often be the case that an employer can meet the requirements of federal law and the City Law at the same time by allowing time off with pay. Moreover, leave that an employer provides under the City Law would generally count toward meeting obligations under federal and state laws, even though additional leave may be required under those laws.

[12] For more information about FMLA, visit the U.S. Department of Labor website dol.gov/whd
[13] For more information on New York State Paid Family Leave, visit paidfamilyleave.ny.gov

# Durr v. Slator

United States District Court for the Northern District of New York

September 2, 2021, Decided; September 2, 2021, Filed

5:20-CV-00662 (MAD/TWD)

**Reporter**
558 F. Supp. 3d 1 *; 2021 U.S. Dist. LEXIS 166716 **

JERRY DURR, Plaintiff, vs. DANIEL SLATOR, Police Officer; WILLIAM CLARK, Police Sergeant; CITY OF ONEIDA, NEW YORK; AARON SILVERMAN, Sheriff's Deputy; and MADISON COUNTY, NEW YORK, Defendants.AARON SILVERMAN, Sheriff's Deputy; and MADISON COUNTY, NEW YORK, Cross-Plaintiffs, vs. DANIEL SLATOR, Police Officer; WILLIAM CLARK, Police Sergeant; and CITY OF ONEIDA, NEW YORK, Cross-Defendants.

**Counsel: [**1]** For Plaintiff: DAVID A. LONGERETTA, ESQ., OF COUNSEL, LAW OFFICE OF DAVID A. LONGERETTA, PLLC, Utica, New York.

For Plaintiff: ZACHARY C. OREN, ESQ., OF COUNSEL, LAW OFFICE OF ZACHARY C. OREN, ESQ., Utica, New York.

For Daniel Slator, William Clark, and City of Oneida, Defendants: DAVID H. WALSH, IV, ESQ., DANIEL CARTWRIGHT, ESQ., OF COUNSEL, KENNEY SHELTON LIPTAK NOWAK LLP, Jamesville, New York.

For Aaron Silverman and Madison County, Defendants: KEVIN G. MARTIN, ESQ., OF COUNSEL, Utica, New York.

**Judges:** Mae A. D'Agostino, United States District Judge.

**Opinion by:** Mae A. D'Agostino

## Opinion

**[*13] MEMORANDUM-DECISION AND ORDER**

### I. INTRODUCTION

Plaintiff, Jerry Durr, brought this action on June 12, 2020, asserting thirteen causes of action pursuant to *42 U.S.C. §§ 1983*, *1988*, *12132*, and the *Fourth*, *Fifth*, *Sixth*, and *Fourteenth Amendments of the United States Constitution* against Defendants Officer Daniel Slator, Sergeant William Clark, the City of Oneida, New York, Sheriff's Deputy Aaron Silverman, and Madison County, New York. Dkt. Nos. 1, 5. Plaintiff's claims arise out of his arrest on March 15, 2019, and his subsequent detainment. Dkt. No. 5. On September 29, 2020, Defendants Slator, Clark, the City of Oneida (hereinafter the "City Defendants") filed a pre-answer motion to dismiss. Dkt. No. 18. On October 21, 2020, Defendants **[**2]** Silverman and Madison County (hereinafter the "County Defendants") filed a motion for judgment on the pleadings.[1] Dkt. No. 30.

Currently before the Court are the City Defendants' motion to dismiss and the County Defendants' motion for judgment on the pleadings. Dkt. Nos. 18, 30. Based on the following, the City Defendants' motion to dismiss and the County Defendants' motion for judgment on the pleadings are both granted in part and denied in part.

### II. BACKGROUND

#### A. Facts

On March 15, 2019, Plaintiff was obstructing traffic and yelling in the roadway of Lenox Avenue, in Oneida, New York. Dkt. No. 5 at ¶ 10. Plaintiff has been diagnosed with, and receives social security disability benefits for, bipolar depression and attention deficit disorder. *Id.* at ¶ 37. On March 15, 2019, Plaintiff had not taken his

[1] In a footnote, Plaintiff raises the issue of the ethical considerations of Attorney Kevin Martin representing both Defendants Silverman and Madison County. Dkt. No. 32 at 17, n.8. Plaintiff requests that the Court undertake *Dunton* procedures to ensure that Defendant Madison County will indemnify Defendant Silver, and if not, that Defendant Silverman be provided separate legal counsel. *Id.* (citing *Dunton v. County of Suffolk, 729 F. 2d 903 (2d Cir. 1984)*). The Court rejects Plaintiff's requests and notes that if Plaintiff would like to challenge Attorney Martin's ability to represent both County Defendants, he must do so via formal motion.

medication and asserts that he was having a psychotic episode. *Id.* at ¶¶ 10, 39. Additionally, Plaintiff asserts that he was exhibiting erratic behavior sufficient to have classified him as a mentally disturbed person. *Id.* at ¶ 13.

Defendants Slator and Silverman arrived at the scene and Defendant Slator arrested Plaintiff. *Id.* at ¶¶ 11-14. Plaintiff consented to being handcuffed **[**3]** but then spit toward Defendant Slator. *Id.* at ¶¶ 15-17. Defendant Silverman kicked Plaintiff while he was handcuffed, dislocating Plaintiff's knee, and causing him to fall to the ground in pain. *Id.* at ¶¶ 19-20. Defendants Slator, Clark,[2] and Silverman then took Plaintiff to Oneida Healthcare for treatment for his knee via ambulance. *Id.* at ¶¶ 24, 26. Plaintiff was subsequently discharged with instructions that he be transferred to the Upstate Emergency Department **[*14]** because Oneida Healthcare did not have orthopedic services. *Id.* at ¶ 27.

Rather than bring Plaintiff to the Upstate Emergency Department, Plaintiff was placed in a cell at the Oneida City Police Station. *Id.* at ¶ 28. While in his cell, Plaintiff's knee began to swell and became so painful that he could not use the toilet and twice defecated on himself. *Id.* at ¶¶ 29-30. After the second time, Defendant Clark asked Plaintiff why he defecated on himself, and Plaintiff responded that he could not get up due to his knee and that he would clean it up. *Id.* at ¶ 31. Plaintiff was then charged for criminal tampering in the third degree for defecating on the floor and throwing toilet paper covered in his feces on the walls. *Id.* at ¶ **[**4]** 32; Dkt. No. 5-1.

On June 12, 2020, Plaintiff brought this action asserting claims for excessive force against Defendants Slator and Silverman; deliberate indifference to Plaintiff's serious medical condition against Defendants Slator, Silverman, and Clark; violation of *Title II of the Americans with Disabilities Act* against all Defendants; and failure to intervene for a constitutional violation against all Defendants in violation of *42 U.S.C. §§ 1983*, *12132*. Dkt. No. 5 at ¶¶ 10-77. Additionally, Plaintiff asserts a *Monell* claim against Defendants City of Oneida and Madison County for a failing to investigate, supervise, and discipline Defendants Slator, Clark, and Silverman. *Id.* at ¶¶ 78-83. Finally, Plaintiff asserts claims for assault, negligence, and violations of *New York Human Rights Law § 28* for failure to provide medical care and mental health assistance against Defendants. *Id.* at ¶¶ 84-132.

On September 30, 2020, the City Defendants filed a pre-answer motion to dismiss. Dkt. No. 18. On October 21, 2020, the County Defendants filed a motion for judgment on the pleadings. Dkt. No. 31. On November 23, 2020, Plaintiff filed oppositions to both the City Defendants' motion to dismiss and the County Defendants' motion for judgment on the pleadings. Dkt. Nos. 31, 32. The City Defendants **[**5]** filed a reply on December 1, 2020. Dkt. No. 34. The County Defendants filed a reply on December 7, 2020. Dkt. No. 35.

## III. DISCUSSION

### A. Standard of Review

A motion to dismiss for failure to state a claim pursuant to *Rule 12(b)(6) of the Federal Rules of Civil Procedure* tests the legal sufficiency of the party's claim for relief. *See Patane v. Clark, 508 F.3d 106, 111-12 (2d Cir. 2007)* (citation omitted). In considering the legal sufficiency, a court must accept as true all well-pleaded facts in the pleading and draw all reasonable inferences in the pleader's favor. *See ATSI Commc'ns, Inc. v. Shaar Fund, Ltd., 493 F.3d 87, 98 (2d Cir. 2007)* (citation omitted). This presumption of truth, however, does not extend to legal conclusions. *See Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (citation omitted). Although a court's review of a motion to dismiss is generally limited to the facts presented in the pleading, the court may consider documents that are "integral" to that pleading, even if they are neither physically attached to, nor incorporated by reference into, the pleading. *See Mangiafico v. Blumenthal, 471 F.3d 391, 398 (2d Cir. 2006)* (quoting *Chambers v. Time Warner, Inc., 282 F.3d 147, 152-53 (2d Cir. 2002)*).

To survive a motion to dismiss, a party need only plead "a short and plain statement of the claim," *see Fed. R. Civ. P. 8(a)(2)*, with sufficient factual "heft to 'sho[w] that the pleader is entitled to relief[,]'" *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557, 127 S. Ct. 1955, 167 L. Ed. 2d 929 **[*15]** (2007)* (quotation omitted). Under this standard, the pleading's "[f]actual allegations must be enough to raise a right of relief above **[**6]** the speculative level," *see id. at 555* (citation omitted), and present claims that are "plausible on [their] face," *id. at 570*. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a

[2] It is unclear at what point Defendant Clark arrived at the scene.

sheer possibility that a defendant has acted unlawfully." *Iqbal, 556 U.S. at 678* (citation omitted). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of "entitlement to relief."'" *Id.* (quoting *[Twombly, 550 U.S.] at 557, 127 S. Ct. 1955, 167 L. Ed. 2d 929*). Ultimately, "when the allegations in a complaint, however true, could not raise a claim of entitlement to relief," *Twombly, 550 U.S. at 558*, or where a plaintiff has "not nudged [its] claims across the line from conceivable to plausible, the[ ] complaint must be dismissed[,]" *id. at 570*.

"In deciding a *Rule 12(c)* motion, we 'employ[ ] the same standard applicable to dismissals pursuant to *Fed. R. Civ. P. 12(b)(6)*.'" *Hayden v. Paterson, 594 F.3d 150, 160 (2d Cir. 2010)* (quoting *Johnson v. Rowley, 569 F.3d 40, 43 (2d Cir. 2009)*) (alterations in original). "Thus, we will accept all factual allegations in the complaint as true and draw all reasonable inferences in [the plaintiff's] favor." *Id. at 43-44* (citing *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd., 493 F.3d 87, 98 (2d Cir. 2007)*). "To survive a *Rule 12(c)* motion, [the plaintiff's] complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting **[**7]** *Iqbal, 556 U.S. at 678*).

**B. Plaintiff's Claims for Excessive Force**

Plaintiff claims that Defendants Slator and Silverman engaged in an excessive use of force when Defendant Silverman kicked Plaintiff while he was handcuffed. Dkt. No. 5 at ¶¶ 19-22. The City Defendants assert that Plaintiff's claim must be dismissed against Defendant Slator because he was not personally involved in the use of excessive force. Dkt. No. 18 at 6-8. The County Defendants assert that Plaintiff's claim must be dismissed because the act of sweeping Plaintiff's leg was not unreasonable, and Plaintiff's pre-existing knee condition was the primary reason for his injury. Dkt. No. 30-6 at 8-10. Based on the following, the City Defendants' motion to dismiss is granted and the County Defendants' motion for judgment on the pleadings is denied.

***1. Reasonableness of Force***

"Excessive force claims related to an arrest or seizure are evaluated under the *Fourth Amendment* using an 'objective unreasonableness' standard." *Bogart v. City of New York, No. 13-cv-1017, 2016 U.S. Dist. LEXIS 128350, 2016 WL 4939075, *7 (S.D.N.Y. Sept. 6, 2016)* (quoting *Graham v. Connor, 490 U.S. 386, 388, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989)*). "Excessive force claims asserted in the 'non-seizure, non-prisoner context' are analyzed under the *Due Process Clause of the Fourteenth Amendment* using a more stringent 'shocks the conscience' standard." *Id.* (quoting *Rodriguez v. Phillips, 66 F.3d 470, 477 (2d Cir. 1995)*); *see also Tierney v. Davidson, 133 F.3d 189, 199 (2d Cir. 1998)* ("Plaintiffs do not assert that they were arrested **[**8]** or seized, and therefore these claims fall outside of the *Fourth Amendment* protections applied in *Graham* . . . and are governed instead by the *Due Process Clause of the Fourteenth Amendment*"). Since the force used in the **[*16]** present matter occurred during Plaintiff's arrest, his claims are properly analyzed under the reasonableness standard set forth in *Graham*. *Ostroski v. Town of Southold, 443 F. Supp. 2d 325, 342 (E.D.N.Y. 2006)* (applying the *Fourth Amendment* reasonableness standard to force used while the plaintiff was handcuffed and allegedly resisting arrest).

"The *Fourth Amendment* prohibits the use of excessive force in making an arrest, and whether the force used is excessive is to be analyzed under that Amendment's reasonableness standard.'" *Outlaw v. City of Hartford, 884 F.3d 351, 366 (2d Cir. 2018)* (quoting *Brown v. City of New York, 798 F.3d 94, 100 (2d Cir. 2015)*). "The 'proper application' of this standard 'requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.'" *Id.* (quoting *Graham, 490 U.S. at 396*). The reasonableness determination must include consideration of the fact that law enforcement officers often are forced to make quick decisions under stressful and rapidly evolving circumstances rendering the calculation of what amount **[**9]** of force is reasonable difficult. *See Graham, 490 U.S. at 396-97*. Relevant factors include the severity of the crime at issue, whether the suspect posed an immediate threat to the safety of the officers or others, and whether the suspect was actively resisting arrest. *See Brown, 798 F.3d at 100* (citing *Graham, 490 U.S. at 396*).

Moreover, to support an excessive force claim, the plaintiff must establish that the defendant used more than *de minimis* force. *See Feliciano v. Thomann, 747 Fed. Appx. 885, 887 (2d Cir. 2019)*. Even conduct that caused some physical pain and resulted in side effects

need not be compensated if a jury finds that such injuries were *de minimis. See* Kerman v. City of New York, 374 F.3d 93, 123 (2d Cir. 2004). Nevertheless, while "not every push or shove constitutes excessive force," Lennon v. Miller, 66 F.3d 416, 426 (2d Cir. 1995) (citing Graham, 490 U.S. at 396), a show of force by an officer that is overly disproportionate to the risk of harm may support a claim for excessive force. *See* Gersbacher v. City of New York, No. 1:14-cv-7600, 2017 U.S. Dist. LEXIS 162707, 2017 WL 4402538, *11 (S.D.N.Y. Oct. 2, 2017) (denying the defendant police officers' motion for summary judgment on the plaintiff's excessive force claim where evidence showed that the plaintiff verbally opposed the arrest, but did not attempt to flee or attack the arresting officer, calling into question whether the force used by the arresting officer, which caused relatively minor injuries, was excessive). The "reasonableness of **[**10]** a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." Brown, 798 F.3d at 100-01.

Defendant Silverman asserts that sweeping Plaintiff's knee was not an excessive use of force because Plaintiff spit at Defendant Slator which could have proven deadly to Defendants Slator and Silverman due to the existence of "AIDS and other communicable diseases."[3] Dkt. No. 30-6 at 8. Further, Defendant Silverman asserts that kicking a handcuffed arrestee is far less conscious shocking than other conduct **[*17]** previously found to be *de minimus. Id.* However, the County Defendants cite cases involving incidences between prison guards and inmates, not police officers and arrestees. *See id.* at 9. Such cases apply the Fourteenth Amendment's more stringent "shocks the conscious" standard rather than the Fourth Amendment's reasonableness standard. *See* Bogart, 2016 U.S. Dist. LEXIS 128350, 2016 WL 4939075, at *7.

Additionally, Plaintiff alleges that Defendant Silverman kicked Plaintiff after he had already consented to, and had been, handcuffed. Dkt. No. 5 at ¶¶ 15-17. While Defendant Silverman may have only kicked Plaintiff once, courts have distinguished between kicking an arrestee prior to and following their handcuffing. *See* Ostroski, 443 F. Supp. 2d at 342 (citing Pierre-Antoine v. City of New York, No. 04 CIV. 6987, 2006 U.S. Dist. LEXIS 28963, 2006 WL 1292076, *4 (S.D.N.Y. May 9, 2006); Graham v. Springer, No. 03-CV-6190, 2005 U.S. Dist. LEXIS 43118, 2005 WL 775901, *6 (W.D.N.Y. Apr. 5, 2005); *Jones v. Ford*, No. 00-CV-0934, 2002 WL 1009733, *4 (M.D.N.C. Feb. 15, 2002)). Even **[**11]** one kick may be an excessive use of force once an arrestee has been handcuffed and subdued. Graham, 2005 U.S. Dist. LEXIS 43118, 2005 WL 775901, at *6 ("If the Court accepts plaintiff's version as true, which it must, it cannot say that the kick or kicks were objectively reasonable as a matter of law").

While Defendants claim that Plaintiff spitting toward Defendant Slator created exigent circumstances that could have potentially proven fatal to Defendants, spitting does not give rise to an excusable use of force *per se. See* Dkt. No. 30-6 at 8, 13. In *Roguz*, the District of Connecticut denied summary judgment for the defendants on the plaintiff's excessive force claim where the defendant officers punched the plaintiff in the face after he was handcuffed despite claiming that the plaintiff was actively resisting arrest and spitting at the defendants both before and after being handcuffed. Roguz v. Walsh, No. 09-cv-1052, 2012 U.S. Dist. LEXIS 172644, 2012 WL 6049580, *4 (D. Conn. Dec. 5, 2012). The court determined that the conflicting testimony created a factual dispute for the jury as the plaintiff testified that he was not resisting arrest and was only spitting the blood out of his mouth after the defendants attacked him. *Id.*

Plaintiff claims that he consented to his arrest for obstructing traffic, and while he was handcuffed, he was kicked with **[**12]** sufficient force to dislocate his knee, immobilize him, and require emergency medical services.[4] Dkt. No. 5 at ¶¶ 19-24. At this stage of litigation, such allegations are sufficient to establish that Defendant Silverman's use of force was plausibly unreasonable. The County Defendants' motion for judgment on the pleadings is denied.[5]

---

[3] It is important to note that Plaintiff's arrest was effectuated almost a year prior to the Coronavirus pandemic and therefore the Defendant Officers' fear of "other communicable diseases" did not include Coronavirus.

[4] The County Defendants assert that Plaintiff's injuries stemmed from a pre-existing medical condition. Dkt. No. 30-6 at 9. However, there is no evidence or assertion in the pleadings that Plaintiff had a pre-existing medical condition regarding his knee. *See generally* Dkt. No. 5.

[5] In the alternative Plaintiff asserts that Defendant Silverman failed to intervene during the excessive use of force. However, Plaintiff may not assert that Defendant Silverman failed to intervene because Plaintiff alleges that Defendant Silverman was directly involved because he actually engaged in the use

**[*18]** ***2. Qualified Immunity***

The County Defendants further assert that Defendant Silverman is shielded from liability based on qualified immunity. Dkt. No. 30-6 at 10-13.

Qualified immunity is an affirmative defense and, as such, Defendants bear the burden of proving that the privilege of qualified immunity applies. *See* Coollick v. Hughes, 699 F.3d 211, 219 (2d Cir. 2012). "Under the doctrine of qualified immunity, 'government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" Tracy v. Freshwater, 623 F.3d 90, 95-96 (2d Cir. 2010) (quoting Kelsey v. County of Schoharie, 567 F.3d 54, 60-61 (2d Cir. 2009)). The Court is mindful that qualified immunity is "'an entitlement not to stand trial or face the other burdens of litigation,'" and that this privilege is "'effectively lost if a case is erroneously permitted to go to trial.'" **[**13]** Saucier v. Katz, 533 U.S. 194, 200, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001) (quoting Mitchell v. Forsyth, 472 U.S. 511, 526, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985)).

Courts engage in a two-part inquiry to determine whether the doctrine of qualified immunity bars a suit against government officials. *See* Jones v. Parmley, 465 F.3d 46, 55 (2d Cir. 2006). First, a court must consider whether the facts, construed in favor of the party asserting the injury, "demonstrate a violation of a constitutional right." *Id.* (citing Saucier v. Katz, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001)). Second, a court must also determine "whether the officials' actions violated 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Id.* (quoting Hope v. Pelzer, 536 U.S. 730, 739, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002)). Courts may exercise their discretion in deciding which prong should be considered first. *See* Pearson v. Callahan, 555 U.S. 223, 243, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009).

A right is clearly established if its "contours" are "sufficiently clear that a reasonable official would understand that what he is doing violates that right." Hope v. Pelzer, 536 U.S. 730, 739, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002). An official's actions are not protected by qualified immunity by virtue of the fact that the action in question has not previously been held unlawful. *See id.*; Terebesi v. Torreso, 764 F.3d 217, 231 (2d Cir. 2014) ("An officer is not entitled to qualified immunity on the grounds that the law is not clearly established every time a novel method is used to inflict injury"). "[I]f decisions from this or other circuits clearly foreshadow a particular ruling on the issue," the **[**14]** court may treat the law as clearly established. *See* Terebesi, 764 F.3d at 231 (internal quotation marks omitted) (stating that the courts "consider the specificity with which a right is defined, the existence of Supreme Court or Court of Appeals case law on the subject, and the understanding of a reasonable officer in light of preexisting law" in determining whether the law is clearly established) (quoting Varrone v. Bilotti, 123 F.3d 75, 79 (2d Cir. 1997)).

"It is well established that qualified immunity may operate as a defense to excessive force claims." Betts v. Rodriquez, No. 15-CV-3836, 2017 U.S. Dist. LEXIS 73862, 2017 WL 2124443, *4 (S.D.N.Y. May 15, 2017). "Even if the force is objectively unreasonable, an officer may still be eligible for qualified immunity if it was objectively reasonable for the officer to *believe* that her action did not violate clearly established law." Keene v. Schneider, 350 Fed. Appx. 595, 596 ***[*19]*** (2d Cir. 2009). "The Supreme Court has made clear that officers who have used excessive force may be entitled—under the qualified immunity doctrine—to an extra layer of protection 'from the sometimes hazy border between excessive and acceptable force.'" De Michele v. City of New York, No. 09-CV-9334, 2012 U.S. Dist. LEXIS 136460, 2012 WL 4354763, *17 (S.D.N.Y. Sept. 24, 2012) (quoting Saucier, 533 U.S. at 206).

Multiple circuit courts have dealt with the relationship between leg sweeps, excessive force, and qualified immunity. In Shafer v. County of Santa Barbara,868 F.3d 1110, 2017 WL 3707904 (9th Cir. 2017), the plaintiff sued a police officer for excessive force and false arrest. A jury found that the officer had probable **[**15]** cause to arrest the plaintiff for "resisting, delaying or obstructing" an officer, but the jury also found that the officer used excessive force in taking down the plaintiff with a leg sweep maneuver. *See* 868 F.3d 1110, id. at *2. The Ninth Circuit held that there was sufficient evidence to support the jury's excessive

---

of excessive force by kicking Plaintiff. Cuellar v. Love, No. 11-CV-3632, 2014 U.S. Dist. LEXIS 51622, 2014 WL 1486458, *8 (S.D.N.Y. Apr. 11, 2014) ("Of course, where the officer is a direct participant in the allegedly excessive use of force, the failure to intervene theory of liability is inapplicable"). As such, Plaintiff's claim for failure to intervene during the use of excessive force is dismissed. The County Defendants' motion for judgment on the pleadings is therefore granted as to Plaintiff's failure to intervene claim.

force verdict but that the officer was nonetheless entitled to qualified immunity because using a leg sweep against a resisting arrestee does not violate clearly established law:

> [T]he question at hand is whether an officer violates clearly established law when he progressively increases his use of force from verbal commands, to an arm grab, and then a leg sweep maneuver, when a misdemeanant refuses to comply with the officer's orders and resists, obstructs, or delays the officer in his lawful performance of duties such that the officer has probable cause to arrest him in a challenging environment. The answer is no.

*Id.* at 5. There is, however, an important difference between *Schafer* and this case: when reviewing the facts in the light most favorable to Plaintiff, he was not resisting arrest.

Courts have overwhelmingly held that police officers are not entitled to qualified immunity when they **[**16]** use leg sweep maneuvers to take down arrestees who are not resisting. *See* McCaig v. Raber, 515 Fed. Appx. 551, 555 (6th Cir. 2013) (rejecting a qualified immunity defense where the police officer used a leg sweep to take down an arrestee who "jerked away" when the police officer screamed in his ear but did not otherwise resist arrest); Montoya v. City of Flandreau, 669 F.3d 867, 873 (8th Cir. 2012) ("[T]he contours of the right at issue were sufficiently clear to inform a reasonable officer in [the defendant's] position it was unlawful for him to perform a 'leg sweep' and throw to the ground a nonviolent, suspected misdemeanant who was not threatening anyone, was not actively resisting arrest, and was not attempting to flee"); *accord* Johnson v. City of Fayetteville, 91 F. Supp. 3d 775, 804 (E.D.N.C. 2015).

In *Frantz*, the plaintiff alleged that she was not resisting arrest but refused to cease speaking when the defendants told her to stop or she would be arrested. Frantz v. City of Oswego, No. 5:15-CV-1192, 2017 U.S. Dist. LEXIS 173413, 2017 WL 4737258, *2 (N.D.N.Y. Oct. 19, 2017). The defendants claimed that she was walking away from them, shouting obscenities, and resisting arrest. *Id.* The defendants then tackled the plaintiff to the ground while holding her arms back to handcuff her. *Id.* The court held that, making all inferences in the plaintiff's favor, at the time that she was arrested for a noise ordinance violation, she was not a threat to anyone, was not resisting arrest, and was **[**17]** not attempting to flee. *See* 2017 U.S. Dist. LEXIS 173413, [WL] at *6. Making all inferences in Plaintiff's favor, at the time that he was arrested for obstructing traffic, he consented to—and was already—handcuffed, and was not attempting **[*20]** to flee. Plaintiff further alleges that he was kicked in the knee with greater force than a leg sweep. Dkt. No. 5 at ¶¶ 19-20. Therefore, Defendant Silverman is not entitled to qualified immunity.

***3. Personal Involvement of Defendant Slator***

Section 1983 imposes liability for "conduct which 'subjects, or causes to be subjected' the complainant to a deprivation of a right secured by the Constitution and laws." Rizzo v. Goode, 423 U.S. 362, 370-71, 96 S. Ct. 598, 46 L. Ed. 2d 561 (1976) (quoting 42 U.S.C. § 1983). Not only must the conduct deprive the plaintiff of rights and privileges secured by the Constitution, but the actions or omissions attributable to each defendant must be the proximate cause of the injuries and consequent damages that the plaintiff sustained. *See* Brown v. Coughlin, 758 F. Supp. 876, 881 (S.D.N.Y. 1991) (citing Martinez v. California, 444 U.S. 277, 284-85, 100 S. Ct. 553, 62 L. Ed. 2d 481 (1980)). As such, for a plaintiff to recover in a Section 1983 action, he must establish a causal connection between the acts or omissions of each defendant and any injury or damages he suffered as a result of those acts or omissions. *See id.* (citing Givhan v. Western Line Consolidated School District, 439 U.S. 410, 99 S. Ct. 693, 58 L. Ed. 2d 619, (1979)) (other citation omitted).

"A police officer is personally involved in the use of excessive **[**18]** force if he 'directly participates in an assault, or was present during the assault with reasonable opportunity to intercede on plaintiff's behalf yet failed to do so.'" Mcrae v. City of Hudson, No. 1:14-cv-236, 2015 U.S. Dist. LEXIS 6979, 2015 WL 275867, *6 (N.D.N.Y. Jan. 21, 2015) (quoting Espada v. Schneider, 522 F. Supp. 2d 544, 555 (S.D.N.Y. 2007)).

> Under the latter theory, plaintiff must prove the use of excessive force by an individual and show that the defendant who allegedly failed to intervene: "1) possessed actual knowledge of the use ... of excessive force; 2) had a realistic opportunity to intervene and prevent the harm from occurring; and 3) nonetheless disregarded that risk by intentionally refusing or failing to take reasonable measures to end the use of excessive force."

*Id.* (quoting Lewis v. Mollette, 752 F. Supp. 2d 233, 244 (N.D.N.Y. 2010)).

Plaintiff's complaint does not assert that Defendant Slator kicked Plaintiff or had any physical interaction with Plaintiff other than formally arresting him. *See generally* Dkt. No. 5 at ¶¶ 10-24. While a defendant's presence may be sufficient to establish personal involvement where the plaintiff is unaware of who actually engaged in the use of excessive force, that is not the case here. See *LaPoint v. Vasiloff, No. 5:15-CV-185, 2017 U.S. Dist. LEXIS 35083, 2017 WL 976947, *5 (N.D.N.Y. Mar. 13, 2017)* (citing *De Michele v. City of New York, No. 09 Civ. 9334, 2012 U.S. Dist. LEXIS 136460, 2012 WL 4354763, *16-17 (S.D.N.Y. Sept. 24, 2012)*; *Snoussi v. Bivona, No. 05-cv-3133, 2010 U.S. Dist. LEXIS 110568, 2010 WL 3924255, *3 (E.D.N.Y. Feb. 17, 2010)*); *see also Mabb v. Town of Saugerties, No. 1:18-CV-866, 2020 U.S. Dist. LEXIS 5797, 2020 WL 210313, *3 (N.D.N.Y. Jan. 14, 2020)*. Rather, Plaintiff **[**19]** is aware of who kicked him and affirmatively asserts that it was Defendant Silverman. Dkt. No. 5 at ¶¶ 19-20. Thus, Defendant Slator's presence alone does not establish his personal involvement as he did not engage in the alleged use of force. *See Espada, 522 F. Supp. 2d at 555-56*.

Additionally, Plaintiff's complaint fails to sufficiently allege that Defendant Slator failed to intervene during the excessive use of force as he failed to put forth any facts establishing that Defendant Slator had a realistic opportunity to intervene and prevent Defendant Silverman from kicking **[*21]** Plaintiff. In *O'Neill*, the Second Circuit found that three blows in rapid succession did not leave the defendant a "realistic opportunity to attempt to prevent them." *O'Neill v. Krzeminski, 839 F.2d 9, 11 (2d Cir. 1988)*. Accordingly, the Second Circuit found that there "was not an episode of sufficient duration to support a conclusion that an officer who stood by without trying to assist the victim became a tacit collaborator." *Id. at 11-12*.

Plaintiff alleges only that Defendant Silverman kicked him once and that he was then taken to the hospital in an ambulance. *See* Dkt. No. 5 at ¶¶ 15-20, 24, 26. Like *O'Neill*, Plaintiff has not alleged an episode of sufficient duration for Defendant Slator to have intervened. **[**20]** Without more, the Court cannot find that Plaintiff has pled a plausible claim of excessive force against Defendant Slator. *See Espada, 522 F. Supp. 2d at 556* ("[I]t is clear that Miranda would not have had a reasonable opportunity to intercede during such a brief and spontaneous assault, and thus could not be liable for excessive force"). Therefore, the City Defendants' motion to dismiss Plaintiff's excessive force/failure to intervene claim against Defendant Slator is granted.

***4. Failure to Intervene Claims against Defendant Clark***

Plaintiff asserts that Defendant Clark failed to intervene during the use of excessive force against him. Dkt. No. 5 at ¶ 69. The City Defendants have moved to dismiss this claim as Plaintiff's complaint has failed to allege that Defendant Clark was present during Plaintiff's arrest, let alone during the alleged use of excessive force. Dkt. No. 18 at 17. Plaintiff does not oppose this assertion but has requested that if the Court determines that Plaintiff has failed to adequately plead that Defendant Clark failed to intervene, that it dismiss Plaintiff's claim without prejudice so that Plaintiff may later assert these claims if he learns of facts through discovery establishing Defendant **[**21]** Clark's presence during the use of excessive force. Dkt. No. 31 at 14.

Indeed, Plaintiff's complaint fails to assert any facts regarding Defendant Clark during the use of excessive force. *See* Dkt. No. 5 at ¶¶ 10-22. As Plaintiff has failed to allege that Defendant Clark was present at the scene during the use of excessive force, or at any point prior to his transportation to Oneida Healthcare, Plaintiff has failed to plead a claim for failure to intervene against Defendant Clark. *See Mcrae, 2015 U.S. Dist. LEXIS 6979, 2015 WL 275867, at *7* (dismissing the plaintiff's claim where there was no allegation that the defendant was present for the assault or had knowledge that the plaintiff was at risk of harm).

"Although Plaintiff has failed to state a cause of action with respect to the claims outlined above, because the Court cannot definitively conclude that Plaintiff is unable to state a cause of action with respect to at least some of those claims, the dismissal is without prejudice." *Bryant v. Ciminelli, 267 F. Supp. 3d 467, 479-80 (W.D.N.Y. 2017)*. Thus, Plaintiff's claim for failure to intervene during the use of force against Defendant Clark is dismissed without prejudice and the City Defendants' motion to dismiss this claim is granted.

**C. Deliberate Indifference**

Defendants assert that Plaintiff's dislocated **[**22]** knee is not a serious medical need and because Plaintiff concedes that he was immediately brought to Oneida Healthcare, there can be no finding of deliberate indifference. Dkt. No. 18 at 9-12; Dkt. No. 30-6 at 14-16. The County Defendants also assert that Plaintiff has failed to allege personal involvement of Defendant

Silverman. Dkt. No. 30-6 at 13. The City Defendants' **[*22]** motion to dismiss is denied and the County Defendants' motion for judgment on the pleadings is granted.

***1. Deliberate Indifference Claim***

"The *Due Process Clause* ... does require the responsible government or governmental agency to provide medical care to persons . . . who have been injured while being apprehended by the police." *City of Revere v. Massachusetts Gen. Hosp., 463 U.S. 239, 244, 103 S. Ct. 2979, 77 L. Ed. 2d 605 (1983)*. "In fact, the due process rights of a person in [the arrestee's] situation are at least as great as the *Eighth Amendment* protections available to a convicted prisoner." *Id.* (citing *Bell v. Wolfish, 441 U.S. 520, 535, n. 16, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979)*). An arrestee's constitutional guarantees are satisfied where he is "taken promptly to a hospital that provided the treatment necessary for his injury." *Id. at 245*. A plaintiff's claims for deliberate indifference to a serious medical need are governed by the same standard as a pretrial detainee when their claim arises from their arrest. *See Maldonado v. Town of Greenburgh, 460 F. Supp. 3d 382, 394-95 (S.D.N.Y. 2020)*.

As Plaintiff **[**23]** was a pretrial detainee at the time of the incidents addressed in the complaint, Plaintiff's claims are governed by the *Due Process Clause of the Fourteenth Amendment*, rather than the *Cruel and Unusual Punishments Clause of the Eighth Amendment*. *See Yancey v. Robertson, 828 Fed. Appx 801, 803 (2d Cir. 2020)* (citing *Darnell v. Pineiro, 849 F.3d 17, 29 (2d Cir. 2017)*). "This, in turn, requires a two-step inquiry. ... First, the plaintiff must satisfy the 'objective prong' by showing a sufficiently serious need. ... Second, the plaintiff must meet the 'subjective prong' which requires the officer to have acted with 'deliberate indifference' to the challenged condition." *Id.* (citing *Darnell, 849 F.3d at 29*) (international citations omitted). However, a claim for "'deliberate indifference' does not require proof of 'a malicious or callous state of mind' and is instead akin to recklessness, requiring a plaintiff to show that the official knew or should have known of the excessive risk to the plaintiff's health." *Id. at 803, n.2*.

***a. The Objective Prong***

The objective prong requires "that the alleged deprivation of medical treatment is, in objective terms, 'sufficiently serious'—that is, the prisoner must prove that his medical need was 'a condition of urgency, one that may produce death, degeneration, or extreme pain.'" *Johnson v. Wright, 412 F.3d 398, 403 (2d Cir. 2005)* (quoting *Hemmings v. Gorczyk, 134 F.3d 104, 108 (2d Cir. 1998)*). To determine whether inadequate care is "sufficiently serious," a court must "examine how the offending conduct **[**24]** is inadequate and what harm, if any, the inadequacy has caused or will likely cause the prisoner." *Salahuddin v. Goord, 467 F.3d 263, 280 (2d Cir. 2006)*. Where a plaintiff alleges that inadequate care was provided—instead of alleging a failure to provide any treatment—the inquiry focuses on "the particular risk of harm faced by a prisoner due to the challenged deprivation of care, rather than the severity of the prisoner's underlying medical condition, considered in the abstract." *Smith v. Carpenter, 316 F.3d 178, 186 (2d Cir. 2003)*; *see also Ray v. Zamilus, No. 13-CV-2201, 2017 U.S. Dist. LEXIS 158957, 2017 WL 4329722, *8 (S.D.N.Y. Sept. 27, 2017)* (finding that where a "plaintiff suffered from a delay in treatment, rather than a complete lack of treatment, the objective element must be satisfied by harm that resulted from the delay").

**[*23]** Courts outside of the Second Circuit have found that dislocated joints are serious medical conditions. *Petrichko v. Kurtz, 117 F. Supp. 2d 467, 470 (E.D. Pa. 2000)* ("Is a dislocated shoulder a serious medical need? I conclude that it is. A dislocated shoulder undisputably causes great pain, and the evidence—including records showing that plaintiff's work activities were restricted because of the dislocated shoulder—indicates that a dislocated shoulder can lead to permanent disability"); *Sanders v. Wexford Health Sources, Inc., No. 1:07-cv-1100, 2009 U.S. Dist. LEXIS 88893, 2009 WL 3152864, *9 (C.D. Ill. Sept. 25, 2009)* ("[P]laintiff's chronically dislocating right shoulder does constitute a **[**25]** serious medical need"); *Von Haney v. Cross, No. 2:18-CV-1836, 2019 U.S. Dist. LEXIS 23776, 2019 WL 586620, *3 (E.D. Cal. Feb. 13, 2019)* (accepting the plaintiff's dislocated knee cap as a serious medical condition when examining the plaintiff's motion to proceed *in forma pauperis*); *Plaster v. Kneal, No. 3:06CV1655, 2009 U.S. Dist. LEXIS 70310, 2009 WL 2475037, *15 (M.D. Pa. Aug. 11, 2009)* (finding that the plaintiff's knee injury was a serious medical condition).

It is clear that where a dislocated joint causes "extreme pain," the injury constitutes a serious medical need. *Johnson, 412 F.3d at 403*. Even minor tooth cavities have been found to be serious medical conditions where

the plaintiff experienced further tooth decay and chronic pain. *See* Chance v. Armstrong, 143 F.3d 698, 703 (2d Cir. 1998) (citing Fields v. Gander, 734 F.2d 1313, 1314-15 (8th Cir. 1984); Boyd v. Knox, 47 F.3d 966, 969 (8th Cir. 1995); Hunt v. Dental Dep't, 865 F.2d 198, 200 (9th Cir. 1989); Dean v. Coughlin, 623 F. Supp. 392, 404 (S.D.N.Y. 1985)).

Plaintiff alleges that when Defendant Silverman kicked him, Defendant Silverman dislocated his knee and caused it to swell and become very painful. Dkt. No. 5 at ¶¶ 19-20. Plaintiff claims that he was in so much pain he could not stand, get himself to a toilet, and twice defecated on himself. *Id.* at ¶¶ 29-30. In *Hathaway*, the Second Circuit held that a prisoner's hip pain due to broken pins and arthritis was a sufficiently serious medical condition as the plaintiff "continued to experience great pain over an extended period of time and had difficulty walking." Hathaway v. Coughlin, 37 F.3d 63, 65, 67 (2d Cir. 1994). Plaintiff's allegations in the complaint set forth a plausible claim **[**26]** that his dislocated knee was a serious medical condition.

Plaintiff acknowledges that Defendants Slator, Clark, and Silverman brought Plaintiff to Oneida Healthcare for treatment for his knee. Dkt. No. 5 at ¶¶ 24, 26. Plaintiff was, however, discharged with instructions to seek care at Upstate Emergency Department because Oneida Healthcare did not provide orthopedic services. *Id.* at ¶ 27. Rather than bring Plaintiff to the Upstate Emergency Department, Defendants Slator and Clark placed him in a cell at the Oneida City Police Station. *Id.* at ¶ 28. Defendants assert that they fulfilled their obligations to get Plaintiff care by bringing him to Upstate Emergency Department and make no comment as to why they failed to bring Plaintiff to Oneida Healthcare. Dkt. No. 18-1 at 12.

The Supreme Court has held that an arrestee's constitutional guarantees pursuant to the Due Process Clause are generally satisfied where he is "taken promptly to a hospital that provided the treatment necessary for his injury." City of Revere, 463 U.S. at 244-45. However, Plaintiff claims that while he was brought to the hospital, he did not receive treatment. Dkt. No. 5 at ¶ 27. Rather, the hospital was unable to treat him and told him to go to another hospital that **[**27]** could. *Id.* Plaintiff asserts that his condition only worsened after being discharged and he received no further treatment. *Id.* at ¶¶ 29-30. A plaintiff's claims **[*24]** that prison officials failed to follow discharge instructions of a physician to schedule further medical care for the plaintiff are sufficient to establish a claim for deliberate indifference. Lugo v. Senkowski, 114 F. Supp. 2d 111, 116 (N.D.N.Y. 2000).

As Plaintiff has alleged that he suffered a dislocated joint causing such extreme pain that it affected his activities of daily life and required multiple surgeries, and that the deprivation of care rendered him immobile, he has plausibly alleged a sufficiently serious medical need.

***b. The Mental Element***

"After *Darnell*, 'deliberate indifference' is now 'defined objectively,' and the 'Due Process Clause can be violated when an official does not have subjective awareness that the official's acts (or omissions) have subjected the pretrial detainee to a substantial risk of serious harm.'" Lloyd v. City of New York, 246 F. Supp. 3d 704, 719 (S.D.N.Y. 2017) (quoting Darnell, 849 F.3d at 35). A pretrial detainee suing for deliberate indifference under the Fourteenth Amendment "is required to show only that the prison official acted with objective recklessness, or that the defendant 'knew or should have known' that 'an excessive risk to health or safety' would result." **[**28]** Grimmett v. Corizon Med. Assocs. of New York, No. 15-CV-7351, 2017 U.S. Dist. LEXIS 79794, 2017 WL 2274485, *4 (S.D.N.Y. May 24, 2017) (quoting Darnell, 849 F.3d at 35).

"Prison officials are deliberately indifferent to an inmate's health, and thus have a sufficiently culpable state of mind, when they 'act or fail to act while actually aware of a substantial risk that serious inmate harm will result.'" McFadden v. Noeth, 827 Fed. Appx. 20, 27 (2d Cir. 2020) (quoting Salahuddin v. Goord, 467 F.3d 263, 280 (2d Cir. 2006)).

Prolonged pain may constitute serious harm. *See* Brock v. Wright, 315 F.3d 158, 163 (2d Cir. 2003). "'[T]he Eighth Amendment forbids not only deprivations of medical care that produce physical torture and lingering death, but also less serious denials which cause or perpetuate pain.'" *Id.* (quoting Todaro v. Ward, 565 F.2d 48, 52 (2d Cir.1977)). Thus, claims that prison officials denied a plaintiff treatment for pain which caused "continuous, significant pain unnecessarily, and led to a needlessly prolonged period of delay in Plaintiff's receipt of medical treatment" are sufficient to satisfy the subjective prong of deliberate indifference. Robinson v. Knibbs, No. 16-CV-3826, 2017 U.S. Dist. LEXIS 131629, 2017 WL 3578700, *6 (S.D.N.Y. Aug. 17, 2017). Therefore, under the Darnell standard, officers

act with the requisite mental element for deliberate indifference where they deny the plaintiff medical treatment and knew or should have known that it would unnecessarily prolong the plaintiff's pain. *See id.*

Plaintiff claims that Defendants Slator, Clark, and Silverman took him to Oneida Healthcare, and upon discharge, he was instructed to go to the **[**29]** Upstate Emergency Department but was instead taken to the Oneida City Police Station. Dkt. No. 5 at ¶¶ 27-28. Plaintiff claims that Defendants were in possession of his discharge instructions. *Id.* at ¶ 27. Further, Defendant Clark was aware that Plaintiff's pain rendered him immobile and that he twice defecated himself. *Id.* at ¶¶ 29-31.

Plaintiff's claims are sufficient to establish that Defendants Slator and Clark denied Plaintiff medical treatment and knew or should have known that it would unnecessarily prolong his pain. Plaintiff has therefore pled a plausible claim for deliberate indifference. The City Defendants' motion to dismiss this claim is denied.

***2. Personal Involvement of Defendant Silverman***

The County Defendants assert that Plaintiff's claims against Defendant **[*25]** Silverman must be dismissed because Plaintiff failed to allege that Defendant Silverman had any further involvement in Plaintiff's arrest after he was brought to Oneida Healthcare. Dkt. No. 30-6 at 13-14. Further, the Oneida City Police Department had complete decision-making authority regarding Plaintiff's medical care as he was arrested, taken into custody, held, and charged by the Oneida City Police, not the Madison **[**30]** County Sheriff's Department. *Id.* at 14. Therefore, Plaintiff failed to allege that Deputy Silverman directly participated in the constitutional violation. *Id.*

"It is well settled in this Circuit that 'personal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under *§ 1983*.'" *Wright v. Smith, 21 F.3d 496, 501 (2d Cir. 1994)* (quoting *Moffitt v. Town of Brookfield, 950 F.2d 880, 885 (2d Cir. 1991)*. Thus, a plaintiff must plead "direct participation, or failure to remedy the alleged wrong after learning of it, or creation of a policy or custom under which unconstitutional practices occurred, or gross negligence in managing subordinates" by the Defendant. *Black v. Coughlin, 76 F.3d 72, 74 (2d Cir. 1996)*. In *Tangreti v. Bachmann, 983 F.3d 609 (2d Cir. 2020)*, the Second Circuit clarified that there is no special test for liability of supervisors but that "'a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution.'" *Id. at 616* (quoting *Iqbal, 556 U.S. at 676*).

Plaintiff asserts that he was arrested by Defendant Slator, and then that Defendants Silverman, Clark, and Slator transported him to Oneida Healthcare via ambulance for his knee injury. Dkt. No. 5 at ¶¶ 14, 24, 26. Plaintiff claims that he was taken to Oneida City Police Station upon discharge. *Id.* at ¶ 28. Plaintiff does not allege who transported **[**31]** him to the Oneida City Police Station rather than to the Upstate Emergency Department. *See id.* at ¶¶ 23-35. Plaintiff asserts that claiming that Defendant Silverman was present when he was taken to Oneida Healthcare is sufficient to show deliberate indifference. Dkt. No. 32 at 7. Plaintiff is incorrect.

Plaintiff argues that Defendants acted deliberately indifferent to Plaintiff's serious medical need when they failed to bring him to the Upstate Emergency Department as they were instructed by Oneida Healthcare. Dkt. No. 5 at ¶¶ 27-34. Plaintiff does not assert any facts demonstrating that Defendant Silverman was present when Plaintiff was discharged from Oneida Healthcare or that he was directly involved in the failure to transfer Plaintiff. Following Plaintiff's discharge, the complaint establishes that Plaintiff was within the custody of the City Defendants as he was arrested by Defendant Slator and placed in a cell at the Oneida Police Station. *Id.* at ¶ 28. Further, the charges that Plaintiff complains of were brought by Defendant Clark of the Oneida Police Department. Dkt. No. 5-1 at 2.

The only point at which Plaintiff asserts that Defendant Silverman was present was when Plaintiff **[**32]** was immediately provided medical attention. Dkt. No. 5 at ¶ 26. Plaintiff has thus failed to establish Defendant's Silverman's personal involvement by failing to claim that he was a direct participant in the allege constitutional violation. The County Defendants' motion for judgment on the pleadings is therefore granted.

***3. Failure to Intervene***

"A law enforcement officer has an affirmative duty to intercede on the behalf of a citizen whose constitutional **[*26]** rights are being violated in his presence by other officers." *O'Neill, 839 F.2d at 11* (citations omitted). "An

officer who fails to intercede is liable for the preventable harm caused by the actions of the other officers where that officer observes or has reason to know: (1) that excessive force is being used, ... (2) that a citizen has been unjustifiably arrested, ... or (3) that any constitutional violation has been committed by a law enforcement official." *Anderson v. Branen, 17 F.3d 552, 557 (2d Cir. 1994)* (internal citations omitted). "In order for liability to attach, there must have been a realistic opportunity to intervene to prevent the harm from occurring." *Id.* (citing *O'Neill, 839 F.2d at 11-12*). "Whether an officer had sufficient time to intercede or was capable of preventing the harm being caused by another officer is **[**33]** an issue of fact for the jury unless, considering all the evidence, a reasonable jury could not possibly conclude otherwise." *Id.* (citing *O'Neill, 839 F.2d at 11-12*).

Plaintiff has failed to allege any facts demonstrating that Defendant Silverman knew or should have known that Plaintiff's constitutional rights were being violated when he was not taken to the Upstate Emergency Department. Plaintiff has failed to allege that Defendant Silverman was present when he was discharged or transported from Oneida Healthcare to the Oneida Police Station. Additionally, Plaintiff does not allege that Defendant Silverman was capable of transporting him to the Upstate Emergency Department when the City Defendants transported him to the Oneida Police Department. Plaintiff has thus failed to allege that Defendant Silverman observed the constitutional violation or that he had an opportunity to intervene. Plaintiff's claim against Defendant Silverman for failing to intervene is dismissed and the County Defendants' motion for judgment on the pleadings is granted.

However, Plaintiff's complaint alleges sufficient facts to support that Defendants Slator and Clark failed to intervene during the alleged constitutional violation. Plaintiff **[**34]** claims that Defendants Slator, Clark, and Silverman transported him via ambulance to Oneida Healthcare. Dkt. No. 5 at ¶ 26. Plaintiff alleges that he was instructed to go to the Upstate Emergency Department and was discharged. *Id.* at ¶ 27. Rather than being brought to the Upstate Emergency Department, he was taken to the Oneida Police Station. *Id.* at ¶ 28. While at the Oneida Police Station, Plaintiff claims that Defendant Clark questioned him as he defecated on himself and that Plaintiff told Defendant Clark that he could not move. *Id.* at ¶ 31.

While Plaintiff's complaint does not allege how he was transported to the Oneida Police Station, the complaint alleges sufficient facts for the Court to infer that either Defendants Slator or Clark transported him to the Oneida Police Station. Finally, unlike Plaintiff's claims for excessive force, Plaintiff does not allege that either Defendant in particular acted with deliberate indifference by transporting Plaintiff to the Oneida Police Station rather than the Upstate Emergency Department. As such, Plaintiff is permitted to plead in the alternative that Defendants Clark and Slator failed to intervene in the alleged constitutional violation. **[**35]** *Matthews v. City of New York, 889 F. Supp. 2d 418, 444 (E.D.N.Y. 2012)* ("Because plaintiffs properly allege at least one constitutional violation, plaintiffs are entitled to discovery to determine which officers participated directly in the alleged constitutional violations and which officers were present and failed to intervene").

**[*27] D. Title II of the ADA**

The City Defendants assert that Plaintiff's ADA claims must be dismissed because Plaintiff has failed to allege a qualifying disability. Dkt. No. 18-1 at 12-15. Plaintiff argues that under the amended ADA, he has sufficiently pled a qualifying disability. Dkt. No. 31 at 9-13. The County Defendants assert that Plaintiff's ADA claims must be dismissed because individuals are not liable under the ADA and the ADA does not cover arrests. Dkt. No. 30-6 at 16-19.

Title II of the ADA provides in relevant part that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." *42 U.S.C. § 12132*. A "disability" is defined as a "physical or mental impairment that substantially limits one or more major life activities." *42 U.S.C. § 12102(1)(A)*. In general, plaintiffs **[**36]** who seek to state a claim for disability discrimination under the ADA must establish "that (1) they are 'qualified individuals' with a disability; (2) that the defendants are subject to the ADA; and (3) that plaintiffs were denied the opportunity to participate in or benefit from defendants' services, programs, or activities, or were otherwise discriminated against by defendants, by reason of plaintiffs' disabilities." *Henrietta D. v. Bloomberg, 331 F.3d 261, 272-73 (2d Cir. 2003)*.

"The purpose of [Title II of the ADA] is to 'eliminate discrimination on the basis of disability and to ensure evenhanded treatment between the disabled and able-

bodied.'" *Maccharulo v. New York State Dept. of Corr. Servs., No. 08 Civ. 301, 2010 U.S. Dist. LEXIS 73312, 2010 WL 2899751, *2 (S.D.N.Y. July 21, 2010)* (quoting *Doe v. Pfrommer, 148 F.3d 73, 82 (2d Cir. 1998)*). Under Title II of the ADA, a defendant discriminates when it fails to make a reasonable accommodation that would permit a qualified disabled individual "to have access to and take a meaningful part in public services." *Powell v. Nat'l Bd. of Med. Exam'rs, 364 F.3d 79, 85 (2d Cir. 2004)*, *opinion corrected on other grounds* at *511 F.3d 238 (2d Cir. 2004)*; *Disabled In Action v. Board of Elections of New York, 752 F.3d 189, 197 (2d Cir. 2014)* ("A public entity discriminates against a qualified individual with a disability when it fails to provide 'meaningful access' to its benefits, programs, or service'") (citation omitted).

The Supreme Court has held that state prisons "fall squarely within the statutory definition of 'public entity'" in Title II of the ADA, and state **[**37]** inmates may bring ADA claims. *Pennsylvania Department of Corrections v. Yeskey, 524 U.S. 206, 210, 118 S. Ct. 1952, 141 L. Ed. 2d 215 (1998)*; *see also Hilton v. Wright, 673 F.3d 120, 128 (2d Cir. 2012)* (DOCCS treated as a public entity under Title II of the ADA).

"A number of courts have considered whether interactions between law enforcement and disabled individuals—whether initiated by the disabled individual or the police and whether the interaction culminates in an arrest—are 'services, programs, or activities' subject to the requirement of accommodation under Title II of the ADA." *Williams v. City of New York, 121 F. Supp. 3d 354, 365 (S.D.N.Y. 2015)* (citations omitted). "Those courts have generally found that Title II applies, but the reasonableness of the accommodation required must be assessed in light of the totality of the circumstances of the particular case." *Id.*

There are two main scenarios in which an arrest made by an officer of a covered agency can violate Title II of the ADA. *See id. at 369*. First, failure to take **[*28]** account of a person's disability can result in "wrongful arrest, where police wrongly arrest someone with a disability because they misperceive the effects of that disability as criminal activity." *Id.* (citations omitted). Second, even where an arrest is appropriate, officers may fail to provide "reasonable accommodation, where ... they fail to reasonably accommodate the person's disability in **[**38]** the course of investigation or arrest, causing the person to suffer greater injury or indignity in that process than other arrestees." *Id.*

***1. Qualifying Disability***

Plaintiff asserts that the ADA has been amended to allow for a broader definition of disability and under this new, more lenient standard, Plaintiff has adequately pled a qualifying disability regarding his bipolar disorder and dislocated knee. Dkt. No. 31 at 9-13.

Foremost, *42 U.S.C. § 12102*, which defines disability within the meaning of the ADA, was last amended in 2008—almost 13 years ago. *See also Montague v. Nat'l Grid USA, No. 17-CV-3, 2020 U.S. Dist. LEXIS 217798, 2020 WL 6833418, *8 (W.D.N.Y. Nov. 20, 2020)*. While Defendants do present some caselaw under the previous standard, the large portion of their briefs cite to caselaw following 2009.

"Under the 2008 ADA Amendment Act, Pub. L. 110-325, 122 Stat. 3553 (2008), the intent of Congress was to make it easier for claimants to obtain protection under the ADA, *29 C.F.R. § 1630.1(c)(4)*." *Montague, 2020 U.S. Dist. LEXIS 217798, 2020 WL 6833418, at *8*. However, "[n]ot every impairment is a 'disability' within the meaning of the ADA." *Williams v. N.Y.C. Dep't of Educ., No. 18-CV-11621, 2020 U.S. Dist. LEXIS 32403, 2020 WL 906386, *4 (S.D.N.Y. Feb. 25, 2020)* (quoting *Capobianco v. City of New York, 422 F.3d 47, 56 (2d Cir. 2005)*). "[A] qualifying disability 'must limit a major life activity and the limitation must be substantial.'" *O'Hara v. Bd. of Coop. Educ. Servs., S. Westchester, No. 18-CV-8502, 2020 U.S. Dist. LEXIS 47210, 2020 WL 1244474, *12 (S.D.N.Y. Mar. 16, 2020)*.

"To successfully plead a qualifying disability under the ADA, a plaintiff 'must allege which major life activity or activities their impairment substantially affects.'" *Langella v. Mahopac Cent. Sch. Dist., No. 18-CV-10023, 2020 U.S. Dist. LEXIS 95588, 2020 WL 2836760, *9 (S.D.N.Y. May 31, 2020)* (quoting ***[**39]*** *Laface v. E. Suffolk BOCES, No. 2:18-cv-1314, 2020 U.S. Dist. LEXIS 85343, 2020 WL 2489774, *10 (E.D.N.Y. May 18, 2020)*). "[M]ajor life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working." *42 U.S.C. § 12102(2)(A)*. "The term '[s]ubstantially limits' is not meant to be a demanding standard,' but it is 'well-established that an impairment does not significantly restrict a major life activity if it results only in mild limitations." *Collins v. Giving Back Fund, No. 18 Civ. 8812, 2019 U.S. Dist.*

LEXIS 132088, 2019 WL 3564578, *13 (S.D.N.Y. Aug. 6, 2019) (quoting Whalley v. Reliance Grp. Holdings, Inc., No. 97 Civ. 4018, 2001 U.S. Dist. LEXIS 427, 2001 WL 55726, *4 (S.D.N.Y. Jan. 22, 2001)).

***a. Plaintiff's bipolar disorder***

"'Bipolar Affective Disorder has been recognized as a disability under the ADA.'" Mercado v. Dep't of Corr., No. 3:16-CV-1622, 2018 U.S. Dist. LEXIS 87681, 2018 WL 2390139, *10 (D. Conn. May 25, 2018) (quoting Glowacki v. Buffalo Gen. Hosp., 2 F. Supp. 2d 346, 351 (W.D.N.Y. 1998)). However, "[t]he ADA requires an 'individualized assessment' which prevents the Court from determining that Plaintiff is disabled solely on the basis of his diagnosis." *Id.* (citing 28 C.F.R. § 35.108(d)(1)(vi)). Additionally, "'whether an impairment substantially limits a major life activity [must] be made **[*29]** without regard to the ameliorative effects of mitigating measures' such as medication, psychotherapy, or behavioral therapy." *Id.* (quoting 28 C.F.R. §§ 35.108(d)(1)(viii), 35.108(d)(4)) (alterations in original).

A plaintiff sufficiently pleads an ADA-protected disability **[**40]** where he has "plausibly alleged that the symptoms of his bipolar disorder, when active, substantially limit multiple major life activities. Moreover, even if [the plaintiff's] impairment w[as] merely temporary, it would not be '*per se* unprotected under the ADA.'" Robles v. Medisys Health Network, Inc., No. 19-CV-6651, 2020 U.S. Dist. LEXIS 109115, 2020 WL 3403191, *8 (E.D.N.Y. June 19, 2020) (quoting Adams v. Citizens Advice Bureau, 187 F.3d 315, 317 (2d Cir. 1999)).

Plaintiff's complaint alleges that he was diagnosed with and has received social security disability for bipolar depression and attention deficit disorder since 2014. Dkt. No. 5 at ¶ 37. Additionally, he is prescribed a "multitude of prescription medications" and without such medications he became an emotionally disturbed person on March 15, 2020, leading to his arrest. *Id.* at ¶¶ 38-39. Specifically, Plaintiff claims that without his medication, he suffered a psychotic episode and began running in the street and obstructing traffic. *Id.* at ¶ 10. Finally, Plaintiff claims that his bipolar disorder has "substantial[ly] impaired major life activities." *Id.* at ¶ 40.

By alleging that he becomes significantly mentally disturbed when his bipolar disorder is left untreated, Plaintiff has sufficiently pled a qualifying disability under the ADA. *See* Mercado, 2018 U.S. Dist. LEXIS 87681, 2018 WL 2390139, at *10 (holding that the plaintiff's bipolar disorder substantially affected major **[**41]** life activities where he "'demonstrated behavioral regressions, including threatening and intimidating staff'" when off of his medication); Robles, 2020 U.S. Dist. LEXIS 109115, 2020 WL 3403191, at *7 (holding that the plaintiff alleged sufficient facts to make a plausible claim that he had a qualifying disability where he suffered significant mental disturbances requiring hospitalization when not using his medication).

***b. Plaintiff's dislocated knee***

Defendants assert that Plaintiff's dislocated knee is not a qualifying disability as it was merely temporary. Dkt. No. 18 at 14-15. "Indeed, injuries of longer duration are routinely found to be transitory for purposes of assessing ADA claims." Pitter v. Target Corp., No. 1:20-CV-183, 2020 U.S. Dist. LEXIS 244420, 2020 WL 8474858, *11 (N.D.N.Y. Sept. 1, 2020) (citing Guary v. Upstate Nat'l Bank, 618 F. Supp. 2d 272, 275 (W.D.N.Y. 2009)). However, "even if [the plaintiff's] impairment[s] were merely temporary, it would not be '*per se* unprotected under the ADA.'" Robles, 2020 U.S. Dist. LEXIS 109115, 2020 WL 3403191, at *8 (quoting Adams, 187 F.3d at 317).

Courts have found that broken bones which resolved within relatively short periods of time are not ADA-qualifying disabilities. Guary, 618 F. Supp. 2d at 275 ("[P]laintiff's broken ankle, which resulted in a single, twelve-week disability leave with no alleged physical limitations thereafter, is not a disability for purposes of the ADA or the parallel New York statute"). However, even a broken bone **[**42]** may be sufficient to establish an ADA-qualified disability where a plaintiff alleges that it "impeded his ability to perform major life functions." Poulos v. City of New York, No. 14CV3023, 2015 U.S. Dist. LEXIS 131562, 2015 WL 5707496, *9 (S.D.N.Y. Sept. 29, 2015) (finding plaintiff's broken jaw to be an ADA-qualified disability).

Unlike Guary, there are no allegations in the complaint that Plaintiff's dislocated knee resolved quickly and without further complications. Additionally, Defendants **[*30]** present no evidence to support this assertion and merely assert—without any case law directly on point—that a dislocated knee *per se* cannot be an ADA-qualifying disability. Further, Plaintiff presents evidence that his dislocated knee inhibited his activities of daily life such that he could not walk, and, and twice

defecated on himself. Dkt. No. 5 at ¶¶ 29-30. Plaintiff also asserts that he required multiple surgeries to resolve his injury. *Id.* at ¶ 22. However, the Court need not decide this issue now as plaintiff has failed to plead any accommodation that should have been provided him and that it would have been reasonable. *See* Gilbert v. Frank, 949 F.2d 637, 642 (2d Cir. 1991) (holding that a court need not examine whether an individual had a qualifying disability where they have not established that a reasonable accommodation existed and thus a *prima* ***[**43]*** *facie* case).

More fundamentally, however, Plaintiff's ADA claims relating to his knee injury must be dismissed because he "has not adequately pleaded that he was denied the opportunity for medical treatment by reasons of his" injured knee. *See* Schnauder v. Gibens, 679 Fed. Appx. 8, 11 (2d Cir. 2017) (citing Wright, 831 F.3d at 72). Any argument that the denial of timely and meaningful medical treatment for his knee constituted a failure to provide a reasonable accommodation fails because his injured knee "was not the reason he was unable to access medical services; rather, it was the reason he sought such services." *Id.*; *see also* Tardif v. City of New York, 991 F.3d 394, 405 (2d Cir. 2021) ("At its core, the issue here is not whether Tardif was denied medical services *because* she has a disability. Instead, her claim relates solely to whether she received adequate medical treatment in police custody *for* her disability, and such a claim is not cognizable under the ADA. To hold otherwise would allow inmates to litigate in federal court virtually every medical malpractice claim arising in a custodial setting under the auspices of the ADA") (emphasis in original);[6] Bryant v. Madigan, 84 F.3d 246, 249 (7th Cir. 1996) ("[T]he Act would not be violated by a prison's simply failing to attend to the medical needs of its disabled prisoners. ... The ADA does not create a remedy for **[**44]** medical malpractice"). Accordingly, the Court grants Defendants' motions insofar as they seek dismissal of Plaintiff's ADA claims relating to his knee injury.

***2. Services, Benefits, or Programs***

In their motion, the County Defendants first contend that arrests are not covered by the ADA because an arrest is not a "program, service or activity" from which a disabled person could be excluded or otherwise denied a benefit. *See* Dkt. No. 30-6 at 15-19. The County Defendants acknowledge that some district courts and out-of-circuit caselaw have concluded that interactions between law enforcement and disabled individuals are subject to the protections of the ADA but argue that these cases are distinguishable from the present matter. *See id.* In response, Plaintiff contends that the cases upon which the County Defendants rely are outdated and cites to cases that have found that Title II of **[*31]** the ADA applies to arrests. *See* Dkt. No. 32 at 9-13.

As discussed above, to allege a violation of Title II of the ADA, a plaintiff must allege (1) that he was a "qualified individual" with a disability; (2) that the defendant is subject to the ADA; and (3) that the plaintiff was denied the opportunity **[**45]** to participate in or benefit from the defendant's services, programs, or activities, or was otherwise discriminated against by the defendant by reason of his disability. *See Disabled in Action v. Bd. of Elections in City of New York, 752 F.3d 189, 196-97 (2d Cir. 2014)* (citing McElwee v. Cnty. of Orange, 700 F.3d 635, 640 (2d Cir. 2012)).

Although the Second Circuit has not addressed whether interactions between law enforcement and disabled individuals are subject to the protections of the ADA, several district courts have addressed the issue. In Williams v. City of New York, 121 F. Supp. 3d 354, 364-365 (S.D.N.Y. 2015), that district court held that the ADA does govern "on-the-street encounters" between police and covered individuals, concluding that "the City's crabbed interpretation of Title II's coverage of police activity simply does not comport with the language of Title II and its implementing regulations, particularly in light of the remedial purpose of the statute and the weight of authority that has considered the issue." The *Williams* court reasoned that

> "Congress enacted Title II against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights" and "a pattern of unequal treatment" in a wide range of public services and activities "in the administration of justice." Lane, 541 U.S. at 524-25, 124 S. Ct. 1978, 158 L. Ed. 2d 820. The Department of Justice's implementing **[**46]** regulations for the ADA make

[6] In *Tardif*, the Second Circuit noted that its holding "does not leave pretrial detainees, such as Tardif, without a remedy; rather, such a claim for denial of medical treatment can be pursued under 42 U.S.C. § 1983, as a due process claim under a deliberate indifference standard (as Tardif alternatively asserted in her complaint)." Tardif, 991 F.3d at 405, n.9. As in *Tardif*, Plaintiff has alleged a deliberate indifference claim regarding the denial of medical treatment for his knee injury.

clear that, with exceptions not relevant here, Title II of the ADA "applies to all services, programs, and activities provided or made available by public entities," 28 C.F.R. § 35.102(a), and requires public entities to make "reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability," unless the required modification would fundamentally alter the nature of the service, program, or activity, 28 C.F.R. § 35.130(b)(7). The phrase "services, programs, or activities" is "a catch-all phrase" that prohibits all discrimination by a public entity. Noel v. N.Y.C. Taxi & Limousine Comm'n, 687 F.3d 63, 69 (2d Cir. 2012) (quoting Innovative Health Sys., Inc. v. City of White Plains, 117 F.3d 37, 45 (2d Cir. 1997), *recognized as superseded on other grounds,* Zervos v. Verizon N.Y., Inc., 252 F.3d 163, 171 n.7 (2d Cir. 2001)). As the Second Circuit has explained, the ADA should be "broadly construed to effectuate its purpose of providing a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." Id. at 68 (quotation marks and citation omitted).

A number of courts have considered whether interactions between law enforcement and disabled individuals—whether initiated by the disabled individual or the police and whether the interaction culminates in an arrest—are "services, programs, or activities" **[**47]** subject to the requirement of accommodation under Title II of the ADA. Those courts have generally found that Title II applies, but the reasonableness of the accommodation required must be assessed in light of the totality of the circumstances of the particular case.

**[*32]** Williams, 121 F. Supp. 3d at 365-66 (citing *Sheehan v. City & Cnty. of San Francisco, 743 F.3d 1211, 1232 (9th Cir. 2014)*, reversed in part on other grounds, 575 U.S. 600, 135 S. Ct. 1765, 191 L. Ed. 2d 856 (2015); Waller ex rel. Estate of Hunt v. Danville, Va., 556 F.3d 171, 175 (4th Cir. 2009); Bircoll v. Miami-Dade Cnty., 480 F.3d 1072, 1085-86 (11th Cir. 2007); Hainze v. Richards, 207 F.3d 795, 802 (5th Cir. 2000); Gohier v. Enright, 186 F.3d 1216 (10th Cir. 1999).

The *Williams* court went on to conclude that there are "at least two types of Title II claims applicable to arrests," including "(1) wrongful arrest, where police wrongly arrest someone with a disability because they misperceive the effects of that disability as criminal activity; and (2) reasonable accommodation, where, although police properly investigate and arrest a person with a disability for a crime unrelated to that disability, they fail to reasonably accommodate the person's disability in the course of investigation or arrest, causing the person to suffer greater injury or indignity in that process than other arrestees." Id. at 369 (quoting *Sheehan, 743 F.3d at 1232*). The court found that "[t]he only reasonable interpretation of Title II is that law enforcement officers who are acting in an investigative or custodial capacity are performing 'services, programs, or activities' within the scope **[**48]** of Title II." Id. at 368. Other courts in this Circuit have similarly concluded that Title II applies to arrests and investigative activities. *See* Reyes v. Town of Thomaston, No. 3:18-cv-831, 2020 U.S. Dist. LEXIS 181331, 2020 WL 5849529, *3-4 & n.1 (D. Conn. Sept. 30, 2020); Sage v. City of Winooski, No. 2:16-cv-116, 2017 U.S. Dist. LEXIS 43467, 2017 WL 1100882, *3-4 (D. Vt. Mar. 22, 2017). The Court agrees with these cases and finds that Title II of the ADA requires police officers to provide reasonable accommodations to arrestees and that any threatening or exigent circumstances should be considered when determining the reasonableness of the proposed accommodation.

Defendants further contend that the ADA claims must be dismissed because "Plaintiff was treated no differently than any other arrestee who is angry, resisting, spitting and yelling." Dkt. No. 30-6 at 18. Defendants argue that "Plaintiff's disability was simply irrelevant to the arrest. Plaintiff's behavior, which was caused by his own failure to take his medication, resulted in the arrest and having to get him under control. Plaintiff certainly never requested any accommodation, and it is far from clear and completely unfair now to try and determine in hindsight what accommodation would have been appropriate." *Id.* The Court disagrees.

In his complaint, Plaintiff alleges that he has **[**49]** a history of mental illness and that, on the day in question, he "was having a psychotic episode and as a result was yelling in the roadway of Lenox Avenue, Oneida, New York and was obstructing traffic." Dkt. No. 5 at ¶ 10. Further, Plaintiff claims that he was clearly exhibiting signs of an emotionally disturbed person when Defendants Slator and Silverman arrived on the scene. *See id.* at ¶ 13. The complaint alleges that, instead of placing Plaintiff in handcuffs, informing him that he was under arrest, and subsequently kicking him in the knee, Defendants Silverman and Slator should have used de-escalation techniques. *See id.* at ¶¶ 18, 42, 72-73.

In Sage v. City of Winooski, No. 2:16-cv-116, 2017 U.S. Dist. LEXIS 43467, 2017 WL 1100882 (D. Vt. Mar. 22, 2017), the defendant police officers responded to a report of a person trespassing at a local health club. *See* 2017 U.S. Dist. LEXIS 43467, [WL] at *1. When the officers arrived, they were informed by the health club employees that the plaintiff had left the property at their request, but still asked the officers to serve the plaintiff with a notice of trespass. **[*33]** *See id.* When the officers located the plaintiff and asked to see his identification, the plaintiff responded that they should already know him as a resident of Allen House, which **[**50]** is a group home operated for persons with chronic and persistent serious mental illness. *See id.* When the plaintiff declined to provided identification, one of the officers asked the plaintiff if he preferred to be arrested and proceeded to open a handcuff case. *See id.* Seeing the handcuff case, the plaintiff struck the officer in the face. *See id.* When the other responding officer attempted to grab the plaintiff, he was able to break away from his grasp. *See id.* At this point, the officers deployed their tasers on the plaintiff. *See id.* While the plaintiff was "flailing" on the ground, one of the officers fired his service weapon, hitting the plaintiff in the leg. *See id.*

In his complaint, the plaintiff asserted five causes of action, including a claim for failure to provide reasonable accommodations in violation of the ADA. *See* 2017 U.S. Dist. LEXIS 43467, [WL] at *2. The defendants moved to dismiss the ADA claim, arguing that the statute does not apply to police interactions and that, even assuming it does apply, the claim should still be dismissed because the plaintiff presented a direct threat to the police officers. *See* 2017 U.S. Dist. LEXIS 43467, [WL] at *3. Denying the motion to dismiss, the court first agreed with the majority position and found that **[**51]** the ADA applies to police interactions like the one at issue. *See id.* Second, the court found that the plaintiff's "violent behavior could arguably have been avoided if the officers had acknowledged and accommodated [the plaintiff's] mental illness." 2017 U.S. Dist. LEXIS 43467, [WL] at *4. The court also rejected the defendants' argument that the ADA claim must be dismissed because the plaintiff never made a demand for accommodations, noting that the Second Circuit has specifically held that reasonable accommodations are required if the disability is obvious. *See id.* (citing Brady v. Wal-Mart Stores, Inc., 531 F.3d 127, 135 (2d Cir. 2008)).

In *Sheehan*, a mentally-ill person was threatening police with a knife. *See Sheehan, 743 F.3d at 1216*. The court explained that while the plaintiff bore "the initial burden of producing evidence of the existence of a reasonable accommodation," she had met her burden at the motion to dismiss stage by asserting that "the officers should have respected her comfort zone, engaged in non-threatening communications and used the passage of time to defuse the situation rather than precipitating a deadly confrontation." *Id. at 1233*.

In the present matter, as in *Sage* and *Sheehan*, the Court finds that the allegations in Plaintiff's complaint are sufficient to support his ADA claim relating to his **[**52]** bipolar disorder against Defendants City of Oneida and Madison County.

### *3. Claims Against Defendants Slator, Clark, and Silverman*

In their motions, the City and County Defendants argue that the ADA claims must be dismissed insofar as they are brought against the individual Defendants because the ADA does not create individual liability. Plaintiff, however, argues that the ADA claims against the individual Defendants are brought pursuant to 42 U.S.C. § 1983 to enforce his statutory rights under Title II of the ADA. *See* Dkt. No. 31 at 13-14.

"It is well-settled that neither Title II of the ADA nor [Section] 504 of the Rehabilitation Act provides for individual capacity suits against state officials." Hill v. LaClair, No. 9:20-CV-441, 2020 U.S. Dist. LEXIS 82942, 2020 WL 2404771, *7 (N.D.N.Y. May 11, 2020) (internal quotation marks and citation omitted). This limitation on claims brought pursuant to Title II of the ADA poses a significant obstacle to Plaintiff, insofar as his claims **[*34]** are brought against Defendants Slator, Clark, and Silverman. Yet Plaintiff tries to evade this black-letter law by tacking on citations to 42 U.S.C. § 1983 in her complaint. Section 1983 "authorizes suits to enforce individual rights under federal statutes as well as the Constitution." City of Rancho Palos Verdes, Cal. v. Abrams, 544 U.S. 113, 119, 125 S. Ct. 1453, 161 L. Ed. 2d 316 (2005). But not every federal statutory right can be vindicated **[**53]** through Section 1983. *See* id. at 120. Instead, "there is only a rebuttable presumption that the right is enforceable under § 1983." Blessing v. Freestone, 520 U.S. 329, 341, 117 S. Ct. 1353, 137 L. Ed. 2d 569 (1997). "The defendant may defeat this presumption by demonstrating that Congress did not intend that remedy for a newly created right." Abrams, 544 U.S. at 120; *see also* Smith v. Robinson, 468 U.S. 992, 1012, 104 S. Ct. 3457, 82 L. Ed. 2d 746 (1984),

*superseded by statute on other grounds as stated in Fry v. Napoleon Cmty. Sch., 137 S. Ct. 743, 750, 197 L. Ed. 2d 46 (2017)*. The Supreme Court has "explained that evidence of such congressional intent may be found directly in the statute creating the right, or inferred from the statute's creation of a 'comprehensive enforcement scheme that is incompatible with individual enforcement under *§ 1983*.'" *Abrams, 544 U.S. at 120* (quoting *Blessing, 520 U.S. at 341, 117 S. Ct. 1353, 137 L. Ed. 2d 569*); *see also Middlesex County Sewerage Authority v. National Sea Clammers Assn., 453 U.S. 1, 19-20, 101 S. Ct. 2615, 69 L. Ed. 2d 435 (1981)*. "The crucial consideration is what Congress intended." *Smith, 468 U.S. at 1012*.

The Second Circuit has not yet decided whether *Section 1983* can be used as a backstop to create individual liability under the ADA. But every court of appeals to consider this issue, as well as a majority of district courts in this Circuit, have rejected this approach and concluded *Section 1983* is not available to provide a remedy for alleged violations of rights under the ADA. *See Lollar v. Baker, 196 F.3d 603, 610 (5th Cir. 1999)*; *see also Williams v. Pennsylvania Human Rels. Comm'n, 870 F.3d 294, 300 (3d Cir. 2017)* ("[E]very circuit to consider this exact question has held that, while a plaintiff may use *§ 1983* as a vehicle for vindicating rights independently conferred by the Constitution, Title **[**54]** VII and ADA statutory rights cannot be vindicated through *§ 1983*"); *Tri-Corp Housing Inc. v. Bauman, 826 F.3d 446, 449 (7th Cir. 2016)* (holding that "*§ 1983* cannot be used to alter the categories of persons potentially liable in private actions under the Rehabilitation Act or the Americans with Disabilities Act"); *Vinson v. Thomas, 288 F.3d 1145, 1156 (9th Cir. 2002)* ("[A] plaintiff cannot bring an action under *42 U.S.C. § 1983* against a State official in her individual capacity to vindicate rights created by *Title II of the ADA* or *section 504* of the Rehabilitation Act"); *Holbrook v. City of Alpharetta, Ga., 112 F.3d 1522, 1531 (11th Cir. 1997)*. Although the Second Circuit has not yet addressed the issue of whether rights established in the ADA may be enforced under *Section 1983*, it has addressed the issue in the context of the Rehabilitation Act and, in doing so, it cited favorably to cases from its Sister Circuits which "all have concluded that *§ 1983* cannot be used to alter the categories of persons potentially liable in private actions under the Rehabilitation Act or the ADA." *Costabile v. New York City Health & Hosps. Corp., 951 F.3d 77, 83 (2d Cir. 2020)* (holding that "the rights established in the Rehabilitation Act may not be enforced through *§ 1983*").

The Court finds this approach persuasive. The ADA provides an extensive, comprehensive remedial framework that addresses every aspect of a plaintiff's claims **[*35]** under *Section 1983*. As the Fifth Circuit explained in *Lollar*, "both the Rehabilitation Act and the ADA provide extensive, comprehensive **[**55]** remedial frameworks that address every aspect of [a plaintiff's claim] under *section 1983*. To permit a plaintiff to sue both under the substantive statutes that set forth detailed administrative avenue of redress as well as *section 1983* would be duplicative at best; in effect such a holding would provide the plaintiff with two bites at precisely the same apple." *Lollar, 196 F.3d at 610*.

Finding this reasoning persuasive, the Court grants the pending motions insofar as they seek dismissal of Plaintiff's ADA claims brought against the individual Defendants.

**E. *Monell* Claims**

Plaintiff asserts first that Defendants Madison County and City of Oneida had a duty to investigate allegations of excessive force and failed to do so. *See* Dkt. No. 5 at ¶ 79. Second, Plaintiff claims that Defendants Clark, Silverman, and Slator were required to activate the cameras on their dashboards and body cameras when they activated the lights on their patrol cars, and despite their failure to do so, they were not punished. *Id.* at ¶¶ 80-81. Therefore, Plaintiff asserts that Defendants City of Oneida and Madison County were deliberately indifferent to the need to supervise, investigate and discipline Defendants Silverman, Clark, and Slator for violating Plaintiff's **[**56]** rights. *See id.* at ¶ 82. Defendants argue that Plaintiff has failed to plead a *prima facie Monell* claim. *See* Dkt. No. 18-2 at 18-20; Dkt. No. 30-6 at 19-21.

A municipality "may not be held liable under *Section 1983* unless the challenged action was performed pursuant to a municipal policy or custom." *Powers v. Gipson, No. 04-CV-6338, 2004 U.S. Dist. LEXIS 32192, 2004 WL 2123490, *2 (W.D.N.Y. Sept. 14, 2004)* (citing *Monell v. Dep't of Soc. Serv., 436 U.S. 658, 694, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978)*). This is because "[m]unicipalities are not subject to *Section 1983* liability solely on the basis of a *respondeat superior* theory." *2004 U.S. Dist. LEXIS 32192, [WL] at *2*. As a result, to demonstrate *Monell* liability, a plaintiff must allege a violation of constitutional rights by employees of the municipality and "(1) 'the existence of a municipal policy or custom ... that caused his injuries beyond merely

employing the misbehaving officer[s]'; and (2) 'a causal connection—an "affirmative link"—between the policy and the deprivation of his constitutional rights.'" *Harper v. City of New York, 424 Fed. Appx. 36, 38 (2d Cir. 2011)* (quoting *Vippolis v. Village of Haverstraw, 768 F.2d 40, 44 (2d Cir. 1985)*).

"A plaintiff may plead a municipal policy or custom by alleging: (1) a formal policy, promulgated or adopted by the entity; or (2) that an official with policymaking authority took action or made a specific decision which caused the alleged violation of constitutional rights; or (3) the existence of an unlawful practice by subordinate officials that was so permanent **[**57]** or well settled so as to constitute a 'custom or usage,' and that the practice was so widespread as to imply the constructive acquiescence of policymaking officials." *Shepherd v. Powers, No. 11-CV-6860, 2012 U.S. Dist. LEXIS 141179, 2012 WL 4477241, *9 (S.D.N.Y. Sept. 27, 2012)* (internal quotation marks omitted).

"[A] failure to investigate incidents of force, and by extension, a failure to discipline officers for use of excessive force, can amount to an actionable policy under *§ 1983* when such failure evidences 'deliberate indifference' to the rights of persons with whom the police come into contact." *Moses v. Westchester Cty. Dep't of Correction, No. 10 CIV. 9468, 2017 U.S. Dist. LEXIS 163030, 2017 WL 4386362, *16 (S.D.N.Y. Sept. 29, 2017)* (citing *Fiacco v. City of Rensselaer, 783 F.2d 319, 326 (2d Cir. 1986)*).

> **[*36]** To establish "deliberate indifference," a plaintiff must show that: [i] a policymaker knows "to a moral certainty" that city employees will confront a particular situation; [ii] the situation either presents the employee with "a difficult choice of the sort that training or supervision will make less difficult" or "there is a history of employees mishandling the situation;" and [iii] "the wrong choice by the city employee will frequently cause the deprivation of a citizen's constitutional rights."

*Wray v. City of New York, 490 F.3d 189, 195-96 (2d Cir. 2007)* (quoting *Walker v. City of New York, 974 F.2d 293, 297-98 (2d Cir. 1992)*).

Further, "[i]n order for Plaintiff to succeed on his failure to train and failure to discipline theories, there must be a pattern of similar misconduct." *Davis v. City of New York, No. 12 CIV. 3297, 2018 U.S. Dist. LEXIS 231116, 2018 WL 10070540, *6 (S.D.N.Y. Mar. 30, 2018)* (citing *Connick v. Thompson, 563 U.S. 51, 62, 131 S. Ct. 1350, 179 L. Ed. 2d 417 (2011)*). Multiple complaints **[**58]** of excessive force alone are insufficient to establish a pattern of the use of excessive force by police officers. *See 2018 U.S. Dist. LEXIS 231116, [WL] at *6-8*. The instances of use must be sufficient to demonstrate that the officers' use of excessive force was so pervasive that it established a "'custom or policy.'" *2018 U.S. Dist. LEXIS 231116, [WL] at *7-8* (quoting *Dixon v. City of New York, 14 Civ. 4930, 2017 U.S. Dist. LEXIS 119042, at *32-33 (S.D.N.Y. July 27, 2017)*). Without evidence of such a policy or custom, a court is unable to infer that the municipality had any greater duty to supervise, investigate, or discipline its officers. *Moses, 2017 U.S. Dist. LEXIS 163030, 2017 WL 4386362, at *18*.

Plaintiff's claim for *Monell* liability against Defendants Madison County and City of Oneida for failing to discipline Defendants Silverman, Clark, and Slator for not activating their body cameras must be dismissed as he fails to allege a constitutional violation. In order to establish municipal liability, the rights violated must be a constitutional right. *Harper, 424 Fed. Appx. at 38*. While failing to activate worn body cameras may result in a due process violation by failing to preserve evidence, this requires a showing of bad faith. *United States v. Tillard, No. 18-CR-6091, 2020 U.S. Dist. LEXIS 1539, 2020 WL 57198, *5 (W.D.N.Y. Jan. 6, 2020)* (citing *Arizona v. Youngblood, 488 U.S. 51, 58, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988)*). Thus, a "police officers' failure to activate body-worn cameras alone does not constitute a due process violation." *Id.* (citing *United States v. Taylor, 312 F. Supp. 3d 170, 178 (D.D.C. 2018)*; *United States v. Brown, No. 2:17-CR-58, 2017 U.S. Dist. LEXIS 215420, 2017 WL 8941247, *15-16 (D. Nev. Aug. 14, 2017)*).

Plaintiff has failed to make any claim or assert any facts demonstrating that Defendants **[**59]** Silverman, Slator, and Clark acted in bad faith when they failed to turn on their body cameras. Without more, Plaintiff has failed to allege that Defendants Silverman, Slator, and Clark committed a constitutional violation by failing to turn on their body cameras and cannot impose liability on Defendants Madison County or the City of Oneida for failing to discipline them.

Plaintiff's deliberate indifference claims must also fail because Plaintiff has not alleged a policy or custom. Rather, Plaintiff has alleged only one isolated incident involving the use of excessive force. Such a claim cannot be considered to amount to deliberate indifference as courts have found that even repeated instances of excessive force do not necessarily

establish a policy or custom. *See* Davis, 2018 U.S. Dist. LEXIS 23116, 2018 WL 10070540, at *6; Moses, 2017 U.S. Dist. LEXIS 163030, 2017 WL 4386362, at *18. In *Davis*, the court noted that even eighteen cases of excessive force complaints in a fifteen-month period did not establish a policy or custom. 2018 U.S. Dist. LEXIS 231116, [WL] at *7 **[*37]** (quoting Dixon, 2017 U.S. Dist. LEXIS 119042, at *32-33).

Plaintiff has thus failed to allege a policy or custom regarding the alleged use of force and cannot assert claims for deliberate indifference. As such, the Court grants Defendants' motions insofar as they seek dismissal of Plaintiff's *Monell* claims.

**F. Assault**

Plaintiff **[**60]** asserts claims for assault against all Defendants for the physical contact that occurred while he as being placed under arrest and the subsequent injuries that resulted. Dkt. No. 5 at ¶¶ 84-100. It is unclear what physical contact Plaintiff complains of, the arrest, the kick, or both. However, as Plaintiff does not make any assertions that his arrest was unlawful and notes that he consented to being handcuffed, the Court can only assume that Plaintiff is referring to the kick. Defendants assert that Plaintiff's claim requires dismissal as it is duplicative and fails to state a claim for assault. Dkt. No. 18-2 at 21; Dkt. No. 30-6 at 22-23.

***1. The City Defendant's Motion to Dismiss***

"Federal excessive force claims and state law assault and battery claims against police officers are nearly identical." Graham v. City of New York, 928 F. Supp. 2d 610, 624 (E.D.N.Y. 2013) (citing Humphrey v. Landers, 344 Fed. Appx. 686, 688 (2d Cir. 2009)). Thus, such claims "must be disposed of in the same manner." Pierre-Antoine v. City of New York, No. 04 CIV. 6987, 2006 U.S. Dist. LEXIS 28963, 2006 WL 1292076, *8 (S.D.N.Y. May 9, 2006) (finding that the same factual deficiencies resulting in summary judgment on the plaintiff's excessive force claims are grounds for granting summary judgment on the assault claims). Therefore, Plaintiff's claims for assault against Defendants Slator and Clark must be dismissed as Plaintiff failed to sufficiently allege **[**61]** that they were personally involved in the assault. *See id.* The City Defendants' motion to dismiss Plaintiff's claims for assault is granted.

***2. The County Defendants' Motion for Judgment on the Pleadings***

The County Defendants assert that Plaintiff's assault claims against them in their individual capacities are untimely as this action was filed more than one year since the alleged assault. Dkt. No. 30-6 at 21-22. The County Defendants also assert that Defendant Madison County is not liable for the acts of Defendant Silverman as such a suit is prohibited against them by the New York State Constitution. *Id.* at 22.

***a. Statute of Limitations***

New York General Municipal Law § 50-i requires that any "action or special proceeding ... prosecuted or maintained against a city, county, town, village, fire district or school district for personal injury ... alleged to have been sustained by reason of the negligence or wrongful act of" said entities "shall be commenced within one year and ninety days after the happening of the event upon which the claim is based. ..." New York Civil Practice Law and Rules § 215 also requires that "an action against a sheriff, coroner or constable, upon a liability incurred by him by doing an act in his official capacity or by omission of an official **[**62]** duty, except the non-payment of money collected upon an execution," "shall be commenced within one year."

Whether the statute of limitations outlined in GML § 50-i or NY CPLR § 215 applies "depends upon who is the real party in interest." Coe v. Town of Conklin, 94 A.D.3d 1197, 1198, 942 N.Y.S.2d 255 (3d Dep't 2012). Where an individual "was acting solely on his own behalf" NY CPLR § 215 applies. *Id.* Where an individual is alleged **[*38]** to have been "acting within the scope of his employment with the Town, however, the Town may be liable for his conduct and would thus be the real party in interest; in those circumstances, General Municipal Law § 50-i would apply." Id. at 1198-99; *see also Ripka v. Cty. of Madison, 162 A.D.3d 1371, 1373, 80 N.Y.S.3d 479 (3d Dep't 2018)*.

Plaintiff filed this action on June 12, 2020 claiming that Defendant Silverman assaulted him during his arrest on March 15, 2019. Dkt. No. 1; Dkt. No. 5 at ¶¶ 10, 97-100. Plaintiff claims assault against Defendant Silverman in his official and unofficial capacities. Dkt. No. 5 at ¶¶ 97-100. However, claims against municipal "employees in their individual capacities are governed by the one-year statute of limitations in C.P.L.R. § 215(1)." *Wierzbic v.*

*Cty. of Erie*, No. 13-CV-978S, 2018 U.S. Dist. LEXIS 12360, 2018 WL 550521, *9 (W.D.N.Y. Jan. 25, 2018). Thus, Plaintiff's claim for assault against Defendant Silverman in his individual capacity must be dismissed.

However, Plaintiff's assault claim against Defendant Silverman in his official capacity **[**63]** and against Defendant Madison County is subject to the one year and ninety-day statute of limitations set forth in General Municipal Law § 50-i. *See* Wierzbic, 2018 U.S. Dist. LEXIS 12360, 2018 WL 550521, at *9. As such, these claims are timely.

***b. Defendant Madison County's Liability***

Defendant Madison County asserts that "subdivision (a) of section 13 of Article XIII of the New York State Constitution ... provides that 'the county shall never be made responsible for the acts of the sheriff' which has been construed to defeat damages claims against counties for acts of its Deputy Sheriffs." Dkt. No. 30-6 at 22 (citing Snow v Harder, 43 A.D.2d 1003, 352 N.Y.S.2d 523 (3d Dep't 1975)).

The language that the County Defendants cite to was removed from the New York Constitution in 1989—over thirty years ago. *See* N.Y. Const. art. XIII, § 13. Further, the Court cannot locate, and the County Defendants do not present, any case citing *Snow* following 1982. Clearly, this authority is, at a minimum, outdated and even a cursory review would have revealed this.

Present authority demonstrates that a municipality may be liable for the acts of the sheriff where she was acting within the scope of her duties. Green v. City of New York, 465 F.3d 65, 86 (2d Cir. 2006) ("A New York employer, such as the City, is liable for intentional torts, such as assault and battery, committed by its employees provided that the tort is committed within the scope of the plaintiff's employment"); *see also* Colon v. City of Rochester, 419 F. Supp. 3d 586, 603 (W.D.N.Y. 2019); Lepore v. Town of Greenburgh, 120 A.D.3d 1202, 1204, 992 N.Y.S.2d 329 (2d Dep't 2014); *Eckardt v. City of White Plains, 87 A.D.3d 1049, 1051, 930 N.Y.S.2d 22 (2d Dep't 2011)*.

Alternatively, the County **[**64]** Defendants assert that they are not liable for Defendant Silverman's actions based on the standard set forth in Lauer v. City of New York, 95 N.Y.2d 95, 99, 733 N.E.2d 184, 711 N.Y.S.2d 112 (2000). However, *Lauer* did not deal with an intentional tort and is inapplicable. In *Laurer*, the City of New York claimed that it was not liable for the negligence of its employee. *Id.* The employee, a medical examiner, improperly published a three-year-old boy's cause of death as blunt force trauma and ruled his death a homicide before further examination. Id. at 97-98. As a result, the police began a homicide investigation focusing on the boy's father. Id. at 98. Two months later, the **[*39]** medical examiner and a neurologist conducted a more in-depth examination and ruled that the boy's death was actually due to the rupture of a brain aneurism but failed to tell anyone. *Id.* As a result, the homicide investigation continued for seventeen months until the media revealed the correct cause of death. *Id.*

The Court of Appeals specifically stated that the issue they were addressing was "whether a member of the public can recover damages against a municipality for its employee's negligence." Id. at 97. The court went on to hold that while New York had waived its right to be sued for negligence based on the tortious actions **[**65]** of their employees, municipalities are not liable for the discretionary acts of their employees regardless of whether they rise to the level of negligence. Id. at 99. The Court of Appeals went on to state, "[b]y contrast, ministerial acts--meaning conduct requiring adherence to a governing rule, with a compulsory result--may subject the municipal employer to liability for negligence." *Id.*

In *Williams*, the City of New York similarly tried to apply *Lauer* for the position that a municipality may not be held liable for the discretionary acts of their employees, whether intentional or negligent. Williams v. City of New York, 121 F. Supp. 3d 354, 376 (S.D.N.Y. 2015). The Southern District held that *Lauer* did not apply where the complained of conduct was an intentional tort and not negligence. *Id.* Thus, to the extent that the County Defendants assert that Defendant Madison County could not be held liable for the alleged assault by Defendant Silverman because it was a discretionary act, they are incorrect, and their motion is denied.[7]

---

[7] It is unclear what argument the County Defendants are trying to make. Their motion for judgment on the pleadings is merely a recitation of case law for points six, eight, nine, ten, eleven and twelve that is often contradictory and without any analysis. *See* Dkt. No. 30-6 at 19-24. For example, regarding their argument for point ten, the County Defendants state, "[m]oreover, the decision to arrest Plaintiff, as well as any other allegedly tortious conduct that followed, were discretionary acts that cannot form a basis for municipal liability." *Id.* at 23. They continue to state that *Lauer* prevents

Additionally, as recited above, Plaintiff has sued Defendant Silverman in his official capacity and alleges that the conduct occurred while he was effectuating arrest. Dkt. No. 5 at ¶¶ 84-100. The County Defendants acknowledge **[**66]** that Defendant Silverman was acting within the scope of his employment during the alleged assault. Dkt. No. 30-6 at 22. As a municipality may be held liable for the intentional torts of its employees where they are acting within the scope of their employment, and the County Defendants do not assert any facts to the contrary, their motion for judgment on the pleadings regarding Plaintiff's claims for assault are denied.

**G. Negligence**

Plaintiff asserts a state law claim for negligence against all Defendants in all capacities. Dkt. No. 5 at ¶¶ 101-108. Plaintiff does not specifically assert what action was negligent but states that "Defendants breached said special duty of care when Plaintiff became injured while in their custody." **[*40]** *Id.* at ¶ 104. Liberally construed, Plaintiff appears to allege either that Defendants breached a duty of care owed to him by kicking him and by failing to take him to the hospital. *See id.* at ¶¶ 101-108. The City Defendants assert that Plaintiff has failed to adequately plead a negligence claim and is barred from asserting claims for negligence that he claims also amounted to excessive force. Dkt. No. 18 at 22. The County Defendants reject the notion that they **[**67]** may be sued for negligence. Dkt. No. 30-6 at 22-23.

To the extent that Plaintiff claims negligence for being kicked while handcuffed, these claims must be dismissed. "When a plaintiff brings excessive force and assault claims which are premised upon a defendant's allegedly intentional conduct, a negligence claim with respect to the same conduct will not lie." *Naccarato v. Scarselli, 124 F. Supp. 2d 36, 45 (N.D.N.Y. 2000)*; *see also Stratakos v. Nassau Cnty.*, No. 2:15-cv-7244, *2019 U.S. Dist. LEXIS 211781, 2019 WL 6699817, *16 (E.D.N.Y. Dec. 9, 2019)* (citing cases). Additionally, because Plaintiff has failed to allege any personal involvement of Defendant Silverman in the deprivation of medical care following his arrest, Plaintiff's negligence claims against the County Defendants are dismissed. *Bryant, 267 F. Supp. 3d at 479*.

Regarding Plaintiff's claims for negligence for the conduct following his injury, Plaintiff must allege a special duty owed to him by the City Defendants. *McLean v. City of N.Y., 12 N.Y.3d 194, 199, 905 N.E.2d 1167, 878 N.Y.S.2d 238 (2009)* (quoting *Garrett v. Holiday Inns, 58 N.Y.2d 253, 261, 447 N.E.2d 717, 460 N.Y.S.2d 774 (1983)*) ("[A]n agency of government is not liable for the negligent performance of a governmental function unless there existed 'a special duty to the injured person, in contrast to a general duty owed to the public'"). "Such a duty, we have explained—'a duty to exercise reasonable care toward the plaintiff'—is 'born of a special relationship between the plaintiff and the **[**68]** governmental entity.'" *Id.* (quoting *Pelaez v. Seide, 2 N.Y.3d 186, 198-99, 810 N.E.2d 393, 778 N.Y.S.2d 111 (2004)*).

> "A special relationship can be formed in three ways: (1) when the municipality violates a statutory duty enacted for the benefit of a particular class of persons; (2) when it voluntarily assumes a duty that generates justifiable reliance by the person who benefits from the duty; or (3) when the municipality assumes positive direction and control in the face of a known, blatant and dangerous safety violation."

*Id. at 199* (quoting *Pelaez, 2 N.Y.3d at 199-200*).

"It is the plaintiff's obligation to prove that the government defendant owed a special duty of care to the injured party because duty is an essential element of the negligence claim itself." *Applewhite v. Accuhealth, Inc., 21 N.Y.3d 420, 426, 995 N.E.2d 131, 972 N.Y.S.2d 169 (2013)*. "In situations where the plaintiff fails to meet this burden, the analysis ends and liability may not be imputed to the municipality that acted in a governmental capacity." *Id.*

Plaintiff asserts that a special relationship was created by Defendants arresting him. Dkt. No. 5 at ¶ 103. The Court agrees. "'[I]t is well-established in New York that when the State assumes physical custody of inmates or detainees, who cannot protect and defend themselves in the same way as those at liberty can, the State owes a duty of care to safeguard those individuals **[**69]** from harm.'" *Maldonado v. Town of Greenburgh, 460 F.*

---

Defendant Madison County from being liable for Defendant Silverman's actions and then state that *Lauer* does not apply in the very next sentence. *Id.* at 23. Plaintiff's six sentence argument includes only four sentences of contradictory case law and then a summarizing sentence: "[a]s a result, the County may not be held liable for the State law based claims against Deputy Silverman on this additional basis." *Id.* While the remainder of the arguments in the County Defendants' motion for judgment on the pleadings are not quite as bald, they also provide only the most minimal amount of analysis, if any.

Supp. 3d 382, 400-01 (S.D.N.Y. 2020) (quotation and other citations omitted); *Kemp v. Waldon, 115 A.D.2d 869, 497 N.Y.S.2d 158 (3d Dep't 1985)*. **[*41]** The complaint plausibly alleges that Plaintiff was seriously injured during the course of his arrest and that the City Defendants, knowing that Plaintiff was in severe pain, declined to take him to the Upstate Emergency Department for treatment, despite being instructed to do so by healthcare personnel at Oneida Healthcare. Accordingly, Plaintiff may proceed with his negligence claim relating to the City Defendants' alleged failure to provide medical care upon his arrest.

**H. Failure to Provide Medical Care and Mental Health Assistance**

Plaintiff asserts claims against Defendants for failure to provide medical care pursuant to *New York Civil Rights Law § 28*. Dkt. No. 5 at ¶¶ 109-132. Defendants assert that Plaintiff's claims should be dismissed as *Section 28* was not enacted until three days after Plaintiff brought this action and two weeks before Plaintiff filed his amended complaint. Dkt. No. 18 at 23; Dkt. No. 30-6 at 24. Defendants further assert that *Section 28* does not apply retroactively. Dkt. No. 34 at 10; Dkt. No. 30-6 at 24.

*New York Civil Rights Law § 28* was enacted on June 15, 2020 and provides that

> [w]hen a person is under arrest or otherwise in the custody of a police officer, peace officer or other **[**70]** law enforcement representative or entity, such officer, representative or entity shall have a duty to provide attention to the medical and mental health needs of such person, and obtain assistance and treatment of such needs for such person, which are reasonable and provided in good faith under the circumstances.

All parties agree that there is no case law examining *Section 28*. However, they have asked the Court to examine whether *Section 28* may be applied retroactively.

"In *Landgraf v. USI Film Products, 511 U.S. 244, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994)*, the Supreme Court established a two-part test to determine whether a statute applies retroactively." *Weingarten v. United States, 865 F.3d 48, 54 (2d Cir. 2017)*. "First, if Congress 'expressly prescribed' that a statute applies retroactively to antecedent conduct, 'the inquiry ends[ ] and the court enforces the statute as it is written,' save for constitutional concerns." *Id. at 54-55* (quoting *Enter. Mortg. Acceptance Co., LLC, Sec. Litig. v. Enter. Mortg. Acceptance Co., 391 F.3d 401, 405-06 (2d Cir. 2004)*, *as amended* (Jan. 7, 2005)) (alterations in original). "Second, when a statute 'is ambiguous or contains no express command' regarding retroactivity, a reviewing court must determine whether applying the statute to antecedent conduct would create presumptively impermissible retroactive effects." *Id. at 55* (quoting *Enterprise, 391 F.3d at 406*). "If it would, then the court shall not apply the statute retroactively '"absent clear congressional intent" **[**71]** to the contrary.'" *Id.* (quoting *Enterprise, 391 F.3d at 406*).[8]

**[*42]** Plaintiff agrees that there is no express command regarding retroactivity. Dkt. No. 31 at 19. Thus, the Court must determine whether applying the statute to antecedent conduct would create presumptively impermissible retroactive effects. *Weingarten, 865 F.3d at 54-55* (quoting *Enterprise, 391 F.3d at 406*).

A statute has retroactive effects where "it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf, 511 U.S. at 280*. "If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.'" *Id.* However, "a statute that affects only the propriety of prospective relief or the nonsubstantive provisions governing the procedure for adjudication of a claim going forward has no potentially problematic retroactive effect even when the liability arises from past conduct." *Regina Metro, 35 N.Y.3d at*

---

[8] The County Defendants assert that the Court may not look to federal cases to determine whether a law is to be applied retroactively. Dkt. No. 35 at 15. Specifically, the County Defendants assert that Plaintiff's reliance on *Rankine v. Reno, 319 F.3d 93, 98 (2d Cir. 2003)* is inappropriate as only the New York Court of Appeals may determine whether a state law is to be applied retroactively and in *Rankine*, the Second Circuit examined a federal law. *Id.* (citing Dkt. No. 31 at 19). However, Plaintiff cited *Rankine* for the standard articulated by the Supreme Court in *Landgraf*. *See* Dkt. No. 31 at 19. The County Defendants cited *Landgraf* for a similar position in their motion for judgment on the pleadings. *See* Dkt. No. 30-6 at 24. And, the Court of Appeals has expressly adopted the retroactivity test articulated in *Landgraf* when examining state laws. *See Regina Metro. Co., LLC v. New York State Div. of Hous. & Cmty. Renewal, 35 N.Y.3d 332, 365, 130 N.Y.S.3d 759, 154 N.E.3d 972 (2020)*. Thus, the Court rejects the County Defendants' assertion.

365 (quoting Landgraf, 511 U.S. at 273) (internal quotation marks omitted).

Plaintiff asserts that *Section 28* should apply retroactively because it merely codifies a right already recognized by state and federal law. Dkt. No. 31 at 19-20. The **[**72]** Court disagrees as *Section 28* broadens the scope of an arrestee's rights against an arresting officer.

"The Due Process Clause ... does require the responsible government or governmental agency to provide medical care to persons ... who have been injured while being apprehended by the police." City of Revere, 463 U.S. at 244. Indeed, in the June 19, 2019 New York Senate Bill No. 6601, the New York Senate stated that the purpose of *Section 28* was to "affirm[] the duty of police officers, peace officers, and other law enforcement representatives and entities to provide attention to medical and mental health needs of persons in custody." The Senate went on to state that "the bill establishes a new right of action for [the] failure to provide reasonable and good faith attention, assistance or treatment by an officer." *Id.*

However, as the Second Department has recognized, an individual's rights pursuant to Section 1983 are not without limitations and require proof of deliberate indifference. Mays v. City of Middletown, 70 A.D.3d 900, 904, 895 N.Y.S.2d 179 (2d Dep't 2010). As a pre-trial detainee, Plaintiff's claims are brought pursuant to the Fourteenth Amendment and he must therefore demonstrate that he suffered a "sufficiently serious need" and that the arresting officers "knew or should have known of the excessive risk to the plaintiff's health." Yancey, 828 Fed. Appx. at 803 (citing Darnell, 849 F.3d at 29). While **[**73]** *Section 28* similarly requires that the arrestee "suffer[ a] serious physical injury or significant exacerbation of an injury or condition" because they did not receive "reasonable and good faith attention," *Section 28* does not identify any mental state required of the officers beyond requiring that they act in good faith. *N.Y. Civ. Rights Law § 28*. Rather, the statute creates an affirmative duty on behalf of the officers to provide reasonable medical care for an arrestee. *See id.* ("When a person is under arrest or otherwise in the custody of a police officer, ... such officer . . . *shall have a duty* to provide attention to the medical and mental health needs of such person, and obtain assistance and treatment of such needs for such person. ...") (emphasis added); *see* ***[*43]*** *also* 2019 New York Senate Bill No. 6601, New York Two Hundred Forty-Third Legislative Session ("By specifically mandating a duty of care, this bill seeks to redress these wrongs and, in the future, prevent such persons from having to endure the infliction of distress and harm").

While under the objective prong of the deliberate indifference standard a condition that may appear to be relatively minor, such as a dislocated joint or cavity, may be a sufficiently serious **[**74]** medical condition if it causes "extreme pain," Johnson, 412 F.3d at 403, the subjective prong requires that the denial of treatment must have caused "continuous, significant pain unnecessarily, and led to a needlessly prolonged period of delay in Plaintiff's receipt of medical treatment." Robinson, 2017 U.S. Dist. LEXIS 131629, 2017 WL 3578700, at *6. However, the legislative history of *§ 28* asserts that the purpose of this statute is to prevent even "needless, pain and suffering." 2019 New York Senate Bill No. 6601, New York Two Hundred Forty-Third Legislative Session. While *Section 28* certainly would encompass claims for deliberate indifference, it also creates an even greater duty to provide care to perhaps a wider range of injuries. Thus, it cannot be said that *Section 28* is merely a recitation of the deliberate indifference standard.

Further, because *Section 28* extends the rights of arrestees, it has retroactive effects rather than merely affecting only the propriety of prospective relief or the nonsubstantive provisions governing the procedure for adjudication of a claim going forward. As such, there is a presumption against retroactivity and *Section 28* may only be applied retroactively if there is "a clear expression of the legislative purpose ... to justify a retroactive application of a statute." Regina Metro., 35 N.Y.3d at 370 (quoting **[**75]** Gleason v. Gleason, 26 N.Y.2d 28, 36, 256 N.E.2d 513, 308 N.Y.S.2d 347 (1970)). While "[t]here is certainly no requirement that particular words be used[,] ... the expression of intent must be sufficient to show that the Legislature contemplated the retroactive impact on substantive rights and intended that extraordinary result." Id. at 370-71 (citations omitted).

Plaintiff agrees that the legislature did not expressly call for or contemplate retroactive effects of the law. Dkt. No. 31 at 19. Rather, the legislative history indicates that the past harm by police misconduct was contemplated by the legislature, but that they ultimately determined that the law would become effective immediately without any discussion of retroactive effects. *See* 2019 New York Senate Bill No. 6601, New York Two Hundred Forty-Third Legislative Session. Without more, there is not a clear expression of the legislative purpose to have the

law apply retroactively as there is nothing the Court can rely on to determine that the Legislature contemplated the retroactive impact on substantive rights and intended that extraordinary result.

As such, the Court declines to apply *Section 28* retroactively and Plaintiff's claims pursuant to *Section 28* must be dismissed. The County Defendants' motion for judgment on the pleadings **[**76]** and the City Defendants' motion to dismiss are both granted as to these claims.

**I. Damages**

Plaintiff's complaint seeks compensatory and punitive damages for conscious pain and suffering. Dkt. No. 5 at 19. The City Defendants assert that Plaintiff is barred from seeking such damages as damages for conscious pain and suffering are limited to survivorship actions and punitive **[*44]** damages are barred in *§ 1983* and ADA cases. Dkt. No. 18-2 at 24.

The purpose of punitive damages is "'to punish the defendant and to deter him and others from similar conduct in the future.'" *Lee v. Edwards, 101 F.3d 805, 809 (2d Cir. 1996)* (quoting *Vasbinder v. Scott, 976 F.2d 118, 121 (2d Cir. 1992)*). "Punitive damages are available in a *§ 1983* action 'when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others.'" *Id.* (quoting *Smith v. Wade, 461 U.S. 30, 56, 103 S. Ct. 1625, 75 L. Ed. 2d 632 (1983)*).

"It is well established that, as a municipal entity, defendant County is not subject to exposure to punitive damages, including for claims brought under *42 U.S.C. § 1983* and the ADA." *Levesque v. Clinton Cty., No. 9:10-CV-0787, 2012 U.S. Dist. LEXIS 185947, 2012 WL 6948779, *8 (N.D.N.Y. Dec. 28, 2012)* (citing *Ciraolo v. City of New York, 216 F.3d 236, 238 (2d Cir. 2000)*). "Although punitive damages are not available against municipalities or against individuals sued in their official capacities, punitive damages may be awarded against defendants sued in their individual capacities." **[**77]** *Lin v. Cty. of Monroe, 66 F. Supp. 3d 341, 362 (W.D.N.Y. 2014)* (citing *De Michele v. City of New York, No. 09 Civ. 9334, 2012 U.S. Dist. LEXIS 136460, 2012 WL 4354763, *22 (S.D.N.Y. Sept. 24, 2012)*).

Additionally, a plaintiff may recover compensatory damages for deliberate indifference to his medical needs. *See Poulos v. City of New York, No. 14CV03023, 2018 U.S. Dist. LEXIS 118364, 2018 WL 3750508, *5 (S.D.N.Y. July 13, 2018)*. "Compensatory damages are damages grounded in determinations of plaintiff's actual losses caused by the deprivation of her constitutional rights and 'may include not only out-of-pocket loss and other monetary harms, but also such injuries as impairment of reputation ... personal humiliation, and mental anguish and suffering.'" *Sulkowska v. City of New York, 129 F. Supp. 2d 274, 308 (S.D.N.Y. 2001)* (quoting *Memphis Community Sch. Dist. v. Stachura, 477 U.S. 299, 307, 106 S. Ct. 2537, 91 L. Ed. 2d 249 (1986)*). "To recover compensatory damages for deliberate indifference to his medical needs, plaintiff must present admissible evidence of pain and suffering incurred during the period of deliberate indifference." *Poulos, 2018 U.S. Dist. LEXIS 118364, 2018 WL 3750508, at *5* (citing *Virgil v. Keith, No. 10-CV-6479, 2016 U.S. Dist. LEXIS 45306, 2016 WL 1298515, at *5 (W.D.N.Y. Mar. 30, 2016)*).

As set forth above, both compensatory and punitive damages are available to a plaintiff who succeeds on a *Section 1983* claim against a defendant in his or her individual capacity. Therefore, the declines to dismiss Plaintiff's request for compensatory and punitive damages, which is included in the complaint's prayer for relief, and not tied to any specific cause of action.

**IV. CONCLUSION**

After carefully reviewing the entire record in this matter, the parties' submissions and the applicable law, the Court hereby

**ORDERS** that City **[**78]** Defendants' motion to dismiss (Dkt. No. 18) is **GRANTED in-part and DENIED in-part**; and the Court further

**ORDERS** that County Defendants' motion for judgment on the pleadings (Dkt. No. 30) is **GRANTED in-part and DENIED in-part;**[9] and the Court further

[9] As a result of this Memorandum-Decision and Order, the following claims remain: (1) excessive force against Defendant Silverman; (2) deliberate indifference/failure to intervene against Defendants Slator and Clark; (3) the ADA claims against Defendants City of Oneida and Madison County relating to Plaintiff's bipolar disorder and arrest; (4) the assault claim against Defendant Silverman in his individual capacity and against Defendant Madison County; and (5) the negligence claim against the City Defendants for failure to provide medical care.

**[*45] ORDERS** that the Clerk of the Court shall serve a copy of this Memorandum-Decision and Order on the parties in accordance with the Local Rules.

**IT IS SO ORDERED**.

Dated: September 2, 2021

Albany, New York

/s/ Mae A. D'Agostino

Mae A. D'Agostino

United States District Judge

---

End of Document

# *Tully-Boone v. North Shore-Long Island Jewish Hosp. Sys.*

United States District Court for the Eastern District of New York

December 6, 2008, Decided

08-CV-2497 (ADS)(WDW)

**Reporter**
588 F. Supp. 2d 419 *; 2008 U.S. Dist. LEXIS 101093 **; 157 Lab. Cas. (CCH) P35,531; 21 Am. Disabilities Cas. (BNA) 1132

CAROLYN TULLY-BOONE, Plaintiff, -against- NORTH SHORE-LONG ISLAND JEWISH HOSPITAL SYSTEM, GLEN COVE HOSPITAL, BARBARA BACKUS, CAROLYN MUELLER and GLORIA COHEN, Defendants.

**Subsequent History:** Summary judgment granted by, in part, Summary judgment denied by, in part *Tully-Boone v. N. Shore-Long Island Jewish Hosp. Sys., 2010 U.S. Dist. LEXIS 165651 (E.D.N.Y., May 3, 2010)*

Motion denied by *Tully-Boone v. N. Shore-Long Island Jewish Hosp. Sys., 2010 U.S. Dist. LEXIS 164321 (E.D.N.Y., Aug. 11, 2010)*

**Counsel: [**1]** For Plaintiff: Rick Ostrove, Esq., Matthew Scott Porges, Esq., Of Counsel, Leeds Morelli & Brown, Carle Place, NY.

For Defendants: Shaffin Abdul Datoo, Esq., Of Counsel, Venable LLP, New York, NY.

**Judges:** ARTHUR D. SPATT, United States District Judge.

**Opinion by:** ARTHUR D. SPATT

## Opinion

**[*421] MEMORANDUM OF DECISION AND ORDER**

**SPATT, District Judge**.

On June 23, 2008, Carolyn Tully-Boone ("the Plaintiff") commenced this lawsuit against North Shore-Long Island Jewish Hospital System ("North Shore"), Glen Cove Hospital ("the Hospital"), Barbara Backus, Carolyn Mueller, and Gloria Cohen (collectively "the Defendants"), asserting claims under the ***Family and Medical Leave*** Act ("FMLA"), *29 U.S.C. § 2601 et seq.*, the Health Insurance Portability Act ("HIPAA"), the Americans With Disabilities Act ("ADA"), *42 U.S.C. § 12101 et seq.*, and *New York Executive Law § 290, et seq.* ("New York Human Rights Law" or "NYHRL"). Presently before the Court is the Defendants' *Fed. R. Civ. P. 12(b)(6)* motion to dismiss the Plaintiff's complaint.

**I. BACKGROUND**

The Plaintiff, a registered nurse, was employed by North Shore in various staff and management nursing positions from 1981 until December of 2006. On **[**2]** or about September 11, 2006, the Plaintiff was transferred to the Hospital to work as a Quality Management Coordinator. At that time, the Plaintiff was advised that she would be subject to a six-month probationary period and a three-week orientation.

Shortly after her transfer, the Plaintiff experienced several personal problems that affected her physical and mental health. After being diagnosed as having anxiety and depression, the Plaintiff began to take medication that left her lethargic and drowsy. The Plaintiff also alleges that she had difficulty sleeping and this affected her ability to arrive at work on time at 8:00 a.m.

In September of 2006, the Plaintiff alleges that she advised Backus, the Assistant Director of Quality Management, and Cohen, North Shore's Director of Human Resources, about her personal issues. On or about October 23, 2006, the Plaintiff avers that she told Mueller, the Director of Quality Management, and Backus that she needed time off because her condition was deteriorating and preventing her from completing work tasks. In the weeks that followed, the Plaintiff alleges that Mueller and Backus made a number of inquiries into the Plaintiff's ***medical*** conditions **[**3]** and the medications she was using.

On or about November 9, 2006, Backus had a discussion with the Plaintiff about her punctuality. The Plaintiff explained that complications from her medication made it difficult for her to arrive at work on

time at 8:00 a.m. Backus agreed to push the Plaintiff's start time back to 8:30. The Plaintiff told Backus that she would like to extend her start time even further in light of her condition and that she was willing to stay later to ensure that her tasks were completed. On or about November 24, 2006, the Plaintiff received a memorandum from Backus regarding the fact that she had arrived fifteen minutes late for work on that day.

On or about November 29, 2006, the Plaintiff alleges that she initiated a meeting with Backus and Mueller at which time she requested ***medical leave*** as an accommodation **[*422]** for her disability. The Plaintiff further alleges that Mueller informed her that she would discuss the matter with Cohen to determine whether the Plaintiff was in fact eligible for ***medical leave***. On or about November 30, 2006, the Plaintiff received a disciplinary warning notice that noted she was ten minutes late to work on that day. The Plaintiff was summoned **[**4]** to meet with Backus and John Sendak, the Administrator of the Hospital. In this meeting, the Plaintiff alleges that the parties discussed her disability and she reiterated her request that the Hospital accommodate her by permitting her to "occasionally arrive late to work."

At the conclusion of the November 30th meeting, the Plaintiff was informed that, as a disciplinary action, she would be suspended without pay for one day. The Plaintiff alleges that she refused to sign the disciplinary warning until she was allowed to insert handwritten comments indicating that, among other things, she was still waiting for Mueller to respond to her request for ***medical leave***. On or about December 4, 2006, the Plaintiff received an employment review from Backus. According to the Plaintiff, this review "included positive feedback as well as certain alleged deficiencies."

During the week of December 4, 2006, the Plaintiff alleges that she initiated a meeting with Cohen to complain that North Shore had violated the FMLA by failing to "carry over" benefits she had accrued over the course of her tenure as a North Shore employee. During the meeting, the Plaintiff also inquired about her request for ***medical*** **[**5]** ***leave***. However, Cohen indicated that she was unaware of any such request. On or about December 18, 2006, the Plaintiff met with Cohen again to discuss her benefits and the suspension. The Plaintiff alleges that when she told Cohen that her lateness was caused by her ***medical*** condition, Cohen "became hostile and abruptly ended the meeting."

On December 20, 2006, the Plaintiff was terminated from her position as Quality Management Coordinator. Mueller and Backus presented the Plaintiff with a review prepared by Backus and was informed that she did not "pass" her orientation period. According to the Plaintiff, the review "extensively detailed nine performance areas with alleged deficiencies."

On or about January 24, 2007, the Plaintiff discussed her termination with Rosemary Milano in Corporate Human Resources. The Plaintiff alleges that Milano was never informed about the Plaintiff's request for ***medical leave***. On or about January 31, 2007, the Plaintiff spoke with Milano a second time. The Plaintiff alleges that, in this conversation, Milano told her that Mueller, Backus, and Cohen claimed that the Plaintiff had never requested a ***medical leave***.

On June 23, 2008, the Plaintiff commenced this **[**6]** lawsuit alleging that: (i) she was discriminated against because of her disability in violation of the ADA and NYHRL; (ii) she was retaliated against because she requested reasonable accommodations for her disability; (iii) her request for reasonable accommodations were denied in violation of the ADA and NYHRL; (iv) the Defendants interfered with her rights under the FMLA; and (v) Backus, Mueller, and Cohen ("the Individual Defendants") violated NYHRL by aiding and abetting the unlawful discrimination. The complaint also asserted a cause of action under HIPAA, but this claim has since been withdrawn by the Plaintiff. On August 25, 2008, the Defendants filed the instant motion to dismiss part of the Plaintiff's complaint.

## **[*423]** II. DISCUSSION

### A. 12(b)(6) Standard

In considering a 12(b)(6) motion to dismiss, "the Court must accept all of the plaintiff's factual allegations in the complaint as true and draw inferences from those allegations in the light most favorable to the plaintiff." *Starr v. Georgeson S'holder, Inc., 412 F.3d 103, 109 (2d Cir. 2005)*. A complaint should be dismissed only if it does not contain enough allegations of fact to state a claim for relief that is "plausible on its **[**7]** face." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 1974, 167 L. Ed. 2d 929 (2007)*. The Second Circuit has interpreted Twombly to require that a complaint "allege facts that are not merely consistent with the conclusion that the defendant violated the law, but which actively and plausibly suggest that conclusion." *Port Dock &*

Stone Corp. v. Oldcastle Northeast, Inc., 507 F.3d 117, 121 (2d Cir. 2007).

The Supreme Court has held that "a complaint in an employment discrimination lawsuit [need] not contain specific facts establishing a prima facie case of discrimination under the framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L. Ed. 2d 668 (1973)." Swierkiewicz v. Sorema N. A., 534 U.S. 506, 508, 122 S.Ct. 992, 152 L. Ed. 2d 1 (2002) (internal citation omitted). In order to survive a motion to dismiss, a Plaintiff's complaint need only include "a short and plain statement of the claim showing that the pleader is entitled to relief." Id. (citing Fed. R. Civ. P. 8(a)(2)). "Such a statement must simply give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." Id. **[**8]** (internal citation and quotation marks omitted).

**B. The Defendants' Motion to Dismiss**

The Defendants argue that the complaint must be dismissed in part because: (i) they did not interfere with the Plaintiff's rights under the FMLA; (ii) the accommodations requested by the Plaintiff were unreasonable as a matter of law; (iii) the Plaintiff has failed to offer allegations that show Mueller and Cohen actually aided and abetted violations of NYHRL; and (iv) Backus could not have aided and abetted her own allegedly discriminatory acts.

**1. The Plaintiff's FMLA Claim**

"The FMLA gives eligible employees an 'entitlement' to twelve workweeks per year of unpaid ***leave*** '[b]ecause of a serious health condition that makes the employee unable to perform the functions of the position of such employee.'" Sista v. CDC Ixis North America, Inc., 445 F.3d 161, 174 (2d Cir. 2006) (citing 29 U.S.C. § 2612(a)(1)(D)). "The FMLA 'creates a private right of action to seek both equitable relief and money damages against any employer . . . should that employer 'interfere with, restrain, or deny the exercise of' FMLA rights." Id. (citing Nevada Dept. of Human Resources v. Hibbs, 538 U.S. 721, 724-25, 123 S.Ct. 1972, 155 L. Ed. 2d 953 (2003)); **[**9]** 29 U.S.C. § 2615(a)(1).

As a threshold matter, the Court notes that, at this stage, the Plaintiff has offered allegations sufficient to show that she is entitled to FMLA ***leave***. Courts have recognized that ***depression*** is a ***serious health condition*** within the meaning of the FMLA and the Plaintiff has made an adequate showing that she was unable to perform her job function because of her condition. Spangler v. Federal Home Loan Bank of Des Moines, 278 F.3d 847, 852 (8th Cir. 2002) (recognizing that ***depression*** is a "***serious health condition***" within the meaning of the FMLA); Collins ***[*424]*** v. NTN-Bower Corp., 272 F.3d 1006 (7th Cir. 2001) (same); Tambash v. St. Bonaventure Univ., 2004 U.S. Dist. LEXIS 19914, 2004 WL 2191566, at *8 (W.D.N.Y. Sep. 24, 2004) (same). The Court's analysis must turn, then, to whether the Defendants interfered with the Plaintiff's attempts to exercise her rights under the statute.

The Plaintiff alleges that the Defendants interfered with her rights under the FMLA in several different ways. First, the Plaintiff contends that the Defendants failed to inform her about her rights under the statute once she made a request for ***medical leave***. The Defendants counter that the Plaintiff's **[**10]** claim is foreclosed by the Second Circuit's decision in Sarno v. Douglas Elliman-Gibbons & Ives, Inc., 183 F.3d 155 (2d Cir.1999). The Court disagrees.

In Sarno, the Second Circuit found that the FMLA does not give an employee "a right to sue [an] employer for failing to give notice of the terms of the Act *where the lack of notice had no effect on the employee's exercise of . . . any substantive right conferred by the Act*." Id. at 162 (emphasis added). Here, the Defendants' failure to provide notice about the options available to the Plaintiff may well have affected her opportunity to exercise substantive rights under the statute. The Defendants could have, for example, apprised the Plaintiff of her entitlement to 12 weeks of ***leave*** or her right to intermittent ***leave*** under § 2612(b)(1). Accordingly, the Plaintiff can assert a plausible claim that, in failing to inform her about her FMLA rights, the Defendants interfered with those rights.

The Plaintiff also alleges that the Defendants interfered with her rights under the FMLA by failing to respond to her request for ***medical leave***. Federal regulations require employers to respond to ***leave*** requests under the statute within two business **[**11]** days. 29 C.F.R § 825.208(a),(c). Here, the Plaintiff alleges she made her first request for ***medical leave*** on or about November 29, 2006. The Defendants never responded to this request or the Plaintiff's subsequent request to Cohen and the Plaintiff was terminated on or about December 20, 2006. The Defendants appear to argue that because the Plaintiff was fired before they could respond to her requests, they could not have interfered with her rights

under the FMLA.

The Defendants rest their argument entirely upon *Ferguson v. Lander Co, Inc., 2008 U.S. Dist. LEXIS 26738, 2008 WL 921032, at * 19 (N.D.N.Y. Apr. 2, 2008)*. In that case, the plaintiff was terminated five weeks after submitting a ***leave*** request without ever receiving notification from his employer about the disposition of his request. The Court found that "[w]hile a technical violation of the FMLA has been established," the plaintiff had no private cause of action for a violation of the regulation. In particular, the Court appears to have found that where the plaintiff was discharged before his request was considered, the employer's failure to approve the request did not interfere with his rights under the statute.

The Court respectfully disagrees with the **[**12]** reasoning in *Ferguson*. The Court declines to find, as a matter of law, that an employer may evade liability for interfering with an employee's FMLA rights simply because that employee is terminated before her employer can respond to her request for ***medical leave***. Here, during the period from the Plaintiff's initial request for ***medical leave*** until her termination, the Plaintiff did not take the ***leave*** to which she may have been entitled because the Defendants failed to respond to her request. In this sense, the Defendants did not merely commit a "technical violation" of the regulations construing *§ 2615*; **[*425]** their failure to respond to her request may well have interfered with her statutory entitlement to take ***medical leave***.

To the extent that the complaint attempts to set forth an alleged violation of the FMLA for the Defendants' failure to "carry over [the Plaintiff's] benefits," it is clear that this claim must be dismissed because an employer's failure to "carry over benefits," does not constitute interference with an employee's rights under the FMLA.

**2. The Plaintiff's Reasonable Accommodation Claims**

Both the ADA, *42 U.S.C. § 12112(b)(5)(A)*, and NYHRL, *N.Y. Exec. Law § 296(3)(a)*, make **[**13]** it unlawful for an employer to refuse to make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified" employee. *Brady v. Wal-Mart Stores, Inc., 531 F.3d 127, 134 (2d Cir. 2008)* (citing *42 U.S.C. § 12112(b)(5)(A)*); see *Burton v. Metropolitan Transp. Auth., 244 F. Supp 2d 252, 258 (S.D.N.Y. 2003)* (noting that reasonable accommodation claims under the ADA and NYHRL are analyzed under essentially the same standard). The Plaintiff alleges that the Defendants failed to make reasonable accommodations for her disability when they did not address her request for ***medical leave*** or consult with her to create a more flexible start time. The Defendants counter that the Plaintiff's requests were unreasonable "as a matter of law." In particular, the Defendants contend that the Plaintiff requested an unreasonable indefinite ***leave*** and that her second request for a later start time, made after Backus had already pushed her start time back thirty minutes, was in actuality a request to "arrive for work at whatever time she wanted."

In the instant case, on a motion to dismiss, it would not be appropriate for the Court to decide whether the Plaintiff's requests for **[**14]** accommodation were reasonable. The Second Circuit has recognized that in the context of a motion to dismiss" [w]hile there may be claims requesting [accommodation] under the ADA that warrant dismissal as unreasonable as a matter of law," many cases require "a fact-specific inquiry," and are therefore not properly disposed of at the pleading stage. *Staron v. McDonald's Corp., 51 F.3d 353, 356 (2d Cir. 1995)*.

Here, the Plaintiff has alleged that she sought ***leave*** as an accommodation for her anxiety and depression and sought a later start time because the medication she was taking for her condition made it difficult for her to arrive at work on time at 8:30 a.m. The Plaintiff further alleges that she informed Backus that, if the Defendants would push back her start time, she was willing to stay later to complete her work. At this early stage, the Court is unwilling to find that such requests for accommodation were unreasonable as a matter of law. Accordingly, the Defendants' motion to dismiss the Plaintiff's reasonable accommodation claims under the ADA and NYHRL is denied.

**3. The Plaintiff's Aiding and Abetting Claims under NYHRL § 296(6)**

NYHRL provides that "it shall be an unlawful discriminatory **[**15]** practice 'for any person to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this article, or attempt to do so.'" *Feingold v. New York, 366 F.3d 138, 157-58 (2d Cir. 2004)* (citing *N.Y. Exec. Law § 296(6)*). In *Tomka v. Seiler Corp., 66 F.3d 1295, 1317 (2d Cir. 1995)*, the Second Circuit held that an employee who "actually participates in the conduct giving **[*426]** rise to a discrimination claim," may be held liable under *§ 296(6)*.

The Plaintiff contends that the Individual Defendants aided and abetted the unlawful discrimination allegedly committed by North Shore and the Hospital. The Defendants counter that: (i) the Plaintiff has failed to adequately allege that Mueller and Cohen "actually participated" in the unlawful conduct; and (ii) the claim against Backus should be dismissed because "as the alleged primary actor, Backus cannot aid and abet her own actions as a matter of law." For the sake of clarity, the Court will analyze the Plaintiff's § 296(6) claims as to each Individual Defendant separately.

**a. As to Carolyn Mueller**

The Plaintiff alleges that Mueller asked the Plaintiff, on several occasions, about her ***medical*** conditions and the medication she was taking; **[**16]** Mueller refused to consult a doctor's note offered by the Plaintiff; Mueller never discussed the Plaintiff's ***leave*** request with Cohen as she promised to do; Mueller presented her with a negative employment review on the day she was fired; and Milano informed her that, after the Plaintiff's termination, Mueller claimed that the Plaintiff never requested ***medical leave***. Viewing these allegations, as the Court must, in the light most favorable to the Plaintiff, she could establish that Mueller participated in unlawful, discriminatory acts. Accordingly, the Plaintiff has sustained her burden to state a plausible § 296(6) claim against Mueller.

**b. As to Gloria Cohen**

The Plaintiff alleges that on or about December 4, 2006, she inquired of Cohen about the status of her ***leave*** request and Cohen informed her that she was unaware of any such request; when she told Cohen in a meeting that her lateness was caused by her medication, Cohen "became hostile and abruptly ended the meeting"; in January of 2007 after she was terminated, Milano told her that Cohen denied any knowledge of the Plaintiff's request for ***medical leave***. The allegations that describe Cohen's actual participation in unlawful acts **[**17]** are not as viable as those offered against Mueller. Nevertheless, if these allegations are true, the Plaintiff could establish that Cohen participated in acts that contributed to the Defendants' alleged failure to accommodate her disability. Accordingly, the Court finds that, at this stage, the Plaintiff has alleged a plausible aiding and abetting claim against Cohen.

**c. As to Barbara Backus**

In order to discuss the Defendants' argument in favor of dismissing the Plaintiff's aiding and abetting claim against Backus, a more thorough review of NYHRL is in order. NYHRL § 296(1)(a) makes it an unlawful discriminatory practice "[f]or an employer . . . because of the . . . disability . . . of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment." The New York Court of Appeals has found that an employee may not be held individually liable under the statute "if he [or she] is not shown to have any ownership interest or any power to do more than carry out personnel decisions made by others." Patrowich v. Chemical Bank, 63 N.Y.2d 541, 542, 473 N.E.2d 11, 12, 483 N.Y.S.2d 659, 660 (1984).

The **[**18]** Plaintiff alleges that North Shore and the Hospital, acting through the Individual Defendants, violated NYHRL 296(1)(a). As discussed above, the Plaintiff **[*427]** further alleges that the Individual Defendants violated § 296(6) by aiding and abetting the alleged unlawful discrimination by North Shore and the Hospital. Backus counters that, as the "primary actor" committing the allegedly unlawful acts, she cannot be liable under § 296(6) because she cannot aid and abet her own actions. See Chamblee v. Harris & Harris, Inc., 154 F. Supp 2d 670, 677 (S.D.N.Y.2001) (McMahon, J.) (finding that under § 296(6) "primary actor cannot be an aider and abettor of his own actions"); Hicks v. IBM, 44 F. Supp 2d 593, 600 (S.D.N.Y. 1999) (McMahon, J.) (same). There is, of course, some logical appeal to this argument.

Indeed, certain Courts have cast doubt on the Second Circuit's interpretation of § 296(6) in Tomka. 66 F.3d at 1317. As one Court noted, the Tomka formulation of the statute "creates a **[**19]** strange and confusing circularity where the person who has directly perpetrated the [unlawful discrimination] only becomes liable through the employer whose liability in turn hinges on the conduct of the direct perpetrator." Lippold v. Duggal Color Projects, Inc., 1998 U.S. Dist. LEXIS 335, 1998 WL 13854, at *3 (S.D.N.Y. Jan.15, 1998). Confronted with an argument identical to the one made by Backus here, the late Judge Jacob Mishler offered a useful analysis of the logical problem presented by the Second Circuit's interpretation of § 296(6):

> Defendant argues that she should not be found liable as an aider and abetter because she could not have aided and abetted her own acts. see also, Hicks v. IBM, 44 F. Supp. 2d 593, 600 (S.D.N.Y. 1999). The Second Circuit apparently disagrees. In Tomka, plaintiff "alleged that each of the individual

defendants assaulted her and thereby created a hostile work environment". *Tomka, 66 F.3d at 1317*. The court held that that allegation was "sufficient to satisfy *§ 296(6)* [HRL's aiding and abetting statute]". Id. Perhaps the rationale behind the court's decision was that each of the three individual defendants were aiding and abetting their fellow defendants' violations. If this **[**20]** is true, individuals may not be liable under Tomka for aiding and abetting their own violations of the HRL. Perhaps the rationale behind the decision was that the employees' actions imposed liability on the employer and therefore the employees were aiding and abetting the employer's violation of the HRL, and not their own. We must wait for the Second Circuit to revisit the issue so that we may gain a firmer understanding of its rationale in Tomka and better understand the intended breadth of its application.

*Perks v. Town of Huntington, 96 F. Supp 2d 222, 228 (E.D.N.Y. 2002)* (internal citations omitted).

The Court is mindful that the *Tomka* interpretation of *§ 296(6)* is not without controversy. Nevertheless, "until the Second Circuit revisits the issue, Tomka is the law in this circuit." *Perks, 96 F. Supp 2d at 228*. Accordingly, Backus may be held liable for aiding and abetting allegedly unlawful discrimination by her employer even where her actions serve as the predicate for the employer's vicarious liability. See *Prince v. Madison Square Garden, 427 F. Supp 2d 372, 385 (S.D.N.Y. 2006)*; *Bennett v. Progressive Corp., 225 F. Supp 2d 190, 214 (N.D.N.Y. 2002)*; *Perks, 96 F. Supp 2d at 228*; **[**21]** *Lippold, 1998 U.S. Dist. LEXIS 335, 1998 WL 13854, at *3*. The Plaintiff's complaint is replete with allegations that Backus "actually participated" in the alleged unlawful conduct, and therefore, the Plaintiff has adequately pled that she may be held liable as an aider and abetter under *§ 296(6)*.

## III. CONCLUSION

Based on the foregoing, it is hereby

**[*428]** **ORDERED**, that the Plaintiff's HIPAA claim is dismissed with prejudice, and it is further

**ORDERED**, that the Defendants' motion to dismiss the Plaintiff's FMLA causes of action is **GRANTED** as to the claim for their failure to "carry over benefits" and **DENIED** as to the claims for the Defendants' alleged failure to notify the Plaintiff of her rights under the statute and their alleged failure to respond to her request for ***leave***.

**ORDERED**, that the Defendants' motion to dismiss the Plaintiff's reasonable accommodation claims under the ADA and NYHRL is **DENIED**, and it is further

**ORDERED**, that the Defendants' motion to dismiss the Plaintiff's *§ 296(6)* claims against the Individual Defendants is **DENIED**, and it is further

**ORDERED**, that the parties are directed to report to United States Magistrate Judge William D. Wall to set a discovery schedule.

**SO ORDERED**.

Dated: Central Islip, New **[**22]** York

December 6, 2008

*/s/ Arthur D. Spatt*

ARTHUR D. SPATT

United States District Judge

End of Document

ALM | LAW.COM

Page Printed From:
https://www.law.com/americanlawyer/2019/02/12/scared-ashamed-crippled-how-one-lawyer-overcame-living-with-depression-in-big-law/

SPECIAL REPORTS ›

Minds Over Matters: An Examination of Mental Health in the Legal Profession

NOT FOR REPRINT

COMMENTARY

# 'Scared. Ashamed. Crippled.': How One Lawyer Overcame Living With Depression in Big Law

Reed Smith counsel Mark Goldstein wasn't sure he could both be a lawyer and have mental health disabilities. But he learned how to survive and thrive in Big La

February 12, 2019 at 02:15 PM

By Mark S. Goldstein | February 12, 2019 at 02:15 PM

It was Oct. 16, 2017. A Monday. My wife's 32nd birthday. A day after the Jets blew a 14-point lead to the Patriots. It was also what I thought would be the last time I would ever walk through the halls of Reed Smith, the law firm at which I had spent the past four-plus years.

Roughly six weeks earlier, I had been diagnosed with severe depression, obsessive-compulsive disorder (OCD) and anxiety. I felt scared. Ashamed. Crippled. As if I was going to die. Perhaps most of all, I felt alone, particularly in a profession that often stigmatizes mental health disorders. A profession that tends to label them, instead, as "burnout," or sweep them under the rug. The symptoms of my conditions, which had likely been percolating for some time, came on suddenly and swiftly over Labor Day weekend 2017. These symptoms included not only mentally crippling cognitions, but also physically impairing side effects as well. By early the following week, I knew that this was no mere passing phase; it could not be ignored.

For the next month and a half, I sought the counsel of a small circle of family, friends and colleagues. With their support, I searched high and low for a path to reclaim a life that I felt slipping further away by the day. I attempted to persevere with my personal and professional lives. This, unfortunately, proved futile. My relationships with my wife and son continued to deteriorate, due largely to my own self-imposed isolation. As for work, I simply could not function. In fact, I spent most of my time parked on the couch in one of Reed Smith's wellness rooms. And when, between panic attacks, I could stomach being in my office, I was often held hostage by symptoms of my OCD.

Eventually, I realized that the "stigma" associated with mental health issues—particularly for lawyers—and suffering in silence, paled in comparison to the need to protect my personal well-being. I realized that I needed time away to address my issues head-on. To seek professional care and help. To salvage whatever semblance I could of my life as a husband, father, lawyer.

On Oct. 12, I mustered the courage to inform Reed Smith of my decision to take a leave of absence. The firm was exceedingly supportive and conveyed a clear message: take all the time you need to recover. Still, as I turned off the lights in my office on Oct. 16—the day before my leave began—I was confident I would never set foot on that gray/brown carpet ever again. I was confident that I would not and could not recover; that there would be no light at the end of the tunnel for me (and, frankly, no end of the tunnel). At least not while I remained a lawyer.

Over the next 11 weeks, I underwent an oft-challenging journey of self-reflection. I re-evaluated both my personal and professional goals. On an almost weekly basis, I met separately with a psychiatrist, psychologist and cognitive behavioral therapist. I began taking—and still to this day take—prescription medication to treat my mental disabilities. I also came to terms with the fact that the conditions from which I suffer are indeed disabilities, no different from physical impairments. With the help of a mindfulness coach, I took up meditation. I began running again, and went for long walks in the nature preserve near my home in Maplewood, New Jersey. I spent more time—quality time—with my wife and son. I started engaging in activities that had fallen by the wayside, due to my conditions, for many months prior. Many of these were unremarkable, mundane activities that I had previously taken for granted. Listening to music, watching movies, smiling, laughing, even reading legal publications.

By year-end, I felt like my old self again. I wasn't "cured," nor will I ever be. But I was finally ready to hit the play button on a life then on pause. I returned to Reed Smith on Jan. 2, 2018. Although my office, as if frozen in time, had not changed one bit, I still had no idea what to expect. Would I be welcomed back, shunned or something in between? While the firm had been tremendously supportive both before and during my leave of absence, was that mere rhetoric?

Quite quickly, I came to realize that it was not. In fact, 2018 proved to be perhaps my most fulfilling year as an attorney. Reed Smith, including everyone from the partner with whom I work most, to the labor and employment group more broadly, to management, HR, support staff and beyond, welcomed me back with open arms. I was treated as if nothing had happened and no time had passed. I felt no stigma or shaming. Quite the contrary, I worked with an even broader swath of attorneys and on even more exciting matters. I joined LEADRS, Reed Smith's disability affinity group. The firm helped me overcome what I had previously believed to be an insurmountable obstacle.

## How to Survive and Thrive

After much contemplation, I now feel comfortable sharing my story. My hope is to reach and help other legal professionals suffering with mental health issues. With that in mind, and with the obvious caveat that I have no formal mental health training, the following are a few tips for anyone who has or may find themselves in a situation similar to mine:

Speak up—and now. Forget about the perceived stigma surrounding mental health issues (and, yes, I know that's easier said than done). There is literally nothing more important than your health and well-being. Be it a friend, family member, colleague, HR representative or someone else (feel free to make it me), you need to find at least one person in whom you can confide the gravity and extent of your struggles. You will not reach your professional goals—or, likely, your personal ones either for that matter—if you suffer in silence.

Contact a medical and/or mental health provider (some firms provide these services free-of-charge through employee assistance programs). Many mental health disabilities can be treated and contained through medication, therapy, a combination of both or some other means. A licensed professional will be able to work with you to determine the necessary approach based on your particular set of circumstances.

Figure out what you want your priorities to be … then act on them. If you want to spend more quality time with loved ones, figure out a way to do it. If the endorphins produced through exercise boost your mental state, find even a sliver of time for a workout. Whatever is most important to you—both personally and professionally—needs to be taken front and center.

Learn to how to breathe properly (yes, that's a real thing). Then breathe, breathe and breathe some more. I cannot say enough about the benefits of proper breathing through meditation and mindfulness.

Don't be too hard on yourself. As I dole out this advice, it occurs to me that I don't always follow these eight tips on a daily basis. But I strive to. Sometimes I fall short, sometimes I don't. On the days when I achieve my goals, I am grateful for that (see the next tip). On the days when I don't, I try not to beat myself up over it. There will, in fact, be a tomorrow and another opportunity to reach for the gold.

Show gratitude in the good times. Anyone suffering from a mental health disorder knows there are good times and bad. In the good times, show gratitude for the people and things that make you happy. It can be a small gesture, like sending a thank you email to someone who went above and beyond to help you on a project, but I have found that practicing and projecting gratefulness is one of the easiest ways to improve your mental health. (To those who helped me in my time of need—and there are simply too many to list, but I think you know who you are—I am forever in your debt.)

## 'You Are Not Alone'

Don't assume that others are not sensitive to or understanding of your situation. Perhaps the most enlightening revelation of the past year, for me, has been discovering that other attorneys with whom I work, whom I respect, and who seem so poised and polished, are also suffering mental health issues and have sought/are seeking treatment for the same. As mental health has become a more acceptable topic of public discussion, I am glad to have seen other attorneys come out of the woodwork to share their personal journeys. Which leads me to my final point, and this is critically important: Remember that you are NOT alone.

I cannot emphasize this enough. We are beginning to see the development of some fantastic resources and infrastructure for attorneys who suffer from mental health disabilities (e.g., Quinn Emanuel Urquhart & Sullivan partner Joe Milowic's Lawyer Depression Project). Take advantage of these resources and recognize that there are many other individuals in the same predicament as you. Listen to their stories and, of course only if you feel comfortable, share your own. Ask what helped them make it through the bad times and offer tips of your own. There is no singular attorney or law firm that can eradicate the mental health issues that are pervasive in the legal industry. However, if enough of us band together, we can create a support network that hopefully eviscerates the stigma associated with our disorders and helps others in their recovery.

I started this article with a date. I want to end it with another: Dec. 9, 2018. That was the day I learned that, less than 12 months after my return to work, Reed Smith had voted to promote me to counsel. While we are not and should not be defined exclusively by our professional achievements, this was, for me, the culmination of many months of hard work, both on a professional and, more importantly, a personal level. It was a day that, a year and a half earlier, I didn't know whether I would be alive to see.

As I said above, I will never be cured and, if you also suffer from mental health disabilities, you will never be either. However, if you are an attorney suffering from such disabilities, one thing I can assure you is that you can not only maintain a legal practice, but that you can in fact thrive.

**Mark S. Goldstein** *is counsel in the labor and employment practice of Reed Smith. He is based in New York.*

NOT FOR REPRINT

Copyright © 2022 ALM Global, LLC. All Rights Reserved.

Hazelden Betty Ford Foundation

MENU

# ABA, Hazelden Betty Ford Foundation Release First National Study on Attorney Substance Use, Mental Health Concerns

CENTER CITY, MINN. (February 3, 2016) —A new, landmark study conducted by the Hazelden Betty Ford Foundation and the American Bar Association Commission on Lawyer Assistance Programs reveals substantial and widespread levels of problem drinking and other behavioral health problems in the U.S. legal profession.

Posted online this week in the *Journal of Addiction Medicine*, the study reports that 21 percent of licensed, employed attorneys qualify as problem drinkers, 28 percent struggle with some level of depression and 19 percent demonstrate symptoms of anxiety. The study found that younger attorneys in the first 10 years of practice exhibit the highest incidence of these problems. The print edition of the journal will be available in mid-February.

The findings of the national study, the most comprehensive ever, represent a reversal of previous research that indicated rates of problem drinking increased as individuals spent more time in the legal profession. When focusing solely on the volume and frequency of alcohol consumed, more than 1 in 3 practicing attorneys are problem drinkers, the study found. Attorney and clinician Patrick R. Krill, Hazelden's architect of the project and lead author of the study, said the findings are a call to action.

"This long-overdue study clearly validates the widely held but empirically under supported view that our profession faces truly significant challenges related to attorney well-being," Krill said. "Any way you look at it, this data is very alarming, and paints the picture of an unsustainable professional culture that's harming too many people. Attorney impairment poses risks to the struggling individuals themselves and to our communities, government, economy and society. The stakes are too high for inaction.

enormous and tells us that the problem is best approached from a systems perspective. All sectors of the profession will benefit from reading, understanding and utilizing this important study, and now we can better develop strategies for preventing and addressing substance use problems and mental health concerns in this population."

The study compared attorneys with other professionals, including doctors, and determined that lawyers experience alcohol use disorders at a far higher rate than other professional populations, as well as mental health distress that is more significant. The study also found that the most common barriers for attorneys to seek help were fear of others finding out and general concerns about confidentiality.

"This new research demonstrates how the pressures felt by many lawyers manifest in health risks," ABA President Paulette Brown said. "These ground-breaking findings provide an important guide as the ABA commission works with lawyer assistance programs nationally to address the mental health risks and needs of lawyers."

The collaborative research project marks the first nationwide attempt to capture such data about the legal profession. Approximately 15,000 attorneys from 19 states and across all regions of the country participated in the study.

**About the Hazelden Betty Ford Foundation**

The Hazelden Betty Ford Foundation helps people reclaim their lives from the disease of addiction. It is the nation's largest nonprofit treatment provider, with a legacy that began in 1949 and includes the 1982 founding of the Betty Ford Center. With 16 sites in California, Minnesota, Oregon, Illinois, New York, Florida, Massachusetts, Colorado and Texas, the Foundation offers prevention and recovery solutions nationwide and across the entire continuum of care for youth and adults. It includes a specialized program for legal professionals, the largest recovery publishing house in the country, a fully-accredited graduate school of addiction studies, an addiction research center, an education arm for medical professionals and a unique children's program, and is the nation's leader in advocacy and policy for treatment and recovery. Follow us on Twitter.

**About The American Bar Association**

The American Bar Association, with more than 400,000 members, is one of the largest voluntary professional membership organizations in the world. As the national voice of the legal profession, the ABA works to improve the administration of justice, promotes programs that assist lawyers and judges in their work, accredits law schools, provides continuing legal education, and works to build public understanding around the world of the importance of the rule of law. View our privacy statement on line.

programs in developing and maintaining methods of providing effective solutions for recovery.

**Reporters looking for resources, quotes, or contact with authors, please email or call 1-651-213-4231.**

Email Us

The Hazelden Betty Ford Foundation is a force of healing and hope for individuals, families and communities affected by addiction to alcohol and other drugs. As the nation's leading nonprofit provider of comprehensive inpatient and outpatient addiction and mental health care for adults and youth, the Foundation has treatment centers and telehealth services nationwide as well as a network of collaborators throughout health care. Through charitable support and a commitment to innovation, the Foundation is able to continually enhance care, research, programs and services, and help more people. With a legacy that began in 1949 and includes the 1982 founding of the Betty Ford Center, the Foundation today is committed to diversity, equity and inclusion in its services and throughout the organization, which also encompasses a graduate school of addiction studies, a publishing division, an addiction research center, recovery advocacy and thought leadership, professional and medical education programs, school-based prevention resources and a specialized program for children who grow up in families with addiction.

Hazelden Betty Ford Foundation

MENU

LOCATIONS

Virtual Services
- Online Addiction & Mental Health Treatment

California
- Los Angeles
- Rancho Mirage
- San Diego

Colorado
- Greenwood Village

Florida
- Naples

Illinois
- Chicago

Minnesota
- Center City
- Chaska
- Maple Grove
- Plymouth (ages 12-25)
- St. Paul

New York
- New York

Oregon
- Beaverton
- Newberg

Washington
- Bellevue

ADDICTION
- What is Addiction?
- Help For Families
- Addiction Intervention
- Types of Addiction

Hazelden Betty Ford Foundation

MENU

- Mental Health Services
- Family and Children's Program
- Admissions
- Choosing a Treatment Center
- Insurance
- Medical Records and Billing Information
- Pay Your Bill Online

RECOVERY

- Preventing Relapse
- Alumni
- Families & Friends
- Recovery Tools

EDUCATION

- Graduate School of Addiction Studies
- Butler Center For Research
- Medical and Professional Education

PROFESSIONALS

- How to Refer a Patient
- Patient Care Network

ABOUT US

- About Us
- Why Choose Us
- Testimonials
- Careers

---

For Help, Call 1-877-773-6180

ADMISSIONS AND GENERAL INFORMATION

1-877-773-6180

PO Box 11

Center City, MN 55012-2011

MEDICAL RECORDS

1-651-213-4492

MEDIA INQUIRIES

1-877-773-6180 ext. 4231

HAZELDEN PUBLISHING

1-800-328-9000

PO Box 176

Hazelden Betty Ford Foundation

MENU

PO Box 11 C09
15251 Pleasant Valley Road
Center City, MN 55012-0011

Stay in the Know with Hazelden Betty Ford Foundation Emails

**Sign Up**

Terms of Use
Privacy
Notice of Privacy Practices
Accessibility
Nondiscrimination

© 2022 Hazelden Betty Ford Foundation. All Rights Reserved.

OPEN

# The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys

*Patrick R. Krill, JD, LLM, Ryan Johnson, MA, and Linda Albert, MSSW*

**Objectives:** Rates of substance use and other mental health concerns among attorneys are relatively unknown, despite the potential for harm that attorney impairment poses to the struggling individuals themselves, and to our communities, government, economy, and society. This study measured the prevalence of these concerns among licensed attorneys, their utilization of treatment services, and what barriers existed between them and the services they may need.

**Methods:** A sample of 12,825 licensed, employed attorneys completed surveys, assessing alcohol use, drug use, and symptoms of depression, anxiety, and stress.

**Results:** Substantial rates of behavioral health problems were found, with 20.6% screening positive for hazardous, harmful, and potentially alcohol-dependent drinking. Men had a higher proportion of positive screens, and also younger participants and those working in the field for a shorter duration ($P < 0.001$). Age group predicted Alcohol Use Disorders Identification Test scores; respondents 30 years of age or younger were more likely to have a higher score than their older peers ($P < 0.001$). Levels of depression, anxiety, and stress among attorneys were significant, with 28%, 19%, and 23% experiencing symptoms of depression, anxiety, and stress, respectively.

**Conclusions:** Attorneys experience problematic drinking that is hazardous, harmful, or otherwise consistent with alcohol use disorders at a higher rate than other professional populations. Mental health distress is also significant. These data underscore the need for greater resources for lawyer assistance programs, and also the expansion of available attorney-specific prevention and treatment interventions.

**Key Words:** attorneys, mental health, prevalence, substance use

(*J Addict Med* 2016;10: 46–52)

From the Hazelden Betty Ford Foundation (PRK, RJ); Wisconsin Lawyers Assistance Program (LA).

Received for publication June 26, 2015; accepted October 25, 2015.

Funding: The study was funded by the Hazelden Betty Ford Foundation and the American Bar Association Commission on Lawyer Assistance Programs.

Conflicts of interest: Linda Albert is an employee of the State Bar of Wisconsin. Remaining authors are employees of the Hazelden Betty Ford Foundation. No conflicts of interest are identified.

Send correspondence and reprint requests to Patrick R. Krill, JD, LLM, Hazelden Betty Ford Foundation, PO Box 11 (RE 11), Center City, MN 55012-0011. E-mail: pkrill@hazeldenbettyford.org.

Copyright © 2016 American Society of Addiction Medicine. This is an open-access article distributed under the terms of the Creative Commons Attribution-Non Commercial-No Derivatives License 4.0, where it is permissible to download and share the work provided it is properly cited. The work cannot be changed in any way or used commercially.

ISSN: 1932-0620/15/0901-0031

DOI: 10.1097/ADM.0000000000000182

Little is known about the current behavioral health climate in the legal profession. Despite a widespread belief that attorneys experience substance use disorders and other mental health concerns at a high rate, few studies have been undertaken to validate these beliefs empirically or statistically. Although previous research had indicated that those in the legal profession struggle with problematic alcohol use, depression, and anxiety more so than the general population, the issues have largely gone unexamined for decades (Benjamin et al., 1990; Eaton et al., 1990; Beck et al., 1995). The most recent and also the most widely cited research on these issues comes from a 1990 study involving approximately 1200 attorneys in Washington State (Benjamin et al., 1990). Researchers found 18% of attorneys were problem drinkers, which they stated was almost twice the 10% estimated prevalence of alcohol abuse and dependence among American adults at that time. They further found that 19% of the Washington lawyers suffered from statistically significant elevated levels of depression, which they contrasted with the then-current depression estimates of 3% to 9% of individuals in Western industrialized countries.

While the authors of the 1990 study called for additional research about the prevalence of alcoholism and depression among practicing US attorneys, a quarter century has passed with no such data emerging. In contrast, behavioral health issues have been regularly studied among physicians, providing a firmer understanding of the needs of that population (Oreskovich et al., 2012). Although physicians experience substance use disorders at a rate similar to the general population, the public health and safety issues associated with physician impairment have led to intense public and professional interest in the matter (DuPont et al., 2009).

Although the consequences of attorney impairment may seem less direct or urgent than the threat posed by impaired physicians, they are nonetheless profound and far-reaching. As a licensed profession that influences all aspects of society, economy, and government, levels of impairment among attorneys are of great importance and should therefore be closely evaluated (Rothstein, 2008). A scarcity of data on the current rates of substance use and mental health concerns among lawyers, therefore, has substantial implications and must be addressed. Although many in the profession have long understood the need for greater resources and support for attorneys struggling with addiction or other mental health concerns, the formulation of cohesive and informed strategies for addressing those issues has been handicapped by the



Copyright © 2016 American Society of Addiction Medicine. Unauthorized reproduction of this article is prohibited.

outdated and poorly defined scope of the problem (Association of American Law Schools, 1994).

Recognizing this need, we set out to measure the prevalence of substance use and mental health concerns among licensed attorneys, their awareness and utilization of treatment services, and what, if any, barriers exist between them and the services they may need. We report those findings here.

## METHODS

### Procedures

Before recruiting participants to the study, approval was granted by an institutional review board. To obtain a representative sample of attorneys within the United States, recruitment was coordinated through 19 states. Among them, 15 state bar associations and the 2 largest counties of 1 additional state e-mailed the survey to their members. Those bar associations were instructed to send 3 recruitment e-mails over a 1-month period to all members who were currently licensed attorneys. Three additional states posted the recruitment announcement to their bar association web sites. The recruitment announcements provided a brief synopsis of the study and past research in this area, described the goals of the study, and provided a URL directing people to the consent form and electronic survey. Participants completed measures assessing alcohol use, drug use, and mental health symptoms. Participants were not asked for identifying information, thus allowing them to complete the survey anonymously. Because of concerns regarding potential identification of individual bar members, IP addresses and geo-location data were not tracked.

### Participants

A total of 14,895 individuals completed the survey. Participants were included in the analyses if they were currently employed, and employed in the legal profession, resulting in a final sample of 12,825. Due to the nature of recruitment (eg, e-mail blasts, web postings), and that recruitment mailing lists were controlled by the participating bar associations, it is not possible to calculate a participation rate among the entire population. Demographic characteristics are presented in Table 1. Fairly equal numbers of men (53.4%) and women (46.5%) participated in the study. Age was measured in 6 categories from 30 years or younger, and increasing in 10-year increments to 71 years or older; the most commonly reported age group was 31 to 40 years old. The majority of the participants were identified as Caucasian/White (91.3%).

As shown in Table 2, the most commonly reported legal professional career length was 10 years or less (34.8%), followed by 11 to 20 years (22.7%) and 21 to 30 years (20.5%). The most common work environment reported was in private firms (40.9%), among whom the most common positions were Senior Partner (25.0%), Junior Associate (20.5%), and Senior Associate (20.3%). Over two-thirds (67.2%) of the sample reported working 41 hours or more per week.

**TABLE 1.** Participant Characteristics

| | n (%) |
|---|---|
| Total sample | 12825 (100) |
| Sex | |
| Men | 6824 (53.4) |
| Women | 5941 (46.5) |
| Age category | |
| 30 or younger | 1513 (11.9) |
| 31–40 | 3205 (25.2) |
| 41–50 | 2674 (21.0) |
| 51–60 | 2953 (23.2) |
| 61–70 | 2050 (16.1) |
| 71 or older | 348 (2.7) |
| Race/ethnicity | |
| Caucasian/White | 11653 (91.3) |
| Latino/Hispanic | 330 (2.6) |
| Black/African American (non-Hispanic) | 317 (2.5) |
| Multiracial | 189 (1.5) |
| Asian or Pacific Islander | 150 (1.2) |
| Other | 84 (0.7) |
| Native American | 35 (0.3) |
| Marital status | |
| Married | 8985 (70.2) |
| Single, never married | 1790 (14.0) |
| Divorced | 1107 (8.7) |
| Cohabiting | 462 (3.6) |
| Life partner | 184 (1.4) |
| Widowed | 144 (1.1) |
| Separated | 123 (1.0) |
| Have children | |
| Yes | 8420 (65.8) |
| No | 4384 (34.2) |
| Substance use in the past 12 mos* | |
| Alcohol | 10874 (84.1) |
| Tobacco | 2163 (16.9) |
| Sedatives | 2015 (15.7) |
| Marijuana | 1307 (10.2) |
| Opioids | 722 (5.6) |
| Stimulants | 612 (4.8) |
| Cocaine | 107 (0.8) |

*Substance use includes both illicit and prescribed usage.

### Materials

#### *Alcohol Use Disorders Identification Test*

The Alcohol Use Disorders Identification Test (AUDIT) (Babor et al., 2001) is a 10-item self-report instrument developed by the World Health Organization (WHO) to screen for hazardous use, harmful use, and the potential for alcohol dependence. The AUDIT generates scores ranging from 0 to 40. Scores of 8 or higher indicate hazardous or harmful alcohol intake, and also possible dependence (Babor et al., 2001). Scores are categorized into zones to reflect increasing severity with zone II reflective of hazardous use, zone III indicative of harmful use, and zone IV warranting full diagnostic evaluation for alcohol use disorder. For the purposes of this study, we use the phrase ''problematic use'' to capture all 3 of the zones related to a positive AUDIT screen.

The AUDIT is a widely used instrument, with well established validity and reliability across a multitude of populations (Meneses-Gaya et al., 2009). To compare current rates of problem drinking with those found in other populations, AUDIT-C scores were also calculated. The AUDIT-C is a subscale comprised of the first 3 questions of the AUDIT

© 2016 American Society of Addiction Medicine


Copyright © 2016 American Society of Addiction Medicine. Unauthorized reproduction of this article is prohibited.

**TABLE 2.** Professional Characteristics

| | n (%) |
|---|---|
| Total sample | 12825 (100) |
| Years in field (yrs) | |
| 0–10 | 4455 (34.8) |
| 11–20 | 2905 (22.7) |
| 21–30 | 2623 (20.5) |
| 31–40 | 2204 (17.2) |
| 41 or more | 607 (4.7) |
| Work environment | |
| Private firm | 5226 (40.9) |
| Sole practitioner, private practice | 2678 (21.0) |
| In-house government, public, or nonprofit | 2500 (19.6) |
| In-house: corporation or for-profit institution | 937 (7.3) |
| Judicial chambers | 750 (7.3) |
| Other law practice setting | 289 (2.3) |
| College or law school | 191 (1.5) |
| Other setting (not law practice) | 144 (1.1) |
| Bar Administration or Lawyers Assistance Program | 55 (0.4) |
| Firm position | |
| Clerk or paralegal | 128 (2.5) |
| Junior associate | 1063 (20.5) |
| Senior associate | 1052 (20.3) |
| Junior partner | 608 (11.7) |
| Managing partner | 738 (14.2) |
| Senior partner | 1294 (25.0) |
| Hours per wk | |
| Under 10 h | 238 (1.9) |
| 11–20 h | 401 (3.2) |
| 21–30 h | 595 (4.7) |
| 31–40 h | 2946 (23.2) |
| 41–50 h | 5624 (44.2) |
| 51–60 h | 2310 (18.2) |
| 61–70 h | 474 (3.7) |
| 71 h or more | 136 (1.1) |
| Any litigation | |
| Yes | 9611 (75.0) |
| No | 3197 (25.0) |

focused on the quantity and frequency of use, yielding a range of scores from 0 to 12. The results were analyzed using a cut-off score of 5 for men and 4 for women, which have been interpreted as a positive screen for alcohol abuse or possible alcohol dependence (Bradley et al., 1998; Bush et al., 1998). Two other subscales focus on dependence symptoms (eg, impaired control, morning drinking) and harmful use (eg, blackouts, alcohol-related injuries).

### *Depression Anxiety Stress Scales-21 item version*

The Depression Anxiety Stress Scales-21 (DASS-21) is a self-report instrument consisting of three 7-item subscales assessing symptoms of depression, anxiety, and stress. Individual items are scored on a 4-point scale (0–3), allowing for subscale scores ranging from 0 to 21 (Lovibond and Lovibond, 1995). Past studies have shown adequate construct validity and high internal consistency reliability (Antony et al., 1998; Clara et al., 2001; Crawford and Henry, 2003; Henry and Crawford, 2005).

### Drug Abuse Screening Test-10 item version

The short-form Drug Abuse Screening Test-10 (DAST) is a 10-item, self-report instrument designed to screen and quantify consequences of drug use in both a clinical and research setting. The DAST scores range from 0 to 10 and are categorized into low, intermediate, substantial, and severe-concern categories. The DAST-10 correlates highly with both 20-item and full 28-item versions, and has demonstrated reliability and validity (Yudko et al., 2007).

## RESULTS

Descriptive statistics were used to outline personal and professional characteristics of the sample. Relationships between variables were measured through $\chi^2$ tests for independence, and comparisons between groups were tested using Mann-Whitney *U* tests and Kruskal-Wallis tests.

### Alcohol Use

Of the 12,825 participants included in the analysis, 11,278 completed all 10 questions on the AUDIT, with 20.6% of those participants scoring at a level consistent with problematic drinking. The relationships between demographic and professional characteristics and problematic drinking are summarized in Table 3. Men had a significantly higher proportion of positive screens for problematic use compared with women ($\chi^2$ [1, N = 11,229] = 154.57, $P < 0.001$); younger participants had a significantly higher proportion compared with the older age groups ($\chi^2$ [6, N = 11,213] = 232.15, $P < 0.001$); and those working in the field for a shorter duration had a significantly higher proportion compared with those who had worked in the field for longer ($\chi^2$ [4, N = 11,252] = 230.01, $P < 0.001$). Relative to work environment and position, attorneys working in private firms or for the bar association had higher proportions than those in other environments ($\chi^2$ [8, N = 11,244] = 43.75, $P < 0.001$), and higher proportions were also found for those at the junior or senior associate level compared with other positions ($\chi^2$ [6, N = 4671] = 61.70, $P < 0.001$).

Of the 12,825 participants, 11,489 completed the first 3 AUDIT questions, allowing an AUDIT-C score to be calculated. Among these participants, 36.4% had an AUDIT-C score consistent with hazardous drinking or possible alcohol abuse or dependence. A significantly higher proportion of women (39.5%) had AUDIT-C scores consistent with problematic use compared with men (33.7%) ($\chi^2$ [1, N = 11,440] = 41.93, $P < 0.001$).

A total of 2901 participants (22.6%) reported that they have felt their use of alcohol or other substances was problematic at some point in their lives; of those that felt their use has been a problem, 27.6% reported problematic use manifested before law school, 14.2% during law school, 43.7% within 15 years of completing law school, and 14.6% more than 15 years after completing law school.

An ordinal regression was used to determine the predictive validity of age, position, and number of years in the legal field on problematic drinking behaviors, as measured by the AUDIT. Initial analyses included all 3 factors in a model to predict whether or not respondents would have a clinically significant total AUDIT score of 8 or higher. Age group predicted clinically significant AUDIT scores; respondents 30 years of age or younger were significantly more likely to have a higher score than their older peers ($\beta = 0.52$, Wald [$df = 1$] = 4.12, $P < 0.001$). Number of years in the field


© 2016 American Society of Addiction Medicine

Copyright © 2016 American Society of Addiction Medicine. Unauthorized reproduction of this article is prohibited.

**TABLE 3.** Summary Statistics for Alcohol Use Disorders Identification Test (AUDIT)

| | AUDIT Statistics | | | | |
|---|---|---|---|---|---|
| | n | M | SD | Problematic %* | P** |
| Total sample | 11,278 | 5.18 | 4.53 | 20.6% | |
| Sex | | | | | |
| Men | 6012 | 5.75 | 4.88 | 25.1% | <0.001 |
| Women | 5217 | 4.52 | 4.00 | 15.5% | |
| Age category (yrs) | | | | | |
| 30 or younger | 1393 | 6.43 | 4.56 | 31.9% | |
| 31–40 | 2877 | 5.84 | 4.86 | 25.1% | |
| 41–50 | 2345 | 4.99 | 4.65 | 19.1% | <0.001 |
| 51–60 | 2548 | 4.63 | 4.38 | 16.2% | |
| 61–70 | 1753 | 4.33 | 3.80 | 14.4% | |
| 71 or older | 297 | 4.22 | 3.28 | 12.1% | |
| Years in field (yrs) | | | | | |
| 0–10 | 3995 | 6.08 | 4.78 | 28.1% | |
| 11–20 | 2523 | 5.02 | 4.66 | 19.2% | |
| 21–30 | 2272 | 4.65 | 4.43 | 15.6% | <0.001 |
| 31–40 | 1938 | 4.39 | 3.87 | 15.0% | |
| 41 or more | 524 | 4.18 | 3.29 | 13.2% | |
| Work environment | | | | | |
| Private firm | 4712 | 5.57 | 4.59 | 23.4% | |
| Sole practitioner, private practice | 2262 | 4.94 | 4.72 | 19.0% | |
| In-house: government, public, or nonprofit | 2198 | 4.94 | 4.45 | 19.2% | |
| In-house: corporation or for-profit institution | 828 | 4.91 | 4.15 | 17.8% | <0.001 |
| Judicial chambers | 653 | 4.46 | 3.83 | 16.1% | |
| College or law school | 163 | 4.90 | 4.66 | 17.2% | |
| Bar Administration or Lawyers Assistance Program | 50 | 5.32 | 4.62 | 24.0% | |
| Firm position | | | | | |
| Clerk or paralegal | 115 | 5.05 | 4.13 | 16.5% | |
| Junior associate | 964 | 6.42 | 4.57 | 31.1% | |
| Senior associate | 938 | 5.89 | 5.05 | 26.1% | <0.001 |
| Junior partner | 552 | 5.76 | 4.85 | 23.6% | |
| Managing partner | 671 | 5.22 | 4.53 | 21.0% | |
| Senior partner | 1159 | 4.99 | 4.26 | 18.5% | |

*The AUDIT cut-off for hazardous, harmful, or potential alcohol dependence was set at a score of 8.
**Comparisons were analyzed using Mann-Whitney *U* tests and Kruskal-Wallis tests.

approached significance, with higher AUDIT scores predicted for those just starting out in the legal profession (0–10 yrs of experience) ($\beta = 0.46$, Wald $[df = 1] = 3.808$, $P = 0.051$). Model-based calculated probabilities for respondents aged 30 or younger indicated that they had a mean probability of 0.35 (standard deviation [SD] = 0.01), or a 35% chance for scoring an 8 or higher on the AUDIT; in comparison, those respondents who were 61 or older had a mean probability of 0.17 (SD = 0.01), or a 17% chance of scoring an 8 or higher.

Each of the 3 subscales of the AUDIT was also investigated. For the AUDIT-C, which measures frequency and quantity of alcohol consumed, age was a strong predictor of subscore, with younger respondents demonstrating significantly higher AUDIT-C scores. Respondents who were 30 years old or younger, 31 to 40 years old, and 41 to 50 years old all had significantly higher AUDIT-C scores than their older peers, respectively ($\beta = 1.16$, Wald $[df = 1] = 24.56$, $P < 0.001$; $\beta = 0.86$, Wald $[df = 1] = 16.08$, $P < 0.001$; and $\beta = 0.48$, Wald $[df = 1] = 6.237$, $P = 0.013$), indicating that younger age predicted higher frequencies of drinking and quantity of alcohol consumed. No other factors were significant predictors of AUDIT-C scores. Neither the predictive model for the dependence subscale nor the harmful use subscale indicated significant predictive ability for the 3 included factors.

## Drug Use

Participants were questioned regarding their use of various classes of both licit and illicit substances to provide a basis for further study. Participant use of substances is displayed in Table 1. Of participants who endorsed use of a specific substance class in the past 12 months, those using stimulants had the highest rate of weekly usage (74.1%), followed by sedatives (51.3%), tobacco (46.8%), marijuana (31.0%), and opioids (21.6%). Among the entire sample, 26.7% (n = 3419) completed the DAST, with a mean score of 1.97 (SD = 1.36). Rates of low, intermediate, substantial, and severe concern were 76.0%, 20.9%, 3.0%, and 0.1%, respectively. Data collected from the DAST were found to not meet the assumptions for more advanced statistical procedures. As a result, no inferences about these data could be made.

## Mental Health

Among the sample, 11,516 participants (89.8%) completed all questions on the DASS-21. Relationships between demographic and professional characteristics and depression, anxiety, and stress subscale scores are summarized in Table 4. While men had significantly higher levels of depression ($P < 0.05$) on the DASS-21, women had higher levels of anxiety ($P < 0.001$) and stress ($P < 0.001$). DASS-21 anxiety,

© 2016 American Society of Addiction Medicine


Copyright © 2016 American Society of Addiction Medicine. Unauthorized reproduction of this article is prohibited.

**TABLE 4.** Summary Statistics for Depression Anxiety Stress Scale (DASS-21)

| | DASS Depression | | | | DASS Anxiety | | | | DASS Stress | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | n | M | SD | $P^*$ | n | M | SD | $P^*$ | n | M | SD | $P^*$ |
| Total sample | 12300 | 3.51 | 4.29 | | 12277 | 1.96 | 2.82 | | 12271 | 4.97 | 4.07 | |
| Sex | | | | | | | | | | | | |
| Men | 6518 | 3.67 | 4.46 | <0.05 | 6515 | 1.84 | 2.79 | <0.001 | 6514 | 4.75 | 4.08 | <0.001 |
| Women | 5726 | 3.34 | 4.08 | | 5705 | 2.10 | 2.86 | | 5705 | 5.22 | 4.03 | |
| Age category (yrs) | | | | | | | | | | | | |
| 30 or younger | 1476 | 3.71 | 4.15 | | 1472 | 2.62 | 3.18 | | 1472 | 5.54 | 4.61 | |
| 31–40 | 3112 | 3.96 | 4.50 | | 3113 | 2.43 | 3.15 | | 3107 | 5.99 | 4.31 | |
| 41–50 | 2572 | 3.83 | 4.54 | <0.001 | 2565 | 2.03 | 2.92 | <0.001 | 2559 | 5.36 | 4.12 | <0.001 |
| 51–60 | 2808 | 3.41 | 4.27 | | 2801 | 1.64 | 2.50 | | 2802 | 4.47 | 3.78 | |
| 61–70 | 1927 | 2.63 | 3.65 | | 1933 | 1.20 | 2.06 | | 1929 | 3.46 | 3.27 | |
| 71 or older | 326 | 2.03 | 3.16 | | 316 | 0.95 | 1.73 | | 325 | 2.72 | 3.21 | |
| Years in field | | | | | | | | | | | | |
| 0–10 yrs | 4330 | 3.93 | 4.45 | | 4314 | 2.51 | 3.13 | | 4322 | 5.82 | 4.24 | |
| 11–20 yrs | 2800 | 3.81 | 4.48 | | 2800 | 2.09 | 3.01 | | 2777 | 5.45 | 4.20 | |
| 21–30 yrs | 2499 | 3.37 | 4.21 | <0.001 | 2509 | 1.67 | 2.59 | <0.001 | 2498 | 4.46 | 3.79 | <0.001 |
| 31–40 yrs | 2069 | 2.81 | 3.84 | | 2063 | 1.22 | 1.98 | | 2084 | 3.74 | 3.43 | |
| 41 or more yrs | 575 | 1.95 | 3.02 | | 564 | 1.01 | 1.94 | | 562 | 2.81 | 3.01 | |
| Work environment | | | | | | | | | | | | |
| Private firm | 5028 | 3.47 | 4.17 | | 5029 | 2.01 | 2.85 | | 5027 | 5.11 | 4.06 | |
| Sole practitioner, private practice | 2568 | 4.27 | 4.84 | | 2563 | 2.18 | 3.08 | | 2567 | 5.22 | 4.34 | |
| In-house: government, public, or nonprofit | 2391 | 3.45 | 4.26 | | 2378 | 1.91 | 2.69 | | 2382 | 4.91 | 3.97 | |
| In-house: corporation or for-profit institution | 900 | 2.96 | 3.66 | <0.001 | 901 | 1.84 | 2.80 | <0.001 | 898 | 4.74 | 3.97 | <0.001 |
| Judicial chambers | 717 | 2.39 | 3.50 | | 710 | 1.31 | 2.19 | | 712 | 3.80 | 3.44 | |
| College or law school | 182 | 2.90 | 3.72 | | 188 | 1.43 | 2.09 | | 183 | 4.48 | 3.61 | |
| Bar Administration or Lawyers Assistance Program | 55 | 2.96 | 3.65 | | 52 | 1.40 | 1.94 | | 53 | 4.74 | 3.55 | |
| Firm position | | | | | | | | | | | | |
| Clerk or paralegal | 120 | 3.98 | 4.97 | | 121 | 2.10 | 2.88 | | 121 | 4.68 | 3.81 | |
| Junior associate | 1034 | 3.93 | 4.25 | | 1031 | 2.73 | 3.31 | | 1033 | 5.78 | 4.16 | |
| Senior associate | 1021 | 4.20 | 4.60 | <0.001 | 1020 | 2.37 | 2.95 | <0.001 | 1020 | 5.91 | 4.33 | <0.001 |
| Junior partner | 590 | 3.88 | 4.22 | | 592 | 2.16 | 2.78 | | 586 | 5.68 | 4.15 | |
| Managing partner | 713 | 2.77 | 3.58 | | 706 | 1.62 | 2.50 | | 709 | 4.73 | 3.84 | |
| Senior partner | 1219 | 2.70 | 3.61 | | 1230 | 1.37 | 2.43 | | 1228 | 4.08 | 3.57 | |
| DASS-21 category frequencies | n | % | | | n | % | | | n | % | | |
| Normal | 8816 | 71.7 | | | 9908 | 80.7 | | | 9485 | 77.3 | | |
| Mild | 1172 | 9.5 | | | 1059 | 8.6 | | | 1081 | 8.8 | | |
| Moderate | 1278 | 10.4 | | | 615 | 5.0 | | | 1001 | 8.2 | | |
| Severe | 496 | 4.0 | | | 310 | 2.5 | | | 546 | 4.4 | | |
| Extremely severe | 538 | 4.4 | | | 385 | 3.1 | | | 158 | 1.3 | | |

*Comparisons were analyzed using Mann-Whitney *U* tests and Kruskal-Wallis tests.

depression, and stress scores decreased as participants' age or years worked in the field increased ($P < 0.001$). When comparing positions within private firms, more senior positions were generally associated with lower DASS-21 subscale scores ($P < 0.001$). Participants classified as nonproblematic drinkers on the AUDIT had lower levels of depression, anxiety, and stress ($P < 0.001$), as measured by the DASS-21. Comparisons of DASS-21 scores by AUDIT drinking classification are outlined in Table 5.

Participants were questioned regarding any past mental health concerns over the course of their legal career, and provided self-report endorsement of any specific mental health concerns they had experienced. The most common mental health conditions reported were anxiety (61.1%), followed by depression (45.7%), social anxiety (16.1%), attention deficit hyperactivity disorder (12.5%), panic disorder (8.0%), and bipolar disorder (2.4%). In addition, 11.5% of the participants reported suicidal thoughts at some point during their career, 2.9% reported self-injurious behaviors, and 0.7% reported at least 1 prior suicide attempt.

## Treatment Utilization and Barriers to Treatment

Of the 6.8% of the participants who reported past treatment for alcohol or drug use (n = 807), 21.8% (n = 174) reported utilizing treatment programs specifically tailored to legal professionals. Participants who had reported prior treatment tailored to legal professionals had significantly lower mean AUDIT scores (M = 5.84, SD = 6.39) than participants who attended a treatment program not tailored to legal professionals (M = 7.80, SD = 7.09, $P < 0.001$).

Participants who reported prior treatment for substance use were questioned regarding barriers that impacted their ability to obtain treatment services. Those reporting no prior treatment were questioned regarding hypothetical barriers in the event they were to need future treatment or services. The 2 most common barriers were the same for both groups: not wanting others to find out they needed help (50.6% and 25.7% for the treatment and nontreatment groups, respectively), and concerns regarding privacy or confidentiality (44.2% and 23.4% for the groups, respectively).


© 2016 American Society of Addiction Medicine

Copyright © 2016 American Society of Addiction Medicine. Unauthorized reproduction of this article is prohibited.

**TABLE 5.** Relationship AUDIT Drinking Classification and DASS-21 Mean Scores

| | | Nonproblematic M (SD) | Problematic* M (SD) | P** |
|---|---|---|---|---|
| DASS-21 total score | | 9.36 (8.98) | 14.77 (11.06) | <0.001 |
| DASS-21 subscale scores | Depression | 3.08 (3.93) | 5.22 (4.97) | <0.001 |
| | Anxiety | 1.71 (2.59) | 2.98 (3.41) | <0.001 |
| | Stress | 4.59 (3.87) | 6.57 (4.38) | <0.001 |

AUDIT, Alcohol Use Disorders Identification Test; DASS-21, Depression Anxiety Stress Scales-21.

*The AUDIT cut-off for hazardous, harmful, or potential alcohol dependence was set at a score of 8.

**Means were analyzed using Mann-Whitney *U* tests.

## DISCUSSION

Our research reveals a concerning amount of behavioral health problems among attorneys in the United States. Our most significant findings are the rates of hazardous, harmful, and potentially alcohol dependent drinking and high rates of depression and anxiety symptoms. We found positive AUDIT screens for 20.6% of our sample; in comparison, 11.8% of a broad, highly educated workforce screened positive on the same measure (Matano et al., 2003). Among physicians and surgeons, Oreskovich et al. (2012) found that 15% screened positive on the AUDIT-C subscale focused on the quantity and frequency of use, whereas 36.4% of our sample screened positive on the same subscale. While rates of problematic drinking in our sample are generally consistent with those reported by Benjamin et al. (1990) in their study of attorneys (18%), we found considerably higher rates of mental health distress.

We also found interesting differences among attorneys at different stages of their careers. Previous research had demonstrated a positive association between the increased prevalence of problematic drinking and an increased amount of years spent in the profession (Benjamin et al., 1990). Our findings represent a direct reversal of that association, with attorneys in the first 10 years of their practice now experiencing the highest rates of problematic use (28.9%), followed by attorneys practicing for 11 to 20 years (20.6%), and continuing to decrease slightly from 21 years or more. These percentages correspond with our findings regarding position within a law firm, with junior associates having the highest rates of problematic use, followed by senior associates, junior partners, and senior partners. This trend is further reinforced by the fact that of the respondents who stated that they believe their alcohol use has been a problem (23%), the majority (44%) indicated that the problem began within the first 15 years of practice, as opposed to those who indicated the problem started before law school (26.7%) or after more than 15 years in the profession (14.5%). Taken together, it is reasonable to surmise from these findings that being in the early stages of one's legal career is strongly correlated with a high risk of developing an alcohol use disorder. Working from the assumption that a majority of new attorneys will be under the age of 40, that conclusion is further supported by the fact that the highest rates of problematic drinking were present among attorneys under the age of 30 (32.3%), followed by attorneys aged 31 to 40 (26.1%), with declining rates reported thereafter.

Levels of depression, anxiety, and stress among attorneys reported here are significant, with 28%, 19%, and 23% experiencing mild or higher levels of depression, anxiety, and stress, respectively. In terms of career prevalence, 61% reported concerns with anxiety at some point in their career and 46% reported concerns with depression. Mental health concerns often co-occur with alcohol use disorders (Gianoli and Petrakis, 2013), and our study reveals significantly higher levels of depression, anxiety, and stress among those screening positive for problematic alcohol use. Furthermore, these mental health concerns manifested on a similar trajectory to alcohol use disorders, in that they generally decreased as both age and years in the field increased. At the same time, those with depression, anxiety, and stress scores within the normal range endorsed significantly fewer behaviors associated with problematic alcohol use.

While some individuals may drink to cope with their psychological or emotional problems, others may experience those same problems as a result of their drinking. It is not clear which scenario is more prevalent or likely in this population, though the ubiquity of alcohol in the legal professional culture certainly demonstrates both its ready availability and social acceptability, should one choose to cope with their mental health problems in that manner. Attorneys working in private firms experience some of the highest levels of problematic alcohol use compared with other work environments, which may underscore a relationship between professional culture and drinking. Irrespective of causation, we know that co-occurring disorders are more likely to remit when addressed concurrently (Gianoli and Petrakis, 2013). Targeted interventions and strategies to simultaneously address both the alcohol use and mental health of newer attorneys warrant serious consideration and development if we hope to increase overall well being, longevity, and career satisfaction.

Encouragingly, many of the same attorneys who seem to be at risk for alcohol use disorders are also those who should theoretically have the greatest access to, and resources for, therapy, treatment, and other support. Whether through employer-provided health plans or increased personal financial means, attorneys in private firms could have more options for care at their disposal. However, in light of the pervasive fears surrounding their reputation that many identify as a barrier to treatment, it is not at all clear that these individuals would avail themselves of the resources at their disposal while working in the competitive, high-stakes environment found in many private firms.

Compared with other populations, we find the significantly higher prevalence of problematic alcohol use among attorneys to be compelling and suggestive of the need for tailored, profession-informed services. Specialized treatment services and profession-specific guidelines for recovery management have demonstrated efficacy in the physician population, amounting to a level of care that is quantitatively and qualitatively different and more effective than that available to the general public (DuPont et al., 2009).

Our study is subject to limitations. The participants represent a convenience sample recruited through e-mails and

© 2016 American Society of Addiction Medicine


Copyright © 2016 American Society of Addiction Medicine. Unauthorized reproduction of this article is prohibited.

news postings to state bar mailing lists and web sites. Because the participants were not randomly selected, there may be a voluntary response bias, over-representing individuals that have a strong opinion on the issue. Additionally, some of those that may be currently struggling with mental health or substance use issues may have not noticed or declined the invitation to participate. Because the questions in the survey asked about intimate issues, including issues that could jeopardize participants' legal careers if asked in other contexts (eg, illicit drug use), the participants may have withheld information or responded in a way that made them seem more favorable. Participating bar associations voiced a concern over individual members being identified based on responses to questions; therefore no IP addresses or geolocation data were gathered. However, this also raises the possibility that a participant took the survey more than once, although there was no evidence in the data of duplicate responses. Finally, and most importantly, it must be emphasized that estimations of problematic use are not meant to imply that all participants in this study deemed to demonstrate symptoms of alcohol use or other mental health disorders would individually meet diagnostic criteria for such disorders in the context of a structured clinical assessment.

## CONCLUSIONS

Attorneys experience problematic drinking that is hazardous, harmful, or otherwise generally consistent with alcohol use disorders at a rate much higher than other populations. These levels of problematic drinking have a strong association with both personal and professional characteristics, most notably sex, age, years in practice, position within firm, and work environment. Depression, anxiety, and stress are also significant problems for this population and most notably associated with the same personal and professional characteristics. The data reported here contribute to the fund of knowledge related to behavioral health concerns among practicing attorneys and serve to inform investments in lawyer assistance programs and an increase in the availability of attorney-specific treatment. Greater education aimed at prevention is also indicated, along with public awareness campaigns within the profession designed to overcome the pervasive stigma surrounding substance use disorders and mental health concerns. The confidential nature of lawyer-assistance programs should be more widely publicized in an effort to overcome the privacy concerns that may create barriers between struggling attorneys and the help they need.

## ACKNOWLEDGMENTS

*The authors thank Bethany Ranes, PhD, and Valerie Slaymaker, PhD, of the Hazelden Betty Ford Foundation for their contributions to the analyses (BR) and overall manuscript (VS).*

*The authors also thank the Hazelden Betty Ford Foundation and The American Bar Association for their support of this project.*

## REFERENCES

Antony M, Bieling P, Cox B, Enns M, Swinson R. Psychometric properties of the 42-item and 21-item versions of the depression anxiety stress scales in clinical groups and a community sample. *Psychol Assess* 1998;2:176–181.

Association of American Law Schools. Report of the AALS special committee on problems of substance abuse in the law schools. *J Legal Educ* 1994;44:35–80.

Babor TF, Higgins-Biddle JC, Saunders JB, Monteiro MG. The alcohol use disorders identification test: guidelines for use in primary care [WHO web site]. 2001. Available at: http://whqlibdoc.who.int/hq/2001/who_msd_msb_01.6a.pdf. Accessed August 5, 2014.

Beck C, Sales B, Benjamin, GA. Lawyer distress: alcohol-related problems and other psychological concerns among a sample of practicing lawyers. J.L. Health 1995–1996; 10(1):1–60.

Benjamin GA, Darling E, Sales B. The prevalence of depression, alcohol abuse, and cocaine abuse among United States lawyers. *Int J Law Psychiatry* 1990;13:233–246. ISSN 0160-2527.

Bradley K, Bush K, McDonell M, Malone T, Fihn S. Screening for problem drinking comparison of CAGE and AUDIT. *J Gen Intern Med* 1998;13(6):379–989. 0884-8734.

Bush K, Kivlahan D, McDonell M, Fihn S, Bradley K. The AUDIT Alcohol Consumption Questions (AUDIT-C): an effective brief screening test for problem drinking. *Arch Intern Med* 1998;158:1789–1795. 0003-9829.

Clara I, Cox B, Enns M. Confirmatory factor analysis of the depression-anxiety-stress scales in depressed and anxious patients. *J Psychopathol Behav Assess* 2001;23:61–67.

Crawford J, Henry J. The Depression Anxiety Stress Scale (DASS): normative data and latent structure in a large non-clinical sample. *Br J Clin Psychol* 2003;42:111–131 (0144-6657).

DuPont R, McLellan AT, White W, Merlo L, Gold M. Setting the standard for recovery: Physicians' Health Programs. *J Subst Abuse Treat* 2009;36: 1597–2171 (0740-5472).

Eaton W, Anthony J, Mandel W, Garrison R. Occupations and the prevalence of major depressive disorder. *J Occup Med* 1990;32(11):1079–1087 (0096-1736).

Gianoli MO, Petrakis I. Pharmacotherapy for and alcohol comorbid depression dependence: Evidence is mixed for antidepressants, alcohol dependence medications, or a combination. January 2013. Available at: http://www.currentpsychiatry.com/fileadmin/cp_archive/pdf/1201/1201CP_Petrakis.pdf. Accessed June 1, 2015.

Henry J, Crawford J. The short-form version of the Depression Anxiety Stress Scales (DASS-21): construct validity and normative data in a large non-clinical sample. *Br J Clin Psychol* 2005;44:227–239 (0144-6657).

Lovibond, SH, Lovibond, PF. Manual for the Depression Anxiety Stress Scales. 2nd ed. Sydney: Psychology Foundation; 1995.

Matano RA, Koopman C, Wanat SF, Whhitsell SD, Borggrefe A, Westrup D. Assessment of binge drinking of alcohol in highly educated employees. *Addict Behav* 2003;28:1299–1310.

Meneses-Gaya C, Zuardi AW, Loureiro SR, Crippa A. Alcohol Use Disorders Identification Test (AUDIT): an updated systematic review of psychometric properties. *Psychol Neurosci* 2009;2:83–97.

Oreskovich MR, Kaups KL, Balch CM, et al. Prevalence of alcohol use disorders among American surgeons. *Arch Surg* 2012;147(2):168–174.

Rothstein L. Law students and lawyers with mental health and substance abuse problems: protecting the public and the individual. *Univ Pittsburgh Law Rev* 2008;69:531–566.

Yudko E, Lozhkina O, Fouts A. A comprehensive review of the psychometric properties of the drug abuse screening test. *J Subst Abuse Treat* 2007;32:189–198.



© 2016 American Society of Addiction Medicine

Copyright © 2016 American Society of Addiction Medicine. Unauthorized reproduction of this article is prohibited.