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

TABLE OF CONTENTS

INTRODUCTION 3

SECTION I: UNIFORM STATE POLICY 4
- A. Policy Statement 4
- B. Employee Access to Information on Reasonable Accommodation 5
- C. Confidentiality Requirements 5

SECTION II: DEFINITIONS AND PROCEDURES FOR HANDLING REQUESTS FOR REASONABLE ACCOMMODATION IN NEW YORK STATE AGENCIES 6
- A. Definitions 6
  - 1. Covered Individuals 6
    - a. Person with a Disability 6
    - b. Person with a Pregnancy-related Condition 6
  - 2. Physical, Mental or Medical Impairment 6
  - 3. Reasonable Performance 7
  - 4. Essential Job Functions 7
  - 5. Qualified Person with a Disability 7
  - 6. Reasonable Accommodation 8
  - 7. Undue Hardship 8
- B. Uniform Procedures for Processing Reasonable Accommodation Requests 9
  - 1. Who May Request a Reasonable Accommodation? 9
  - 2. Processing a Request for Reasonable Accommodation 10
    - a. Request for Reasonable Accommodation 11
    - b. Acknowledgement of Request for Reasonable Accommodation 11
    - c. Status Update/Notification of Need for Additional Information 11
    - d. Notification of Agency Determination 13
- C. Maintenance of Records and Data Collection 16

Appendix A: Sample Forms, Sections A through D 17

Appendix B: Regulations 22

INTRODUCTION

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

Assistive technology may also play an important role in accommodating individuals in the workplace with disabilities. For questions regarding assistive technology, please contact:

New York State
Chief Information Officer/Office of Information Technology Services
Empire State Plaza
Albany, New York 12220
(866) 789-4638

SECTION I: UNIFORM STATE POLICY

A. Policy Statement

Each agency, department, office and facility shall follow the Statewide Reasonable Accommodation Policy and Procedures, as set forth below, and communicate its commitment to provide reasonable accommodation to employees and applicants with disabilities or pregnancy-related conditions.

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

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

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

Reasonable accommodation must be considered in all employment decisions. The employer may not deny any employment opportunity to a qualified employee or applicant with a disability or pregnancy-related conditions, thus attempting to avoid the need to make a reasonable accommodation, unless the accommodation would impose an undue hardship. This protects the disabled individual's right to equal job opportunity.

B. Employee Access to Information on Reasonable Accommodation

Every agency must periodically inform its employees of the Reasonable Accommodation Policy and Procedures. Acceptable means of communicating this information include distributing a copy of the policy and procedures to all employees annually via email; referring to the policy on an annual basis in the agency's newsletter and advising employees of where the policy is available both in hardcopy and electronic format; and having division or program directors remind staff of the policy and procedures on an annual basis.

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

The Reasonable Accommodation Policy should be made available at interviews. The names and office phone numbers of key personnel involved in providing accommodation, including the agency's Designee for Reasonable Accommodation (DRA), shall be posted and the listing maintained by the agency's DRA. This listing shall also be provided to and made available from personnel offices, EAP coordinators, as well as an agency's Counsel's Office. DRAs and any Alternate DRAs shall be employees of an agency's Human Resource or Personnel Office. DRAs must always work closely with an identified individual or individuals in their Agency's Counsel or Legal Office to ensure that potential legal issues are identified and addressed in a timely manner. For difficult issues or those that require technical assistance, agencies should contact their Diversity and Inclusion Specialist at the Department of Civil Service Office of Diversity and Inclusion Management (ODIM).

C. Confidentiality Requirements

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

All medical information must be treated as confidential medical records. Agency personnel must take steps to guarantee the security of the employee's medical information, including keeping the information in files in a secure location, separate from personnel files, and designating a specific person or persons to have access to the medical file. Supervisors and managers are not entitled to copies of medical records or specific medical information, and need only be informed about necessary restrictions on the work or duties of the employee and necessary accommodations. First aid and safety personnel may be informed, when appropriate, if the disability may require emergency treatment, or if any specific procedures are needed in case of fire or other evacuations.

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

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

A. Definitions

The following definitions are based on the New York State Human Rights Law. Unlike both the Americans with Disabilities Act and the Rehabilitation Act of 1973, the New York State Human Rights Law protects all individuals with physical, mental or medical impairments that either impede normal bodily function *or* are demonstrable by medically accepted diagnostic technique. The protection of the federal statutes is limited to those impairments which substantially limit one or more major life activities. *Therefore, State law coverage is broader, and the broader definition of disability must be applied when making a determination as to whether an individual is a person with a disability.* On January 19, 2016, under the New York State Human Rights Law, individuals with pregnancy-related conditions became specifically protected from discrimination. Additionally, the New York State Human Rights Law now requires employers to provide a reasonable accommodation to individuals with pregnancy-related conditions.

1. Covered Individuals
   a. Person with a Disability

Any person who has "a physical, mental or medical impairment," who, upon provision of reasonable accommodation if needed, is able to perform in a reasonable manner, the activities involved in the job or occupation sought or held.

"Person with a disability" also includes a person who has a record or history of impairment, even if s/he does not currently have an impairment. These individuals are protected from discrimination, but only current impairments need to be reasonably accommodated. Similarly, persons who have a condition regarded by others as an impairment, or who are incorrectly perceived as having an impairment, are also protected from discrimination. However, only actual impairments need to be reasonably accommodated.

While the law may also protect from discrimination those individuals who do not themselves have a disability, but who are discriminated against on the basis of their association with an individual with a disability, only the employee's or applicant's disability must be accommodated.

   b. Person with a Pregnancy-related condition

Any person who has a medical condition related to pregnancy or childbirth that inhibits the exercise of a normal bodily function, or is demonstrable by medically accepted clinical or laboratory diagnostic techniques, where such condition, after the provision of a reasonable accommodation, does not prevent such person from performing, in a reasonable manner, the activities involved in the job or occupation sought or held.

2. Physical, Mental or Medical Impairment

Any 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."

3. Reasonable Performance

The Human Rights Law protects from discrimination those individuals who can reasonably perform the job, with reasonable accommodation, if needed, despite the person's impairment. Reasonable performance is not perfect performance or performance unaffected by the disability, but reasonable job performance reasonably meeting the employer's needs to achieve its business goals. Ability to reasonably perform the "activities involved in the job or occupation" means the ability, with or without accommodation, to satisfactorily perform the essential functions of the job or occupation. Satisfactory performance means minimum acceptable performance of the essential functions of the job as established by the employer. The employer's judgment as to what is minimum acceptable performance will prevail, as long as standards for performance are applied equally to all employees in the same position. Such standards for satisfactory performance may include minimum productivity standards or quotas.

4. Essential Job Functions

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

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

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

5. Qualified Person with a Disability

A person with a disability who, as defined above, can reasonably perform the activities involved in (i.e., the essential functions of) the job, and who satisfies the requisite skill, experience, education and other job-related requirements of the position which the individual holds or desires.

6. Reasonable Accommodation

The New York State Human Rights Law, the Rehabilitation Act of 1973, and the Americans With Disabilities Act require that certain employers provide reasonable accommodation to the known physical or mental limitations of otherwise qualified applicants or employees with disabilities, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of its business. Reasonable accommodation refers to the modifications or adjustments to a job application process which enables a qualified individual with a disability to be considered for the position sought and to modifications or adjustments to the work environment or the manner or circumstances under which a job is performed which permit an employee to perform their job in a reasonable manner. An accommodation is reasonable if it removes or mitigates the barriers to performance caused by the individual's impairment, and does not cause undue hardship to the employer.

Reasonable accommodations may include, but are not limited to: making facilities more readily accessible to individuals with disabilities; acquisition or modification of equipment; job restructuring; modified work schedules; adjustments to work schedule for treatment or recovery; reassignment to an available, vacant position for which the employee is qualified; adjustment of examinations, training materials or policies; providing readers or interpreters or providing high or low assistive technology, such as voice recognition software. Generally, the provisions of personal items or provisions for personal care needs, such as hearing aids or wheelchairs, are not the responsibility of the employer. Personal attendants, when provided by the employee or applicant, should be permitted to accompany and assist the employee or applicant.

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

7. Undue Hardship

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

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

Before granting a reasonable accommodation, the Designee for Reasonable Accommodation ("DRA") must consider whether the accommodation may have a direct impact on the terms of a collective bargaining agreement. The agency designee should seek guidance from the agency general counsel and/or the agency's Human Resources Director. These individuals may consult with GOER as needed.

B. Uniform Procedures for Processing Reasonable Accommodation Requests

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

Many specific issues that arise in connection with the provision of reasonable accommodation of disability are addressed in the regulations of the Division of Human Rights, 9 NYCRR § 466.11, which are attached as Appendix B. These regulations have been endorsed by the courts in many respects, and can be relied upon for substantial guidance as to what is and is not a reasonable accommodation.

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

To request an accommodation, an individual need not mention the Human Rights Law, the ADA or use the phrase "reasonable accommodation". Rather, the individual need only let the employer know that s/he needs an adjustment or change in applying for a position or at work for a reason related to a medical condition.

The accommodation process should not be adversarial in nature. To the contrary, the spirit of the Human Rights Law as well as the Rehabilitation Act of 1973, and the Americans with Disabilities Act, encourages a meaningful dialogue between the employee and the employer and/or the unions. Additionally, the employer must obtain the consent of the employee prior to sharing any confidential information with unions regarding the employee's disability or pregnancy-related condition.

It should also be noted that agencies generally are required to complete the reasonable accommodation process prior to initiating or proceeding with any action pursuant to Section 72 of the Civil Service Law.

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

1. <u>Who May Request a Reasonable Accommodation?</u>

Employees or applicants with disabilities may request a reasonable accommodation, regardless of title, salary grade, bargaining unit, employment status (permanent, contingent, temporary or provisional) or jurisdictional classification (exempt, non-

competitive, competitive or labor class). An employee with a disability may request an accommodation at any time.

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

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

a. Applicants

The agency must provide a reasonable accommodation during the application process to applicants with disabilities who request such accommodation. Reasonable accommodation requests may be received by agency personnel and/or the agency's DRA. The Applicant Flow Procedure, as outlined on pages 11-17 of the Internal Agency Auditing and Reporting Systems (Model Affirmative Action Procedures) may be used to track and monitor accommodations.

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

b. Current Employees

Current employees may request an accommodation through either their first-line supervisor or the agency's DRA. If an employee makes his or her request through the supervisor, the supervisor may handle and even approve the request, but only after consultation with and approval by the DRA. However, since certain determinations may require a more complex analysis, or may involve agency expenditures, the supervisor shall forward the request to the DRA for handling where so directed.

2. <u>Processing a Request for Reasonable Accommodation</u>

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

a. Request for Reasonable Accommodation

This section serves as an initial application form, and asks for basic information needed to consider and act upon the request, such as the name of the applicant/employee; title information; office or unit; work location (for current State employees); and contact information, along with a description of the reasonable accommodation being requested and the reason for the accommodation.

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

b. Acknowledgement of Request for Reasonable Accommodation

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

The following steps should be followed:

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

c. Status Update/Notification of Need for Additional Information

This section is used to provide an update to the applicant/employee or to request additional information/supporting documentation, which is necessary before a decision regarding a reasonable accommodation can be made. No later than two weeks after providing a completed Section B to the employee, the DRA must provide this form to the individual who has requested the reasonable accommodation, specifying the additional information or documentation that is required to continue with the review and assessment process. Such additional information must truly be necessary to complete the process, and includes, but is not limited to information regarding the specific functional limitations of the individual, medical documentation, and/or information regarding specific type or types of accommodations that might be effective.

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

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

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

- Since a reasonable accommodation must take into consideration the specific abilities and functional limitations of a particular applicant or employee with a disability, and the specific functional requirements of a particular job, the focus should be on identifying the abilities and limitations of an individual, not on the diagnosis and prognosis of a physical or mental condition.

- If the DRA is unsure as to whether or not it is appropriate to request such medical documentation, he or she should confer with agency counsel for guidance.

ii. Requesting Medical Information / Documentation

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

- An agency may require that the applicant/employee with the disability provide reasonable documentation substantiating the need for an accommodation. The agency may require only that documentation necessary to establish that the individual has a qualified disability, and that the disability or pregnancy-related condition, and that the disability or pregnancy-related condition necessitates a reasonable accommodation. Accordingly, the documentation should identify the specific functional limitations imposed by the physical or mental disability, and the precise job limitations imposed by the disability or pregnancy-related condition.
- An employer has the right to require – and applicants/employees have the right to supply – the documentation about the disability and functional limitations from a physician or other medical professional, psychologist, social worker, rehabilitation counselor, occupational or physical therapist, independent living specialist or other professional with knowledge of the employee's disability or pregnancy-related condition.
- If the agency determines that the medical documentation provided is inadequate to support the request or has reason to doubt its veracity, the agency should explain to the individual why the documentation is inadequate and provide the employee with an opportunity to submit additional documentation supporting the request.

- However, in a situation where the disability and/or the need for accommodation is not obvious, and an agency finds that, based on its criteria, the need for an

accommodation or the exact functional limitations are still not clearly established, the agency may require the employee to submit to a medical examination by the Employee Health Service of the Department of Civil Service or an appropriate medical professional designated by the agency. The agency, as employer, must pay any costs associated with the visit.

- If the employee's disability or need for reasonable accommodation is not obvious, and he or she fails to submit documentation meeting agency criteria or refuses to submit to a medical examination required by the agency, and such information or documentation is necessary to complete the reasonable accommodation process, then the agency may deny the requested accommodation.

- Any medical documentation submitted may be used only to evaluate the employee's request for accommodation. An agency may not use documentation obtained during this process or the refusal to submit to the medical examination as a basis for taking any adverse personnel action.

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

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

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

d. Notification of Agency Determination

i. <u>Overview of Process</u>

This section advises the applicant/employee of the agency's determination and provides information regarding potential remedies should the individual be dissatisfied with the agency's determination. It is to be completed once the DRA completes the review process, as described below, but must be provided to the employee within three weeks of either receipt of Section A, or the receipt of final additional information required to properly

review and assess the request. Once the form is provided to the individual who has requested the accommodation, s/he signs the form, indicating whether s/he is accepting or rejecting the reasonable accommodation, retains a copy, and returns the original to the agency's DRA for filing. If the employee accepts the accommodation, a letter from the agency head (or designee) confirming this decision is sent to the employee within the next week. If the employee does not accept the offered accommodation (which may differ from the accommodation requested) the form shall be returned to the agency's DRA and filed. The employee is then free to pursue the various options outlined in the notification of rights provided as part of Section D.

ii. Final Review

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

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

Following review of the documentation, the DRA must determine whether or not granting the accommodation(s) requested – or an alternate reasonable accommodation - would cause undue hardship. The DRA should also confer with the relevant supervisor prior to granting any accommodation. In making the undue hardship determination, some factors to be considered include:

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

Remember that reasonable accommodation seeks to facilitate the individual's reasonable performance of essential job functions, but does not require the permanent reassignment of essential job functions.

iii. Alternative Accommodation

If more than one alternative is identified as an effective accommodation, the agency may choose the accommodation that best meets its needs. However, whenever possible, the agency should certainly take into consideration the employee's preferences.

Example: If an employee with a disability requests that the thermostat in the workplace be raised to a certain level to accommodate his/her disability, and this level would make it uncomfortably hot for other employees or customers, the employer would not have to provide this accommodation. However, if there were an alternative accommodation that would not be an undue hardship, such as placing the employee in a room with a separate thermostat, the employer may have to provide that accommodation.

iv. Consultation with Employee

An employee consultation *may* be conducted before approval of a reasonable accommodation, but *must always* be conducted before there is a denial of a request for reasonable accommodation or an offer of an alternative accommodation.

The consultation is an opportunity to discuss:

- How job-related limitations could be overcome;
- Possible reasonable accommodations; and
- The expected efficacy of each possible accommodation.
- The consultation should include discussion of the employee's preferences.

Where more than one possible reasonable accommodation exists, the agency should consider the employee's preference. However, the agency has the discretion to choose among various effective reasonable accommodations.

v. Agency Will Provide the Reasonable Accommodation as Requested

If, based on the information provided by the employee, and any information that may have been provided by the employee's medical professionals, the agency is able to provide the employee with the reasonable accommodation that the employee requested, the DRA will so note in Section D. Before the employee is notified of the approval of the accommodation, the DRA should first notify the employee's supervisor.

A reasonable accommodation may be provided for a limited duration, such as where an unusual or even novel reasonable accommodation is being provided, and the agency needs the opportunity to assess whether or not the accommodation is working well, and whether or not it is operationally disruptive or otherwise causes an undue hardship. If this is the

case, the DRA must specify a date upon which the reasonable accommodation will be reevaluated.

The employee's supervisor is instructed to discuss implementation of this accommodation with the employee. If the employee has any questions, s/he may contact the agency's DRA.

vi. Agency Will Offer an Alternative Accommodation

If the agency determines that it will offer an accommodation different from the one requested, then the supervisor should be consulted about the proposed accommodation before the employee is advised of the offer. Section D of the Application shall be completed and sent to the employee, to inform the employee of the agency's determination.

If the employee does not accept the offered accommodation, Section D of the Application should be returned to the DRA, with the employee's signature, denoting that s/he rejects the accommodation that has been offered.

vii. Agency Is Unable to Provide a Reasonable Accommodation

If, based on the information provided, the agency is unable to provide a reasonable accommodation, the DRA will so note in the latter portion of Section D. A reason for the denial must be given to the employee. The employee is also given information on additional alternatives which include the filing of a discrimination complaint if the employee feels that the agency's denial of the accommodation was unlawful. At this point, the employee may elect to accept the agency's decision and end the process; to file an internal discrimination complaint under the State's Equal Employment Opportunity Policy, as set forth in the Handbook of Rights and Responsibilities for New York State agency employees; or to pursue various other remedies, as set forth in Section D. If pursuing an outside complaint, the employee should consult with the appropriate antidiscrimination agency regarding the time limitations for initiating an action. Although these time limitations vary, the time for filing a complaint pursuant to all the alternatives begins to run at the time of the agency's first denial of the accommodation request.

C. Maintenance of Records and Data Collection

To the extent that any applicable laws, Executive Orders or Memoranda, rules, regulations, or policies require the maintenance of records regarding requests for accommodation, it shall be the DRA's responsibility to maintain such records.

Sections A through D

Application to Request
Reasonable Accommodation of a Disability

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

Section A

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

Name	Civil Service Title	Job Title (if different)
Office/Unit	Work Location	Telephone Number(s)
E-mail address:	Preferred method of communication:	

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

Employee Signature	Date

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

Application to Request Reasonable Accommodation of Disability

Section B

Initial Response to Request for an Accommodation
(To be completed by DRA)

Name of Employee:

We have reviewed your application for an accommodation.

☐ Your request has been approved

Comments:

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

Comments:	
Agency's DRA's Signature	Date
DRA's name:	

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

Application to Request Reasonable Accommodation of Disability

Section C

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

Name of Employee:

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

☐ **Medical Documentation**

Please inform your doctor of your application for an accommodation and have your doctor send us medical documentation, indicating the limitations that your disability would place on your job performance.

☐ A copy of the duties description for your title; or -

☐ A list of the essential functions of your position is attached for the doctor's reference.

Information should be sent by the following date: (date) _____ .
The report should be provided to the agency's Designee for Reasonable Accommodation (DRA).

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

☐ Other

Explain:

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

The [agency]'s review process will include an evaluation of all relevant information. This may include an interview with you and/or your supervisor. After completion of the review, you will be informed in writing by the Commissioner of the Department, or the DRA, regarding the Department's decision.
We anticipate that the decision will be made by (date): (date) _____ .
If you have any questions, please contact [the DRA].

Signature of *DRA*	Date

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

Application to Request Reasonable Accommodation of Disability

Section D

Notification of Agency Determination:
(To be completed by the DRA and returned to the employee)

Name of Employee:

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

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

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

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

I accept ☐ / reject ☐ the above reasonable accommodation.	
Employee Signature	Date

-or-

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

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

Signature of *[DRA]*	Date

If you have any questions, please call *[the DRA]*. The employee should retain a copy of this form. The original will be filed by *[the DRA]*.

Remedies relating to Dissatisfaction with Agency's Reasonable Accommodation Determination

A letter from *[the Commissioner of the Department or the DRA]* confirming the decision will be sent to you within the next week after you receive the Notification of Agency Determination. If you are dissatisfied with the determination, you now have several options:

1. You may choose to accept this decision and end the process; or

2. You may choose to file an internal discrimination complaint at this time if you feel that the *[Agency]*'s determination is unlawful.

3. In addition to the options stated above, other alternatives may also be available. These include, but are not limited to:

- filing a complaint with any compliance agency designated under Sections 503/504 of the Rehabilitation Act of 1973;
- filing a complaint with the New York State Division of Human Rights;
- filing a complaint with the Equal Employment Opportunity Commission or any appropriate federal oversight agency under the American with Disabilities Act; and
- filing a private right of action to challenge the alleged discriminatory act, under the New York State Human Rights Law, or any applicable statute.

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

Regulations

REASONABLE ACCOMMODATION

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

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

(a) Reasonable accommodation.

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

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

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

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

(b) Determination of reasonableness.

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

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

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

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

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

(i) The overall size of the business, program or enterprise with respect to the number of employees, number and type of facilities, and size of budget;

(ii) The type of operation which the business, program or enterprise is engaged in, including the composition and structure of the workforce; and

(iii) The nature and cost of the accommodation needed, including consideration of any money available from other sources to assist the employer in paying the cost.

(c) Covered disabilities.

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

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

(i) a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques or

(ii) a record of such an impairment or

(iii) a condition regarded by others as such an impairment.

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

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

(d) Who is entitled to a reasonable accommodation?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(g) Safety concerns; objectionable behaviors.

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

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

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

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

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

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

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

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

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

(h) Drug addiction and alcoholism.

(1) Alcoholism and drug addiction are diseases. However, an individual who is currently using drugs illegally (see paragraph (4) of this subdivision), is not protected in this regard by the Human Rights Law. The Law does protect an individual who is a recovered/recovering alcoholic or drug addict.

(2) Adjustments to the work schedule, where needed to allow for ongoing treatment, must be allowed as an accommodation where reasonable, if the individual is still able to perform the essential functions of the job including predictable and regular attendance.

(3) The recovered/recovering alcoholic or drug addict should be expected to perform job tasks just as anyone else with similar skills, experience and background.

(4) Where the employer has knowledge of the current illegal use of drugs, the employee is not entitled by law to accommodation, and may be terminated.

(i) "Current illegal use of drugs" means illegal use of drugs that occurred recently enough to justify a reasonable belief that a person's drug use is current or that continuing use is a real and ongoing problem.

(ii) In determining whether recent use is enough to justify a reasonable belief in current use, the individual's successful participation in a program for rehabilitation or recovery since the recent use is relevant.

(5) Employers are encouraged, where the employer knows of current illegal use of drugs, or where job performance of an alcoholic or drug addict deteriorates to below acceptable standards, to utilize the practice of leave of absence and required attendance at a rehabilitation program, along with a "last chance" agreement requiring acceptable performance and attendance upon return. If an employee denies the problem and refuses the leave, treatment and last chance agreement, the employee may be terminated or disciplined for the documented performance problems.

(6) Drug testing.

(i) A test to determine the illegal use of drugs is not to be considered a medical test.

(ii) Nothing in these regulations is to be construed to encourage, prohibit, or authorize the conducting of drug tests for the illegal use of drugs by job applicants or employees, or the making of employment decisions based on the test results.

(iii) Nothing in these regulations is to be construed to encourage, prohibit, restrict or authorize the otherwise lawful exercise by entities subject to the jurisdiction of the United State Department of Transportation, of authority to test applicants for or employees in safety sensitive positions for the illegal use of drugs or for on-duty impairment by alcohol, or to remove persons who test positive from safety sensitive duties.

(iv) Any information regarding the medical condition or history of any applicant or employee obtained from a drug test, except information regarding illegal use of drugs, must be kept confidential, and may not be used in any way to the disadvantage of the applicant or employee.

(i) Temporary disabilities.

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

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

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

(j) Rights and duties of the employer.

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

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

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

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

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

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

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

(k) Rights and duties of the employee.

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

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

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

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

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