



Department of Employee Relations

**City of Milwaukee Policy and Compliance Manual
 AMERICANS WITH DISABILITIES ACT
 AMERICAN WITH DISABILITIES AMENDMENT ACT
 WISCONSIN FAIR EMPLOYMENT ACT**

May 30, 2012

Policy Statement

The City of Milwaukee is committed to providing equal employment opportunities for all employees and applicants for employment with the City regardless of disability. It is the City’s policy, in compliance with the Americans with Disabilities Act (ADA), the American with Disabilities Amendment Act (ADAAA) and the Wisconsin Fair Employment Act (WFEA) to prohibit discrimination and harassment on the basis of disability, with regard to application and examination procedures, hiring, advancement, compensation, job training, discharge and other terms, conditions and privileges of employment. The City will reasonably accommodate a qualified individual where such accommodation does not create an undue hardship in accordance with applicable legal provisions.

This policy, consistent with applicable laws, also prohibits retaliation against an applicant or employee for asserting his/her rights under the law.

This policy regarding qualified individuals with disabilities will be coordinated with all other City policies such as safety, workplace violence prevention, pre-employment medical examinations, leave, etc. This policy will also be coordinated with other applicable laws such as the Family Medical Leave Act and the Wisconsin Worker’s Compensation law. The City reserves the right to amend or interpret this policy as necessitated by individual circumstances and/or changes in state and federal laws.

Definitions

Individual with a disability - is a person who:

Under the ADA/ADAAA (federal)	Under the WFEA (state)
<ul style="list-style-type: none"> • Has a physical or mental impairment that substantially limits one or more major life activities; • Has a record of such impairment; or • Is regarded as having such impairment. 	<ul style="list-style-type: none"> • Has a physical or mental impairment which makes achievement unusually difficult or limits capacity to work; • Has a record of such impairment; or • Is perceived as having such impairment.

Qualified individual with a disability - Under federal and state law, a “qualified individual” is one who possesses the required training, education, experience, knowledge, skills, and abilities or other job-related requirements of the job and who, with or without a reasonable accommodation, can perform the essential functions of the job.

Essential functions – the most important job duties and critical elements that must be performed to achieve the objectives of a job. Under federal and state law a function may be considered “essential” when the reason the position exists is to perform that function; a limited number of employees are available among whom the performance of that job function can be distributed; and/or the function is highly specialized and an individual is hired based on his/her ability to perform it.

Impairment - any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organ, respiratory, cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin and endocrine. In addition, any mental or psychological disorder such as intellectual disability, organic brain syndrome, emotional or mental illness and specific learning disabilities.

Interactive process- a good faith communication process between the City or a City agency to identify a reasonable accommodation that allows an employee to perform effectively. The process requires participants to consider information such as: the essential functions of the job, the employee's functional limitations and medical information; possible accommodations; and the reasonableness and implementation of possible accommodations.

Major life activities- include, but may not be limited to, caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working. They also include bodily functions such as the functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions.

Mitigating measures- medications and/or assistive devices that an individual uses to eliminate or reduce the effect of an impairment.

Reasonable accommodation – modifications or an adjustment 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. A reasonable accommodation may also be a modification to the format or manner in which a test is given that does not require use of an impaired skill unless the test is designed to measure that skill.

Record of disability – An individual has a record of a disability if the individual has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities. An individual with a record of a substantially limiting impairment may be entitled, absent undue hardship, to a reasonable accommodation if needed and related to the past disability. For example, an employee with an impairment that previously limited, but no longer substantially limits, a major life activity may need leave or a schedule change to permit him or her to attend follow-up or “monitoring” appointments with a health care provider.

Regarded as - An individual meets the requirement of 'being regarded as' having an impairment' if the individual establishes that he or she has been subjected to an action prohibited under the ADA because of an actual perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity. However “regarded as” does not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less. To be covered, an individual only has to establish that an employer discriminated against him/her because of a medical condition, whether he/she actually has one or the employer just thought he/she did. The employee does not have to meet the substantially-limited-in-a-major-life activity standard.

Substantially limiting - an individual is “substantially limited” in a major life activity when the individual is unable to perform a major life activity as compared to an average person in the general population without regard to ameliorative (positive) effects of mitigating measures

Undue hardship – an action that is unduly costly, extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the City department requiring significant difficulty or expense by the employer.

Reasonable Accommodations

A reasonable accommodation is a modification or adjustment to a job, an employment practice, or the work environment that makes it possible for a qualified individual with a disability to enjoy an equal employment opportunity. There are three categories of "reasonable accommodations":

- modifications or adjustments to a job application or selection process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or
- 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
- 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.

Under federal and state law, a “reasonable accommodation” may include, but is not necessarily limited to making existing facilities used by employees or applicants readily accessible to and usable by persons with disabilities; job restructuring, modifying work schedules, reassignment to a vacant position for which the individual is qualified; and/or acquiring or modifying equipment or devices, adjusting, modifying examinations, training materials, or policies, and providing qualified readers or interpreters.

A modification or adjustment is reasonable if it seems reasonable on its face (if it appears to be feasible or plausible). An accommodation must also be effective in meeting the needs of the individual. However, it is important to recognize that the City of Milwaukee can choose among effective accommodation options and is not required to:

- provide the requested accommodation;
- provide accommodations that pose an undue hardship;
- make a testing accommodation that eliminates testing of a critical knowledge or skill;
- make an accommodation for an individual who is not otherwise qualified for a position;
- remove essential functions, create new jobs, or lower production standards as an accommodation;
- grant indefinite leave as a reasonable accommodation;
- provide as reasonable accommodations personal use items needed in accomplishing daily activities both on and off the job; and,
- rescind disciplinary action or a less than satisfactory evaluation warranted by poor performance when a disclosure of disability happens after performance deficiencies are addressed.

The City 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.

In order to qualify for a reasonable accommodation an individual must be covered under the “actual disability” or “record of disability” categories. Individuals who only meet the “regarded as” definition of disability are not entitled to accommodations.

Factors in Determining whether a Condition Substantially Limits a Major Life Activity

In determining whether a condition substantially limits a major life activity, the City will follow the following “rules of construction” provided by the EEOC.

- The term substantially limits shall be construed broadly in favor of expansive coverage.
- An impairment is a disability if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population (not just a comparison to those similarly situated).
- Determining whether an impairment substantially limits a major life activity shall be done quickly without demanding extensive scientific, medical, or statistical analysis.
- The determination of whether an impairment substantially limits a major life activity requires an individualized assessment.
- When determining whether a person is substantially limited in a major life activity, the beneficial effects of mitigating measures (except for ordinary eyeglasses or contact lens) shall be ignored. However if the mitigating measure itself causes any limitations, then those shall be considered.
- An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

- To be considered a disability an impairment needs to substantially limit only one major life activity.

For conditions that are not so obviously disabilities, the EEOC regulations state that in determining whether an individual is substantially limited in a major life activity, it may be useful in appropriate cases to consider, as compared to most people in the general population, the condition under which the individual performs the major life activity; the manner in which the individual performs the major life activity; and/or the duration of time it takes the individual to perform the major life activity, or for which the individual can perform the major life activity.

Accommodations in the Employment Process

Applicants for City of Milwaukee positions may request reasonable accommodations as part of examination process by completing the appropriate section on the employment application form. The City will 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 selection process and to be considered for a job (unless it would cause undue hardship). Individuals with disabilities who meet initial requirements to be considered for a job will not be excluded from a selection process based on an accommodation needed to perform the job if hired.

During the interview process and before a conditional offer is made, the City 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 City may inquire as to what type.

The City will not ask disability-related questions during the interview process. The City will ask about the applicant's ability to perform specific job functions, other non-medical qualifications and skills, and may ask applicants to describe or demonstrate how they would perform job tasks. After a conditional offer of employment is extended, the City 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.

The Interactive Accommodation Process for City Employees

The City will engage in an informal, interactive process with qualified individuals with a disability in need of a reasonable accommodation. The goal of this process will be to identify the precise limitations resulting from the disability and potential reasonable accommodations that could eliminate any artificial barriers in the workplace that will allow the employee or applicant with a disability to perform the essential functions of the job. This process requires cooperation and participation by both the employee and the City.

An employee requesting a reasonable accommodation may make such a request orally or in writing to their department personnel officer, immediate supervisor, section manager, department head, or to Kristin Urban, Human Resources Compliance Officer, Department of Employee Relations, City Hall, Room 706. A request for a reasonable accommodation may be made by either the individual with a disability or a family member, health professional, or other representative acting on the individual's behalf.

If the employee request is made to his or her immediate supervisor or section manager, that person shall report the accommodation request to the Personnel Officer or Department Head so that the process outlined below can be followed.

- The appropriate City representative will meet with the employee who has requested an accommodation;
- The City representative will request information about the condition or impairment and the limitations of the employee;
- The City representative will ask the employee what he or she specifically is requesting as a reasonable accommodation;
- The City representative shall then investigate the feasibility and reasonableness of the requested accommodation; and either;
- Make the accommodation, discuss available alternative that would also be effective reasonable

accommodations or explain why the condition or impairment cannot be reasonably accommodated without imposing an undue hardship.

Note: Before denying requests for accommodations, departments are strongly encouraged to consult with the Department of Employee Relations and/or the City Attorney's Office.

The determination of a reasonable accommodation is a cooperative process in which both the City and the employee must make reasonable efforts to define an effective reasonable accommodation and exercise good faith during the process. The interactive process is meant to identify the individual's functional limitations and the potential reasonable accommodation that is needed. It does not guarantee that the employee will be given their favored accommodation, but that the City will attempt to reach a reasonable and effective accommodation where one can be given without creating an undue hardship.

The City may choose among reasonable accommodations as long as the chosen accommodation is effective. This means that the City 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 City may choose the less expensive or burdensome accommodation as long as it is effective. Similarly, when there are two or more effective accommodations, the City may choose the one that is easier to provide. In either situation, the City 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 City will give the preference of the individual with a disability primary consideration. However, the City retains ultimate discretion to choose between effective accommodations.

The following is a list of some of the general factors to consider in determining accommodation issues within specific categories.

Work-site Accessibility

- Evacuation plans should address the needs of employees with disabilities.
- Parking, if provided to all employees, should also be made available to employees with disabilities unless it poses an undue hardship to do so.
- Transportation as a reasonable accommodation is not required unless transportation is provided to all employees.

Job Re-structuring (subject to undue hardship provision)

- Redistribution of marginal functions that an individual can't perform because of a disability.
- Modified schedules, including part time work.
- Reassignment to an equivalent existing vacancy for which the individual is qualified.

Modified Work Schedules and Leave

- Availability of part-time work (An existing full-time job does not have to be changed to part-time as a reasonable accommodation if it requires a fundamental change to the job).
- Leave time (beyond that required under FMLA) as an accommodation may be provided unless doing so poses an undue hardship.

Modified Policies

- Modification of attendance or sick leave policies may be a form of accommodation.
- Modification of dress code or hygiene requirements may be a form of accommodation unless the requirement is necessary for the job at issue.
- Allowing employees to work at home may be a form of accommodation for certain jobs.

Equipment and Services

- Specialized work equipment or tool of the trades needed by an employee with a disability may need to be provided as a form of accommodation.

- An alternative means of communication may be considered a form of accommodation for an employee with a hearing impairment.
- Allowing an employee with a disability to use a personal need item (canes, walkers, wheelchairs) or service (personal attendant care, service animals) in the workplace may be a form of a reasonable accommodation.
- Allowing a job coach at a job site may be a form of a reasonable accommodation.

Factors to Consider in Determining Undue Hardship

The only statutory limitation on the City's obligation to provide "reasonable accommodation" is that no such change or modification is required if it would cause "undue hardship". "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. 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 department making the reasonable accommodation; the number of persons employed at this location; the effect on expenses and resources of the department;
- the overall financial resources, size, number of employees, and type and location of facilities of the department;
- the structure and functions of the workforce, the geographic separateness, and the administrative or fiscal relationship of the department involved in making the accommodation to the employer;
- the impact of the accommodation on the operations of the department.

If 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 City will provide the second accommodation. The City will not claim undue hardship based on the fears or prejudices of others toward the individual's disability. 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.

Applying Performance and Conduct Standards to Employees with Disabilities

When an employee requests a reasonable accommodation in response to a discussion or evaluation of the person's performance, a supervisor may proceed with the discussion or evaluation but also should begin the "interactive reasonable accommodation process" by discussing with the employee how the disability may be affecting performance and what accommodation the employee believes may help to improve it. Supervisors cannot refuse to discuss the request or fail to provide a reasonable accommodation as punishment for the performance problem. Although the ADA does not require employees to ask for an accommodation at a specific time, the timing of a request for reasonable accommodation is important because the City does not have to rescind discipline or an evaluation warranted by poor performance. If a reasonable accommodation is needed to assist an employee in addressing a performance problem, and the department refuses to provide one, absent undue hardship, the department may be liable for violating the ADA.

The employee may need reasonable accommodation, for example, to enable him/her to meet a production standard or to perform an essential function. Where a lower performance rating results from an inability to perform a marginal function because of the disability, the appropriate accommodation would be to remove the marginal function and consider substituting one that the employee can perform.

Employee Responsibilities

- Ensure complete and thorough understanding of ADA Policy.
- Adhere to performance and conduct standards that apply to all employees. *(The ADA does not protect employees from the consequences of violating conduct requirements even where the conduct is caused by the disability as long as the required conduct is job-related and consistent with business necessity).*

- Request a reasonable accommodation when s/he knows that there is a workplace barrier that is preventing him/her, due to disability, from effectively competing for a position, performing a job, or gaining equal access to a benefit of employment.
- Request a reasonable accommodation before performance suffers or conduct problems occur.
- Provide suggestions regarding the type of accommodation the department might be able to consider.
- Respond to medical inquiries by providing necessary documentation with regard to a disability and a reasonable accommodation.

Supervisor's Responsibilities

- Ensure job descriptions are accurate and up to date.
- Define jobs and evaluate employees according to consistently applied standards governing performance and conduct.
- Focus on performance or conduct problems that employees have and apply their policies in a uniform manner rather than assuming that a medical problem or disability is contributing to or causing the problem.
- Recognize when an employee may be requesting an accommodation although he or she may not mention the ADA or use the phrase "reasonable accommodation" and follow up accordingly.
- Engage in a process to clarify what an employee needs and identify the appropriate reasonable accommodation.
- Request medical documentation only when needed to evaluate the accommodation request.
- Request only relevant medical information that will facilitate the decision making process.
- Protect the confidentiality of medical information.
- Respond to reasonable accommodation requests in a timely manner.
- Ensure that the Personnel Officer or Department Head is consulted before an accommodation request is denied.

Medical Inquiries and Medical Records

The ADA permits the City to request medical information or order a medical examination when it is job-related and consistent with business necessity. Generally, this means that the City has a reasonable belief, based on objective evidence, that an employee is unable to perform an essential function or will pose a "direct threat" because of a medical condition. The scope and manner of any inquiries or medical examinations must be limited to information necessary to determine whether the employee is able to perform the essential functions of the job or can work without posing a direct threat.

The City must have objective evidence suggesting that a medical reason is a likely cause of the problem to justify seeking medical information or ordering a medical examination. In limited circumstances, the nature of an employee's performance problems or unacceptable conduct may provide objective evidence that leads an employer to a reasonable belief that a medical condition may be the cause.

The City is entitled to require the employee/applicant to provide reasonable documentation with regard to the employees/applicant's disability and functional limitations. The City may require documentation to establish that the employee has a qualified disability as defined under State or Federal law, and that the disability necessitates a reasonable accommodation.

Reasonable documentation means that the City 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, in response to a request for reasonable accommodation, the department representative 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 the City 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, the City can request information pertaining only to the disability that requires a reasonable accommodation.

When medical information or documentation provided is ambiguous or insufficient, the City representative should explain why the documentation is insufficient and allow the employee 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.

It is recommended that specific, job related questions be given to the employee for a response from the healthcare provider. As an alternative, the City may request the employee to submit to a job-related medical examination by a health care provider of the City's choice, at the City's expense. Any medical examination conducted by the City'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.

All employee medical records are confidential and will be kept separate from employee personnel records. All medical records, requests for accommodation and reasonable accommodations will be kept confidential as required by law, except to the extent necessary to effectuate the reasonable accommodation. When a reasonable accommodation has been given to an employee with a disability pursuant to this policy neither the accommodation made nor the reason for the accommodation shall be discussed with co-workers or other employees. If asked why a job modification has been made, the responding supervisor, department head, etc. shall respond that the modification was made in compliance with state and federal laws, which also strictly prohibit disclosure of any further information.

The following exceptions may apply with regard to confidential medical records, conditions or accommodations:

1. Supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodation;
2. First aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and
3. Government official's investigation in compliance with the ADA and/or the WFEA shall be provided relevant information on request.

Results of pre-employment medical examinations will be subject to the above confidentiality provisions.

Safety

All City employees are required to comply with all workplace safety standards. The City is committed to providing a safe work environment for all of its employees. The ADA permits the City to require that an individual not pose a direct threat to the health and safety of the individual or others in the work-place. A direct threat means a significant risk of substantial harm. The City cannot refuse to hire or fire an individual because of a slightly increased risk of harm to himself or others. The determination that an individual poses a direct threat must be based on objective, factual evidence regarding the individual's present ability to perform essential job functions. If an applicant or employee with a disability poses a direct threat to the health or safety of himself or others, the City must consider whether the risk can be eliminated or reduced to an acceptable level with a reasonable accommodation.

Any applicant who poses a direct threat to the health or safety of themselves or other individuals in the workplace that cannot be eliminated by a reasonable accommodation will not be employed in that position. Similarly, current employees who become disabled and pose a direct threat to themselves or others, which threat may not be eliminated by reasonable accommodation, will be placed on an appropriate leave or payroll status. An attempt will be made to place employees in positions for which they are qualified and in which they do not pose a direct threat to the safety of themselves or others.

The ADA and Substance Abuse Problems

Anyone who is currently using drugs illegally is not protected by the ADA and may be denied employment or fired on the basis of such use. The ADA does not prevent employers from testing applicants or employees for current illegal drug use, or from making employment decisions based on verifiable results. A test for the illegal use of drugs is not considered a medical examination under the ADA; therefore, it is not a prohibited pre-employment medical examination and the City does not have to show that the administration of the test is job related and consistent with business necessity. The ADA does not encourage, authorize or prohibit drug tests.

Complaint Procedure

Employees or applicants who believe that they have been the victim of discrimination or harassment on the basis of a real or perceived disability, or record of a disability should immediately contact their department personnel officer, supervisor or department head. In the alternative, individuals may contact the Department of Employee Relations to report any violations of this policy, or with questions or concerns regarding the City's ADA policy. The Department of Employee Relations will be responsible for implementing this policy, including investigation of claims, and resolution of reasonable accommodation, safety, and undue hardship issues.

The appropriate City representative will provide confidential assistance to individuals in an attempt to resolve issues regarding disability discrimination/harassment. In all cases, efforts should be made to resolve and correct the discrimination/harassment issues prior to filing a complaint. If an employee wishes to file a complaint, he or she may do so through DER or the appropriate departmental representative.

Investigation of complaints will begin with a signed, written statement by the complainant, and will include the parties involved in the complaint and any witnesses. Assistance in filling out the complaint will be provided if necessary. Retaliation against an employee who has filed a complaint or has assisted in an investigation is strictly prohibited.

Complaints will be investigated in a timely and confidential manner. All information concerning an applicant's medical condition or a current employee's medical condition will be kept strictly confidential unless that individual grants specific authorization to disclose it, to the extent necessary to efficiently investigate the complaint. In no event will information concerning a complaint be released to or discussed with anyone who is not involved with the investigation.

If an investigation reveals that a complaint is valid, the supervisors and the department head or the Department of Employee Relations will take immediate action to stop the discrimination/harassment, to prevent its recurrence and to discipline an employee found to have violated this policy. Disciplinary action may include a verbal or written warning, suspension or discharge. Complainants and witnesses should understand that they might be required to testify in legal proceedings if their complaint results in disciplinary action being taken against another individual.

Questions regarding this policy and compliance manual should be directed to Kristin Urban, Human Resources Compliance Officer at (414) 286-6210 or krurban@milwaukee.gov.