



ADAAA/WFEA POLICY AND COMPLIANCE MANUAL December 2015

I. Policy Statement

The City of Milwaukee (the City) 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 to prohibit discrimination on the basis of disability with regard to application and examination procedures, hiring, advancement, compensation, job training, discharge and other terms and conditions of employment, in compliance with the Americans with Disabilities Act Amendment Act of 2009 (ADAAA) and the Wisconsin Fair Employment Act of 2004 (WFEA). The City is committed to engaging in the interactive process with individuals with disabilities to discuss granting reasonable accommodations, in accordance with applicable legal requirements.

This policy, consistent with applicable laws, also prohibits retaliation against an applicant or an employee for asserting his or her rights under the law. This policy will be coordinated with all other City policies, including those related to safety, workplace violence prevention, pre-employment medical examinations and leave. This policy will also be coordinated with other applicable laws such as the state and federal Family Medical Leave Acts and the Wisconsin Worker's Compensation law.

This policy governs general City employees only and therefore does not apply to the employees of the Milwaukee Police Department or the Milwaukee Fire Department; both protected service departments administer their own policies and procedures related to the ADAAA and the WFEA.

II. Pre-Employment Accommodation Considerations

A. Application/Testing Phase

Applicants for City of Milwaukee positions may request reasonable accommodations as part of the testing 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 provide that individual with an equal opportunity to participate in the application and testing process and to be placed on an eligible list, unless the accommodation would cause an undue hardship or would preclude evaluation of the candidate on a skill that the job-related test (e.g. interview, performance examination or physical abilities test) was designed to measure.

Individuals with disabilities who meet a position's minimum requirements, as established by a job analysis performed by the Department of Employee Relations (DER), will not be excluded from a testing process based on an accommodation that may be needed to interview for or to perform the job, if hired.

B. Pre-offer/Interview Phase

During the interview, the hiring manager will provide each candidate with an accurate job description and will verbally highlight the essential functions, physical and environmental demands and work schedule or working condition requirements. After allowing the candidate an opportunity to both read and to ask questions regarding the job description, the hiring manager will ask the candidate whether he or she is able to perform the essential functions of the job, with or without accommodations.

In order to ensure that a candidate's hidden disability, including a prior history of a disability, is not considered before the employer evaluates a candidate's non-medical qualifications, asking disability-related questions during the interview process is prohibited. Accordingly, the interviewer may not ask questions regarding an applicant's worker's compensation history, illnesses or injuries. Hiring managers may ask about an applicant's prior attendance record in general terms, but not in a manner designed to elicit information about a disability or any medical conditions. The focus of the interview must be upon the applicant's ability to perform specific job functions and an assessment of job-related, non-medical qualifications and skills.

When a hiring manager reasonably believes that a candidate may not be able to perform an essential job function(s) because of a "known disability," the hiring manager may ask the candidate to describe how he or she would perform the function(s), whether he or she needs a reasonable accommodation and, if so, what reasonable accommodation is needed. A candidate's disability is a "known disability" either because the disability is obvious (e.g. the candidate uses a sign language interpreter to communicate) or because the candidate has voluntarily disclosed that he or she has a disability. If the candidate indicates that he or she needs a reasonable accommodation(s) to perform the essential functions of the position, the hiring manager may inquire as to what type. It is critical that the hiring manager document this interaction, including whether the candidate voluntarily disclosed that he or she has a disability.

After the Conditional Offer of Employment.

Once a conditional job offer is accepted by a candidate, a pre-employment drug screen and medical examination are required and the job offer is conditioned upon the results of both post-offer examinations. If a candidate fails the pre-employment medical examination because of a disability, the department must be able to demonstrate that the rejection is job-related and consistent with business necessity. Accordingly, it is critical to furnish the medical provider with an accurate job description, including the physical and environmental demands of the position, prior to the pre-employment medical examination.

If a candidate voluntarily discloses that he or she has a disability and/or requests a reasonable accommodation after he or she has been offered the position and prior to participation in the pre-employment screening, the hiring manager may ask for documentation of the candidate's disability and the functional limitations related to performing the essential functions of the job. Evaluation of the request must be performed in consultation with the DER or the Office of the City Attorney.

If medical restrictions are identified during the pre-employment medical examination, the provider may contact the designated employee in the DER, who may then consult with the department to determine whether the restrictions can be reasonably accommodated. If the candidate's medical restrictions cannot be accommodated, the candidate will be informed by the hiring manager that he or she has failed a portion of the pre-employment testing and that the offer has been rescinded. The designated employee from the DER will determine, on a case-by-case basis, whether the candidate's name will remain on the eligible list for the title. This determination will be made based upon factors

including the candidate's medical restrictions, the essential functions of the position, whether the restrictions are permanent and whether the eligible list may be utilized to fill vacancies in multiple work settings for other titles. Pre-employment medical examinations are performed based upon the essential functions and physical and environmental demands of the position for which a candidate is being considered; accordingly, failure of a pre-employment medical examination for one position does not preclude an individual from applying for another position within the City.

III. The Interactive Accommodation Process for Current City Employees

At any point during employment, the City will engage in an informal, timely and good-faith interactive process with qualified individuals with a disability who are in need of reasonable accommodation(s). The goal of this process is to identify the limitations resulting from the disability and the potential reasonable accommodations that could eliminate barriers in the workplace and to allow the employee to perform the essential functions of the job. This process requires cooperation and participation by both the employee and the City.

A. Employee and Employer Responsibilities

1. Employee Responsibilities

- Ensuring a complete and thorough understanding of this Policy and Compliance Manual;
- Requesting a reasonable accommodation before performance suffers or conduct problems occur;
- Adhering to performance and conduct standards that apply to all employees. *The ADAAA does not protect employees from the consequences of violating performance or conduct requirements, even where the conduct and/or performance deficiencies are caused by the disability as long as the required conduct is job-related and consistent with business necessity;*
- Requesting a reasonable accommodation when he or she knows that there is a workplace barrier that is preventing him or her, due to the disability, from effectively competing for a position, performing a job or gaining equal access to a benefit of employment;
- Providing suggestions regarding the type of accommodation(s) the department might be able to consider; and
- Responding to medical inquiries by providing necessary documentation with regard to a disability and a reasonable accommodation within a specified timeframe.

2. Employer Responsibilities

- Ensuring a complete and thorough understanding of this Policy and Compliance Manual;
- Ensuring job descriptions are accurate, up-to-date and list the essential functions of each position;
- Defining jobs and evaluating employees according to consistently applied standards governing performance and conduct;
- Focusing upon performance or conduct problems that employees have and applying policies in a uniform manner rather than assuming that a medical problem or a disability is contributing to or causing the problem;
- Recognizing when an employee may be requesting an accommodation, although he or she may not mention the ADAAA or use the phrase "reasonable accommodation," and responding in a timely manner;
- Engaging in a process to clarify what an employee needs and identifying the appropriate reasonable accommodation;
- Requesting relevant medical documentation only when needed to evaluate the accommodation request;
- Protecting the confidentiality of medical information;

- Ensuring that the departmental ADA/AA Coordinator (i.e. Personnel Officer) is involved in decision making regarding requests for accommodation; and
- Consulting with staff from the DER or the City Attorney's Office prior to denial of a request for an accommodation.

An employee requesting a reasonable accommodation may make such a request verbally, in writing or by utilizing the Disability Accommodation Request Form (Appendix C). The request must be directed to the employee's departmental personnel officer, immediate supervisor, section manager, department head or to the DER Human Resources Compliance Officer, (Department of Employee Relations, City Hall, Room 706; PH: 414.286.6210; EMAIL: krurban@milwaukee.gov). A request for a reasonable accommodation may be made by either the individual with a disability or by a family member, healthcare professional or other representative acting on the employee's behalf. The employee does not have to include any special words, such as "reasonable accommodation," "disability" or "ADA" when making the request. A request is any communication in which an individual asks or states that he or she needs the department to provide or to change something because of a disability. A supervisor or manager should ask an individual whether he or she is requesting a reasonable accommodation if the nature of the initial communication is unclear.

The determination of a reasonable accommodation is a cooperative process in which both the City and the employee must make reasonable efforts to define a reasonable accommodation and to exercise good faith during the process. The interactive process does not guarantee that the employee will be given his or her preferred accommodation; 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 amongst 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, the City may choose the less expensive or less burdensome accommodation, as long as it is effective. If more than one accommodation is effective and reasonable, the City may give consideration to the preference of the individual with a disability. However, the City retains the ultimate discretion to choose between effective accommodations. An employee's receipt or denial of an accommodation does not preclude the employee from making another request at a later time if circumstances change and if the employee believes that an accommodation is needed due to limitations from a disability (e.g. the disability worsens or an employee is assigned new duties that require an additional or different reasonable accommodation).

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

When an employee has requested a reasonable accommodation or when it is known to the supervisor that an employee may require a reasonable accommodation, it must first be determined whether the employee's condition substantially limits a major life activity. In making this determination, the City will adhere to the "rules of construction" provided by the EEOC.

- The term "substantially limits" shall be construed broadly in favor of expansive coverage.
- Impairment is a disability if the impairment substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population, not just compared to those similarly-situated.

- Determining whether impairment substantially limits a major life activity shall be done quickly without demanding extensive scientific, medical or statistical analysis, though medical documentation and clarification may be required.
- The determination of whether 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 lenses, shall be ignored. However, if the mitigating measure itself causes any limitations, then those limitations shall be considered.
- An impairment that is episodic or in remission is a disability if the impairment would substantially limit a major life activity when active.

To be considered a disability, impairment must substantially limit one or more major life activities. 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 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.

C. 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, without creating an undue hardship for the employer. Reasonable accommodations may include:

- 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 job modification, job restructuring; acquisition or modification of equipment or devices; and other accommodations.

A modification or adjustment is reasonable if it seems reasonable on its face and it is effective in meeting the needs of the individual. However, 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 productions standards;
- grant indefinite leave;
- provide personal use items needed in accomplishing daily activities both on and off the job; or

- rescind disciplinary action or a less than satisfactory evaluation warranted by poor performance when a disclosure of a disability happens after performance deficiencies are addressed.

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.

The Job Accommodations Network (JAN – askjan.org) is a valuable resource for researching reasonable accommodation options. The JAN provides multiple support services for employers, including state and local governmental employers, such as a searchable database of reasonable accommodations, based upon disability. Additionally, employers may obtain advice and guidance from a JAN representative by phone or by email. Accessing the services offered by the JAN may highlight reasonable accommodations that neither the manager nor the employee previously considered.

D. 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 an 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, size, number of employees, 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; and
- the impact of the accommodation on the operations, expenses and resources 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.

E. Affirmative Obligation of the Department to Place a Permanently Disabled Employee

If an employee is permanently unable to perform the essential functions of the job with or without an accommodation, the Department has an affirmative obligation to offer the employee an authorized vacant and funded position at the same level or below for which the employee is objectively qualified and that is consistent with the employee’s medical restrictions. This means the employee does not have to compete for the vacant and funded equivalent or lower-level position. The determination as to whether an individual is objectively qualified will rest with the DER and will be based upon the position’s minimum requirements, as established by a job analysis information prepared by the DER. However, the Department does not have to create a position for an employee who is permanently unable to perform the essential functions of his or her job with or without accommodations.

A department cannot force an employee to accept a transfer or a lower-level position as a reasonable accommodation. If an employee accepts the position offered, the employee is accepting the position as a voluntary transfer or voluntary demotion. A voluntary demotion under these circumstances does

not entitle an employee with regular status (i.e. a Civil Service employee who has passed probation in a regularly appointed position) to an appeal under Rule XIII of the Rules of the City Service Commission.

After exhausting all obligations to engage in a timely and good faith interactive process and after finding that a reasonable accommodation or reassignment within the department is not feasible, an appointing authority shall discuss all available options with the employee, including leave under FMLA, a leave of absence (LOA) under the CSC Rules, long-term disability, ordinary disability or service retirement. If necessary, a department head may grant an LOA in increments of 30 days, if doing so will enable the employee's medical provider to make an assessment of a reasonable return to work date or will allow the employee to consider all available options. A request for indefinite leave is not reasonable and will not be approved. A referral to the Disabled Employee Placement Program (DEPP) should be made if and when the employee desires to continue to work and wishes to find a position within the City Service for which he or she is objectively qualified and that is consistent with his or her medical restrictions. A transfer under the DEPP will be performed in consultation with both department heads and in a manner consistent with Rule XI, Section 1.b. of the Rules of the City Service Commission. An employee who is on a LOA who is not able to return to work and does not qualify for the DEPP may be separated from City Service; an employee with regular status who is separated from City Service may be entitled to a separation hearing under Rule X, Section 3 of the Rules of the City Service Commission.

IV. Applying Performance and Conduct Standards to Employees with Disabilities

When an employee requests a reasonable accommodation in response to a discussion or evaluation of that employee's performance, a supervisor may proceed with the discussion or evaluation but also should begin the interactive process by discussing with the employee how the disability may be affecting performance and what accommodation the employee believes may help to improve his or her performance. Supervisors cannot refuse to discuss the request or fail to provide a reasonable accommodation as a punishment for the performance problem.

Although the ADAAA 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 ADAAA.

V. Medical Inquiries and Medical Records (Current Employees):

A. Post-employment Medical Inquiries

After employment begins, the ADAAA permits an employer to make disability-related inquiries and require medical examinations *only* if they are job-related and consistent with business necessity.

Generally, this means that the employer has a reasonable belief, based upon observable, factual evidence, that an employee has a medical condition that renders him or her unable to perform an essential function or that the medical condition causes the employee to pose a "direct threat" to him or herself or to others. The employer must consider whether the risk can be eliminated or reduced to an acceptable level with a reasonable accommodation. If the threat may not be eliminated by a reasonable accommodation, the employee may be relieved from his or her duties (i.e. placed on a LOA for which the employee qualifies, including FMLA leave if the employee applies for the same) pending receipt of medical documentation. 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 employer must have objective evidence suggesting that a medical reason is a likely cause of the problem in order to justify seeking medical information or ordering a fitness for duty. 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 can require the employee to provide reasonable documentation with regard to his or her 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 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 unclear or insufficient and allow the employee an opportunity to provide the missing information or clarifying documentation in a timely manner. Documentation is insufficient if it does not specify the existence of an ADA-compliant disability or does not explain the need for a reasonable accommodation. Documentation is ambiguous if the restrictions or the reasonable accommodations requested are unclear. As an alternative, the City may ask the employee to have his or her doctor complete a Medical Questionnaire or request the employee to submit to a job-related medical examination by a healthcare provider of the City's choice, at the City's expense. Any Medical Questionnaire required medical examination conducted by the City's healthcare provider must be job-related and consistent with business necessity. This means that the examination must be limited to determining the existence of an ADA-compliant disability and the functional limitations that require reasonable accommodation.

Whether the information is obtained from the employee's medical provider or from a health care provider chosen by the City, specific, job-related questions must be asked. The Disability Medical Information Request Form must be amended to the specific request and provided to the employee for completion by his or her medical provider or to the provider chosen by the City. If the medical issue is related to a worker's compensation claim, the department should coordinate with the worker's compensation staff in the DER.

B. Medical Records

All employee medical records shall be maintained separately from employee personnel records and in a locked location, with access limited to employees with a legitimate business need to be aware of the information. All medical records related to requests for reasonable accommodations will be kept confidentially as required by law, except to the extent necessary to effectuate the reasonable accommodation. When a reasonable accommodation has been granted 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 with other employees. If asked why a job modification has been made, the departmental representative shall respond that the modification was made in compliance with state and federal laws, which also strictly prohibit disclosure of any further information.

Results of pre-employment medical examinations are subject to the above confidentiality provisions and are only available to designated personnel with the DER.

The following exceptions may apply with regard to confidential medical records, including pre-employment medical examinations, medical conditions or accommodations:

- supervisors and managers who have a legitimate business need to know may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodation;
- first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment;
- the Office of the City Attorney might be consulted by a Department or DER regarding how to handle a request for accommodation and an Assistant City Attorney may need to review applicable medical records, job description, other relevant materials and interview supervisors or managers in order to render an opinion;
- the City may face a claim of discrimination based on disability by an employee and an Assistant City Attorney may need to investigate the claim which would involve reviewing applicable medical records, job description, other relevant materials, and interview supervisors or managers in order to respond to the claim; and
- governmental officials may review records in order to perform an investigation in compliance with the ADA and/or the WFEA; such information shall be provided on request, if responsive.

VI. Complaint Procedures

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 departmental personnel officer, supervisor or department head. In the alternative, individuals may contact the DER to report any violations of this policy or with related questions or concerns (Department of Employee Relations, City Hall, Room 706; PH: 414.286.6210; EMAIL: krurban@milwaukee.gov). The DER 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 or harassment. In all cases, efforts should be made to resolve and to correct the discrimination or harassment issues prior to filing a complaint. If an employee wishes to file a complaint, he or she may do so through the DER or through the appropriate departmental representative.

The investigation of a complaint begins with a signed, written statement by the complainant or documentation of a verbal complaint, and will include the parties involved in the complaint and any witnesses. Assistance in completing 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 to the extent necessary to efficiently investigate the complaint, unless that individual grants specific authorization to disclose it. 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 supervisor and the department head or the DER will take immediate action to stop the discrimination or harassment, to prevent its recurrence and to recommend discipline for 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 may be required to testify in legal proceedings if their complaint results in disciplinary action being taken against another individual.

VII. Documents Related to Engaging in the Interactive Process

The following documents and forms are located on the DER's website for use in the interactive process related to requests for accommodations. These documents include:

Appendix A – Definitions

Appendix B – Request for Accommodation – Process Summary

Appendix C – Accommodation Request Form

Appendix D – Disability Medical Information Request Form

Appendix E – Disabled Employee Placement Program (DEPP)

Appendix F – Job Analysis of Essential Functions

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