



THE AMERICANS WITH DISABILITIES ACT (ADA) & THE ADA AMENDMENTS ACT (ADAAA)

Employment Provisions

Guide for State of Nevada Executive
Branch Agencies

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INTRODUCTION

This guide discusses the application of the employment provisions of the Americans with Disabilities Act (ADA) of 1990. The ADA is a federal antidiscrimination statute designed to remove barriers, which prevent individuals with disabilities who are qualified from enjoying the same employment opportunities, services and privileges available to persons without disabilities. The ADA Amendments Act (ADAAA), effective January 1, 2009, was adopted by Congress with the intention of restoring the original intent of the ADA by providing a clear and comprehensive national mandate for the elimination of discrimination.¹ The ADAAA overturns several United States Supreme Court decisions that had limited coverage under the ADA.

Like the Civil Rights Act of 1964 that prohibits discrimination on the basis of race, color, religion, national origin, and sex, the ADA seeks to ensure access to employment opportunities based on merit. It does not guarantee equal results, establish quotas, or require preferences favoring individuals with disabilities over those without disabilities. However, while the Civil Rights Act of 1964 prohibits any consideration of personal characteristics such as race or national origin, the ADA takes a different approach. When an individual's disability creates a barrier to employment opportunities, services or privileges, the ADA requires an employer to consider whether reasonable accommodation could remove the barrier.

While the ADA focuses on eradicating barriers, it does not relieve an individual with a disability from the obligation to perform the essential functions of a position. To the contrary, the ADA is intended to enable an individual with a disability who is qualified to access the privileges and services offered and to compete in the workplace based on the same performance standards and requirements that agencies expect of individuals who are not disabled. However, where an individual's functional limitation(s) impedes job performance, an employer must take steps to reasonably accommodate, and thus help overcome the particular impediment(s), unless to do so would impose an undue hardship.

The process of identifying whether, and to what extent, a reasonable accommodation is required should be flexible, made on a case-by-case basis and requires participation by both the employer and individual. No specific form of accommodation is guaranteed to all individuals with a particular disability; however, the accommodation process must be consistent and non-discriminatory. An accommodation must be tailored to match the needs of the individual with a disability and the needs of the individual's position.

State government is a covered entity for the purposes of the ADA and must comply with the non-discrimination provisions of the ADA.

This guide is not a substitute for legal advice and is subject to change without notice. If you need specific information regarding the ADA, consult your human resources staff, your agency's attorney, federal and State enforcement and technical assistance agencies or the Division of Human Resource Management (see [Resources & References](#)).

WHAT IS A DISABILITY?

It is important to remember that the definition of disability, as defined by the ADA, is legal and not medical. If an individual is deemed “disabled” under a different law (e.g., Social Security Act) it does not mean that the individual automatically meets the definition of disability under the ADA/ADAAA.

What is a disability as defined by the ADA (ADAAA)?

- A physical or mental impairment which substantially limits one or more major life activities;
- A record of an impairment; or
- Being regarded as having an impairment.

Also an individual may be covered by more than one of the definitions of disability.

PHYSICAL OR MENTAL IMPAIRMENT WHICH SUBSTANTIALLY LIMITS ONE OR MORE MAJOR LIFE ACTIVITIES

PHYSICAL OR MENTAL IMPAIRMENT

The ADAAA specifically states that the definition of disability should be interpreted broadly and that determining whether "an individual's impairment is a disability under the ADA should not demand extensive analysis".¹

A physical impairment is defined by the Equal Employment Opportunity Commission (EEOC) as any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic and lymphatic, skin, and endocrine. A mental impairment is defined by the EEOC as any mental or psychological disorder, such as an intellectual disability, organic brain syndrome, emotional or mental illness, and specific learning disabilities.²

The definition of the term “impairment” does not include physical characteristics such as eye color, hair color, left handedness, or height, weight or muscle tone that are within “normal” range and are not the result of a physiological disorder. Similarly, the definition does not include common personality traits such as poor judgment or a quick temper where they are not symptoms of a mental or psychological disorder. Environmental, cultural, or economic disadvantages such as poverty, lack of education or a prison record are not impairments. Advanced age, in and of itself, is also not an impairment.

MAJOR LIFE ACTIVITIES

What is a major life activity? A major life activity is a basic activity that most people in the general population can perform with little or no difficulty.

Major life activities include, but are not limited to:

- Caring for oneself

- Performing manual tasks
- Seeing
- Hearing
- Eating
- Sleeping
- Walking
- Standing
- Sitting
- Reaching
- Lifting
- Bending
- Speaking
- Breathing
- Learning
- Reading
- Concentrating
- Thinking
- Communicating
- Interacting with others
- Working
- Operation of a major bodily function

MAJOR BODILY FUNCTIONS

Major bodily functions are included as major life activities and may include, but are not limited to:

- Functions of the immune system
- Special sense organs and skin
- Normal cell growth
- Digestive
- Genitourinary
- Bowel
- Bladder
- Neurological

- Brain
- Respiratory
- Circulatory
- Cardiovascular
- Endocrine
- Hemic
- Lymphatic
- Musculoskeletal
- Reproductive

SUBSTANTIALLY LIMITS

A common sense assessment based on comparing an individual's ability to perform a specific major life activity with most people in the general population is used to determine whether an impairment "substantially limits". The ADAAA indicated that a limitation need not "significantly" or "severely" restrict a major life activity to meet the standard of "substantially limits".¹

The EEOC regulations provide rules to use when determining whether an impairment is substantially limiting.

1. The term "substantially limits" should be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA.
2. An impairment is a disability if it substantially limits the ability of the individual to perform a major life activity as compared to most people in the general population.
3. Determination of whether an impairment substantially limits a major life activity should not demand extensive analysis.
4. The determination of whether an impairment substantially limits a major life activity requires an individualized assessment.
5. The comparison of a major life activity to the performance of the same major life activity by most people in the general population will not require scientific, medical or statistical analysis.
6. The determination of whether an impairment substantially limits a major life activity shall be made without regard to ameliorative (improving) effects of [mitigating measures](#).
7. An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.
8. An impairment that substantially limits one major life activity need not substantially limit other major life activities in order to be considered a substantially limiting impairment.
9. The effects of an impairment lasting or expected to last fewer than six months can be substantially limiting.²

MITIGATING MEASURES

The positive effects of mitigating or compensating measures cannot be considered when determining whether an individual meets the definition of disability. However, the negative effects of mitigating factors may be considered.

Mitigating measures, may include, but are not limited to:

- Medications
- Medical supplies
- Equipment or appliances
- Low-vision devices (which do not include ordinary eyeglasses or contact lens)
- Prosthetics including limbs and devices
- Hearing aids and cochlear implants or other implantable hearing devices
- Mobility devices
- Oxygen therapy equipment and supplies
- Use of assistive technology
- Reasonable accommodations or auxiliary aids or services
- Learned behavioral or adaptive neurological modifications
- Surgical intervention, except where it has permanently eliminated the impairment

The one mitigating factor that may be considered in determining whether an individual is disabled is the use of "ordinary eyeglasses or contact lenses" that are intended to fully correct the individual's visual acuity or refractive error.¹

PREDICTABLE ASSESSMENTS

The EEOC regulations give examples of impairments that will, in virtually all cases, result in a determination of substantial limitation of a major life activity.² For this reason, the individualized assessment of the limitations on the individual should be simple and straightforward. The examples are:

- Deafness
- Blindness
- Intellectual disability
- Partially or completely missing limbs
- Mobility impairments requiring the use of a wheelchair
- Autism
- Cancer
- Cerebral palsy

- Diabetes
- Epilepsy
- HIV/AIDS
- Multiple sclerosis (MS)
- Muscular dystrophy
- Major depression
- Bipolar disorder
- Post-traumatic stress disorder (PTSD)
- Obsessive compulsive disorder
- Schizophrenia

RECORD OF AN IMPAIRMENT

An individual would have a record of a disability if the individual had a history of, or was misclassified previously as having, an impairment that substantially limits one or more major life activity.

For example, a cancer survivor would be an individual with a record of an impairment. Or an individual, who was incorrectly diagnosed with bipolar disorder due to a reaction to medication, also has a record of an impairment even though the individual did not actually have the disorder.

“REGARDED AS” HAVING AN IMPAIRMENT

An individual is “regarded as” having a disability if:

1. Subjected to an employment action prohibited under the ADA; and
2. The action was taken because of an actual or perceived impairment regardless of whether the impairment is, or is perceived to be, substantially limiting a major life activity.

Regarding an individual as disabled could include taking a prohibited action based on symptoms of an impairment or the use of mitigating measures.

An employee who is only “regarded as” having a disability is not entitled to accommodation.

TRANSITORY AND MINOR

An individual is not “regarded as” having an impairment, if the impairment is both transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.

ALCOHOL

Alcoholism can, in some circumstances, meet the standard of a covered disability. However, an employer does not have to allow either consumption of alcohol on duty or an employee being under the influence while working.

CONTROLLED SUBSTANCES

Individuals who currently use controlled substances illegally are not individuals with disabilities protected under the Act. This includes individuals who use prescription drugs illegally as well as those who use illegal controlled substances. However, individuals who have been rehabilitated and do not currently use controlled substances illegally may be protected under the ADA.

EXCLUSIONS

Pregnancy in of itself is not a disability as defined by the ADA.

The following conditions are also excluded from the definition of disability under the ADA:

- Pedophilia
- Exhibitionism
- Voyeurism
- Other sexual behavior disorders
- Compulsive gambling
- Kleptomania
- Pyromania
- Psychoactive substance use disorders resulting from current illegal use of controlled substances

IMPACT ON EMPLOYMENT PRACTICES

The ADA/ADAAA prohibits discrimination based on disability in regards to:

- Recruitment, advertising, job application;
- Hiring, promotion, demotion, transfer, layoff, termination, return from layoff, rehire;
- Discipline;
- Compensation;
- Job assignments, job classifications, organizational structures, position descriptions, seniority;
- Leave;
- Benefits;
- Training;
- Sponsored activities; or
- Any other term, condition or privilege of employment.

DISCRIMINATION

Discrimination under the ADA includes limiting, segregating, classifying, harassing, retaliating, denying or otherwise making an employment decision based on an individual's disability. Discrimination is also prohibited under an agency's contracts with any other entity (i.e., benefits, training).

The ADAAA does not protect an individual who is denied an employment opportunity or a reasonable accommodation because he or she does not have a disability.

The federal 9th Circuit Court of Appeals (which Nevada is a part of) has concluded that conduct resulting from a disability "is considered to be part of the disability, rather than a separate basis for termination." (*Dark v. Curry Co.* 451 F.3d 1078, 9th Cir. 2006) Additionally, the 9th Circuit has stated that a "decision motivated even in part by the disability is tainted and entitles a jury to find that an employer violated antidiscrimination laws." (*Gambini v. Total Renal Care, Inc.*, 486 F.3d 1087, 9th Cir. 2007) It is suggested that agencies consult their agency's attorney before proceeding with discipline for misconduct that is directly related to an individual's disability.

ASSOCIATION PROVISION

Discrimination can also be based on a relationship with someone with a disability. The word relationship, as used in this context, is not limited to family relationships; it can include association with an individual with a disability. The EEOC states that the intent of the provision is "to prevent employers from taking adverse actions based on unfounded stereotypes and assumptions about individuals who associate with people who have disabilities."⁵ Refusing to hire an individual with a spouse with a disability based on the assumption that he or she would have to frequently be absent from work to take care of his or her spouse, would be an example of discrimination based on association with an individual with a disability. Accommodation does not have to be provided

to an individual without a disability due to that individual's association with someone with a disability.

ESSENTIAL FUNCTION

Essential functions are so necessary to the position that an individual cannot do the job without being able to perform them.

MARGINAL FUNCTIONS

Marginal functions can be described as peripheral, minimal, extra, borderline, incidental and/or nonessential. Marginal functions can be reassigned to another individual without compromising the core of the position's duties.

ESSENTIAL FUNCTIONS DEVELOPMENT

It is important to establish or re-evaluate the essential functions of a position before taking an employment action such as recruiting, hiring or promoting. Also, the essential functions of a position should be reviewed and revised as needed when the work performance standards are updated.

To establish the essential functions of a position, the position must be clearly defined and its component tasks and requirements analyzed to determine the physical and mental demands these tasks place on the employee and the environmental conditions in which the position is performed.

The factors to be considered in determining whether a function is essential are, as outlined in federal regulation are:

- Whether the position exists to perform the function;
- The number of other employees available among whom the performance of that function can be distributed;
- The degree of expertise or skill required to perform the function;
- Whether an employee is currently performing or has performed the function;
- The consequences of not requiring the incumbent to perform the function; and
- The amount of time spent performing the function.

When identifying essential functions, it is important not to confuse method with function. For example, it would not be correct to say that an employee has to "drive to meetings" when the actual task is to "attend meetings". Do not make assumptions about what the position does, such as relying on job titles or traditional roles.

Keep in mind that functions that are performed infrequently or little time is spent on can also be considered essential. The deciding factor may be the consequence of not performing the function. For example, a firefighter may only occasionally have to carry a person from a burning building but it is still an essential function.

The agency's judgment is a factor in determining which functions are essential.

The [Essential Functions Position Analysis form \(ADA-1\)](#) was developed to assist in identifying which functions are essential. Class specification, work performance standards, [Position Questionnaire \(NPD-19\)](#), the employee that currently is in the position and the employee's supervisor are excellent resources in determining what functions are actually performed and the factors that determine whether they are essential or marginal.

The [Physical and Cognitive Characteristics Inventory form \(ADA-2\)](#) may also be used in developing the essential functions for a position.

The essential functions of a position are documented on the [Position Functions form \(ADA-3\)](#).

MEDICAL INQUIRIES

The rules on medical inquiries/examinations apply to all employees, not just those with a disability.

The EEOC has stated that medical examinations include, but are not limited to:

- "vision tests conducted and analyzed by an ophthalmologist or optometrist;
- blood, urine, and breath analyses to check for alcohol use;
- blood, urine, saliva, and hair analyses to detect disease or genetic markers (e.g., for conditions such as sickle cell trait, breast cancer, Huntington's disease);
- blood pressure screening and cholesterol testing;
- nerve conduction tests (i.e., tests that screen for possible nerve damage and susceptibility to injury, such as carpal tunnel syndrome);
- range-of-motion tests that measure muscle strength and motor function;
- pulmonary function tests (i.e., tests that measure the capacity of the lungs to hold air and to move air in and out);
- psychological tests that are designed to identify a mental disorder or impairment; and,
- diagnostic procedures such as x-rays, computerized axial tomography (CAT) scans, and magnetic resonance imaging (MRI)."³

Tests for illegal use of drugs, physical agility, the ability to read and evaluate objects, psychological tests that measure personality traits such as honesty, preferences and habits and polygraph examinations are generally not considered medical examinations under the ADA and not subject to the ADA restrictions on such examinations.³

PRE-OFFER

An employer may not inquire as to whether an individual has a disability or conduct a medical inquiry/examination prior to a conditional offer of employment. Nor can an employer inquire at the pre-offer stage about an applicant's workers' compensation history. Agencies may ask questions that relate to the applicant's ability to perform job-related functions. However, these questions should not be phrased in terms of disability. If there is a reasonable belief that a candidate will not be able to perform a job function because of a known disability, a candidate may be asked to describe or to demonstrate how, with or without reasonable accommodation, the candidate would perform a job-related function(s) during an interview. However, a candidate may

not be asked for information regarding the possible disability nor should the request for a description or demonstration of how the candidate would perform a job function(s) be made more than once.

A test that is not a medical examination would not be subject to the prohibition against pre-employment medical examinations if given to all similarly situated applicants or employees, regardless of disability. However, if such a test screens out or tends to screen out an individual with a disability or a class of such individuals because of disabling condition(s), the State or agency must be prepared to show that the test is job-related and consistent with business necessity and also that the test or the essential function cannot be performed with a reasonable accommodation.

POST-OFFER

An employer may condition a job offer on the satisfactory result of a pre-employment and post-offer medical examination or inquiry if this is required of all candidates in the same position or class; however, the examination or inquiry must comply with [GINA](#).

If an individual is not hired because a pre-employment and post-offer medical examination or inquiry reveals a disability, the reason(s) for not hiring must be job-related and consistent with business necessity. The employer also must show that no [reasonable accommodation](#) was available that would enable this individual to perform the essential job functions or that the accommodation that would allow the individual to perform the essential job functions would impose an [undue hardship](#).

A pre-employment, post-offer medical examination may also disqualify an individual who would pose a [direct threat](#) to health or safety. Such a disqualification is job-related and consistent with business necessity. However, again the employer also must show that no reasonable accommodation was available that would lower the threat to an acceptable level.

A pre-employment and post-offer medical examination may not disqualify an individual with an impairment who is currently able to perform the essential job functions because of speculation that the impairment may cause a risk of future disability.

AFTER EMPLOYMENT

Medical questions or evaluations after employment must be job related and consistent with business necessity. Generally an evaluation meets that standard when the agency “has a reasonable belief, based on objective evidence, that: (1) an employee’s ability to perform essential job functions will be impaired by a medical condition; or (2) an employee will pose a direct threat due to a medical condition.”³

Agencies may also additionally conduct post employment medical examinations for the following reasons:

- The examinations are required by federal law or regulation; or
- When the examination is voluntary (neither requiring participation nor penalizing for not participating³) and a part of an employee health program.

BACKGROUND AND REFERENCE CHECKS

The rules regarding what medical information may be requested pre-offer, post-offer and after employment also apply to background and reference checks. In general, the EEOC takes the perspective that a job offer is real only if all relevant non-medical information (e.g., background and reference checks) which reasonably could be obtained are analyzed prior to giving the offer. However, the EEOC has recognized that there are times when an employer cannot reasonably obtain and evaluate all non-medical information at the pre-offer stage.¹⁰

RECRUITMENT

In general, the ADA does not require employers to take affirmative action in employing people with disabilities (i.e., agencies are not required by the ADA to recruit, hire and promote individuals with disabilities as part of a mandate to make their work force more diverse). Rather, the ADA requires agencies to modify their hiring processes and employment practices so that discrimination does not occur when a person with a disability applies or is hired.

However, the ADA does not invalidate Section 503 of the Rehabilitation Act, which requires federal contractors and subcontractors with contracts and subcontracts of \$10,000 or more per year to take affirmative action in hiring and promoting individuals with disabilities.

It is generally recommended to base a job posting/notice/advertisement on the essential functions. [Accommodation](#) may be requested in the application and interview processes.

INTERVIEWING

The prohibition on pre-offer medical inquiries also applies to questions asked during interviews. Locations for interviews should be [accessible](#) and an applicant is entitled to [accommodation](#) for the interview.

NAC 284.441 requires the appointing authority to provide a description of the essential functions of the position to each applicant who is being considered for a position. The information must be provided in a timely manner to allow an applicant with a disability to determine his or her need for reasonable accommodation.

SELECTION PROCESS

It is the employer's responsibility to select the most qualified candidate for a position. The ADA makes it unlawful to discriminate against an individual with a disability who is qualified on the basis of a disability. Agencies must determine whether or not an individual with a disability is qualified at the time of the hiring decision, based on the person's present capabilities. Agencies should not make decisions based on speculation about what may happen in the future or concerns about increased insurance premiums or workers' compensation costs.

The appointing authority shall consider the essential functions of the position that have been identified when determining which applicant will be offered employment. If the disability of an applicant prevents or impedes the performance of one or more of the marginal functions of the

position, the agency should not consider those functions when determining which applicant will be offered employment.

QUALIFICATION STANDARDS AND TESTS

It is unlawful for an employer to use qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with disability or a class of individuals with a disability(s) on the basis of disability, unless the standard, test or other selection criteria, as used by the State or agency, is shown to be job-related for the position in question and is consistent with business necessity. This provision is applicable to all types of selection criteria, including safety requirements, vision or hearing requirements, walking requirements, lifting requirements, and employment tests. Legitimate production standards will generally not be subject to a challenge under this provision.

Accommodations may be needed to assure that tests or examinations measure the actual ability of an individual to perform the essential functions, rather than reflecting limitations caused by a disability. Tests should be given to people who have sensory, speaking, or manual impairments in formats that do not require the use of their impaired skills; unless that is the job-related skill the test is designed to measure.

For example, an applicant for a position may have dyslexia, a learning disability, which causes difficulty in reading. The applicant may be given an oral rather than a written test, unless reading is an essential function of the position. Or the individual might be allowed more time to take a test, unless the test is designed to measure speed required for an essential function.

An employer has an obligation to inform applicants in advance that a test will be given, so that an individual who needs an accommodation can make such a request.

TRAINING

Individuals with disabilities must be provided equal access to training.

[Reasonable accommodation](#) should be provided, when needed, to individuals with disabilities to give them equal opportunity to benefit from training to perform their positions effectively and to advance in employment. An employer is responsible to provide reasonable accommodation whether the training occurs at the worksite or elsewhere.

EVALUATIONS, PERFORMANCE MANAGEMENT & DISCIPLINE

An employer can hold an employee with a disability to the same conduct standard (as long as it is job-related and consistent with business necessity) applied to employees without disabilities. For example, the ADA does not prevent an agency from maintaining a workplace free of violence or threats of violence, or from disciplining an employee who steals or destroys property. Thus, an employer may discipline an employee with a disability for engaging in such misconduct if it would impose the same discipline on an employee without a disability.

However, other conduct standards that are not job-related for the position in question and consistent with business necessity an agency cannot discipline for or hold the individual accountable for. For example, an employee with a known psychiatric disability works in a

warehouse loading boxes onto pallets for shipment. He has no customer contact and does not come into regular contact with other employees. Over the course of several weeks, he has come to work appearing increasingly disheveled. His clothes are ill-fitting and often have tears in them. He also has become increasingly anti-social. Coworkers have complained that when they try to engage him in casual conversation, he walks away or gives a curt reply. When he has to talk to a coworker, he is abrupt and rude. However, his work has not suffered. The agency's policy states that employees should have a neat appearance at all times. The policy also states that employees should be courteous to each other. When told that he is being disciplined for his appearance and treatment of coworkers, the employee explains that his appearance and demeanor have deteriorated because of his disability, which was exacerbated during this time period. The dress code and coworker courtesy rules are not job-related for the position in question and consistent with business necessity because this employee has no customer contact and does not come into regular contact with other employees. Therefore, rigid application of these rules to this employee would violate the ADA.⁶

An employer can also hold an employee with a disability to the same production standards for performance of essential functions, with or without accommodation, as other similarly situated employees without disabilities. An agency can hold employees with disabilities to the same performance standards as other employees regarding marginal job functions, unless the disability affects the ability to perform these marginal functions. If the ability to perform marginal functions is affected by the disability, the agency must provide some type of reasonable accommodation, unless to do so would be an undue hardship.

An agency should not evaluate on a lower standard or discipline less severely employees with disabilities. However, an agency may not discipline or terminate an employee with a disability if the agency has refused to provide a requested reasonable accommodation that did not constitute an undue hardship, and the reason for unsatisfactory performance was the lack of accommodation.

REQUIRING "FULL RECOVERY" BEFORE RETURN TO WORK

An agency may not refuse to allow an individual with a disability to return to work on the basis that the employee is not fully recovered, unless he or she:

- Cannot perform the essential functions of the position with or without reasonable accommodation; or
- Would pose a direct threat.

ADDRESSING GRIEVANCE(S)

The suggested procedure for handling ADA issues is through communication between the employee, supervisor and human resource staff.

An agency may have an ADA grievance policy in place; in which case, the procedures outlined may be used to resolve issues which have not been handled through communication between the parties.

Additionally, [NAC 284.696](#) states that an employee alleging unlawful discrimination may:

- Report the alleged discrimination to:

- The section of the Division of Human Resource Management that investigates discrimination (800-767-7381);
- The Attorney General;
- The employee's appointing authority;
- An equal employment opportunity officer;
- A human resource representative of the agency in which the employee is employed;
or
- The office charged with enforcing affirmative action within the appropriate university, state college or community college which is part of the Nevada System of Higher Education.
- Use the grievance procedure; or
- File a complaint with:
 - The Nevada Equal Rights Commission or
 - The United State Equal Employment Opportunity Commission.

POSTER

The ADA requires that agencies post a notice describing the provisions of the ADA, a poster is available from the EEOC. See the [Poster Adviser](#) on the Division of Human Resource Management's website for a link to the current version online. The notice must be made accessible to applicants and employees.

ACCOMMODATION PROCESS

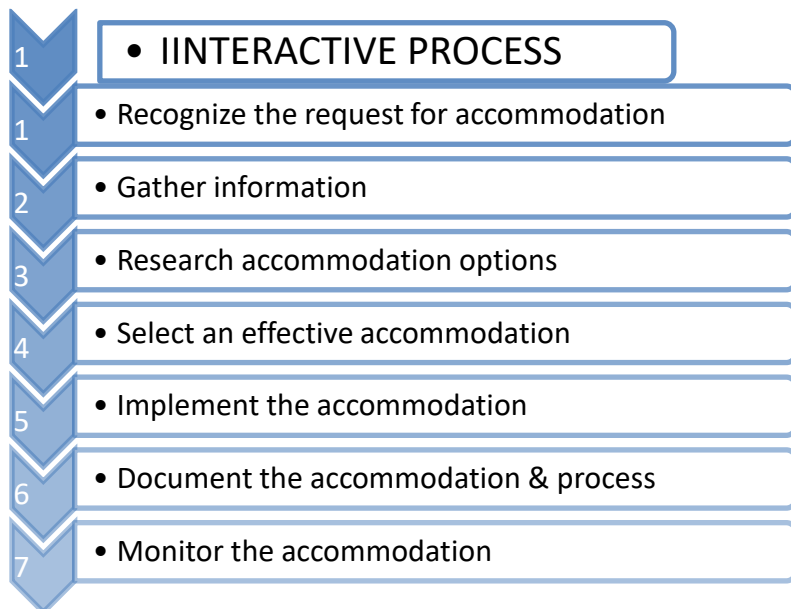
The accommodation requirement is best understood as a means by which barriers to the equal employment opportunity of an individual with a disability are removed or alleviated.

These barriers may be, but are not restricted to:

- Physical or structural obstacles that inhibit or prevent the access of an individual with a disability to job sites, facilities or equipment
- Rigid work schedules that permit no flexibility as to when work is performed or when breaks may be taken
- Inflexible job procedures that unduly limit the methods of communication that are used in the position or the way in which particular tasks are accomplished

An agency is obligated to make an accommodation only to the known limitations of an individual with a disability who is otherwise qualified. In general, it is the responsibility of the applicant or employee with a disability to inform the employer that an accommodation is needed to:

- participate in the application process;
- perform the essential job functions; and/or
- receive equal benefits and privileges of employment.



The ADA provides that an agency cannot require an individual with a disability who is qualified to accept an accommodation that is neither requested nor needed by the individual. However, if a necessary reasonable accommodation is refused, the individual potentially could be considered not qualified for the position if unable to perform the functions of the position.

An agency is not required to provide an accommodation if unaware of the need or disability. However, if an individual's need for accommodation is a) obvious and b) the individual's disability prevents the individual from requesting an accommodation; the agency must begin the accommodation process.

If an agency can grant requested assistance without further consideration, it is suggested that the assistance be provided without labeling it as an "accommodation". If requested assistance cannot be granted without further consideration, then the agency would need to proceed with the interactive process.

What is the interactive process? It can be described as a process to clarify what the individual needs and to identify a reasonable accommodation. Responsibility to move the interactive process forward rests on both the agency and individual. It is suggested to restrict communication to fact finding and problem resolution only and not to discuss performance problems as part of the interactive process.

Also keep in mind that certain steps in the interactive process may be taken at the same time or skipped (if the agency or individual already has addressed the issue).

Appendix to Title 29, Part 1630—Interpretive Guidance on Title I of the Americans with Disabilities Act

“The appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the individual with a disability...

When an individual with a disability has requested a reasonable accommodation to assist in the performance of a job, the employer, using a problem solving approach, should:

- (1) Analyze the particular job involved and determine its purpose and essential functions;
- (2) Consult with the individual with a disability to ascertain the precise job-related limitations imposed by the individual's disability and how those limitations could be overcome with a reasonable accommodation;
- (3) In consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position; and
- (4) Consider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for both the employee and the employer...”

RECOGNIZE THE REQUEST FOR ACCOMMODATION

What is a request for accommodation? Communication of a need for an “adjustment or change... for a reason related to a medical condition”.⁴

An individual may use “plain English” to request accommodation. An applicant or employee does not have to specifically request a "reasonable accommodation" or mention the "ADA". A request for accommodation may be as simple as, "I need <accommodation> because of my <medical condition>".

What if you are not sure if an individual is requesting an accommodation? Ask the individual to clarify what is being requested and why.

However, just because an individual requests an accommodation, it is not a guarantee that the individual will be provided an accommodation or the specific accommodation requested. An individual with a disability should request a reasonable accommodation when he or she knows that there is a workplace barrier that is preventing him or her, due to a disability, from effectively

competing for a position, performing the functions of a position, or gaining equal access to a benefit of employment. When an individual decides to request accommodation, the individual or his or her representative (e.g., family member, friend, health professional) must let the employer know that he or she needs an adjustment or change at work for a reason related to a medical condition. Requests for reasonable accommodation do not need to be in writing. Individuals may request accommodation in conversation or may use any other method of communication.

GATHER INFORMATION

REVIEW ESSENTIAL FUNCTIONS

Review the [Position Functions \(ADA-3\)](#) to verify that they are correct and current. Do they accurately reflect the individual's position?

COMMUNICATE WITH INDIVIDUAL REGARDING IMPAIRMENT

Unless the individual's impairment is obvious, the agency may need to communicate with the individual regarding what his or her limitation(s) are and how long they will last. This communication may involve providing the individual with the position's essential functions and a list of questions for his or her health care provider.

HEALTH CARE PROVIDER

A health care provider can provide the facts necessary to establish whether an individual meets the definition of disability, whether an accommodation is necessary and may recommend an accommodation.

Agencies should provide health care providers who conduct an examination with information about the individual's job, specifically the essential functions. The [Medical Inquiry in Response to an Accommodation Request form \(NPD-86\)](#) has been developed as a template; however, the questions asked of the health care provider must be chosen and adapted based on the individual's specific circumstances. Also, information that has already been provided may not be requested again.

An employer may not ask for documentation when:

- Both the disability and the need for reasonable accommodation are obvious; or
- The individual has already provided the employer with sufficient information to substantiate that he or she has an ADA disability and needs reasonable accommodation.

An agency may not request complete medical records or health information unrelated to the disability.

SECOND OPINION

The ADA does not prevent an employer from requiring an individual to go to an appropriate health professional of the employer's choice if the individual provides insufficient information from his treating health care professional to substantiate that he or she has an ADA disability and needs a reasonable accommodation. However, if an individual provides insufficient documentation in

response to the agency's initial request, the agency should explain why the documentation is insufficient and allow the individual an opportunity to provide the missing information in a timely manner. Documentation is insufficient if it does not establish the existence (or not) of an ADA disability and explain the need for reasonable accommodation.

If an agency requires an employee to go to a health professional of the employer's choice, the agency must pay all costs associated with the visit(s). State administrative regulations provide a procedure for obtaining a second and third medical opinion, see [NAC 284.566](#).

DOES THE INDIVIDUAL HAVE A COVERED DISABILITY?

It is the agency's responsibility to determine whether an individual meets the definition of disability under the ADA. The ADAAA states that this should not require extensive analysis.

IS THE INDIVIDUAL QUALIFIED?

This analysis is a two step inquiry. 1. Does the individual have the skills, experience, education and other job-related requirements (e.g., certification, licensure) of the position? 2. Can the individual perform the essential functions of the position with or without accommodation?

Future, potential difficulties may not be considered in deciding if an individual is qualified.

If an agency adjusts a position and its essential functions based upon business necessity, an individual may no longer be qualified. Also, if an individual poses a direct threat in that position, then the individual is not qualified.

DOES THE INDIVIDUAL POSE A DIRECT THREAT?

A direct threat is a significant risk ("a high, and not just a slightly increased, risk"⁶) of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. The risk must be specific, current (not speculative) and based on objective facts.

In determining whether an individual with a disability poses a direct threat, the factors to consider include:

- the duration of the risk;
- the nature and severity of the potential harm;
- the likelihood that the potential harm will occur; and
- the imminence of the potential harm.

DOES THE INDIVIDUAL NEED AN ACCOMMODATION?

Is the requested accommodation because of or related to the disability? An agency has a responsibility to provide accommodation for limitation(s) relating to a disability. It is not the agency's responsibility to provide accommodation to an individual with a disability if that accommodation will not compensate for the impairment affecting the employee's employment.

RESEARCH ACCOMMODATION OPTIONS

COMMUNICATION WITH INDIVIDUAL

In consultation with the individual to be accommodated, potential accommodations should be identified and assessed as to the effectiveness each would have in enabling the individual to perform the essential functions of the position. If this consultation with the individual does not reveal a potential reasonable accommodation, several other sources of information are available.

RESOURCES

There are various resources for researching potential accommodations, see [Resources & References](#).

SELECT AN EFFECTIVE ACCOMMODATION

Once potential accommodations have been identified, the agency should assess the effectiveness of each potential accommodation in assisting the individual in need of the accommodation to:

- participate in the application process;
- perform the essential job functions; and/or
- receive equal benefits and privileges of employment.

If more than one accommodation will effectively enable the individual to perform the essential functions or if the individual would prefer to provide the accommodation, the preference of the individual should be given primary consideration. However, it should be noted that the agency is encouraged, but not obligated, to select the preference of the individual. The agency providing the accommodation has the ultimate discretion to choose between effective reasonable accommodations, and may choose a less expensive, easier to provide or less disruptive of agency operations reasonable accommodation. Accommodations should be considered on a case-by-case basis.

When selecting a reasonable accommodation the following factors should be considered:

- the individual's impairment(s);
- the position's essential functions;
- impact on workflow;
- applicable productivity standards; and
- interaction with co-worker(s).

IS THE ACCOMMODATION AN UNDUE HARDSHIP?

“29 CFR §1630.2 Definitions...

(p) *Undue hardship*—(1) *In general.* *Undue hardship* means, with respect to the provision of an accommodation, significant difficulty or expense incurred by a covered entity, when considered in light of the factors set forth in paragraph (p)(2) of this section.

(2) *Factors to be considered.* In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include:

(i) The nature and net cost of the accommodation needed under this part, taking into consideration the availability of tax credits and deductions, and/or outside funding;

(ii) The overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at such facility, and the effect on expenses and resources;

(iii) The overall financial resources of the covered entity, the overall size of the business of the covered entity with respect to the number of its employees, and the number, type and location of its facilities;

(iv) The type of operation or operations of the covered entity, including the composition, structure and functions of the workforce of such entity, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the covered entity; and

(v) The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.”

The general principle is that an accommodation does not have to be offered if it is an undue hardship for the State of Nevada. Although the full resources of the State of Nevada, not just the unit the employee is in, would be considered when making this decision, agency management and the Governor’s Finance Office may need to be consulted.

A potential negative effect on the morale of other employees is not an undue hardship.

IMPLEMENT THE ACCOMMODATION

When offering a reasonable accommodation, it is suggested to explain the reason that particular accommodation is being offered (especially if it is not the accommodation that the individual requested). The Agency Response form (NPD-87) documents the decision in writing.

Proceed with implementing the accepted reasonable accommodation as soon as possible.

DOCUMENT THE ACCOMMODATION & PROCESS

If the interactive process breaks down, liability under the ADA will rest on whoever (employer or individual) did not meet their obligations in the process. Documentation will assist an agency in establishing that it fulfilled its obligations in the process.

It is recommended to write a summary of any meetings, submit a copy to attendees asking for revisions/corrections, finalize and then redistribute to all attendees. Summaries of any analysis and records of any research, printouts or notes from conversations should also be kept as documentation. And most importantly, there should be documentation outlining the final decision

regarding any accommodation or decision against providing accommodation and the individual's response to an offer of reasonable accommodation. See [Confidentiality](#) for the guidelines on storage of documents containing medical information.

MONITOR THE ACCOMMODATION

An agency should follow up with an individual regarding the effectiveness of a reasonable accommodation. The follow up should be scheduled, performed and documented. The length of time between follow ups will depend on the type of accommodation provided. Follow ups should include communication with the individual.

If the follow up indicates that the reasonable accommodation is not allowing the individual to participate in the application process, perform the essential job functions or receive equal access to benefits and privileges of employment, the agency should re-enter the interactive process with the individual.

TYPES OF ACCOMMODATION

ACCESSIBILITY

Employment activities must take place in an integrated setting. Employees with disabilities may not be segregated into particular facilities or parts of facilities. This means that architectural barriers might have to be removed or altered to provide structural accessibility to the workplace. However, an employer is not required to make structural modifications that are unreasonable and would impose an undue hardship.

In existing structures, structural modifications are necessary to the extent that they will allow an employee with a disability to perform the essential functions of the job including access to workstations and normal support facilities such as bathrooms, water fountains, and lunchrooms.

The State Public Works Division may be able to provide limited consultation regarding accessibility issues, see the [Resources](#) page for contact information.

POSITION RESTRUCTURING

Position restructuring as a reasonable accommodation may involve reallocating or redistributing the marginal functions of a position. An agency is not required to reallocate essential functions of a job as a reasonable accommodation. Essential functions, by definition, are those that a qualified individual must perform, with or without accommodation.

For example, firefighters are required to pass an annual physical agility test, which would include a lifting requirement, upon employment and annually thereafter as an essential function of the position. If an individual became disabled and could no longer meet the lifting requirement, it would not be reasonable to remove this test as it is essential to the job.

Although an agency is not required to reallocate essential job functions, it may be a reasonable accommodation to change when or how the essential functions are performed. For example:

- Reassigning duties among co-workers. For example, if an administrative assistant had a vision impairment that prevented him or her from typing in small spaces on forms, whenever such forms needed to be prepared, the marginal function might be assigned to another administrative assistant without a visual impairment. In exchange, the administrative assistant with a disability could assume one of the other administrative assistant's marginal functions, such as filing.
- Eliminate non-essential tasks. For example, if a duty(s) of the position is not necessary, it could be eliminated entirely. A mail clerk, rather than traveling to the post office in the early morning, might be allowed to wait for regular mail delivery.
- Reassign visits to accessible sites. For example, a repair person who uses a wheelchair could service the accessible sites, while the other sites could be assigned to someone without a mobility impairment.
- Allow work in other than the traditional office setting. For example, a telephone surveyor could make calls on a designated line from home instead of having to come regularly to an inaccessible office to make the calls.

- Assign uninterrupted work times for particular tasks. For example, an individual with a learning disability may have problems when his or her attention is interrupted. Scheduling uninterrupted work time might allow greater concentration and heighten the performance of such an individual.

LEAVE

Flexible leave policies should be considered as a reasonable accommodation when an individual with a disability requires time off from work because of his or her disability. An agency is not required to provide additional paid leave as an accommodation, but should consider allowing use of accrued leave or leave without pay, where this will not cause an undue hardship. Such employees may meet the eligibility requirements of the Family and Medical Leave Act and the rights and benefits under this law need to be considered, see the [FMLA Overview](#).

How much leave is reasonable? The length of the leave granted will depend on the employee's disability and position. Most courts and the EEOC have indicated that indefinite leave is not reasonable. Also, providing leave for unpredictable attendance is generally not considered reasonable under the ADA.

MODIFICATION OF WORK SCHEDULE

Many people with disabilities are fully qualified to perform jobs with the accommodation of a modified work schedule (e.g., a schedule other than a standard 8:00 a.m. to 5:00 p.m. workday or a standard Monday to Friday workweek). Depending on the nature of the work assignment and operational requirements, modifications to work schedules and hours may be a reasonable accommodation as long as it does not result in an undue hardship. Modified work schedules may include flexibility in work hours, the workweek, or part-time work. For example:

- An employee who is unable to drive at night (e.g., an employee with poor night vision) could be assigned day-shift work.
- An employee may need additional rest periods (e.g., employees diagnosed with multiple sclerosis, cancer, diabetes, respiratory conditions, mental illness).
- An employee with mobility or other impairments may find it difficult to use public transportation during peak hours, or may depend upon special para-transit schedules.
- An employee who needs kidney dialysis treatment may be unable to work two days per week because treatment is only available during work hours on weekdays.

AUXILIARY AIDS

Some examples of auxiliary aids are interpreters, note takers, computer-aided transcription services, written materials, exchange of written notes, telephone handset amplifiers, assistive listening systems, telephones compatible with hearing aids, closed caption decoders, open and closed captioning, text telephones (TTYs), videotext displays, video interpreting services (VIS), accessible electronic and information technology, readers, taped texts, audio recordings, Braille materials and displays, screen reader software, magnification software, optical readers, secondary auditory programs (SAP) and large print materials.

INTERPRETERS

MODIFICATION OR PURCHASE OF EQUIPMENT OR DEVICES

Purchase of equipment or modifications for existing equipment may be an effective accommodation for an employee to overcome existing barriers in performing the functions of a position. These devices range from very simple solutions, such as an elastic band that can enable a person with cerebral palsy to hold a pencil and write, to electronic equipment that can be operated with eye or head movements by people who cannot use their hands. Other types of equipment and devices that may be appropriate include, but are not limited to:

- Telephone headsets and adaptive light switches;
- Speakerphones;
- A supportive desk chair;
- A raised desk;
- Modified equipment controls for hand or foot operation;
- Keyboard hand rest and a finger guide mounted on equipment;
- Armrest attachments; or
- Buzzers to replace warning lights.

An agency is only obligated to provide equipment that is needed to perform a job; generally, there is no obligation to provide equipment that the individual uses regularly in daily life (e.g., hearing aid, wheelchair).

However, an agency may be obligated to provide items of this nature if special adaptations are required to perform a job. For example, an employee with a mobility impairment may own and use a manual wheelchair. If the employee's job requires movement between buildings that are widely separated and the employee's mobility impairment prevents operation of a wheelchair manually for that distance, or if heavy, deep-pile carpeting prevents operation of a manual wheelchair, then it may be a reasonable accommodation to provide an employee with a motorized wheelchair.

MODIFICATION OF WORK ENVIRONMENT

MODIFICATION OF POLICIES AND/OR PROCEDURES

Modifications or adjustments in the ways that tests and training are administered or revisions to other employment policies and practices may be reasonable accommodations to provide equal employment opportunities for individuals with disabilities.

Modifications to policies and procedures may include:

- Modifying a policy prohibiting animals in the workplace, so that a person with a disability may be accompanied by a service animal

- Modifying an emergency evacuation procedure to provide effective evacuation for individuals with difficulty in mobility in case of emergency
- Providing accessible parking for an individual with a qualified sticker, license plate or placard

When the accommodation provided for an individual with a disability is the modification of a policy, the agency may still continue to apply the policy to all other employees.

TELECOMMUTING

The EEOC has stated that telecommuting is a potential reasonable accommodation if it is effective and does not constitute an undue hardship.⁹ However, some questions to be considered when deciding whether telecommuting is a reasonable accommodation are:

- Is teamwork an essential function of the position?
- Does the position require the individual to be physically present?
- Does the individual need physical access to documents and information?
 - Are any of the documents or information confidential?
- Does the position have clearly defined and measurable work activities?
- Does the position need close supervision?
- Does the position require special equipment?

REASSIGNMENT

Before considering reassignment of an employee to a vacant position, accommodations that will allow the employee to remain in his or her position should be considered. Reassignment is only required for current employees, not prospective employees. The State is not required to consider a different position for a job applicant who is not able to perform the essential functions of a position, with or without reasonable accommodation. Reassignment to a vacant position cannot be denied based on the fact that the individual is not a permanent employee. However, if the employee never adequately performed the essential functions with or without reasonable accommodation, reassignment is not necessary as the individual was never qualified.

Reassignment may not be used to limit, segregate, or otherwise discriminate against an employee with a disability. An agency may not reassign people with disabilities only to certain undesirable positions, or only to certain offices or facilities.

Reassignment shall be made to a position equivalent to the one presently held in terms of pay, privileges, benefits, geographical location and responsibilities, if the individual is qualified for the new position and if such a position is vacant or will be vacant within a reasonable amount of time unless it is demonstrated that such an appointment would cause an undue hardship to the appointing authority. A "reasonable amount of time" should be determined on a case-by-case basis.

An employee must be "qualified" for the new position. An employee is "qualified" for a position if the employee:

1. Satisfies the requisite skill, experience, education, and other job-related requirements of the position; and
2. Can perform the essential functions of the new position, with or without reasonable accommodation.

The employee does not need to be the best-qualified individual for the position in order to obtain it as a reassignment. An employee being reassigned does not have to compete for a position if it is equivalent or a lower grade than the employee's current position.

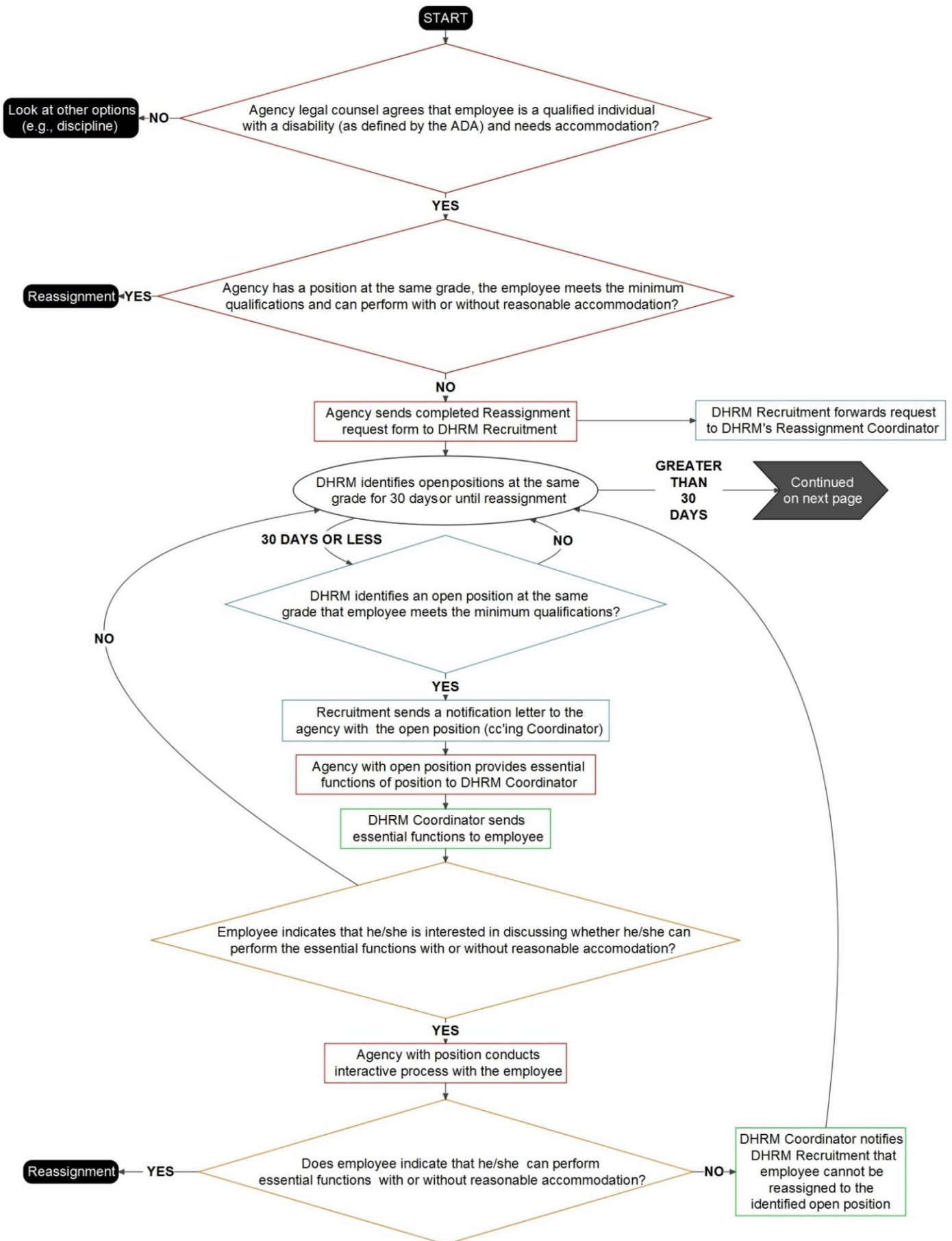
The State of Nevada shall offer to reassign an individual to an equivalent position in a different geographical location if there are no equivalent positions vacant or soon to be vacant in the same geographical location.

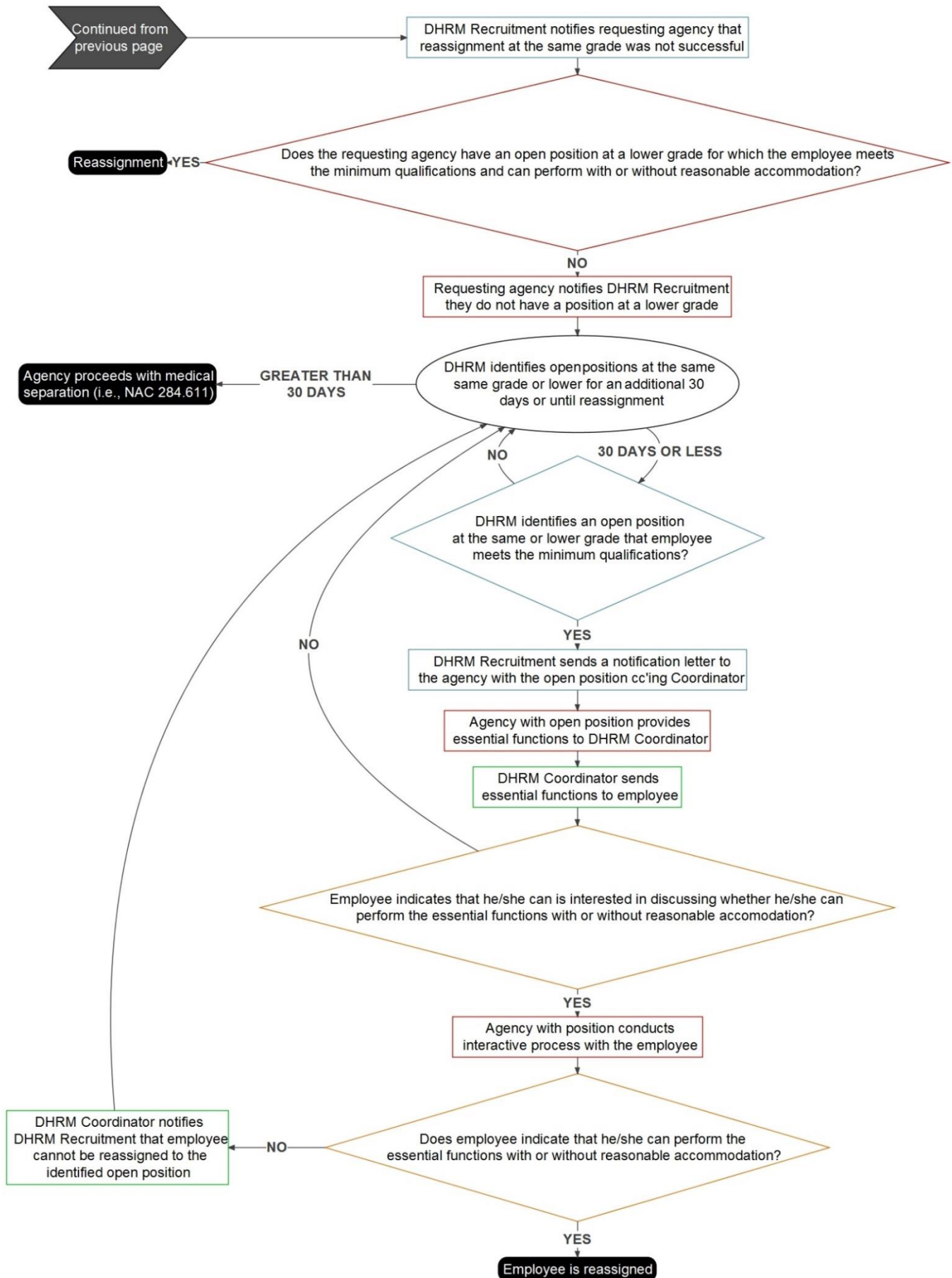
The State of Nevada shall offer to reassign an individual to a lower graded position (unless it is demonstrated that such an appointment would cause an undue hardship to the appointing authority) if there are no reasonable accommodations that would enable the employee to remain in the current position and there are no equivalent positions vacant or soon to be vacant for which the employee is qualified (with or without a reasonable accommodation). In such a situation, the State does not have to maintain the individual's salary at the level of the higher graded position. Refer to the rules governing compensation in the [Rules for State Personnel Administration](#) for how to calculate pay in the case of a voluntary demotion.

If there is more than one vacancy for which the employee is qualified, the State must place the individual in the position that comes closest to the employee's current position in terms of pay, status, privileges and responsibilities. If it is unclear which position comes closest, the employee should be consulted about his or her preference before determining the position to which the employee will be reassigned. Reassignment does not include giving an employee a promotion; thus, an employee must compete for any vacant position that would constitute a promotion.

The State of Nevada is not required to create a new job or to bump another employee from a job in order to provide reassignment as a reasonable accommodation.

[\(NAC 284.405\)](#)





FUNDING

The cost of accommodation does vary; however, the majority of accommodations can be provided at little or no cost.

Once the appropriate accommodation is identified, in consultation with the individual in need of the accommodation, an employer should work with their assigned Budget Analyst to determine appropriate State funding sources.

In addition, the U.S. Department of Veterans Affairs may provide financial assistance to disabled veterans for equipment needed to help perform jobs. Some organizations that serve people with particular types of disabilities also provide financial assistance for needed accommodations. Other types of assistance may be available in the community such as transportation services.

Also, the applicant or employee may be willing to share in the cost of the accommodation, which is an undue hardship on the State, or may already own the equipment or assistive device necessary to perform the essential functions of the job.

CONFIDENTIALITY

All information obtained from medical examinations and inquiries must be collected and maintained on separate forms, in separate secure medical files and must be treated as confidential medical records per [NAC 284.726](#).

All medical-related information must be kept confidential, with the following exceptions:

- Supervisors and managers may be informed about necessary restrictions on the work or duties of an employee and necessary accommodations;
- First aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment;
- Government officials investigating compliance with the ADA must be given relevant information upon request;
- Relevant information may be provided to state workers' compensation offices, "second injury" funds and workers' compensation insurance carriers in accordance with state workers' compensation laws; or
- Relevant information may be provided to insurance companies where the company requires a medical examination to provide health or life insurance for employees.

DEALING WITH RESPONSES FROM CO-WORKERS

Other employees may at times perceive an individual as being given preferential treatment. However, others (including co-workers) may not be told that the individual is receiving a reasonable accommodation because this would usually amount to a disclosure that the individual has a disability.

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

What can a supervisor or human resources say when co-workers ask about another employee's accommodation? "The State's policy is to assist individuals who encounter difficulty in the workplace. However, many workplace issues encountered by individuals are personal and, in those circumstances, it is the State's policy to respect an individual's privacy. Your privacy would also be respected if you found it necessary to ask for some kind of workplace change for personal reasons."⁴

OTHER LAWS & PROVISIONS

FAMILY AND MEDICAL LEAVE ACT (FMLA)

The FMLA and the ADA both potentially grant an employee leave in certain circumstances. Under the ADA, unpaid (though applicable paid leave may be used) leave may be an accommodation and may be provided to an individual with a disability who is otherwise qualified when it is reasonable and unless (or until) it imposes an undue hardship on the operation of the employer's business. Under the FMLA, an "eligible" employee may take leave for a qualifying event, as outlined in the [FMLA Overview](#).

At the end of FMLA leave, an agency must return the employee to the same or an equivalent job. An employee with an ADA disability who is granted leave as a reasonable accommodation is entitled to return to his or her same position unless the agency demonstrates that holding open the position would impose an undue hardship or an employee is no longer qualified to return to his or her original position. If both laws apply, the agency must provide the employee with the greater benefit and restore the employee to his or her same position absent undue hardship.

Not all employees protected by the ADA are entitled to leave under the FMLA. Employees protected by the ADA must be independently determined to be eligible for FMLA coverage. An FMLA "serious health condition" is not necessarily an ADA "disability" and an ADA "disability" is not necessarily an FMLA "serious health condition". In addition, the fact that an individual has a record of a "serious health condition" does not necessarily mean that he or she has a record of an ADA disability.

When an employee requests leave under the FMLA for a "serious health condition", an agency will not violate the ADA by asking for the information specified in a FMLA certification form. An agency is entitled to know why an employee, who otherwise should be at work, is requesting leave as allowed under the FMLA. If the inquiries are strictly limited in this fashion, they would be "job-related and consistent with business necessity" under the ADA.

The FMLA limitation on the number of workweeks of leave taken does not mean that the ADA also limits employees to a specific number of workweeks of leave per year. An individual with a disability who is otherwise qualified may be entitled to more than 12 weeks of unpaid leave as an accommodation if the additional leave is reasonable and will not impose an undue hardship on the operation of the agency's business.

GENETIC INFORMATION NONDISCRIMINATION ACT (GINA)

GINA defines genetic information as including, "information about an individual's genetic tests and the genetic tests of an individual's family members, as well as information about any disease, disorder, or condition of an individual's family members (i.e. an individual's family medical history)."⁷

GINA prohibits requesting or receiving genetic information. Genetic information may be provided by a health care provider in response to medical inquiries as part of the ADA's interactive process. If an employee and/or his or her health care provider is warned not to provide genetic information, receipt of genetic information is not a violation of GINA. The EEOC's Regulations Under the

Genetic Information Nondiscrimination Act of 2008 provides the following sample language to be included with requests for medical information:

“The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. ‘Genetic information’ as defined by GINA, includes an individual’s family medical history, the results of an individual’s or family member’s genetic tests, the fact that an individual or an individual’s family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual’s family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services.’”⁷

The EEOC has stated that genetic information may be kept with other medical information in compliance with the ADA’s rules on medical records confidentiality.

HEALTH INSURANCE PORTABILITY & ACCOUNTABILITY ACT (HIPAA)

Title IV of the Act defines rules for protection of patient information. Health care providers, health organizations, and government health plans that use, store, maintain, or transmit patient health care information are required to comply with the privacy regulations of HIPAA. It sets limits on the use and release of health records and establishes safeguards to protect the privacy of health information. In general, a health care provider or plan may not use or disclose an individual’s healthcare information without the patients permission except for treatment, payment or healthcare operations. Typically, most agencies, in regards to their employees, are not covered by HIPAA regulations. The requirements of the HIPAA Privacy Rule can apply when an employee’s medical information is requested from a HIPAA-covered health care provider. Regardless of whether HIPAA applies in the situation, medical information must be kept confidential and separate from other personnel records.

(FEDERAL) PREGNANT WORKERS FAIRNESS ACT

The federal Pregnant Workers Fairness Act (PWFA) requires an employer to provide reasonable accommodations, absent undue hardship, to a qualified employee or applicant with a known limitation related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions.

“Undue hardship” and “reasonable accommodation” have the same definitions under the PWFA as the Americans with Disabilities Act. “Known limitation” means a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions. “Qualified” includes an employee or applicant who cannot perform one or more essential functions, if: 1) the inability is for a temporary period; 2) the essential function(s) can be resumed “in the near future”; and 3) the inability to perform the essential function(s) can be reasonably accommodated.

It prohibits denying employment opportunities to or taking actions against covered employees based on their need for reasonable accommodations. Additionally, a covered employee may not be forced to take paid or unpaid leave when reasonable accommodation is available that would allow them to work. Any retaliation against employees for reporting or opposing unlawful discrimination under the PWFA or participating in a proceeding under the PWFA is also prohibited.

WORKERS' COMPENSATION

The purpose of workers' compensation is to provide a system for securing prompt and fair settlement of employees' claims against employers for occupational injury and illness. Whereas, the purpose of the ADA is to remove barriers which prevent qualified individuals with disabilities from enjoying the same employment opportunities that are available to persons without disabilities.

Whether an injured worker is protected by the ADA will depend on whether or not the individual meets the ADA definition of an individual with a disability who is qualified.

EARLY RETURN-TO-WORK PROGRAM

The State of Nevada has established an Early Return-to-Work Program to enhance recovery, help minimize workers' compensation costs and provide a service to employees who are injured or contract an occupational disease in the course and scope of their employment with the State. Employees will be placed in temporary modified duty positions, when feasible, during the course of recovery from an injury or occupational disease that precludes them from performing their normal job tasks. In the event of a permanent disability that prevents an employee from performing the essential functions of his or her regular position and for which reasonable accommodation cannot be made, every effort will be made to place the employee in an alternative vacant position that he or she is qualified to perform and that matches his or her physical limitations. See the [Early Return-to-Work Program, A Guide for Managers, Supervisors and Personnel Representatives](#) for additional information. The Risk Management Division serves as a technical resource for the Early Return-to-Work Program. Call (775) 684-3187 for information or assistance.

VOCATIONAL REHABILITATION

Vocational rehabilitation is a State and federally funded program to help eligible individuals with disabilities obtain or retain a job. As appropriate to the vocational rehabilitation needs of each client and consistent with the individual's informed choice, vocational rehabilitation provides assessment and evaluation, counseling and guidance, training, interpretation, and other goods and services to allow an individual with a disability who is qualified to become employed or retain employment. The Rehabilitation Division of the Department of Employment, Training and Rehabilitation may be able to provide agencies with consultation in the accommodation process. See [Resources](#) for the Rehabilitation Division's contact information.

SEPARATION FOR PHYSICAL, MENTAL OR EMOTIONAL DISORDER (NAC 284.611)

[NAC 284.611](#) allows for the separation of an employee for physical, mental or emotional disorder; however, the regulation outlines specific steps that must be taken before proceeding with this action. One of the steps is "determine whether reasonable accommodation can be made to enable the employee to perform the essential functions of his job".

700-HOUR STATUTE

The 700-Hour statute requires agencies to make temporary limited appointment of 700 hours' duration of individuals with disabilities. Individuals must be certified by the Rehabilitation Division of the Department of Employment, Training and Rehabilitation (see [Resources](#) for contact information in both northern and southern Nevada), possess the training and skills necessary for the position, and be able to perform the essential functions of the position with or without reasonable accommodation.

Once employed, the 700 hours of work experience are used to measure the individual's merit and fitness for the job. At the end of the appointment, if the individual's performance is satisfactory, he or she may continue in the position as a regular employee with the 700 hours counting toward the time required to earn permanent status.

A probationary or permanent employee who occupies a permanent full-time position is not eligible for the provisions of this section unless his or her disability jeopardizes his or her continued employment in his or her present position and placement on the list does not merely circumvent the provisions of the Rules for State Personnel Administration governing promotion or transfer, see [NRS 284.327](#) and [NAC 284.364](#).

NEVADA PREGNANT WORKERS' FAIRNESS ACT

Upon request, an employee must be provided reasonable accommodations relating to her pregnancy, childbirth, or a related medical condition unless the accommodation would impose an undue hardship.

RESOURCES & REFERENCES

RESOURCES

Resource	Website/email address	Phone number(s)
AccessibleTech.org	http://www.accessibletech.org	
Rehabilitation Division, Nevada Department of Employment, Training & Rehabilitation	https://detr.nv.gov/Page/Rehabilitation_Division	S. NV: (702) 486-5230 N. NV: (775) 684-4040 S. NV TTY: (702) 486-1018 N. NV TTY: (775) 684-8400
Division of Human Resource Management	http://hr.nv.gov	(775) 684-0111
Disability and Business Technical Assistance Centers (DBTAC): Pacific ADA Center	http://www.adapacific.org	
The Job Accommodation Network	http://www.askJAN.org	Voice (800) 526-7234 TTY (877) 781-9403
The National Organization on Disability	http://www.nod.org	
Public Works Division	https://publicworks.nv.gov/	(775) 684-4141

Resource	Website/email address	Phone number(s)
Department of Administration, Purchasing Division, Translation Interpretation	https://purchasing.nv.gov/Contracts/	
RESNA Technical Assistance Project	http://www.resna.org/	Voice (703) 524-6686 TTY (703) 524-6639
Risk Management Division, Department of Administration (workers' compensation)	http://risk.state.nv.us	(775) 687-3187
U.S. Equal Employment Opportunity Commission	http://www.eeoc.gov/	Voice (800) 669-3362 TTY (800) 800-3302

REFERENCES

- ¹ ADA Amendments Act of 2008, Public Law 110-325, September 25, 2008
- ² U.S. Equal Employment Opportunity Commission, Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, as Amended, Final Rule, Federal Register, Vol.76, No. 58
- ³ U.S. Equal Employment Opportunity Commission, Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act (ADA), Number 915.002, 7/27/00
- ⁴ U.S. Equal Employment Opportunity Commission, Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act, Number 915.002, 10/17/02
- ⁵ U.S. Equal Employment Opportunity Commission, Questions and Answers about the Association Provision of the Americans with Disabilities Act, http://www.eeoc.gov/facts/association_ada.html
- ⁶ U.S. Equal Employment Opportunity Commission, Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities, Number 915.002, 3/25/97
- ⁷ U.S. Equal Employment Opportunity Commission, Regulations Under the Genetic Information Nondiscrimination Act of 2008, Final rule, Federal Register, Vol. 75, No. 216
- ⁸ U.S. Equal Employment Opportunity Commission, Enforcement Guidance: Workers' Compensation and the ADA, Number 915.002
- ⁹ U.S. Equal Employment Opportunity Commission, Work At Home/Telework as a Reasonable Accommodation, <http://www.eeoc.gov/facts/telework.html> (last modified October 27, 2005)
- ¹⁰ ADA Update on Medical Examinations and Disability-Related Inquiries, National Employment Law Institute, David K. Fram Esq., April 2013