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



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

## Introduction

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

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

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<sup>1</sup> Mayor's Office for People with Disabilities, *AccessibleNYC: An Annual Report on the State of People with Disabilities Living in New York City* (2017), [http://www1.nyc.gov/assets/mopd/downloads/pdf/accessiblenyc\\_2017.pdf](http://www1.nyc.gov/assets/mopd/downloads/pdf/accessiblenyc_2017.pdf).

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

The New York City Human Rights Law (“NYCHRL”) prohibits discrimination by most employers,<sup>2</sup> housing providers,<sup>3</sup> and public

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

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

N.Y.C. Admin. Code § 8-102(5).

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

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

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



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

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

N.Y.C. Admin. Code § 8-107(5)(4).

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

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

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

N.Y.C. Admin. Code § 8-102(9).

<sup>5</sup> N.Y.C. Admin. Code §§ 8-602 – 8-604.

<sup>6</sup> N.Y.C. Admin. Code § 14-151.

<sup>7</sup> Local Law No. 85 § 1 (2005); N.Y.C. Admin. Code § 8-130(a) (“The

addition, exemptions to the NYCHRL must be construed “narrowly in order to maximize deterrence of discriminatory conduct.”<sup>8</sup>

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

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

<sup>8</sup> Local Law No. 35 (2016); N.Y.C. Admin. Code § 8-130(b).

<sup>9</sup> The term “physical, medical, mental, or psychological impairment” means:

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

N.Y.C. Admin. Code § 8-102(16)(b).

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

<sup>10</sup> N.Y.C. Admin. Code § 8-102(16)(a).

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

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

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

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

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

<sup>12</sup> N.Y.C. Admin. Code § 8-107(15)(a).

<sup>13</sup> N.Y.C. Admin. Code § 8-107(20).

<sup>14</sup> The term “cooperative dialogue” means the process by which a covered entity and a person entitled to an accommodation, or who may be entitled to an accommodation under the law, engage in good faith in a written or oral dialogue concerning the person’s accommodation needs; potential accommodations that may address the person’s accommodation needs, including alternatives to a requested accommodation; and the difficulties that such potential accommodations may pose for the covered entity. Local Law No. 59 (2018).

<sup>15</sup> *Id.*

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

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

## **Violations of the NYCHRL: Prohibitions on Disability Discrimination**

### Disparate Treatment

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<sup>16</sup> While this document specifically reflects the Commission’s interpretation of the NYCHRL, the Commission has included references to related federal authority where it is persuasive and instructive.

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

To establish disparate treatment under the NYCHRL, an individual must show they were treated less well or subjected to an adverse action, motivated, at least in part, by discriminatory animus. An individual may demonstrate this through direct evidence of discrimination or indirect evidence that gives rise to an inference of discrimination.<sup>19</sup> If a showing of discrimination relies on indirect evidence, the covered entity may respond to the indirect evidence of discrimination by putting forward a non-discriminatory justification for the alleged conduct. If the covered entity does so, the burden shifts back to the aggrieved individual to show that the proffered non-discriminatory motive was pretextual, false, or misleading, or that discrimination at least partly motivated the conduct.<sup>20</sup>

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<sup>17</sup> *Raytheon Co. v. Hernandez*, 540 U.S. 44, 52 (2003).

<sup>18</sup> The NYCHRL also applies in several other contexts such as licensing, real estate, credit, and discriminatory harassment.

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

<sup>20</sup> See *Bennett v. Health Mgmt. Sys., Inc.*, 92 A.D.3d 29, 40-41 (1st Dep't 2011) ("A plaintiff's response to a defendant's showing of nondiscriminatory reasons for its actions can take a variety of forms. In some cases, the plaintiff may present evidence of pretext and independent evidence of the existence of an improper discriminatory

## 1. Treating People Less Well Because of Disability

Adverse treatment may be overt, such as refusing to accept a rental application for an apartment because the applicant has a disability; deciding not to hire an applicant because of their disability; or firing an employee because of their disability. However, discriminatory conduct on the basis of disability often manifests itself in less direct ways. For example, holding an employee to a different standard because of their disability, in the absence of a reasonable accommodation, or acting on assumptions about what an applicant or employee with a disability can or cannot do in making decisions about hiring, assignments, or promotions may be discriminatory conduct. Similarly, not making repairs on a unit because of an assumption that a tenant with a disability is less likely to make a complaint is discriminatory. Such forms of discrimination are actionable under the NYCHRL because they subject individuals with disabilities to worse treatment. These actions contribute to the exclusion of individuals with disabilities from jobs, housing, and places of public accommodation, and violate the NYCHRL.

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motive. In other cases, the plaintiff may leave unchallenged one or more of the defendant's proffered reasons for its actions, and may instead seek only to show that discrimination was just one of the motivations for the conduct. In addition, evidence of an unlawful motive in the mixed motive context need not be direct, but can be circumstantial—as with proof of any other fact....”).



## a. Employment

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

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

- An employer seeks to offset the cost of providing a reasonable accommodation to an employee with a disability by lowering his salary or paying him less than other employees in similar positions.
- An employee who is deaf is often left out of conversations and discussions with her hearing co-workers, impacting her ability to get the information necessary to do her job. This behavior is impacting her professional development and well-being. When she brings this to the attention of her supervisors, the employer dismisses her concerns, tells her that “it’s not a big deal,” she just needs to be more patient, and promises that they will interpret the “important stuff” for her.
- An employer assigns an employee who has a speech disability to a seat at the back of the office so that customers do not hear or see him, and prevents him from engaging with clients in a public-facing role, even though he is perfectly capable of communicating with clients.

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<sup>21</sup> N.Y.C. Admin. Code § 8-107(1).

## b. Housing

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

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

- A landlord has a general “no pets” policy and requires that all tenants with service animals or emotional support animals pay an additional security deposit, take out renter’s insurance, and only use the freight elevator to enter and leave the building, even if the landlord has no reason to believe that a particular service animal or emotional support animal is likely to cause more than the usual amount of wear and tear associated with normal use of the apartment building. A landlord may require a tenant to pay for damage or wear and tear caused by a service animal or emotional support animal, beyond wear and tear that is attributable to normal use, but cannot demand any additional deposits, insurance, or requirements up front.
- A tenant with a child who has autism moves into a building. Upon moving in, the tenant notifies the landlord that her child can have episodes in which he may cause noise. The landlord posts a sign in the lobby of the building alerting all other residents to the

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<sup>22</sup> N.Y.C. Admin. Code § 8-107(5)(a)(1).

<sup>23</sup> N.Y.C. Admin. Code § 8-107(5)(a)(1)(b).

child's disability and asking that they notify him if they have any noise complaints.

### **c. Public Accommodations**

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

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

- A customer who relies on a wheelchair visits a grocery store deli counter. The deli employee ignores the customer until the customer complains that she has been waiting longer than anyone else. In response, the employee says, "You'll just have to wait until I'm done helping all the normal customers and then I'll get to you."
- A patient visits a hospital for a pre-surgical consultation with his doctor. The patient has a disability that affects his speech, causing him to speak in a slow and deliberate manner. During the consultation, the patient has a number of questions about the procedure. His doctor says, "I don't have time for this. Either you want the surgery or not. Next time bring someone with you who can translate for you."
- A restaurant employee denies entry to a customer with a dog that the customer makes clear is a service dog.

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<sup>24</sup> N.Y.C. Admin. Code § 8-107(4).

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

## 2. Harassment

Disparate treatment can manifest as harassment when the incident or behavior creates an environment or reflects or fosters a culture or atmosphere of stereotyping, degradation, humiliation, bias, or objectification. Harassment related to an individual's actual or perceived disability is a form of discrimination, and may consist of a single or isolated incident, or a pattern of repeated acts or behavior. Under the NYCHRL, harassment related to disability covers a broad range of conduct and occurs generally when an individual is treated less well on account of their disability. The severity or pervasiveness of the harassment is only relevant to damages.<sup>26</sup> Harassment may include comments, gestures, jokes, or pictures that target an

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<sup>25</sup> See 35 C.F.R. 35.136(f); U.S. Dep't of Justice, Civil Rights Div., Disability Rights Section, ADA 2010 Revised Requirements: Service Animals (July 12, 2014), [https://www.ada.gov/service\\_animals\\_2010.pdf](https://www.ada.gov/service_animals_2010.pdf).

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

individual based on their disability, and can occur in the context of employment, housing, and public accommodations, such as schools, hospitals, or public transportation.

### ***Examples of Harassment***

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

### **3. Discriminatory Policies**

Any policy that negatively singles out individuals with disabilities is unlawful disparate treatment under the NYCHRL unless the covered entity can demonstrate a legitimate non-discriminatory justification for the distinction. Policies that categorically exclude individuals on account of their disability and without an individualized assessment are unlawful. This includes policies that exclude workers with disabilities from specific job categories or positions without an individualized assessment of the candidate and the essential requisites of the job, deny housing to individuals with disabilities, deny entrance to individuals with disabilities to certain public accommodations, or impose conditions on people on account of their disability. Using safety concerns as a pretext for discrimination or as a way to reinforce stereotypes and assumptions about people with disabilities is unlawful. An employer may, however, require a doctor’s note stating that an individual who had been out on leave related to a disability is able to return to work with or without a reasonable

accommodation, if an employer has a reasonable belief that an employee's ability to perform the essential requisites of the job will be impaired or that they will pose a direct threat to themselves or the safety of others due to a medical condition.<sup>27</sup>

### ***Examples of Discriminatory Policies***

- An employer has a policy that requires employees to be “100% healed” or “fully healed” to return to work, and refuses to provide certain types of accommodations. This policy is unlawful under the NYCHRL, as an employer cannot require an employee with a disability to have no medical restrictions if the employee is able to perform his job with or without a reasonable accommodation. Similarly, a policy that categorically prohibits “light duty” work assignments and fails to provide an exception for reasonable accommodations would be discriminatory.<sup>28</sup>
- An apartment complex for seniors institutes a rule requiring all users of electric or motorized wheelchairs and scooters to obtain liability insurance coverage. This policy imposes a condition on

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

<sup>28</sup> As with any reasonable accommodation request, “light duty” assignments must be awarded unless allowing such an assignment would amount to an undue hardship for the employer. The NYCHRL does not require that an employer create a superfluous position to accommodate an individual with disabilities. However, an employer’s ability to reassign duties among its staff is relevant to an assessment of undue hardship.

some people because of their disability, and is therefore unlawful under the NYCHRL. Nonetheless, as with any damage caused by a tenant during their residency, a housing provider may require that a tenant with an electric or motorized wheelchair pay for any damage such equipment causes in common areas of the building, beyond normal wear and tear.

- A day care center has a policy of refusing admission to children who need medication administered throughout the course of the day. This policy categorically excludes children with certain disabilities from a public accommodation, and is therefore unlawful under the NYCHRL.<sup>29</sup>

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<sup>29</sup> See N.Y. STATE OFFICE OF CHILDREN AND FAMILY SERVS., THE BUREAU OF EARLY CHILDHOOD SERVS., POLICY STATEMENT, ID NUMBER 06-3 (Mar. 28, 2006) <https://ocfs.ny.gov/main/childcare/policies/06-3.pdf> (“The ADA may require that a day care program give medications to children with disabilities, in some circumstances, in order to make reasonable accommodations to enable such children be able to attend the program. The practical ramification of the ADA in New York State is that day care providers should be prepared to obtain, in a timely fashion, the required training in order to administer at least certain basic types of medications if required by children with disabilities where such administration will enable the child to attend the day care program. If a provider would be in violation of the ADA by refusing to administer medication to a child with a disability, and either has such children already in the program or parents or guardians seek to enroll such children, the provider must take steps in a timely manner to become authorized to administer medications in accordance with OCFS regulations, modify its health care plan with the approval of a health care consultant to provide for the administration of medications, and administer any medication required by the ADA.”).

## 4. Actions Based on Stereotypes and Assumptions

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

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

- A landlord decides not to rent an apartment to an otherwise qualified applicant who has a mental health disability because of unfounded speculation that the individual poses a danger.
- A landlord decides not to rent an apartment to an otherwise qualified applicant who has a mobility disability because of assumptions regarding the applicant's need for accommodations and a belief that it will "cost too much." However, if a housing provider and an applicant engage in a cooperative dialogue<sup>30</sup> and the housing provider determines that it will pose an undue hardship<sup>31</sup> to provide an accommodation that the housing applicant will need, it may lawfully determine that it cannot rent that apartment to the applicant.
- An employer decides not to hire an otherwise qualified applicant who uses a mobility device because of assumptions regarding

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<sup>30</sup> See Local Law No. 59 (2018).

<sup>31</sup> See N.Y.C. Admin. Code § 8-102(18).



the applicant's abilities to travel to off-site meetings, events, and conferences.

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

## Neutral Policies That Have a Discriminatory Impact

While the central question in a disparate treatment case is whether the protected trait, at least in part, motivated the covered entity's decision or actions, disparate impact claims involve policies or practices that are facially neutral, but disproportionately or more harshly impact one group. Unless such policies or practices bear a significant relationship to a significant business objective of the covered entity, they are unlawful under the NYCHRL.<sup>32</sup> Therefore, under a disparate impact theory of discrimination, a facially neutral policy or practice may be found to be unlawful discrimination even without evidence of the covered entity's subjective intent to discriminate.<sup>33</sup> For example, a policy that imposes a penalty without

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<sup>32</sup> N.Y.C. Admin. Code § 8-107(17)(2).

<sup>33</sup> *Raytheon Co. v. Hernandez*, 540 U.S. 44, 52–53 (2003).

exception on employees for exceeding a permissible amount of sick leave may appear facially neutral, but it may disparately impact individuals with disabilities, which may result in a finding that the policy is unlawful under the NYCHRL. By contrast, a policy that allows for the possibility of additional sick leave as a reasonable accommodation for individuals with disabilities would not run afoul of the NYCHRL.

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

The standard for establishing a *prima facie* case of disparate impact under the NYCHRL is lower than the standard for analogous claims under federal laws such as the ADA or Title VII, or the New York State Human Rights Law.<sup>35</sup> Under the NYCHRL, a complainant must show that a facially neutral policy or practice has a disparate impact on a protected group.<sup>36</sup> Once such a showing has been made, the

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<sup>34</sup> *Levin v. Yeshiva Univ.*, 96 N.Y.2d 484, 492–93 (2001).

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

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

covered entity has an opportunity to plead and prove as an affirmative defense that either: (1) the policy or practice complained of bears a significant relationship to a significant business objective; or (2) the policy or practice does not contribute to the disparate impact.<sup>37</sup> However, this defense is defeated if the complainant produces substantial evidence of an available alternative policy or practice with less disparate impact, and the covered entity is unable to establish that an alternative policy or practice would not serve its business objective as well as the complained-of policy or practice.<sup>38</sup> “Significant business objective” includes, but is not limited to, successful performance of the job.<sup>39</sup>

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

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imbalance.”).

<sup>37</sup> N.Y.C. Admin. Code § 8-107(17)(2)(b).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

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

- Employment

**“No fault” absence or maximum leave policies:** Maximum leave or “no fault” absence policies generally establish the maximum amount of leave an employer will provide or allow. They may take different forms, such as establishing a flat limit for both extended and intermittent time, or limiting unplanned absences. For example, an employer covered under the Family Medical Leave Act (FMLA) grants employees a maximum of twelve weeks of leave per year. If an employee has exhausted her twelve weeks of FMLA leave,<sup>40</sup> but requires fifteen additional days of leave due to her disability, the employer must engage in a cooperative dialogue<sup>41</sup> with the employee to determine if she needs to take additional leave as a reasonable accommodation and can only deny that request if it would pose an undue hardship.

**Use of form warning letters:** Employers sometimes rely on “form letters” to communicate with employees who are nearing the end of leave provided under an employer’s leave program, that instruct employees to return to work by a certain date or face termination or other discipline. Such warning letters should let employees know that if they need additional leave as a reasonable accommodation for a disability, they should ask for it

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<sup>40</sup> See Family Medical Leave Act, 29 U.S.C. § 2612(a)(1).

<sup>41</sup> See *infra* Part IV(a) for a discussion of the cooperative dialogue process.

as soon as possible so that the employer may consider whether it can grant an extension without causing undue hardship.

**Short-term or on-call scheduling:** Employers often have short-term or on-call scheduling for their employees, where employees do not have regular work hours and are subject to shift cancellations and last-minute changes to their hours. Such policies prevent employees from having stable, predictable schedules, and may have a disparate impact on employees with disabilities or employees who are caretakers for individuals with disabilities.<sup>42</sup> While New York City’s Fair Work Week legislation applies to workers in the fast food and retail sectors, requiring advance notice of schedule changes, stable schedules, and a pathway to full-time hours,<sup>43</sup> short-term or on-call scheduling remains common in many other industries. If an employee requests advanced notice for schedule changes or a stable schedule to accommodate their disability, the employer must engage in a cooperative dialogue with the employee about their request.

- Housing

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

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<sup>42</sup> N.Y.C. Admin. Code § 8-107(20).

<sup>43</sup> Local Law No. 107 (2017).

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

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

- Public Accommodations

***“No outside food” policies:*** A place of public accommodation that does not allow people to bring outside food into its facility may need to make an exception for a person who, for example, has diabetes and needs to eat frequently to control their glucose level, or has severe food allergies and may not be able to avail themselves of food options in the facility.<sup>46</sup>

***“No motorized devices” policies:*** A covered entity that prohibits use of motorized devices on its premises must allow people with disabilities who use mobility devices such as wheelchairs and electric scooters to enter the premises unless a particular type of device cannot be accommodated because of legitimate safety requirements.<sup>47</sup> Entities such as small convenience stores or small offices, where it may not be feasible

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<sup>45</sup> See 42 U.S.C. 3604(f)(3)(A).

<sup>46</sup> See U.S. Dep’t of Justice, Civil Rights Div., Disability Rights Section, ADA Update: A Primer for State and Local Governments (June 8, 2015), [https://www.ada.gov/regs2010/titleII\\_2010/titleII\\_primer.pdf](https://www.ada.gov/regs2010/titleII_2010/titleII_primer.pdf).

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

to accommodate certain types of mobility devices, are required to serve a person with a disability using one of these devices in an alternate manner if possible, such as providing curbside service or meeting the person at an alternate location.

## Associational Discrimination

### 1. Associational Disparate Treatment Claims

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

To establish a disparate treatment claim of associational discrimination based on disability under the NYCHRL, a complainant must show that: (1) the covered entity knew of the individual’s relationship or association with a person with an actual or perceived disability; (2) the individual suffered an independent injury, separate from any injury the person with the disability may have suffered;<sup>49</sup> and

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<sup>48</sup> N.Y.C. Admin. Code § 8-107(20).

<sup>49</sup> N.Y.C. Admin. Code § 8-107(20); see *Bartman v. Shenker*, 5 Misc. 3d 856, 860 (Sup. Ct. N.Y. Cty. 2004); *Jing Zhang v. Jenzabar, Inc.*, No. 12 Civ. 2988, 2015 WL 1475793, at \*12 (E.D.N.Y. Mar. 30, 2015) (“To maintain a claim for association discrimination, [plaintiff] must

(3) the covered entity treated the individual less well and was at least in part motivated by discriminatory animus.<sup>50</sup> A complainant may show this through direct evidence of discrimination. Alternatively, if a complainant provides evidence that would support an inference of discrimination, the burden shifts to the respondent to advance a legitimate, non-discriminatory reason for its actions. If it is able to do so, the burden shifts back to the complainant to demonstrate that discriminatory animus was at least a factor in the adverse action.<sup>51</sup>

The prohibition against associational disability discrimination prevents covered entities from taking adverse actions against individuals who associate with people who have disabilities based on unfounded stereotypes and assumptions. This means that a covered entity may not take adverse action based on unfounded concerns about the

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simply allege that it suffered an independent injury because of its relationship with [a person] who alleges unlawful discriminatory practices related to her terms, conditions, or privileges of employment.”).

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

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



known disability of a family member or anyone else with whom the applicant, employee, or customer has a relationship or association.

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

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

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

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

with a disability is unlawfully denied a reasonable accommodation, their relative or associate may also have an associational claim for failure to accommodate under the NYCHRL.<sup>52</sup>

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

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<sup>52</sup> *In re Comm'n on Human Rights ex rel. Blue v. Jovic*, OATH Index No. 1624/16, Dec. & Order, 2017 WL 2491797, at \*10 (May 26, 2017) *aff'd sub nom. Jovic v. N.Y.C. Comm'n on Human Rights*, Index No. 100838/2017 (Sup. Ct. N.Y. Cty. Feb. 14, 2018); see *In re Comm'n on Human Rights ex rel. Torres v. Prince Mgmt. Corp.*, OATH Index No. 301/98, R&R, 1997 WL 1129224 (Aug. 14, 1997), *adopted*, Dec. & Order, 1997 WL 34613064 (Oct. 27, 1997) (mother awarded damages for independent injury arising from failure to accommodate children with disabilities); accord *Loeffler v. Staten Island Univ. Hosp.*, 582 F.3d 268, 278 (2d Cir. 2009) (reinstating NYCHRL claim of children who suffered a direct, independent injury because of the need to provide sign-language interpretation services to their parent with disabilities when hospital failed to provide reasonable accommodation). "A claim of associational discrimination under § 8-107(20) of the NYCHRL based on a failure to provide a reasonable accommodation is essentially the same as a claim for failure to accommodate under § 8-107(15) ..." *In re Comm'n on Human Rights ex rel. Blue v. Jovic*, OATH Index No. 1624/16, Dec. & Order, 2017 WL 2491797, at \*10 (May 26, 2017) *aff'd sub nom. Jovic v. N.Y.C. Comm'n on Human Rights*, Index No. 100838/2017 (Sup. Ct. N.Y. Cty. Feb. 14, 2018).

respondent's failure to provide a reasonable accommodation;<sup>53</sup> (3) a reasonable accommodation would enable the complainant to use or enjoy a housing accommodation or public accommodation or to perform the essential functions of their job; and (4) the covered entity has failed to provide an accommodation.<sup>54</sup>

### ***Example Associational Reasonable Accommodations Claims***

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

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

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

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

# Postings, Applications, and Selection Processes

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

## Employment

### 1. Job Postings and Advertisements

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

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<sup>56</sup> N.Y.C. Admin. Code §§ 8-107(1)(d), 8-107(4)(a)(2), 8-107(5)(a)(2).

<sup>57</sup> N.Y.C. Admin. Code § 8-107(1)(d).

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

## 2. Applications

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

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<sup>58</sup> N.Y.C. Admin. Code § 8-107(1)(d).

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

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

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

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

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

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

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

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

<sup>62</sup> See, e.g., 29 C.F.R. § 1630.14.

### 3. Interviews

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

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

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<sup>63</sup> N.Y.C. Admin. Code § 8-107(1)(d).

<sup>64</sup> See *infra* Part III(a), discussing reasonable accommodations in the pre-employment context.

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



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

#### 4. Selection Processes After Interviews

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

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

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

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<sup>66</sup> See *supra* Part II(c), discussing associational disability claims.

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

<sup>68</sup> See *infra* Part III(a), discussing reasonable accommodations in the pre-employment context.

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

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

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<sup>69</sup> See N.Y.C. Admin. Code § 8-107(1)(d); see also 42 U.S.C. §12112(d)(3).

<sup>70</sup> See 29 C.F.R. § 1630.14(b)(3).

## 5. Procedures Related to Current Employees

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

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<sup>71</sup> N.Y.C. Admin. Code § 8-107(1)(a)(2).

<sup>72</sup> N.Y.C. Admin. Code § 8-107(17)(a).

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

condition;<sup>74</sup> or (3) the employer is engaging in a cooperative dialog to determine whether a reasonable accommodation should be provided for the employee.

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

Employers that require all employees to undergo periodic medical examinations in the regular course of business may only do so in limited circumstances. Specifically, such periodic medical examinations must be narrowly focused on the employee's ability to perform the essential requisites of the job.<sup>76</sup> Such periodic medical examinations must be administered to all employees in the same

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<sup>74</sup> See U.S. Equal Emp. Opportunity Comm'n, Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans With Disabilities Act (ADA) (July 27, 2000), <https://www.eeoc.gov/policy/docs/guidance-inquiries.html#9>.

<sup>75</sup> See *id.*

<sup>76</sup> See *id.* Any medical information obtained by the employer during periodic medical examinations or in any other context, such as a request for reasonable accommodations, should be kept confidential and in separate medical files to avoid unnecessarily disclosing an applicant's private medical documents and to ensure that managers and other employees are not accidentally given access to the information.

manner and cannot be administered in such a way that they target employees with disabilities.

### ***Examples of Medical Examinations for Current Employees***

- A hazardous waste disposal company may require all its employees to undergo a yearly physical examination and regular medical monitoring based on specific exposures. Monitoring employees' potential health effects from exposure to toxic substances and their ability to safely work in sites with specific exposures are related to their ability to perform the essential requisites of the job.
- A police department cannot require all its employees to periodically undergo medical testing to determine whether they are HIV-positive because a diagnosis of that condition alone is not likely related to officers' abilities to safely perform the essential requisites of the job.

An employee has a mental health disability that has caused her to act erratically in the office and has raised significant and realistic concerns about the safety of other employees and customers. The employer determines that, to ensure the safety and security of their employees and members of the public, it will require that the employee take leave as an accommodation for her disability and require a doctor's note stating that the employee is able to return to work safely. The employee takes leave for several months to receive treatment and her medical provider determines that she is able to safely return to work part-time. The employer determines that a part-time position is not an undue hardship and the employee returns to work in a part-time position.

# Housing

## 1. Postings

Under the NYCHRL, it is unlawful for a housing provider to “declare, print or circulate or cause to be declared, printed or circulated any statement, advertisement or publication” for “the purchase, rental or lease of . . . a housing accommodation or an interest therein” which “expresses, directly or indirectly, any limitation, specification or discrimination” against individuals with disabilities or “any intent to make any such limitation, specification or discrimination.”<sup>77</sup>

### ***Examples of Unlawful Postings***

- An advertisement for an apartment that simply states, “no dogs” would be unlawful under the NYCHRL because it expresses a limitation, specification, or discrimination against individuals with service animals and emotional support animals.
- An advertisement for an apartment that states, “No HASA vouchers”<sup>78</sup> would be unlawful under the NYCHRL because it expresses a limitation, specification, or discrimination against individuals with HIV/AIDS. Such an advertisement would also

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<sup>77</sup> N.Y.C. Admin. Code § 8-107(5)(a)(2).

<sup>78</sup> HASA is a program administered through the NYC Human Resources Administration that assists individuals living with AIDS or HIV illness to live healthier, more independent lives. See N.Y.C. Human Res. Admin., *HIV/AIDS Services*, [https://www1.nyc.gov/site/hra/help/hiv-aids-services.page\\_\(last visited Mar. 6, 2018\)](https://www1.nyc.gov/site/hra/help/hiv-aids-services.page_(last%20visited%20Mar.6,2018)).

violate NYCHRL’s prohibitions against discrimination in housing based on lawful source of income.<sup>79</sup>

## 2. Applications and Interviews

Under the NYCHRL, it is unlawful for a housing provider to “use any form of application for the purchase, rental or lease” of “a housing accommodation or an interest therein or to make any record or inquiry in conjunction with the prospective purchase, rental or lease of such a housing accommodation or an interest therein which expresses, directly or indirectly, any limitation, specification or discrimination” against individuals with disabilities, or “any intent to make any such limitation, specification or discrimination.”<sup>80</sup> Therefore, subject to exceptions described below, it is unlawful for applications or interviewers to ask housing applicants whether they have a disability, or whether a person intending to reside in the dwelling has a disability. Applications and interviews should instead focus inquiries on an applicant’s ability to meet the requirements of the tenancy.

There are, however, a narrow set of circumstances in which a housing provider may inquire about a housing applicant’s disability. For example, if a dwelling is legally available only to persons with a disability or to individuals with a particular type of disability, a housing provider may inquire about an applicant’s disability status. Similarly, housing providers may make inquiries to determine if an applicant qualifies for housing where a disability is one of the characteristics that is necessary to qualify for the program, such as NYC Housing

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<sup>79</sup> See N.Y.C. Admin. Code § 8-107(5)(a)(2).

<sup>80</sup> N.Y.C. Admin. Code § 8-107(1)(a)(3).

Connect.<sup>81</sup> The housing provider should not, however, ask applicants if they have other types of medical conditions. Additionally, if an applicant’s disability and need for accessible features is not readily apparent, the housing provider may request reliable information or documentation of the disability needed to qualify for the housing. In other circumstances, however, it would be unlawful for housing providers to require medical documentation. Where a housing provider is permissibly inquiring about an individual’s disability, the provider must provide an explanation for why they are requesting this information. Any medical information obtained by the housing provider should be kept confidential.

## Public Accommodations

### 1. Postings

Under the NYCHRL, it is unlawful for a place or provider of public accommodation to “directly or indirectly make any declaration, publish, circulate, issue, display, post or mail any written or printed communication, notice or advertisement”<sup>82</sup> that communicates that the full and equal enjoyment of any of the accommodations would “be

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<sup>81</sup> NYC Housing Connect has housing lotteries for affordable housing in New York City. Five percent of developments are set aside for tenants with mobility impairments and two percent are set aside for tenants with visual and hearing disabilities. *See Affordable/Low-Income Housing*, NYC.gov, <http://www1.nyc.gov/site/mopd/resources/affordable-low-income-housing.page> (last visited Mar. 6, 2018).

<sup>82</sup> N.Y.C. Admin. Code § 8-107(4)(a)(2).



refused, withheld from, or denied to any person”<sup>83</sup> on account of their disability or that the patronage of an individual with a disability is “unwelcome, objectionable, not acceptable, undesired, or unsolicited.”<sup>84</sup>

### ***Example of an Unlawful Posting***

- A sign on the window of a restaurant that simply states “no dogs” would be unlawful under the NYCHRL because it expresses that the accommodations would be denied to a person with a service animal, or that an individual with a service animal would be unwelcome. Instead, the sign should say, for example, “Service animals welcome; unfortunately, no other animals allowed.”

## **2. Applications and Interviews**

The NYCHRL prohibits a place or provider of public accommodation from “directly or indirectly making any declaration, or publishing, circulating, issuing, displaying, posting or mailing any written or printed communication, notice or advertisement” that communicates that the patronage of an individual with a disability is “unwelcome, objectionable, not acceptable, undesired, or unsolicited.”<sup>85</sup> Therefore, where public accommodations have application and interview processes (for example, for programs, classes, or schools), applications or interviews that convey to applicants with disabilities that they are unwelcome, undesired, or unacceptable would violate the NYCHRL.

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<sup>83</sup> N.Y.C. Admin. Code § 8-107(4)(a)(2)(a).

<sup>84</sup> N.Y.C. Admin. Code § 8-107(4)(a)(2)(b).

<sup>85</sup> N.Y.C. Admin. Code § 8-107(4)(a)(2).

## ***Examples of Unlawful Applications and Interviews***

- A parent fills out a form to enroll her child in summer day camp. The form includes a question asking the parent to identify whether the child has a disability, allergies, and/or requires any medications. Under the question, the form states, “While our program is not equipped to provide services to children with disabilities, we will provide you with references to other programs that may better suit your needs.” This would be unlawful under the NYCHRL. A form that inquires about disabilities, allergies, and/or requirements regarding medication should clarify that such information is not being used to exclude anyone and recognize the duty to provide reasonable accommodations. For example, the form could say that the provider asks for medical information in order to accommodate the needs of all children to the best of their ability.
- An individual with a mobility disability asks to meet with a membership advisor to fill out an application for a gym membership. The employee discourages the individual from applying based on assumptions they have made about the individual’s abilities. This would be unlawful under the NYCHRL because it communicates that the individual is unwelcome. However, the membership advisor may inquire about whether the individual may need accommodations to provide the individual with access to the facilities or activities the gym offers.

# Reasonable Accommodations in Employment, Housing, and Public Accommodations Based on Disability

Under the NYCHRL, covered entities must make reasonable accommodations to enable individuals with disabilities “to satisfy the essential requisites of a job or enjoy the right or rights in question provided that the disability is known or should have been known by the covered entity.”<sup>86</sup> Under the law, all accommodations are reasonable unless a covered entity shows that the requested accommodation would cause it an “undue hardship.”<sup>87</sup> This standard is more protective than the ADA, FHA, and the New York State Human Rights Law and does not require that the employee, tenant, or customer prove that the reasonable accommodation is readily achievable, necessary, or does not pose an undue hardship.<sup>88</sup> Rather,

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<sup>86</sup> N.Y.C. Admin. Code § 8-107(15)(a).

<sup>87</sup> N.Y.C. Admin. Code § 8-102(18); see *infra* Part IV(c)(i) for a discussion about undue hardship.

<sup>88</sup> The New York State Human Rights Law places the burden on employees seeking reasonable accommodations to show that “upon the provision of reasonable accommodations, the employee could perform the essential functions of his job.” See N.Y. Exec. Law § 292(21-e); *Romanello v. Intesa Sanpaolo, S.P.A.*, 22 N.Y.3d 881, 884 (2013). Both the Fair Housing Act and the New York State Human Rights Law expect residents to show that modifications are “necessary,” and even then, only obligate a landlord to “permit” reasonable modifications, not to provide them. See 42 U.S.C.A. § 3604(f)(3)(A); N.Y. Exec. Law § 296(18).

the employee, tenant, or customer must only establish their *prima facie* case: (1) that they have a disability; (2) that the covered entity knew or should have known about the disability; (3) that an accommodation would enable the employee, tenant, or customer to perform the essential requisites of the job or enjoy the rights in question; and (4) that the covered entity failed to provide an accommodation.<sup>89</sup> The burden then shifts to the covered entity to show that the proposed reasonable accommodation would cause them an undue hardship. Each interaction regarding a reasonable accommodation must be considered on a case-by-case basis given the needs of the individual and the unique circumstances of the covered entity. For example, covered entities may consider the duration that the accommodation is needed in determining whether the time and expense to provide the accommodation would cause an undue hardship. In addition, the type of service a public accommodation provides and the community it serves will be considered in determining whether a public accommodation was on notice that a reasonable accommodation should have been made to accommodate the needs of their served population. The covered entity is responsible for the cost of providing reasonable accommodations.

## Process for Requesting or Offering Reasonable Accommodations

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<sup>89</sup> See *In re Comm'n on Human Rights ex rel. Stamm v. E&E Bagels*, OATH Index No. 803/14, Dec. & Order, 2016 WL 1644879, at \*6 (Apr. 21, 2016).

# 1. Initiating a Cooperative Dialogue

Under the NYCHRL, the first step in providing a reasonable accommodation to an individual with a disability is to begin a cooperative dialogue that assesses the needs of the individual.<sup>90</sup> Local Law No. 59 (2018), effective on October 15, 2018, makes it unlawful for a covered entity to fail to engage in a cooperative dialogue “with an individual who has requested an accommodation or who the covered entity has notice may require such an accommodation.”<sup>91</sup>

The “cooperative dialogue” is “the process by which a covered entity and a person who is entitled to, or may be entitled to an accommodation under the law, engage in good faith in a written or oral dialogue concerning the person’s accommodation needs; potential accommodations that may address the person’s accommodation needs, including alternatives to a requested accommodation; and the difficulties that such potential accommodations may pose for the covered entity.”<sup>92</sup> A cooperative dialogue involves an evaluation of the individual’s needs and consideration of the possible accommodations for the individual that would allow them to perform the essential requisites of the job or enjoy the right or rights in question, without creating an undue hardship for the covered entity.

When a covered entity learns, either directly or indirectly, that an individual requires an accommodation due to their disability, the covered entity has an affirmative obligation to engage in a cooperative

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<sup>90</sup> Local Law No. 59 § 1 (2018); N.Y.C. Admin. Code § 8-102.

<sup>91</sup> N.Y.C. Admin. Code § 8-102.

<sup>92</sup> *Id.*

dialogue with the individual. The NYCHRL imposes a duty on covered entities to provide reasonable accommodations not only when an individual’s disability is known,<sup>93</sup> but also when the covered entity “*should have . . . known*” about the individual’s disability,<sup>94</sup> regardless of whether the individual requested an accommodation. For example, if an employer has knowledge that an employee’s performance at work is diminished or that their behavior at work could lead to an adverse employment action and has a reasonable basis to believe that the issue is related to a disability, the employer must initiate a cooperative dialogue with the employee to explore whether the employee needs an accommodation to continue performing the essential requisites of the job. In doing so, the employer should not ask the employee if the employee has a disability,<sup>95</sup> but may ask if there is anything going on that the employer can help with, inform the employee that various types of support are available, including reasonable accommodations, to enable employees to satisfy the essential requisites of the job, and remind them of workplace policies and procedures for requesting a reasonable accommodation. The employer should do so as a way to open the conversation and invite the employee to feel comfortable in making a request. If an employee chooses not to disclose that they have a disability in that conversation, the employer has met their obligation to initiate a cooperative dialogue.

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<sup>93</sup> By contrast, the New York State Human Rights Law discusses reasonable accommodations in the context of “known physical or mental limitations,” and “known disabilities.” See N.Y. Exec. Law § 296(3)(a).

<sup>94</sup> N.Y.C. Admin. Code § 8-107(15)(a).

<sup>95</sup> See *infra* Part III for a discussion on prohibited disability-related inquiries.

If a covered entity approaches an individual to initiate a cooperative dialogue and the individual does not reveal that they have a disability in that conversation, the individual does not waive their opportunity to reveal their disability and initiate a cooperative dialogue with the covered entity at a later time. In addition, it is unlawful to terminate an employee for failing to disclose their disability status or need for a reasonable accommodation prior to the offer of employment or for failing to disclose such information during the interview process.<sup>96</sup> Similarly, a housing provider is not permitted to penalize a prospective tenant for failing to volunteer information about their disability or need for a reasonable accommodation at the time of applying for housing.<sup>97</sup>

Covered entities should strive to create an environment in which individuals feel comfortable engaging in the process of requesting an accommodation by developing a transparent, clear, and fair process. In order to avoid situations in which covered entities are not sure whether employees, residents, or customers are aware of their right to request reasonable accommodations and engage in a cooperative dialogue, the NYCHRL encourages covered entities to provide notice or information to employees, residents, and customers detailing their right to be free from discrimination based on disability. For example, an employer should include procedures in an employee handbook that identify staff who will respond to requests for accommodations, and a landlord should include procedures on their website about how and where an applicant or resident can request a reasonable accommodation.

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<sup>96</sup> *Hirschmann v. Hassapoyannes*, 11 Misc. 3d 265, 270 (Sup. Ct. N.Y. Cty. 2005).

<sup>97</sup> *Hirschmann v. Hassapoyannes*, 16 Misc. 3d 1014, 1018–20 (Sup. Ct. N.Y. Cty. 2007), *aff'd*, 52 A.D.3d 221, 859 N.Y.S.2d 150 (2008).

## 2. Engaging in a Cooperative Dialogue

The purpose of a cooperative dialogue is to ensure that covered entities understand the individualized needs of the person with a disability and have the opportunity to explore the various ways in which they can meet those needs. Without this type of dialogue, individuals with disabilities and covered entities may not realize the full universe of available accommodations. The covered entity need not provide the specific accommodation sought by the individual making the request so long as they propose reasonable alternatives that meet the specific needs of the individual or that specifically address the impairment at issue.<sup>98</sup>

A cooperative dialogue involves a covered entity communicating in good faith with the individual requesting an accommodation in a transparent and expeditious manner, particularly given the time-sensitive nature of many of these requests. If a covered entity offers an accommodation and the individual with a disability reasonably determines that the first accommodation offered is not sufficient to meet their needs, the covered entity has not met their obligation to engage in the cooperative dialogue. In such circumstances, the covered entity must continue to engage in a conversation with the individual to determine if there are other alternatives that would meet their needs. However, both parties must engage in the cooperative dialogue “in good faith” which means that an individual with a disability cannot simply reject an offered accommodation that would be sufficient to meet their needs because it is not their preferred accommodation. The covered entity should focus on understanding

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<sup>98</sup> See *Cruz v. Schriro*, 51 Misc. 3d 1203(A) (Sup. Ct. N.Y. Cty. 2016) (“[A]n employer is not obligated to provide a disabled employee with the specific accommodation that the employee requests or prefers...”).



the need for the request and how the request can be accommodated. The dialogue may be in person, in writing, by phone, or via electronic means. If a covered entity does not have enough information to understand the individual's needs to offer an appropriate accommodation, it may ask for additional information about the specific impairment.

In evaluating whether or not a covered entity has engaged in a cooperative dialogue in good faith with an individual who requests an accommodation, the Commission will consider various factors, including, without limitation: (1) whether the covered entity has a policy informing employees, residents, or customers how to request accommodations based on disability;<sup>99</sup> (2) whether the covered entity responded to the request in a timely manner in light of the urgency and reasonableness of the request; and (3) whether the covered entity sought to obstruct or delay the cooperative dialogue or in any way intimidate or deter the individual from requesting the accommodation. An indeterminate delay may have the same effect as an outright denial.<sup>100</sup>

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<sup>99</sup> It is a best practice for covered entities to have a written policy that they disseminate to all employees, residents, etc.

<sup>100</sup> See *Logan v. Matveevskii*, 57 F. Supp. 3d 234 (S.D.N.Y. 2014) (finding that under the Fair Housing Act, a refusal of a request for a reasonable accommodation can be actual or constructive, and therefore an indeterminate delay has the same effect as an outright denial).

## a. Applicants for Employment, Housing, and Programs that Are Public Accommodations

As discussed in Part III, the NYCHRL expressly prohibits housing providers and employers from making any inquiries in connection with prospective employment or the prospective purchase, rental, or lease of a housing accommodation that express, directly or indirectly, any limitation, specification, or discrimination against an individual with a disability. Similarly, to the extent that public accommodations have applications or interviews for their programs, such as some drug treatment programs or schools, providers cannot communicate that applicants with disabilities are unwelcome, undesired, or unacceptable. However, when an individual makes a request for a reasonable accommodation during the application process, a covered entity is entitled to obtain information that is necessary to evaluate if the requested accommodation is being sought due to a disability.<sup>101</sup> If a disability is readily apparent—for example, if an individual requesting a ramp is in a wheelchair—formal medical documentation or additional information would not be necessary to evaluate the accommodation. Therefore, a covered entity may make inquiries that will allow them to assess the individual needs of the requester and the reasonableness of the request as part of the cooperative dialogue.

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<sup>101</sup> See U.S. Dep't of Hous. & Urban Dev. & U.S. Dep't of Justice, Joint Statement: Reasonable Accommodations Under the Fair Housing Act (May 17, 2004), [https://www.hud.gov/sites/documents/DOC\\_7771.PDF](https://www.hud.gov/sites/documents/DOC_7771.PDF); U.S. Equal Emp. Opportunity Comm'n, Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans With Disabilities Act (ADA) (July 27, 2000), <https://www.eeoc.gov/policy/docs/guidance-inquiries.html>.

## **Examples**

- An employer is impressed with an applicant's resume and contacts the applicant to schedule her for an interview. The applicant, who is deaf, requests a reasonable accommodation for her interview. The employer engages in a cooperative dialogue—by asking the applicant what she needs in order to be able to participate in the interview. The applicant explains that she will need a sign language interpreter. The employer identifies a service that provides sign language interpreters via Skype, and determines that the cost to contract with the service for the interview would not pose an undue hardship to the employer. The applicant agrees that a sign language interpreter via Skype would be sufficient for her to participate in the interview.
- A housing applicant with an apparent vision disability requests that the leasing agent provide her with assistance in filling out a rental application form as a reasonable accommodation for her disability. The applicant's disability and her need for the requested accommodation are readily apparent because she uses a walking cane to get around, so the housing provider should not make further inquiries or request medical documentation.<sup>102</sup> Asking the applicant to provide information relating to her apparent disability could constitute harassment.

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<sup>102</sup> See U.S. Dep't of Hous. and Urban Dev. & U.S. Dep't of Justice, Joint Statement: Reasonable Accommodations Under the Fair Housing Act (May 17, 2004), [https://www.hud.gov/sites/documents/DOC\\_7771.PDF](https://www.hud.gov/sites/documents/DOC_7771.PDF).

## **b. Current Employees, Residents, and Participants in Programs/Clubs<sup>103</sup>**

When an individual requests an accommodation, a covered entity may ask the individual to provide medical documentation that is sufficient to substantiate that the requester has a disability, identifies the functional limitation due to the disability, and explains the need for the requested accommodation.<sup>104</sup> Unless the exact diagnosis is necessary to determine what accommodation may be needed, a covered entity cannot require that the specific disability or diagnosis be disclosed and must only request information or medical documentation related to the impairment and need at issue. The covered entity may not ask for unrelated documentation, such as complete medical records.<sup>105</sup> Any information or documentation shared must be kept confidential.

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<sup>103</sup> Under the NYCHRL, a “club” which “proves that it is in its nature distinctly private” is not included in the definition of “place or provider of public accommodation.” See N.Y.C. Admin. Code § 8-102(9); see 47 R.C.N.Y. § 2-01.

<sup>104</sup> See U.S. Equal Emp. Opportunity Comm’n, Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans With Disabilities Act (ADA) (July 27, 2000), <https://www.eeoc.gov/policy/docs/guidance-inquiries.html>. An employer may not require an employee to provide medical confirmation of pregnancy, childbirth, or related medical condition, unless it is a pregnancy-related disability.

<sup>105</sup> See U.S. Equal Emp. Opportunity Comm’n, Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans With Disabilities Act (ADA) (July 27, 2000), <https://www.eeoc.gov/policy/docs/guidance-inquiries.html>.

## **Example**

- An employee who has exhausted all of his available sick leave calls his supervisor to inform him that he had a severe pain episode due to his sickle cell anemia, is in the hospital, and requires additional time off. Prior to this call, the supervisor was unaware of the employee's medical condition. The supervisor should initiate a cooperative dialogue with the employee to assess his individual needs and the accommodation requested. In doing so, the supervisor may ask the employee to provide information or medical documentation to substantiate that the employee has a disability and provide information on how long he may be absent from work.<sup>106</sup>

In some circumstances where an individual's disability and the need for the requested accommodation is readily apparent or otherwise known to the covered entity, or to the person making the decision regarding the request for an accommodation, making additional inquiries or asking for medical documentation about the requester's disability or the disability-related need for the accommodation may constitute harassment.<sup>107</sup>

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<sup>106</sup> See id.

<sup>107</sup> See U.S. Dep't of Hous. and Urban Dev. & U.S. Dep't of Justice, Joint Statement: Reasonable Accommodations Under the Fair Housing Act (May 17, 2004), [https://www.hud.gov/sites/documents/DOC\\_7771.PDF](https://www.hud.gov/sites/documents/DOC_7771.PDF); U.S. Equal Emp. Opportunity Comm'n, Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans With Disabilities Act (ADA) (July 27, 2000), <https://www.eeoc.gov/policy/docs/guidance-inquiries.html>.

## **Example**

- An employee who has a disability that causes him to rely on a wheelchair approaches his supervisor with a request for an accommodation—that a temporary ramp be installed where there are steps to access the conference room. The supervisor is the decision-maker regarding the request for an accommodation. The supervisor should not ask the employee for additional information or medical documentation to prove that he has a disability. As his disability and need for a reasonable accommodation are apparent, asking for additional information or documentation could constitute harassment.

If the requester’s disability is known or readily apparent to the provider, but the need for the accommodation is not readily apparent or known, the provider should only request information that is necessary to evaluate how the accommodation would ameliorate the effects of the person’s disability.<sup>108</sup>

## **Example**

- A tenant informs the housing provider that he wishes to keep an emotional support dog in his unit, and asks for an exception to

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<sup>108</sup> See U.S. Dep’t of Hous. and Urban Dev. & U.S. Dep’t of Justice, Joint Statement: Reasonable Accommodations Under the Fair Housing Act (May 17, 2004), [https://www.hud.gov/sites/documents/DOC\\_7771.PDF](https://www.hud.gov/sites/documents/DOC_7771.PDF); U.S. Equal Emp. Opportunity Comm’n, Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans With Disabilities Act (ADA) (July 27, 2000), <https://www.eeoc.gov/policy/docs/guidance-inquiries.html>.

the “no pets” policy as a reasonable accommodation. The need for an emotional support animal is not apparent to the housing provider. The housing provider may therefore make inquiries of the tenant that will provide information that confirms that the dog ameliorates the effects of the tenant’s disability.<sup>109</sup>

While covered entities may require medical documentation to support a request for an accommodation, they cannot require a specific *type* or *form* of documentation. Medical documentation should be considered broadly. For example, a covered entity should not reject a note from a medical professional simply because it is handwritten, because it is not printed on letterhead, because it is not provided by the individual’s long-term care provider, or because it is from an alternative medicine professional where such medical professional is the appropriate specialist for the impairment at issue. Covered entities should focus on the content of the medical documentation and not its form. If a covered entity has reason to believe that the provided documentation is insufficient, it should not reject the accommodation request, but should instead request additional documentation, or, upon the consent of the individual, speak with the health care provider who provided the documentation before denying the request based on insufficient documentation. A covered entity must allow an individual to submit sufficient supplemental written verification should an

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<sup>109</sup> See U.S. Dep’t of Hous. and Urban Dev. & U.S. Dep’t of Justice, Joint Statement: Reasonable Accommodations Under the Fair Housing Act (May 17, 2004), [https://www.hud.gov/sites/documents/DOC\\_7771.PDF](https://www.hud.gov/sites/documents/DOC_7771.PDF); U.S. Equal Emp. Opportunity Comm’n, Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans With Disabilities Act (ADA) (July 27, 2000), <https://www.eeoc.gov/policy/docs/guidance-inquiries.html>.

individual not want the covered entity speaking with their medical provider.

### **c. Customers and Visitors to Public Accommodations**

Places of public accommodation should make every effort to ensure that they are accessible and engage with customers in a cooperative dialogue to ensure they are providing reasonable accommodations. While the determination of whether a provider of public accommodation has failed to provide reasonable accommodations to individuals with disabilities involves an individualized assessment of the undue hardship to the covered entity, the Commission will generally consider the following factors in assessing reasonableness and the adequacy of the cooperative dialogue: the nature of the relationship between the covered entity and the individual (a longer-term relationship such as a regular client, student, member, or patient, or a shorter-term relationship, such as a one-time customer); whether the covered entity knew or should have known of the individual's disability; the nature and duration of the interaction; and the accommodation requested. For example, a deli would generally not be required to provide a qualified sign language interpreter for a customer who is deaf during a short and relatively simple conversation regarding a purchase. Instead, the deli should find an alternative way to effectively accommodate the customer, such as exchanging written notes. A hospital, by comparison, must provide a qualified sign language interpreter to a patient who is deaf as a reasonable accommodation because, in order for a patient in a hospital setting to “enjoy the right or rights in question,”<sup>110</sup> they require in-depth, time-sensitive, and nuanced communications with medical

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<sup>110</sup> N.Y.C. Admin. Code § 8-107(15)(a).



personnel. A patient will therefore not be able to enjoy the right or rights in question without an interpreter. However, there are certain types of accommodations that all public accommodations must consider regardless of an individual customer's or member's need. For example, all public accommodations should evaluate whether it will be an undue hardship to install a ramp at the entrance of their facility; and hospitals should similarly be prepared to provide sign-language interpretation by video or in-person interpretation.

### 3. Concluding the Cooperative Dialogue

A cooperative dialogue is ongoing until one of the following occurs: (1) a reasonable accommodation is granted; or (2) the covered entity reasonably arrives at the conclusion that: (a) there is no accommodation available that will not cause an undue hardship to the covered entity; (b) a reasonable accommodation was identified that meets the individual's needs but the individual did not accept it and no reasonable alternative was identified during the cooperative dialogue; or (c) in the case of an employer, that no accommodation exists that will allow the employee to perform the essential requisites of the job. In the context of employment and housing, Local Law No. 59 (2018) requires that "the covered entity shall provide any person requesting an accommodation who participated in the cooperative dialogue with a written final determination identifying any accommodation granted or denied."<sup>111</sup> There is no such requirement in the public accommodations context.

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<sup>111</sup> Local Law No. 59 § 2 (2018); N.Y.C. Admin. Code § 8-107(28)(d) ("Upon reaching a final determination at the conclusion of a cooperative dialogue pursuant to paragraphs (a) and (c) of this subdivision, the covered entity shall provide any person requesting an accommodation who participated in the cooperative dialogue with a

If an individual with a disability rejects an accommodation offered by the covered entity, the covered entity should continue to engage with the individual to identify alternatives. However, if the individual rejects accommodations offered that would not cause an undue hardship to the covered entity and would meet the individual's needs and/or would allow the employee to perform the essential requisites of the job and is unable or unwilling to propose any alternative options that would address the individual's needs, the covered entity may conclude the cooperative dialogue. If there are two possible reasonable accommodations and one costs more or is more burdensome than the other, the covered entity may choose the less expensive or burdensome accommodation. If more than one accommodation is effective, the preference of the individual with the disability should be given primary consideration, but the covered entity has the ultimate discretion to choose between effective accommodations.<sup>112</sup>

Once a conclusion is reached, either to offer an accommodation, or that no accommodation can be made, a covered entity must promptly notify the individual seeking an accommodation of the determination. Housing providers and employers must notify the individual in writing that the cooperative dialogue has concluded. As an individual's condition changes over time, an individual may make new requests for accommodations. Each time an individual makes a new request,

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written final determination identifying any accommodation granted or denied.”).

<sup>112</sup> U.S. Equal Emp. Opportunity Comm'n, Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (Oct. 17, 2002), <https://www.eeoc.gov/policy/docs/accommodation.html>.

the covered entity must engage in a cooperative dialogue with the individual. Where an accommodation proposed by an individual with a disability is immediately agreed to by a covered entity, the cooperative dialogue will consist solely of the individual with a disability making the request and the covered entity granting the accommodation; even in these circumstances, documentation of the final determination is still required in the cases of employers and housing providers.

## 4. Cooperative Dialogue Sample Scenarios

### *Examples in Employment*

- An employee has exhausted her paid sick leave and has been on unpaid leave as an accommodation to recover from surgery for four weeks. The employee notifies her employer that she will be able to return to work in one week. Her employer extends her leave by the additional week and requests documentation from the employee's doctor confirming that she is fit to return to work, and provides the employee with confirmation of the one-week extension by email to conclude the cooperative dialogue. The employee provides the documentation when she returns to the workplace the following week.
- An employee experiences complications related to multiple sclerosis and requires several months off to recuperate and complete intensive physical therapy at a rehabilitation facility. The employee is eligible for twelve weeks of FMLA leave and uses all of it. At the conclusion of the twelve weeks, the employer asks the employee if she is able to return to work. She is not, and tells the employer that she needs approximately four more weeks. The employer determines that holding the employee's position for an additional period of approximately four weeks is not an undue hardship and tells the employee to check in with

her in two weeks to share any updates on her expected return date. The employer memorializes this communication in writing and provides a copy to the employee to conclude the cooperative dialogue until the next conversation.

- An employer notices that an employee has been struggling to complete tasks that the employee previously had no trouble performing and appears tired and withdrawn. The employer hears from a co-worker that the employee is dealing with a health issue and approaches the employee and initiates a cooperative dialogue. The employer says, “I have noticed you are struggling to finish your tasks as quickly as usual, is there something I can do to help?” The employee says no. The problem persists, and the employer again approaches the employee and asks if he may need an accommodation, and reminds the employee of the accommodation request policy. The employer tells the employee that he will check in again in a week or so, and reiterates that he will work to accommodate or otherwise support the employee if there is anything going on. One week later, the employer tells the employee that the employee will be written up if the behavior does not improve and again asks if the employee needs assistance and offers to set up a meeting to discuss the issue. The employee declines, and after another week, the employer issues a disciplinary notice. The employer attempted to engage the employee in a cooperative dialogue because he believed the employee may have needed accommodations based on a disability. Despite repeated attempts to engage the employee in a cooperative dialogue, the employee was not responsive. The employer does not need to provide the employee with written notice of the conclusion of the cooperative dialogue because the employer attempted to engage in a cooperative dialogue with the employee but he declined.

Under these circumstances, the employer was justified in taking disciplinary action.

- An employee who works in a specific physically-demanding position is placed on light duty as an accommodation after an off-the-job injury causes a herniated disk in his back. His employer requires that he report to an employer-specified physician, at the employer's expense, every two weeks to determine whether he is able to return to regular duty. The physician reports to the employer regarding the employee's ability or inability to return to his regular duty and the employer keeps the employee on light duty until the physician determines he is able to return to regular duty. The physician provides the employer with a note updating the employer on the employee's status, and the employer communicates all updates to the employee in writing. This process serves as a periodic cooperative dialogue.
- An employee has a diagnosed anxiety disorder and informs his supervisor that a particular co-worker's behavior, which involves speaking very loudly and sometimes aggressively to him, exacerbates his condition. The employee has requested to be relocated to a different floor within the office to avoid interacting with this particular employee. The employer asks the employee to provide a doctor's note regarding the need for the accommodation, which the employee provides. Interactions with the co-worker are not required for the employee to successfully complete his job responsibilities as they work in different departments. The employer determines that relocating the employee to another floor is not possible given office space constraints, but offers to relocate the employee to a space far from his co-worker on the same floor. The employee rejects the accommodation, insisting that he must be moved to a different floor. The employer again determines that moving the employee to a different floor would cause significant disruption for many

other workers because of limited space. The employee decides to stay where he is. The employer sends the employee a note concluding the cooperative dialogue and stating that no accommodation was reached. The employer has met his obligation to engage in the cooperative dialogue and offer a reasonable accommodation.

- An employee is on medication for depression that causes excessive tiredness. The employee's supervisor has noticed the employee has fallen asleep on the job twice. After the second incident, the employee informs his supervisor that he is on medication for an illness that causes excessive tiredness. The supervisor asks what, if anything, they can do to help prevent him from falling asleep while working. The employee consults with his doctor who recommends that the employer adjust his schedule to allow for a later start time and space for the employee to rest during his breaks. The supervisor finds that adjusting the employee's schedule slightly and providing him with a quiet space to rest during his breaks is not an undue hardship. The employer provides the employee with a letter summarizing the accommodation and concluding the cooperative dialogue.
- An employee requests an accommodation of time off for gender confirmation surgery and recuperation related to a diagnosis of gender dysphoria.<sup>113</sup> The employee provides her employer with a

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<sup>113</sup> Some transgender and gender non-conforming individuals have a diagnosis of gender dysphoria, which qualifies as a disability under the NYCHRL. See N.Y.C. Comm'n on Human Rights, *Legal Enforcement Guidance on Discrimination on the Basis of Gender Identity or Expression: Local Law No. 3 (2002); N.Y.C. Admin. Code § 8-102(23)*, 10 n.17 (revised June 26, 2016), <http://www1.nyc.gov/assets/cchr/downloads/pdf/publications/GenderI>

note from her doctor stating the date of the surgery and the anticipated recovery period. The employer allows the employee to use her accrued sick time for the surgery and recuperation. The employee returns to work and requests a schedule adjustment as an accommodation to go to twice-monthly voice training appointments with a speech therapist. The employer determines that a schedule adjustment of two hours twice a month is not an undue hardship, grants the request, and provides, via email, confirmation that the accommodation is granted and the cooperative dialogue has concluded.

- An employee with a hearing impairment requests an accommodation of a headset and amplifier that will enable him to communicate on office calls with increased volume when using his phone. The employer provides this accommodation at the employee's desk. However, the employee is regularly required to attend meetings in large conference rooms, where the employee requires the use of an assistive listening device to participate. The employee should not have to request an accommodation every time a meeting is scheduled; instead, either the employer should ask if there is any other equipment the employee needs to participate in meetings in the conference room or the employee can raise the need for additional equipment for the conference room that he can use for conference room meetings.
- A maintenance worker with a mobility impairment is unable to perform some of the more physically-demanding aspects of her job, including lifting or pushing items, and standing for long periods of time. She requests that another worker be assigned to her worksites to assist her with the more physical aspects of the job. Her employer cannot afford to pay for another worker to assist her, because typically workers are placed on small

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worksites alone and not in pairs. The employer instead offers to provide the worker with additional time to complete her tasks by giving her a lighter schedule, which would also result in a pay cut. The worker rejects this proposal. The worker then requests that she be given a desk job at the company instead, but none are available. Neither the employer nor the worker is able to propose any additional options that might accommodate the worker's needs without imposing an undue hardship. As a result, the employer has met its obligation to engage in the cooperative dialogue and informs the worker in writing that they cannot accommodate her request.

### ***Examples in Housing***

- A landlord receives complaints about a long-time resident's potential hoarding tendencies. The resident's neighbors are complaining about an odor and have also seen glimpses inside the apartment when he opens the door. The landlord approaches the resident, notifies him of the other residents' complaints, and asks if she can inspect the apartment. The resident says no. The landlord states that she will need to inspect the apartment, but offers to give the resident a reasonable amount of time to prepare and asks if the resident may need a reasonable accommodation to prepare the apartment for inspection. This constitutes an appropriate initiation of a cooperative dialogue with the tenant.
- A tenant with an emotional support animal consistently pays her rent late. The landlord approaches the tenant to inquire if there is a reason why the rent is late so frequently. The tenant replies that her depression and anxiety occasionally result in her being unable to get out of bed for days at a time and she cannot get to the mailbox to send in the rent. The landlord offers several



options to the tenant to make the rent payment easier: the tenant can pay the rent online, the landlord can offer to have someone pick up the check each month from the tenant's apartment, or the landlord agrees to waive any incidental late fees as an accommodation. The tenant decides that it is easiest for her pay her rent online, and the landlord provides instructions on how to do so. The landlord sends the tenant a note saying that they reached a reasonable accommodation and the cooperative dialogue has concluded.

### ***Examples in Public Accommodations***

- A parent is hard of hearing and requests a Computer Assisted Real-time Translation (CART)<sup>114</sup> system for PTA meetings at his child's school. The school communicates with the parent to create a process for ensuring that a CART system will be provided at all meetings he intends to attend. The parent agrees to notify the parent coordinator one week in advance of each meeting he will attend to provide the school with adequate time to confirm a CART system is in place for the meeting. The school has satisfied its obligation to engage in the cooperative dialogue.
- A deli has aisles that are too narrow to accommodate individuals with certain mobility assistive devices. When a customer using a walker enters the deli to make a few purchases, the manager offers to have a deli employee collect the items and bring them to the customer at the front. The customer agrees and is able to pay for her purchases at the register near the entrance. While

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<sup>114</sup> CART instantly transforms speech into text. See Job Accommodation Network, *CART Services*, <http://soar.askjan.org/Solution/307> (last visited Mar. 19, 2018).

the cooperative dialogue ultimately allowed the customer to receive services in this particular instance, this does not preclude future claims based on failure to accommodate if the deli does not proactively assess the feasibility of making the store actually accessible, now that it has been put on notice.

- A government program that administers rental subsidies to people with disabilities requires that the recipients find an apartment within a specified period of time before the subsidy expires. A program recipient with a mobility disability is unable to visit apartments to find a placement without assistance. The government program offers to provide the recipient with assistance in securing housing and additional time to do so. The program recipient agrees to the accommodation. The program has met its obligation to engage in the cooperative dialogue.

## Failure to Engage in the Cooperative Dialogue in Employment, Housing, and Public Accommodations

Pursuant to Local Law No. 59 (2018), a covered entity's failure to engage in a cooperative dialogue with an individual requesting an accommodation is an independent violation of the NYCHRL.<sup>115</sup>

Without engaging in a cooperative dialogue, a covered entity will be unable to completely assess the individual needs of the person requesting an accommodation.

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<sup>115</sup> Local Law No. 59 (2018).

## ***Examples of Failure to Engage in a Cooperative Dialogue***

- An employee injures herself on the job. Her employer removes the employee from her position and puts her on unpaid leave, without engaging with the employee to determine whether unpaid leave was an appropriate accommodation for the employee's specific condition.<sup>116</sup>
- A landlord ignores his tenant's repeated requests that grab bars be installed in her shower as an accommodation for her disability.

## **Failure to Provide Reasonable Accommodations for Disabilities in Employment, Housing, and Public Accommodations**

The NYCHRL requires covered entities to provide reasonable accommodations for an individual's disability that will allow the individual to enjoy the right or rights in question or perform the essential requisites of the job, so long as the covered entity knew or should have known of the individual's disability. Reasonable accommodation is defined as such accommodation that can be made that shall not cause undue hardship in the conduct of the covered entity's business.<sup>117</sup>

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<sup>116</sup> See *Miloscia v. B.R. Guest Holdings, LLC*, 33 Misc. 3d 466, 476 (Sup. Ct. N.Y. Cty. 2011), *aff'd in part, modified in part*, 94 A.D.3d 563 (1st Dep't 2012).

<sup>117</sup> See N.Y.C. Admin. Code § 8-102(18).

To establish discrimination on the basis of a covered entity's failure to provide a reasonable accommodation, the aggrieved individual must show that: (1) they have a disability; (2) the covered entity knew or should have known of the disability; (3) an accommodation would enable the individual to enjoy the right or rights in question, or perform the essential requisites of their job; and (4) the covered entity failed to provide a reasonable accommodation.<sup>118</sup> The covered entity may then, as a defense, establish that the potential accommodation poses an undue hardship and no other accommodation was available that would not pose an undue hardship on the covered entity and that would allow the individual to enjoy the rights in question.<sup>119</sup> Although a failure to provide a reasonable accommodation is its own distinct claim under the NYCHRL, depending on the specific facts of the case, a failure to accommodate could also implicate a disparate treatment claim.

## Defenses to a Claim of Failure to Provide Reasonable Accommodations for Covered Entities

If a covered entity fails to provide an accommodation, it may defend its decision by asserting that there is no accommodation available that will meet the needs of the individual with the disability that does not pose an undue hardship, or, in the employment context, would allow the employee to perform the essential functions of the job. It is not a

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<sup>118</sup> See N.Y.C. Admin. Code § 8-107(15); *In re Comm'n on Human Rights ex rel. Stamm v. E&E Bagels*, OATH Index No. 803/14, Dec. & Order, 2016 WL 1644879, at \*6 (Apr. 21, 2016).

<sup>119</sup> See *infra* Part IV(d), discussing defenses to claims of failure to provide reasonable accommodations.

defense to a reasonable accommodation claim that the covered entity engaged in a cooperative dialogue.<sup>120</sup>

When the Commission’s Law Enforcement Bureau is investigating a covered entity based on a claim of failure to provide a reasonable accommodation, the covered entity is strongly encouraged to immediately cooperate with the LEB’s investigation, which may resolve through negotiation to find an accommodation that meets the complainant’s needs and does not pose an undue hardship to the covered entity. Such negotiation could serve to mitigate penalties and damages.

## 1. Undue Hardship

“Reasonable accommodation” is defined in the NYCHRL as an accommodation that can be made that does not cause undue hardship in the conduct of the covered entity’s business. The concepts of “reasonable accommodation” and “undue hardship” are inextricably intertwined in the NYCHRL. All accommodations are presumed reasonable unless the covered entity shows that they pose an undue hardship.<sup>121</sup> The covered entity has the burden to prove

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<sup>120</sup> Local Law No. 59 (2018).

<sup>121</sup> N.Y.C. Admin. Code § 8-102(18) (“The term ‘reasonable accommodation’ means such accommodation that can be made that shall not cause undue hardship in the conduct of the covered entity’s business.”); see *Phillips v. City of N.Y.*, 66 A.D.3d 170, 185 (1st Dep’t 2009) (“Under the City HRL . . . the concepts of ‘reasonable accommodation’ and ‘undue hardship’ are inextricably intertwined. An accommodation under Administrative Code § 8–102(18) cannot be considered unreasonable unless the covered entity proves that the

undue hardship by showing the unavailability of a reasonable accommodation.<sup>122</sup> Evidence of undue hardship is assessed by a preponderance of the evidence standard.<sup>123</sup>

There is no accommodation—whether indefinite leave or any other need created by a disability—that is categorically excluded from the universe of reasonable accommodations under the NYCHRL because a covered entity must assess on a case-by-case basis whether a particular accommodation would cause undue hardship.<sup>124</sup>

In making a determination of undue hardship, the NYCHRL sets forth the following non-exhaustive list of factors:

- a) the nature and cost of the accommodation;
- b) the overall financial resources of the facility or the facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

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accommodation would cause undue hardship.”), *overruled on other grounds by Jacobsen v. N.Y.C. Health & Hosps. Corp.*, 22 N.Y.3d 824 (2014).

<sup>122</sup> N.Y.C. Admin. Code § 8-102(18).

<sup>123</sup> See *In re Comm’n on Human Rights ex rel. Agosto v. Am. Construction Assocs.*, OATH Index No. 1964/15, Am. Dec. & Order, 2017 WL 1335244, at \*5 (Apr. 5, 2017).

<sup>124</sup> *Phillips v. City of N.Y.*, 66 A.D.3d 170, 182 (1st Dep’t 2009), *overruled on other grounds by Jacobsen v. N.Y.C. Health & Hosps. Corp.*, 22 N.Y.3d 824 (2014); *Forgione v. City of N.Y.*, No. 11 Civ. 5248, 2012 WL 4049832, at \*9 (E.D.N.Y. Sept. 13, 2012).

- c) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
- d) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.<sup>125</sup>

A covered entity cannot refuse to provide an accommodation just because it involves cost. Instead, there will be a consideration of the overall resources available to the business or agency, including the entity as a whole, outside resources, and tax incentives. Furthermore, as undue hardship is assessed on a case-by-case basis, a specific cost may result in undue hardship for one covered entity, but may not for another.<sup>126</sup> If a covered entity asserts that providing an accommodation will cause an undue hardship, it will be expected to disclose to the Commission financial documents to allow for an assessment of the alleged financial hardship. Without relevant financial information, it will be very challenging to make this assessment, which could result in a finding that the proposed accommodation is not an undue hardship because the requisite

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<sup>125</sup> N.Y.C. Admin. Code § 8-102(18).

<sup>126</sup> See EEOC, ENFORCEMENT GUIDANCE: REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT, (Oct. 17, 2002), <https://www.eeoc.gov/policy/docs/accommodation.html> (“Undue hardship means significant difficulty or expense and focuses on the resources and circumstances of the particular employer in relationship to the cost or difficulty of providing a specific accommodation.”).

financial showing to establish otherwise was not made. Further, failure to provide relevant financial information may result in an adverse inference against the covered entity with respect to the determination of civil penalties.

A covered entity need not provide the specific accommodation sought; rather, a covered entity may propose reasonable alternatives that meet the specific needs of the person with the disability or that specifically address the limitation at issue.<sup>127</sup> Moreover, a covered entity is not required to substantially change its business processes or structure to afford an accommodation; if such a change is required, it will likely cause an undue hardship. Similarly, a covered entity will not be required to take extraordinary financial measures, such as closing business operations, or changing compensation practices, to afford an accommodation. Where it is clearly established that the necessary accommodation will pose an undue hardship on the covered entity due to expense, a covered entity may explore the possibility of seeking third party funding, through a grant or other means, or assist the individual in applying for a grant to obtain the accommodation, or present the possibility of having the individual pay for part or all of the accommodation.<sup>128</sup> Covered entities should immediately cooperate

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<sup>127</sup> *In re Comm'n on Human Rights ex rel. Stamm v. E&E Bagels*, OATH Index No. 803/14, Dec. & Order, 2016 WL 1644879, at \*6 (Apr. 21, 2016).

<sup>127</sup> *Phillips v. City of N.Y.*, 884 N.Y.S.2d 369, 378 (1st Dep't 2009), overruled on other grounds by *Jacobsen v. N.Y.C. Health & Hosps. Corp.*, 22 N.Y.3d 824 (2014).

<sup>128</sup> *See In re Russell v. Chae Choe*, OATH Index No. 09-1021033, Dec. & Order, 2009 WL 6958753 (Dec. 10, 2009) (holding respondent liable for failure to accommodate where removal of a tub and installation of a shower would not cost the respondent any money,



with any investigation to determine what may or may not be reasonable given the unique situations of the individual seeking the accommodation and the covered entity's ability to provide an accommodation.

Requests for accommodations that require physical changes or accommodations to a space may constitute an undue hardship if, for example, they would be architecturally infeasible.<sup>129</sup> In addition, if a physical change or accommodation is needed for a limited period of time because a tenant has a temporary disability, the period of time for which the accommodation is needed will be considered in determining whether the time and expense to provide the accommodation would cause an undue hardship.

If a housing provider is required to make a reasonable accommodation for a tenant's disability, the housing provider is generally prohibited from passing, directly or indirectly, any portion of the cost of providing the reasonable accommodations onto the tenant

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since United Cerebral Palsy of New York had agreed to bear the cost).

<sup>129</sup> See, e.g., *In re Comm'n on Human Rights ex rel. Rose v. Riverbay Corp.*, OATH Index No. 1831/10, Dec. & Order, 2010 WL 8625897, at \*2 (Nov. 1, 2010) (“ . . . the Commission interprets the New York City Human Rights Law as requiring that housing providers, public accommodations and employers (where applicable), make the main entrance to a building accessible unless doing so creates an undue hardship, or is architecturally infeasible. Only then, should an alternative entrance be considered . . . [The NYCHRL] requires that every entrance or exit available to an able-bodied person be made accessible for a disabled person, assuming it would be architecturally feasible and not cause an undue hardship”).

through any fee, rent increase, or other charge.<sup>130</sup> Furthermore, once an accommodation is made, under the NYCHRL, a housing provider cannot require a tenant to restore the housing back to its original condition at the end of the tenancy or pass the cost of doing so onto the tenant.

### ***Examples of Undue Hardship***

- An employee of a small business with six other employees has a disability that prevents him from being at the office. He works as the only receptionist and administrative assistant for the office. He asks his employer if he can work remotely as an accommodation, which is the only accommodation that will allow him to continue working with his condition. The employer considers the employee’s job functions, which include greeting visitors to the office, answering the phone and directing calls,

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<sup>130</sup> See *Phillips v. City of N. Y.*, 66 A.D.3d 170,177 n.5 (1st Dep’t 2009) (“the City HRL . . . requires the housing provider to make the change, and does not shift the cost to the person with a disability (unless the housing provider demonstrates undue hardship)”), *overruled on other grounds by Jacobsen v. N.Y.C. Health & Hosps. Corp.*, 22 N.Y.3d 824 (2014); see also *In re Comm’n on Human Rights ex rel. Blue v. Jovic*, OATH Index No. 1624/16, Dec. & Order, 2017 WL 2491797, at \*18 (May 26, 2017) *aff’d sub nom. Jovic v. N.Y.C. Comm’n on Human Rights*, Index No. 100838/2017 (Sup. Ct. N.Y. Cty. Feb. 14, 2018) (“Consistent with §§ 8-102(18) and 8-107(15)(a) of the NYCHRL, Respondent . . . shall bear the full cost of providing the reasonable accommodation and is prohibited from passing directly or indirectly any portion of that expense onto Complainants through any fee, rent increase, or other charge.”).

making copies, filing documents, preparing materials for meetings, ordering supplies, and maintaining an orderly and organized office space. The employer determines that the majority of the employee's job functions require that he be present in the office and that it would be a financial undue hardship to hire additional staff to cover those responsibilities, given the size of the business. The employer memorializes his determination in writing and provides it to the employee to conclude the cooperative dialogue.

- An employee who works at a small real estate office requests an accommodation of specialized equipment and a license to use a service that will cost approximately \$5,000 per year. The employer determines that they do not have the financial resources to pay for an accommodation at that expense and would have to take out a loan to cover the cost. They explore other alternative accommodations but none adequately provide the services the employee needs. The employer informs the employee that the full cost would pose an undue hardship but offers to split the cost with the employee instead. The employee agrees to the arrangement, and the employer sends an email to the employee memorializing the agreement and concluding the cooperative dialogue.
- A tenant who, due to a mobility limitation, can no longer regularly use the stairs in his building, requests to be relocated from his third-floor apartment to a first-floor apartment in a building with four floors and eight total units. His landlord denies the request because the first-floor apartments rent for several hundred dollars more per month than the tenant's third-floor apartment and the landlord cannot afford to offer the apartment at the tenant's current rent, because he would lose several thousand dollars per year in rental income, and the tenant cannot afford the higher rent. The landlord has an available apartment at a

neighboring building on a lower floor that rents for \$50 more per month, and the landlord offers the apartment to the tenant at his current rent. The tenant does not wish to relocate and rejects the offer. The landlord has appropriately denied the original request based on a more than *de minimis* loss in rental income that he cannot absorb and offered an alternative arrangement that the tenant is free to accept or reject. The landlord leaves the tenant a note concluding the cooperative dialogue by stating that the tenant has rejected the offer of an apartment at a neighboring building and therefore the cooperative dialogue has concluded.

## 2. Essential Requisites of the Job

In employment cases where the need for a reasonable accommodation is placed at issue, the employer may raise the affirmative defense that the person aggrieved by the alleged discriminatory practice could not, even with a reasonable accommodation, satisfy the essential requisites of the job or enjoy the right or rights in question.<sup>131</sup> This means that even when the accommodation does not create an undue hardship for the employer, if it would not enable the employee to perform the basic duties and responsibilities required of the job, the employer may deny the accommodation. The employer has the burden to prove that the employee could not, with reasonable accommodation, satisfy the essential requisites of the job.<sup>132</sup> An employer can establish this by

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<sup>131</sup> N.Y.C. Admin. Code § 8-107(15)(b).

<sup>132</sup> *Phillips v. City of N.Y.*, 66 A.D.3d 170, 183 (1st Dep't 2009), *overruled on other grounds by Jacobsen v. N.Y.C. Health & Hosps. Corp.*, 22 N.Y.3d 824 (2014).

appropriately engaging in the cooperative dialogue with the employee and arriving at this conclusion.

In raising this defense, an employer must show that there are no comparable positions available for which the employee is qualified that would accommodate the employee, and that a lesser position or an unpaid leave of absence is either not acceptable to the employee or would pose an undue hardship.<sup>133</sup>

### ***Example***

- An employee is injured in a car accident after working successfully for six months. The employee, due to her disability, is no longer able to perform the essential requisites of her current position, with or without a reasonable accommodation. The employee seeks a reassignment. A position for which the employee is qualified will become vacant in four weeks. If it would not pose an undue hardship to the employer, the employer must offer this position to the employee. The employer may place the employee on a paid or unpaid leave consistent with its existing policies until the position becomes vacant.

Essential requisites of a job, or essential functions of a job, are *not* synonymous with *all* the functions of the job. In evaluating whether certain functions of a job are considered “essential,” factors including, but not limited to, the following will be considered:

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<sup>133</sup> See *infra* Part V(a) for a discussion on when an employer may offer an alternative position or unpaid leave as a reasonable accommodation.

- Whether the position exists for performance of that particular function;
- Whether other employees perform that function and/or whether it can be reassigned;
- Whether the function is highly specialized so that the employee in the position is hired for their specific expertise or ability to perform it;
- Whether removal or reassignment of the function would fundamentally alter the position;
- How much time is spent performing the function;
- Whether there are consequences associated with failing to perform the function;
- Whether the function is merely a requirement “on paper” or is actually required of employees; and
- Whether the function is critical to one’s job performance.<sup>134</sup>

In making this determination, no one factor is dispositive, and a fact-specific inquiry will be conducted into both the employer’s description of a job and how the job is actually performed in practice.<sup>135</sup> A job description or job posting, while informative, is not considered an absolute list of essential job functions; rather, the specific day-to-day essential functions that the employee performs will be considered.

### ***Example***

- An employee’s schizophrenia requires him to take medication that makes him drowsy and sluggish in the morning and often results in late arrival at work. Because his employer allows all

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<sup>134</sup> See 29 C.F.R. § 1630.2(n).

<sup>135</sup> *McMillan v. City of N.Y.*, 711 F.3d 120, 126 (2d Cir. 2013).

employees to have flexible start times and work late as needed, and the employee is able to perform his job duties with modified hours, his request that he work through lunch and/or work late to make up time lost due to late arrivals would not cause undue hardship to the employer, and thus was reasonable.<sup>136</sup>

### 3. Requested Accommodation Implicates Other City, State, or Federal Law

In some instances, a requested accommodation may conflict with federal, state or local law or regulations. In such circumstances, the covered entity must make inquiries about the possibility of a waiver from the requirements of other laws that would allow it to make the requested accommodation. If a waiver is unavailable, the potential conflict of providing an accommodation that would violate another law may be an undue hardship.

#### **Examples**

- Establishments that sell or prepare food must allow service animals in public areas.<sup>137</sup>

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<sup>136</sup> *Id.* at 123.

<sup>137</sup> The N.Y.C. Health Code exempts service animals from its prohibitions of live animals in food service establishments. N.Y.C. Health Code § 81.25. See also U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., DISABILITY RIGHTS SECTION, ADA 2010 REVISED REQUIREMENTS: SERVICE ANIMALS (July 12, 2014), [https://www.ada.gov/service\\_animals\\_2010.pdf](https://www.ada.gov/service_animals_2010.pdf); N.Y. State Public Health Law § 1352-e (recognizing that service animals are not covered by restrictions applicable to pets).

- The NYC Landmarks Preservation Commission has a long history of approving proposals for work that accommodates barrier-free access at landmark properties, including ramps, lifts, and associated fixtures, such as signage, push plates, and free-standing hardware. If a covered entity's building is landmarked and an individual with a disability requests a reasonable accommodation, the covered entity must contact the Landmark Preservation Commission regarding guidance on whether and how accessibility renovations can be made so that all New Yorkers and visitors can utilize the building.<sup>138</sup>

## Types of Accommodations Based on Disability

The following section is intended to provide an illustrative, non-exhaustive list of a range of possible accommodations available to individuals with disabilities.

### Employment

A reasonable accommodation in employment enables an individual with a disability to apply for a job, interview for a job, perform a job, or have equal access to the workplace and employee benefits. In

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<sup>138</sup> N.Y.C. Landmarks Pres. Comm'n, *Fact Sheet: Barrier-Free Access for Historic Buildings* (Nov. 3, 2016), <http://www1.nyc.gov/assets/lpc/downloads/pdf/pubs/Barrier-Free%20Access.pdf>.



considering accommodations for current employees, an employer's first obligation is to accommodate an employee so that they may remain in their current position. When that is not possible, an employer may then consider whether the employee could be reassigned to a vacant position. In considering alternative positions, an employer may consider the qualifications necessary for the position and whether the pay, status, and benefits are equivalent to the employee's current position. When a comparable position is unavailable, an employer may then explore alternative positions that are not comparable. In circumstances in which no other accommodation can be made, a paid or unpaid leave of absence—consistent with policies for other forms of leave (including whether benefits are continued beyond other statutory requirements to maintain benefits) that do not treat individuals with disabilities less well than other employees on leave—may be offered as a temporary accommodation. However, in some circumstances, leaves of absence may be the preferred accommodation or the only accommodation available.

## 1. Hiring

An employer's obligation to provide reasonable accommodations is not limited to current employees, but equally applies to applicants and interviewees. Employers must provide reasonable accommodations to enable applicants to apply for jobs and be considered for job openings, unless the accommodation poses an undue hardship. For example, employers should make their online application processes accessible to individuals with visual impairments or provide alternative means to apply for jobs, and prepare printed internal job information posted on employee bulletin boards in large print and in a location that is accessible. Employers may tell applicants what the hiring process involves—for example, an interview, a timed written test, or a

presentation—and may ask applicants whether they will need a reasonable accommodation for any part of the process.

### ***Examples***

- Providing an applicant who is deaf with a sign language interpreter for his interview.
- Administering a typing test for an administrative position in a wheelchair-accessible location for an applicant who uses a wheelchair.
- Assisting an applicant who is blind in completing application forms.
- Providing an applicant who has dyslexia with additional time for his pre-employment test.

## **2. Physical Space, Assistants, Technology, and Service Animals**

Often, a reasonable accommodation will involve making the workplace more accessible for individuals with disabilities. Reasonable accommodations may include obtaining equipment, making changes to existing equipment, providing an assistant, allowing a service animal in a business setting, or making non-structural or structural changes to workspaces or support facilities such as restrooms and cafeterias. While employers should provide equipment that is specifically needed to perform a job, they are not obligated to provide equipment that an employee uses in daily life, such as glasses, a cane, or a hearing aid, that are readily transportable to the workplace.

Employment activities should take place in integrated settings and employees with disabilities should not be segregated into particular facilities or parts of facilities, unless the segregated setting itself is a form of reasonable accommodation.<sup>139</sup> In existing facilities, structural changes may be necessary to the extent that they will allow an employee with a disability to perform the essential requisites of the job, including access to work stations and support facilities such as restrooms and cafeterias. Non-structural changes may also be explored if they achieve the same result.

Individuals with speech disabilities, or sensory disabilities such as those relating to vision or hearing, should be able to communicate effectively with others in the workspace. In some employment contexts, an interpreter, reader, or note-taker may be an effective accommodation for an employee. In other contexts, technology or equipment such as assistive listening systems and devices, screen-reader software, magnification software and optical readers, or other electronic and information technology that is accessible may enable more effective communication. In assessing accommodations, the employer should engage in a cooperative dialogue with the employee to assess their specific needs in relation to their job tasks.

### ***Examples***

- Purchasing a talking calculator for an employee with a vision disability.

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<sup>139</sup> For example, a segregated setting may be a reasonable accommodation for an employee with a disability that requires a quieter workspace with less noise or fewer distractions.

- Allowing an employee who has epilepsy to bring her service dog to the office.
- Purchasing a teletypewriter, telecommunications device, text telephone, or video phone for an employee with a hearing and/or speech disability to communicate over the telephone.
- Providing telephone headsets, speaker phones, and adaptive light switches for employees with manual disabilities.
- Providing a quieter workspace or making other changes to reduce noisy distractions for an employee with a mental health disability.
- Installing a cup dispenser at the water fountain to allow an employee who uses a wheelchair to access the water fountain.
- Providing a part-time assistant to support an employee with quadriplegia with clerical duties, such as retrieving items on shelves or filing.

### **3. Work Restructuring or Reassignment**

Job restructuring may be a reasonable accommodation for an employee with a disability, and may involve reallocating or redistributing some of the non-essential functions of a job. For example, an employer may reassign work at an office among coworkers, eliminate non-essential tasks, reassign visits to accessible sites, or allow work in settings other than the traditional office setting.

If an employee develops their disability after being on the job and can no longer perform some or all of the essential requisites of the job, an employer must consider reassignment of the employee to a vacant

position within the organization, if doing so does not constitute an undue hardship.<sup>140</sup>

## 4. Leave

One type of reasonable accommodation for an employee's disability is allowing the use of accrued paid leave or unpaid leave so that the employee can return to work after the leave and perform the essential requisites of the job. In some circumstances, it may be an accommodation of last resort, or it may be the only or preferred option for the employee. Employers should allow employees to exhaust accrued paid leave first and then provide unpaid leave. Leave for disability must be administered consistently with policies for other forms of leave (including whether benefits are continued beyond any other statutory requirements to maintain benefits) that do not treat individuals with disabilities less well than other employees on leave. The use of leave may be a reasonable accommodation for a number of reasons related to the disability, including but not limited to receiving medical treatment, rehabilitation services, or physical or occupational therapy; recuperating from an illness or an episodic manifestation of the disability; getting repairs on a wheelchair or prosthetic device; avoiding temporary adverse conditions in the work environment such as an air conditioning breakdown causing unusually

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<sup>140</sup> The new position should be one that the employee is qualified to perform and that pays a comparable salary. Reassignment does not require the employer to violate a bona fide seniority system or collective bargaining agreement under which someone else is entitled to the vacant position. Reassignment should be considered only if there are no reasonable accommodations available that would allow the employee to perform the essential functions of his/her current job.

warm temperatures that might exacerbate symptoms; or receiving training in the use of Braille or learning sign language.<sup>141</sup>

In some circumstances when an employee requests leave as a reasonable accommodation, the employee, or the employee's doctor, may be able to provide a definitive date on which the employee can return to work, but in some instances, only an approximate date or range of dates can be provided. A projected return date or range of return dates may need to be modified in light of changed circumstances, such as when an employee's recovery takes longer than expected. In order to determine if such accommodations cause an undue hardship, they must be evaluated on a case-by-case basis.<sup>142</sup> Leave as a reasonable accommodation includes the employee's right to return to his or her original position in circumstances where keeping that job open for the employee does not impose undue hardship. In many instances, an employer can reassign work tasks, schedule additional workers to cover shifts, or hire a temporary or part-time employee to minimize any hardship. However, if an employer determines that holding the job for the employee on leave will cause an undue hardship, then it must consider whether there are alternatives that permit the employee to complete the leave and return to work in a different position.

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<sup>141</sup> See U.S. Equal Emp. Emp't Opportunity Comm'n, Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (Oct. 17, 2002), <https://www.eeoc.gov/policy/docs/accommodation.html>.

<sup>142</sup> See U.S. EQUAL EMP. EMP'T OPPORTUNITY COMM'N, EMPLOYER-PROVIDED LEAVE AND THE AMERICANS WITH DISABILITIES ACT (May 9, 2016), <https://www1.eeoc.gov//eeoc/publications/ada-leave.cfm?renderforprint=1>.

Another type of reasonable accommodation is allowing a change in an employee’s regular work schedule or establishing a flexible leave policy. For example, a modified work schedule may involve moving an employee from a 9am to 5pm shift to an 11am to 7pm shift to accommodate the employee’s disability. This type of accommodation may be effective for an employee who requires regular medical appointments for treatment for their disability or an employee whose disability is affected by eating or sleeping schedules. A flexible work schedule may also be a reasonable accommodation for an employee’s disability, allowing an employee to vary their arrival or departure times. Additionally, allowing an employee to work from home may be a reasonable accommodation for an employee with a disability. While many employers rely on policies that require employees to “earn the privilege” of working from home, if an employee requests to work from home as an accommodation, the employer cannot rely on such policies and must instead do an individualized analysis of the employee’s actual work tasks to see whether they can perform them from home on the schedule requested by the employee.

## Housing

A reasonable accommodation in housing enables<sup>143</sup> an individual with a disability an equal opportunity to apply for, obtain recertification for,

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<sup>143</sup> Unlike state law, the NYCHRL requires housing providers to grant reasonable accommodations that would enable a resident equal use and enjoyment of their housing unit. This is a distinctly broader standard than the state law which requires the accommodation be “necessary” to use and enjoy the apartment. See *In re Comm’n on*

use, and enjoy a dwelling, including public and common use spaces.<sup>144</sup> This may involve a structural change to the physical space, or an exception or adjustment to a policy or practice. In considering accommodations for tenants or residents with disabilities, a housing provider's first obligation is to accommodate a resident so that they may remain in their current unit.<sup>145</sup> When that is not possible, a housing provider may then consider whether the resident may be relocated to an accessible unit, or other potential accommodations that may allow the resident to equally use and enjoy their home.<sup>146</sup>

## 1. Physical Space and Technology

A reasonable accommodation will often involve making the housing accommodation more accessible for individuals with disabilities, either through alterations to the existing physical space and structures, or

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*Human Rights ex rel. L.D. v. Riverbay Corp.*, OATH Index No. 1300/11, Rep. & Rec. 2011 WL 126879737, at \*12 (Aug. 26, 2011), *aff'd* Dec. & Order, 2012 WL 1657555 (Jan. 9, 2012).

<sup>144</sup> Unlike state law, the NYCHRL does not make a distinction between modifications in common areas and non-common areas in apartment buildings. See N.Y. Exec. Law § 296(18).

<sup>145</sup> Although the vast majority of housing examples here speak to rental scenarios, it is important to note the breadth of the definition of housing provider under the NYCHRL, which also applies to condominium and cooperative living situations.

<sup>146</sup> If a tenant is in a rent-stabilized or rent-controlled unit, the housing provider should make every reasonable effort to relocate the tenant to another rent-stabilized or rent-controlled unit.



through the installation and/or use of technology, at the housing provider's expense.<sup>147</sup>

If the main entrance to a building is not accessible to a resident who resides in the building, the housing provider must explore how to make the entrance accessible.<sup>148</sup> This may involve building a ramp; installing an electric door that opens automatically; installing a lift; installing intercoms or doorbells that light up instead of make sound; or issuing hard keys to individuals, such as the visually impaired, who have greater difficulty accessing doors with electronic key fobs. Under the NYCHRL, it is a best practice for housing providers to make every entrance or exit accessible to the extent that such alternations do not pose an undue hardship, where a tenant has made such a request.<sup>149</sup>

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<sup>147</sup> Unlike the Fair Housing Act, under which housing providers are only responsible for the cost of reasonable physical accommodations in buildings built after March 13, 1991, all housing providers are responsible for the cost of reasonable physical accommodations to their buildings under the NYCHRL (although condo and coop boards are only responsible for the cost of accommodations in common areas). See *In re Comm'n on Human Rights ex rel. Blue v. Jovic*, OATH Index No. 1624/16, Dec. & Order, 2017 WL 2491797, at \*17 (May 26, 2017) ) *aff'd sub nom. Jovic v. N.Y.C. Comm'n on Human Rights*, Index No. 100838/2017 (Sup. Ct. N.Y. Cty. Feb. 14, 2018).

<sup>148</sup> Some factors that may be considered in determining whether an entrance is a main entrance include the location of security, mailboxes, and the lobby area, access to elevators and other amenities in the building, and the area the residents consider the main entrance.

<sup>149</sup> *In re Comm'n on Human Rights ex rel. Rose v. Riverbay Corp.*, OATH Index No. 1831/10, Dec. & Order, 2010 WL 8625897, at \*2 n.1 (Nov. 1, 2010).

If a main entrance cannot be made accessible because doing so poses an undue hardship, the housing provider must consider whether an alternative entrance could be made accessible. However, it is impermissible for a housing provider to determine that a front entrance cannot be made accessible due to aesthetic concerns unrelated to legal restrictions such as Landmarks Preservation.

Apartment units and common spaces may be configured in a way that makes it extremely difficult or impossible for a resident with a disability to navigate or perform day-to-day activities such as bathing, cooking, or sleeping. In such circumstances, housing providers must provide alterations such as installing grab bars to a bathtub, installing a roll-in shower, or adjusting the location of appliances or other fixtures unless such alterations pose an undue hardship.

### ***Examples***

- Installing a flashing light function to a doorbell may be an effective accommodation for an individual who is deaf or hard of hearing.
- Replacing door knobs with lever hardware may be an effective accommodation for an individual with a disability affecting their dexterity.
- Constructing a ramp at the main entrance to the building and/or to access the building's elevator may be an effective accommodation for an individual with a mobility disability.
- Replacing a bathtub or shower stall with a roll-in shower may be an effective accommodation for an individual with a mobility disability.

- Re-configuring the furniture in the apartment lobby to allow for an accessible path to the elevator may be an effective accommodation for an individual who uses a wheelchair.
- Replacing a complicated latch on a gate surrounding the swimming pool with a lever or loop handle may be an effective accommodation for an individual with a manual disability.

When a housing accommodation has an elevator outage, it is a best practice for the housing provider to give notice of the disruption and provide a timeframe for the disruption to all residents. Reasonable accommodations in such circumstances may include relocating a resident to the ground floor if an apartment of suitable size to meet the resident's needs is available; relocating a resident to another building if the housing provider has multiple buildings on one site; relocating a resident to another complex; paying any reasonable moving expenses; paying for a hotel or other residential option; providing services (*i.e.*, grocery delivery or mail delivery to the individual); providing assistance to navigate the stairs; or providing rent abatement if the resident cannot safely stay in the apartment.

## 2. Policies and Practices

Housing accommodations may also provide reasonable accommodations by making exceptions or changes to their policies and practices.

### ***Examples***

- Permitting a live-in personal care attendant or live-in aide to live with a resident with a disability who might need 24-hour assistance or waiving any guest fees due to this need.

- Accepting a reference from a housing applicant’s social worker or employer if an applicant does not have a rental history due to their disability.
- Changing the method by which a housing provider communicates with a resident with a disability or provides information, such as providing more frequent reminders of rent due for someone with a mental health disability who needs such reminders or informing an individual designated by the resident (e.g. family member or social worker), in addition to the resident, of new policies.
- Doing a home visit to fill out forms for voucher recertification for a resident with a mobility disability.

### 3. Service Animals and Emotional Support Animals

Housing providers are required to reasonably accommodate persons with disabilities who rely on service animals or emotional support animals by providing exceptions to “no pet” or “no dog” policies. A service animal is an animal that does work or performs tasks for an individual with a disability. For example, a dog that guides an individual with a visual impairment is a service animal. An emotional support animal is an animal that provides emotional support or other assistance that ameliorates the symptoms of a disability.<sup>150</sup> If housing

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<sup>150</sup> Unlike under state law, under the NYCHRL a person need only show that the presence of the emotional support animal in some way alleviates symptoms of their disability in order to justify their request for the accommodation. They need not show that the animal is “necessary” to their use and enjoyment of the residential unit. *In re Comm’n on Human Rights ex rel. L.D. v. Riverbay Corp.*, OATH Index No. 1300/11, Rep. & Rec. 2011 WL 126879737, at \*11-12 (Aug. 26,

providers have “no pets” policies, charge pet fees, or have breed, weight, or size restrictions on pets, they must make exceptions to these policies in situations in which a resident requests to keep a service animal or emotional support animal in their housing unit due to a disability, unless doing so would cause the housing provider an undue hardship.

City, state, and federal laws may prohibit certain animals.<sup>151</sup> Unless an exception is made to the prohibition, it will be an undue hardship to permit a prohibited animal as a service or emotional support animal. However, it will rarely cause an undue hardship for a resident to keep a service or emotional support animal as an exception to a building’s “no pet” policy. The possibility of potential incidental property damage is rarely an undue hardship. Where a particular animal creates legitimate health or safety concerns, the housing provider and the resident must engage in a cooperative dialogue to determine what other accommodation may be available.<sup>152</sup>

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2011), *aff’d* Dec. & Order, 2012 WL 1657555 (Jan. 9, 2012).

<sup>151</sup> The New York City Health Code enumerates a list of animals that are prohibited within the City of New York. N.Y. Rules, Tit. 24, Health Code, § 161.01, *available at* <http://www1.nyc.gov/assets/doh/downloads/pdf/about/healthcode/health-code-article161.pdf>.

<sup>152</sup> See *infra* IV(a) for a discussion on cooperative dialogue. If the animal poses a direct threat (*i.e.*, a significant risk of substantial harm) to the health or safety of other individuals that cannot be eliminated or reduced to an acceptable level by another reasonable accommodation, the housing provider may deny the request. In evaluating whether an animal poses a direct threat, the housing provider should consider the health and safety of other individual(s)

When a resident's disability and/or the need for the requested animal is not apparent,<sup>153</sup> the housing provider may ask that the resident provide a statement from a health professional<sup>154</sup> indicating: (1) that the person has a disability; and (2) information that an animal is able to perform tasks, or provide emotional support or other assistance, that would ameliorate one or more symptoms or effects of the disability. If a resident requests an accommodation for a service animal or emotional support animal, and if both the resident's disability and the need for the requested animal are apparent or otherwise known to the housing provider, the housing provider may not inquire about the individual's disability or the need for the animal. For example, if a resident who is blind requests an accommodation

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and whether those concerns may be addressed by an accommodation, or if the animal has caused substantial physical damage to the property of others that cannot be reduced or eliminated by another reasonable accommodation. The housing provider must base such determinations upon consideration of the behavior of the particular animal at issue and not on speculation or fear about the types of harm or damage an animal may cause.

<sup>153</sup> See *infra* Part IV(a)(ii)(1), discussing how in circumstances where an applicant's disability and the need for the requested accommodation is readily apparent or otherwise known to the covered entity, making additional inquiries or asking for medical documentation about the requester's disability or the disability-related need for the accommodation may constitute harassment.

<sup>154</sup> "Health professional" means a person who provides medical care, therapy, or counseling to persons with disabilities, including, but not limited to, doctors, physician assistants, psychiatrists, psychologists, or social workers.

for his service animal who guides him, the housing provider may not inquire about the resident's disability or the animal's training, or require medical documentation to justify the need for the service animal.

A housing provider may not require individuals to provide medical records or details of a disability beyond that which is minimally sufficient to demonstrate the existence of a disability and the relationship between the disability and the requested accommodation.<sup>155</sup>

#### 4. Relocation

Where a reasonable accommodation is not possible given certain structural limitations of the building, the housing provider must consider alternative accommodations. Alternatives may include a temporary or permanent relocation of the resident, to a different apartment building within the housing provider's control, or to a different apartment within the same building. For example, if an elevator is not functioning, and will not be repaired for a long period of time, and it prevents a resident who uses a wheelchair from being able to enter and exit their apartment, the housing provider must consider whether temporarily relocating the resident to a unit on a lower floor or in another building is possible. However, relocation, particularly to a different building, is generally an accommodation of

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<sup>155</sup> However, if the animal is a dog or cat, once the animal has been selected, the housing provider may request copies of the license, tag, or rabies certificate and other vaccination information as required by New York State law, and a photograph of the animal. If the housing provider requests such information, the resident must provide it.

last resort. A resident is not required to relocate if a physical modification to their unit is available and does not pose an undue hardship on the housing provider.

## Public Accommodations

### 1. Physical Space and Technology

Places and providers of public accommodations are required to provide reasonable accommodations for people with disabilities to allow equal and independent access. These types of accommodations can include alterations to the existing physical space and structures or the use of assistive technology.

#### ***Examples***

- A bank may install ATMs with Braille on the keypads and glare-free screens to accommodate individuals with visual impairments.
- A theater may install closed captioning in certain seat sections to accommodate individuals with hearing disabilities during performances.
- A clothing store may alter the height at which they mount mirrors and shelves so they can be accessible for individuals using wheelchairs.



## 2. Policies and Practices

Places of public accommodation must also provide reasonable accommodations by making exceptions or changes to their policies and practices that would allow for equal and independent access for individuals with disabilities.

### ***Examples***

- A museum may provide a sign language interpreter for a lecture as an accommodation for participants who are deaf.
- A fitness facility may waive a guest fee for an aide or nurse who is required to be with an individual with a disability while he exercises.
- A restaurant that does not have menus available in Braille or large print may have its waiter read a menu to a customer who is blind or has low vision.
- A college may appoint a note-taker to a student with a disability to take notes for her classes.
- A doctor's office may schedule an appointment at a specific time that will reduce or eliminate waiting for a patient whose disability is aggravated by waiting in a crowded waiting room.
- A restaurant may allow an individual with a service animal to access the restaurant with their animal.

Allergies or fear of animals by fellow patrons, staff members, or providers of public accommodations generally will not be a basis for denying access or refusing service to people using service animals. For example, if a person who is allergic to dogs and a person who uses a service dog must spend time in the same room or facility, they should both be accommodated by providing services to them, if possible, in different locations within the facility. Otherwise, individuals

with disabilities who use service animals cannot be isolated from other patrons. An individual with a disability cannot be asked to remove their service animal from the premises unless: (1) the animal is out of control and the handler does not take effective action to control it; or (2) the animal is not housebroken or otherwise creates a nuisance. When there is a legitimate reason to ask that a service animal be removed, staff must offer the person with the disability the opportunity to obtain the goods or service without the animal's presence.<sup>156</sup>

"[S]ervice animals should be harnessed, leashed, or tethered, unless these devices interfere with the animal's work or the individual's disability prevents them from using these devices. In that case, the individual must maintain control of the animal through voice, signal, or other effective controls."<sup>157</sup>

When it is not apparent whether the animal is a service animal, only limited inquiries are allowed. Staff may ask two questions: (1) is the service animal required because of a disability; and (2) what work or task has the service animal been trained to perform. Staff cannot ask about the person's disability, require medical documentation, require a special identification card or training documentation for the animal, or ask that the service animal demonstrate its ability to perform a specific task.<sup>158</sup>

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<sup>156</sup> See U.S. Dep't of Justice, Civil Rights Div., Disability Rights Section, ADA 2010 Revised Requirements: Service Animals (July 12, 2014), [https://www.ada.gov/service\\_animals\\_2010.pdf](https://www.ada.gov/service_animals_2010.pdf).

<sup>157</sup> U.S. Dep't of Justice, Civil Rights Div., Disability Rights Section, ADA 2010 Revised Requirements: Service Animals (July 12, 2014), [https://www.ada.gov/service\\_animals\\_2010.pdf](https://www.ada.gov/service_animals_2010.pdf).

<sup>158</sup> See U.S. Dep't of Justice, Civil Rights Div., Disability Rights

# Retaliation

The NYCHRL prohibits retaliation against an individual for opposing discrimination. The purpose of the retaliation provision is to enable individuals to speak out against discrimination and to freely exercise their rights under the NYCHRL. Freedom from retaliation helps ensure that individuals needing accommodations will request them and promotes a culture where people are not afraid to exercise their rights. Retaliating against an individual because they opposed discrimination based on disability or perceived disability is a violation of the NYCHRL.

A covered entity may not retaliate against an individual because they engaged in protected activity, including: (1) oppose a discriminatory practice prohibited by the NYCHRL; (2) raise an internal complaint regarding a practice prohibited under the NYCHRL; (3) make a charge or file a complaint with the Commission or any other enforcement agency; or (4) testify, assist, or participate in an investigation, proceeding, or hearing related to an unlawful practice under NYCHRL.<sup>159</sup> In order to establish a prima facie claim for retaliation, an individual must show that: (1) the individual engaged in a protected activity; (2) the covered entity was aware of the activity; (3) the individual suffered an adverse action; and (4) there was a

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Section, ADA 2010 Revised Requirements: Service Animals (July 12, 2014), [https://www.ada.gov/service\\_animals\\_2010.pdf](https://www.ada.gov/service_animals_2010.pdf).

<sup>159</sup> N.Y.C. Admin. Code § 8-107(7).

causal connection between the protected activity and the adverse action.<sup>160</sup>

When an individual opposes what they believe in good faith to be unlawful discrimination, it is illegal to retaliate against the individual even if the conduct they opposed is not ultimately determined to violate the NYCHRL. For example, if an employee experiences adverse action for raising concerns to their employer about the treatment of a colleague with disabilities, even if the treatment of the colleague does not amount to discrimination, the employee may have a claim for retaliation.<sup>161</sup>

An action taken against an individual that is reasonably likely to deter them from engaging in such activities is considered unlawful retaliation. The action need not rise to the level of a final action or a materially adverse change to the terms and conditions of employment, housing, or participation in a program to be retaliatory under the NYCHRL.<sup>162</sup> The action could be as severe as termination, demotion, removal of job responsibilities, or eviction, but could also be relocating an employee to a less desirable part of the workspace, shifting an employee's schedule, failing to grant an accommodation, or failing to make repairs in a resident's unit.

An individual needing an accommodation for their disability must be able to seek assistance and engage in the cooperative dialogue with covered entities without fear of adverse consequences for making the request. While a request for a reasonable accommodation itself is not

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<sup>160</sup> *Id.*

<sup>161</sup> See, e.g., *Albunio v. City of N.Y.*, 16 N.Y.3d 472 (2011).

<sup>162</sup> N.Y.C. Admin. Code § 8-107(7).

protected activity under the NYCHRL,<sup>163</sup> if a request for a reasonable accommodation leads to an adverse action, there may be a claim for disparate treatment under the NYCHRL.<sup>164</sup>

Claims for disability discrimination under the NYCHRL may be based on a failure to provide a reasonable accommodation.<sup>165</sup> Therefore, it would be retaliation for a covered entity to take an adverse action against an individual with a disability for making a complaint alleging a failure to provide a reasonable accommodation.<sup>166</sup>

### ***Examples of Retaliation***

- An employee is diagnosed with cancer and speaks to her employer about a reasonable accommodation that would allow her to attend regular appointments for treatment. Her employer fails to engage in a cooperative dialogue and ignores her request. The employee submits an internal complaint with Human Resources regarding her employer's failure to accommodate. When the employer learns of the employee's complaint, he demotes her.

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<sup>163</sup> *McKenzie v. Meridian Cap. Grp.*, 35 A.D.3d 676, 677 (2d Dep't 2006) (dismissing claim that plaintiff was fired in retaliation for requesting additional leave time to accommodate her disability because plaintiff failed to allege "that her request was made in opposition to a practice forbidden by" the NYCHRL).

<sup>164</sup> See N.Y.C. Admin. Code §§ 8-107(1) – 8-107(5).

<sup>165</sup> N.Y.C. Admin. Code § 8-107(15)(a).

<sup>166</sup> See *Serdans v. N.Y. Presbyterian Hosp.*, 112 A.d.3d 449, 450 (1st Dep't 2013).

- A tenant informs his landlord of his need to keep an emotional support animal in his apartment as a reasonable accommodation for his disability. While the landlord routinely approves such requests, she denies the request because the tenant had testified on behalf of another tenant’s case alleging discrimination.

It is a best practice for covered entities to implement internal anti-discrimination policies to educate employees, residents, and program participants of their rights and obligations under the NYCHRL with respect to individuals with disabilities, and regularly train staff on these issues. Covered entities should create procedures for employees, residents, and program participants to internally report violations of the law without fear of adverse action and train those in supervisory capacities on how to handle those claims when they witness discrimination or instances are reported to them by subordinates. Covered entities that engage with the public should implement a policy for interacting with the public in a respectful, non-discriminatory manner consistent with the NYCHRL, and ensuring that members of the public do not face discrimination.

## **Discriminatory Harassment**

The NYCHRL prohibits discriminatory harassment or violence motivated by a person’s actual or perceived disability.<sup>167</sup>

Discriminatory harassment occurs when someone uses force or threatens to use force against a victim because of the victim’s actual or perceived disability. Discriminatory harassment also occurs when

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<sup>167</sup> N.Y.C. Admin. Code §§ 8-602 – 8-604.

someone damages or destroys another person's property because of their disability.

### ***Examples of Discriminatory Harassment***

- An individual who uses a cane due to a mobility disability is walking home from work. Two men who are approaching him on the sidewalk point at him and laugh, yelling insults such as “deformed” and “gimp.” When the individual ignores them and continues on his way, one of the men kicks his cane out of his hand, while the other pushes him to the ground.
- An individual who uses a wheelchair is seated in an accessible area at the end of an aisle in a movie theater. Another patron is seated next to her. When he sees her, he gets up and stands over her, and says, “Can you find somewhere else to park yourself? You’re blocking the aisle. Move your stupid chair out of the way or I’ll push you out of here myself,” and hits the wheel of her wheelchair.

# Appendices

**Cooperative Dialogue**

**Sample Reasonable Accommodation Request Form  
(Employment)**

**Sample Grant or Denial of Reasonable Accommodation  
Request Form (Employment)**

**Sample Letter to Employee on Leave**

**Service Animal One-Pager**

**Sample Sign Notifying Public How to Request  
Accommodation in Public Accommodations**

**Sample Service Animals Welcome Sign**

**Sample Reasonable Accommodation Policy**



# Cooperative Dialogue

## Step 1

A covered entity's obligation to engage in a cooperative dialogue is triggered when it learns, either directly or indirectly, that an individual requires an accommodation due to their disability.

The covered entity may learn direct of the accommodation need if, for example, the individual reveals to the covered entity that they have a disability, or requests an accommodation. The covered entity may learn indirectly of the accommodation need if, for example, the employer (1) has knowledge that an employee's performance at work is diminished or that their behavior at work could lead to an adverse employment action, and (2) has a reasonable basis to believe that the issue is related to a disability.

## Step 2

After the covered entity learns, directly or indirectly that an individual requires an accommodation, due to their disability, the covered entity must initiate a cooperative dialogue with the individual.

If the covered entity approaches the individual to initiate a cooperative dialogue and the individual does not reveal that they have a need for an accommodation related to a disability, the covered entity has met their obligation to initiate a cooperative dialogue and need not do anything further.

If, however, individual reveals that they have a need for an accommodation for a disability, the covered entity must proceed to Step 3.

### **Step 3**

The covered entity must communicate in good faith with the individual in a transparent and expeditious manner. The entity evaluates the individual's needs and considers the possible accommodations for the individual that would allow them to perform the essential requisites of the job or enjoy the right or rights in question, without creating an undue hardship on the covered entity.

### **Step 4**

Once a conclusion is reached, either to offer an accommodation, or that no accommodation can be made, the covered entity must promptly notify the individual seeking an accommodation of the determination. In the case of housing providers and employers, this notice must be provided in writing to conclude the cooperative dialogue.

### **Continuing Obligation**

As an individual's condition changes over time, an individual may make new requests for accommodations. Each time an individual makes a new request, the covered entity must engage in a cooperative dialogue with the individual.

# Sample Reasonable Accommodation Request Form (Employment)

This form and all information must be kept confidential.

## **Applicant/Employee Information**

Print Full Name: \_\_\_\_\_

**Job Applicant**    **Current Employee**    **Other**

Home or Work Address: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

Phone Number: \_\_\_\_\_

## **Employee Information**

(Complete this section if you currently employed with [EMPLOYER] even if you are currently on leave.)

Title: \_\_\_\_\_

Email: \_\_\_\_\_

Office Telephone Number: \_\_\_\_\_

Division: \_\_\_\_\_

Supervisor Name and Phone Number: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

Location: \_\_\_\_\_

## **Applicant Information**

(Complete this section only if you are a job applicant)

Position/Title Sought: \_\_\_\_\_

Division/Unit (if known): \_\_\_\_\_

Location of Position (if known): \_\_\_\_\_

Part(s) of employment process for which an accommodation is requested: \_\_\_\_\_

\_\_\_\_\_

### **Completing Job Application**

Job Vacancy Notice Number (if known): \_\_\_\_\_

Interview: \_\_\_\_\_

Interview Date: \_\_\_\_\_

At Work: \_\_\_\_\_

Other (please specify): \_\_\_\_\_

\_\_\_\_\_

[Employer] Contact Person (if known): \_\_\_\_\_

Phone Number: \_\_\_\_\_

Identify the limitation(s) that impacts your ability to complete your assigned tasks or complete the application process. Please be specific. (Attach additional sheets of paper if necessary).

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Is the condition for which you are requesting an accommodation?

Permanent  Temporary  Unknown

If temporary, anticipated date accommodation(s) no longer needed:

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Describe the nature of the accommodation requested and how the accommodation will assist you to perform the essential functions of the job held or desired, or to enjoy the benefits and privileges of employment. Please be specific. (Attach additional sheets and present supporting documentation as appropriate.)

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If equipment is requested, please specify preferred brand, model number and vendor, if known.

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**You may be required to provide verification by a health professional or a disability service provider (e.g. ACCESS-VR, NYS Commission for the Blind and Visually Impaired).**

**This CONFIDENTIAL documentation should be provided to [identify the individual handling accommodation requests].**

Medical verification/documentation should, to the extent possible:

- ✓ Be written on the official letterhead of the qualified health professional or health professional's organization.
- ✓ Identify the health professional's credentials. E.g., M.D., D.O.
- ✓ Be dated and signed by the health professional.
- ✓ Describe the limitations in detail as they currently exist and only in relation to the job.
- ✓ State whether the duration of the limitation is permanent or temporary or unknown.
- ✓ If temporary, specify the date the limitation is expected to no longer require accommodation.

I certify that I have read and understood the information provided in this request, and that it is true to the best of my knowledge, information and belief.

Requestor's Signature/Authorized Agent's Signature:

\_\_\_\_\_

Date: \_\_\_\_\_

**DO NOT WRITE IN THIS SECTION**

To be completed by staff supervising the employment application process or supervising an employee requesting a reasonable accommodation. After completing, supervisors must provide a copy of the entire form to the employee or applicant, and immediately send a copy to the [individual handling accommodation requests].

Name and Title of Supervisor or Staff supervising application process:

\_\_\_\_\_

Unit/Division: \_\_\_\_\_

Location: \_\_\_\_\_

Email and Phone Number: \_\_\_\_\_

\_\_\_\_\_

Date Request Received: \_\_\_\_\_

Supporting Documentation Included: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Supporting Documentation Not Included: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Date: \_\_\_\_\_

Signature: \_\_\_\_\_

To be completed by [xxxx]: \_\_\_\_\_

Date Request Received by [xxxx]: \_\_\_\_\_

Date Supporting Documentation Received by [xxxx] (if any):  
\_\_\_\_\_

Signature: \_\_\_\_\_



# Sample Grant or Denial of Reasonable Accommodation Request Form (Employment)

To be completed by: \_\_\_\_\_

Date: \_\_\_\_\_

Name of Individual requesting reasonable accommodation:  
\_\_\_\_\_

Specific Accommodation Requested: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Decision:

- Reasonable Accommodation Granted as Requested
- Alternative Accommodation Granted

Describe Alternative Accommodation Granted: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Request for reasonable accommodation denied because (you may check more than one box):

- Employee's Request Determined Not to be Related to a Disability
- Accommodation Would Not Meet Requested Need
- Accommodation Would Cause Undue Hardship
- Documentation of Need for the Accommodation Inadequate

Accommodation Would Require Removal of an Essential Requisite of the Job

Accommodation Would Pose Direct Threat

Other (Please specify): \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

If the individual proposed one type of reasonable accommodation, which is being denied, and rejected an offer of a different type of reasonable accommodation, explain both the reasons for denial of the requested accommodation and reason why chosen accommodation would be effective.

Deciding Official: \_\_\_\_\_

Name (print): \_\_\_\_\_

Telephone: \_\_\_\_\_

Email: \_\_\_\_\_

Signature: \_\_\_\_\_

Date Granted or Denied: \_\_\_\_\_

**This serves as documentation of the conclusion of the cooperative dialogue.**

# Sample Letter to Employee on Leave

[Date]

[Addressee]

Re: Leave of Absence

Dear [Employee],

I write regarding your leave of absence from [employer]. When we last spoke on [date], you informed me that you would be visiting your doctor on [date] and would be able to update me as to your ability to return to work following that appointment.

As you know, [employer] has a policy of allowing employees up to [xx] weeks of disability-related leave from work. According to our records, you have now been on leave since [date]. Therefore, your available leave will expire on [date]. In order to maintain your status as an employee, we need to hear from you regarding your plans and ability to return to work. If you need a modification of your job duties or workspace in order to return to work, or if you need an extension of your leave beyond the [xx] weeks allowed by our policy, please contact me at [phone] or [email] to discuss a possible reasonable accommodation. We may ask that you submit a note from your medical provider specifying what accommodations you need and/or when you will be able to return to work.

If we do not hear from you at all by [date], we will unfortunately be left with no option but to terminate your employment. When you

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receive this letter, please contact me at [phone] or [email] to discuss your employment status and future plans.

Sincerely,

[XX]

# Service Animal One-Pager

## SERVICE ANIMAL

### Definition of a Service Animal

Service Animal is defined as a dog that has been partnered with a person who has a disability and has been trained or is being trained, by a qualified person, to aid or guide a person with a disability.



### Allowed Questions

Questions allowed:  
Staff may ask **TWO** questions.

- Is the dog a service animal required because of a disability?
- What work or task has the Service Animal been trained to perform?

### Questions Not Allowed

Questions **NOT** Allowed:

- Staff cannot ask about the person's disability.
- Require medical documentation.
- Require a special identification card or training documentation for the dog.
- Require that the animal demonstrate its ability to perform the work or task.

### Enforcement of the Law

**Denied Access:** You have the right to file a complaint with the New York City Commission on Human Rights please call 311.

### Where Service Animals Are Allowed

Under the ADA, State and Local Governments, businesses, and nonprofit organizations that serve the public generally must allow service animals to accompany people with disabilities in all areas of the facility where the public is normally allowed to go.

### Reasons for Denied Service

A person with a disability can be asked to remove their Service Animal from the premises if:

- The Service Animal is out of control and the handler does not take effective action to control it.
- The Service Animal is not housebroken.

When there is a legitimate reason to ask that a Service Animal be removed, staff must offer the person with the disability the opportunity to obtain goods or services without the animal's presence.



Visit Us On  
Facebook & Twitter

**NYC** Mayor's Office for  
People with Disabilities

## Definition of a Service Animal

Service Animal is defined as a dog that has been partnered with a person who has a disability and has been trained or is being trained, by a qualified person, to aid or guide a person with a disability.

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Staff may ask TWO questions.

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NYC Commission on Human Rights

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

NYC.gov/HumanRights | @NYCCHR

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Visit Us On Facebook & Twitter

NYC Mayor's Office for People with Disabilities

## Sample Sign Notifying Public How to Request Accommodation in Public Accommodations

**If you need help  
accessing certain  
spaces or any  
merchandise in the  
[store, bar, restaurant]  
due to a disability,  
please ask one of our  
staff and we will assist  
you as quickly as  
possible.**

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## Sample Service Animals Welcome Sign

**Service animals  
welcome;  
unfortunately, no  
pets allowed.**

# Sample Reasonable Accommodation Policy

## Reasonable Accommodation Policy

[Landlord] is committed to granting reasonable accommodations to its rules, policies, practices or services where such accommodations enable people with disabilities the equal opportunity to use and enjoy their dwellings as required by federal, state and local law. A reasonable accommodation may include an exception to a rule or policy or physical change to a unit or common area. A disability-related reasonable accommodation exists when there is an identifiable relationship, or nexus, between the requested accommodation and the individual's disability. No accommodation is on its face unreasonable. An accommodation is reasonable unless it causes undue hardship.

## Reasonable Accommodation Requests

[Landlord] accepts reasonable accommodation requests from persons with disabilities and those acting on their behalf. Individuals who would like to request a reasonable accommodation may use, but are not required to use, [landlord]'s "Application for Reasonable Accommodation" Form. Reasonable Accommodation Application Forms are available [place where available]. If you require assistance in completing the Form, or wish to make the request orally, please contact the [job title] at [contact information]. You may also make a Reasonable Accommodation Request orally to [name and job title] at [contact information].

We will make a decision on your request within [timeframe – NYCCHR recommends no longer than ten] calendar days following the receipt of all required documentation. If the request is of a time-sensitive nature, please let us know and we will make our best efforts

to expedite the decision-making process. If we grant the request, we will let you know in writing by sending you a dated letter.

In the event we need additional information to make a determination, we will advise you of the specific information needed within [timeframe – NYCCHR recommends no longer than ten] calendar days of your request. It is [landlord]’s policy to seek only the information needed to determine if a reasonable accommodation should be granted under federal, state or local law. [Landlord] will never require individuals to provide medical records or to provide details of a disability beyond that which is minimally sufficient to demonstrate the existence of a disability and the relationship between the disability and the requested accommodation.

If we deny the request, we will provide you with a dated letter stating all the reasons for our denial. If an individual with a disability believes a request for reasonable accommodation has been unreasonably delayed, denied unlawfully, or that he or she has otherwise been discriminated against on the basis of a disability, then he or she may file a complaint by writing or calling any of the following:

New York City Commission on Human Rights  
22 Reade Street  
New York, NY 10007  
(718) 722-3131  
[NYC.gov/HumanRights](http://nyc.gov/HumanRights)

US Department of Housing and Urban Development Office of  
Fair Housing and Equal Opportunity  
26 Federal Plaza, Rm 3532  
New York, NY 10278  
(212) 542-7519  
<http://hud.gov/complaints>

New York State Division of Human Rights  
1 Fordham Plaza, 4th Fl.  
Bronx, NY 10458  
(718) 741-8400  
<https://dhr.ny.gov/how-file-complain>

## **Service Animals and Emotional Support Animals**

One type of reasonable accommodation is allowing a person with a disability to keep a service animal or an emotional support animal. A service animal is an animal that does work or performs tasks for an individual with a disability. For example, a dog that guides an individual with a visual impairment is a service animal. An emotional support animal is an animal that provides emotional support or other assistance that ameliorates the symptoms of a disability. [Landlord] is committed to ensuring that individuals with disabilities may keep such animals to the extent required by federal, state, and local law.

Except as provided under this Reasonable Accommodation Policy, [landlord] prohibits residents from having animals. For that reason, individuals with disabilities must request a reasonable accommodation to have a service animal or an emotional support animal live with them. Residents who have been allowed a reasonable accommodation to keep a service animal or an emotional support animal are *not* in violation of [landlord]'s rules and regulations. [Landlord] encourages, but does not require, residents to make an accommodation request before, or as soon as reasonably possible after, their service animal or emotional support animal moves into the residence. However, the fact that the animal is already living with the individual in the residence or the fact that the individual has been issued a violation for having an animal is not a factor that will be considered in reviewing a request for a reasonable accommodation.

[Landlord] does not place any breed or weight restrictions on the animals which it allows, and does not require animals to wear any item that identifies the animal as an assistance animal. [Landlord] does not require that assistance animals complete behavioral training. [Landlord] does not require individuals to indemnify [landlord] or pay a fee to have an assistance animal.

If service animal or emotional support animal is a dog or cat, once the animal has been selected, the individual must submit a photograph of the animal. If the animal is a dog, the individual must also submit information that the animal has been vaccinated as required by New York State law. For purposes of this requirement, evidence that the dog has a current license will be sufficient evidence that the dog has been vaccinated.

In the event the service animal or emotional support animal passes away or is no longer living, and the individual who has received a reasonable accommodation to [LANDLORD]'s no pet policy obtains a new service animal or emotional support animal, the individual must provide a photograph of the new animal and proof of vaccination as required above.

### **3. Service Animals**

A service animal is an animal that does work or performs tasks for an individual with a disability. For example, a dog that guides an individual with a visual impairment is a service animal. If a person's disability is apparent, or otherwise known to [landlord], and if the work or task that the animal performs is apparent or otherwise known, for example, a dog that guides an individual with a visual impairment, [landlord] will not inquire about the individual's disability or the animal's training. Otherwise, [landlord] may require that the resident provide:

- a.** A statement from a health professional (“Health professional” means a person who provides medical care, therapy, or counseling to persons with disabilities, including, but not limited to, doctors; physician assistants; psychiatrists; psychologists; or social workers.) indicating that the person has a disability; and
- b.** Information that an animal is able to do work or perform tasks that would ameliorate one or more symptoms or effects of the disability.

[Landlord] will not require that the animal demonstrate its work or task or require that the animal be registered with, or certified by, any organization.

## Emotional Support Animals

An emotional support animal is an animal that provides emotional support or other assistance that ameliorates the symptoms of a disability. When a resident requests a reasonable accommodation for an emotional support animal, [landlord] may require a statement from a health or social service professional indicating:

- a.** That the applicant has a disability; and
- b.** That the animal would provide emotional support or other assistance that would ameliorate one or more symptoms or effects of the disability.

[Landlord] will *not* require information about how an emotional support animal assists with the “activities of daily living.”

If an animal both provides emotional support or other assistance that ameliorates one or more effects of a disability and does work or performs tasks for the benefit of a person with a disability, [landlord]

may require compliance with either the service animal or emotional support animal requirements above, but not both.

## **Conduct of Approved Service and Emotional Support Animals**

In most cases [landlord] requires that service and emotional support animals be leashed or harnessed in the elevators and common areas unless doing so would interfere with the animal's work, or the person's disability prevents use of these devices. Service and emotional support animals that cannot be leashed for the aforementioned reasons must be otherwise under the control of their handler at all times.

If an assistance animal poses a direct threat to the health or safety of other individuals, or if the animal causes substantial physical damage to the property of others that cannot be reduced or eliminated by another reasonable accommodation, [landlord] maintains its right to pursue legal action to abate a nuisance or to enforce the terms and conditions of the lease.

## **Approved Tags**

Upon approval of an individual's request, [landlord] will provide them with a tag for the animal ("Approved Tag") to indicate that the animal is permitted to be on [landlord]'s premises. Use of the tag is optional. The purpose of the Approved Tag is to notify [landlord]'s staff that the animal has been approved as an accommodation. If an individual opts not to use the tag, [landlord] may stop them in order to verify that they are approved to have an animal. If the animal is wearing an Approved Tag, [landlord] will not stop the individual for the purpose of determining if the assistance animal is on the approved animal list.

In any event, [landlord]'s right to confirm that an animal is an approved assistance animal will not be used to harass or annoy any individual. Only employees that have the specific job duty of checking whether an animal is an approved animal will stop any individual for this purpose. Employees will not stop individuals who are with an animal that the employee recognizes as a service or emotional support animal.

## **Damage Caused by Service or Emotional Support Animals**

Residents will be responsible for the cost of any damage caused by their service animal or emotional support animal in the same manner in which they would be responsible for any damage caused by themselves to their unit or the building.

Residents will not be charged any additional security deposit up front for their service animal or emotional support animal.



## Sample Form A: Application for Reasonable Accommodation

Please complete this form to request an accommodation. If you require assistance completing the form or wish to make the request orally, please contact [job title] at [contact information]. [landlord] will keep a record of reasonable accommodation requests relating to requests for assistance animals. The reasonable accommodation policy is available on [landlord]'s website and in writing at [address].

Applicant Name (please print):

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Address: \_\_\_\_\_

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Telephone Number: \_\_\_\_\_

Shareholder or leaseholder name (If different from the person requesting a reasonable accommodation.):

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Your relationship to the shareholder or leaseholder

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1. Please describe the reasonable accommodation you are requesting: \_\_\_\_\_

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2. Please explain why this reasonable accommodation is needed. You should explain the connection between the disability (physical or mental impairment) you live with and the accommodation you are requesting. Beyond that, you do not need to provide detailed information about the nature or severity of the disability: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

3. If you are requesting permission to have a service or emotional support animal in your apartment, unless it is clear or obvious that the animal is a service animal, please answer the following questions. (Please note: if an assistance animal provides you service and emotional support you do not need to provide information about both categories.)

a. Type of animal (for example, dog or cat):

\_\_\_\_\_

b. Is the animal required because of a disability?

**Yes** or  **No**

c. Does the animal for which you are making a reasonable accommodation request perform work or do tasks for you because of your disability?  **Yes** or  **No**

d. If the answer to 3(c) is YES:

i. Please explain what work or tasks the animal does for you: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

ii. Please provide a statement from a health or social service professional indicating:

- that you have a disability (*i.e.*, you have a physical or mental impairment); and
- explaining that an animal is able to do work or perform tasks to ameliorate symptoms or effects of the disability.

e. If the answer to 3(c) is NO: does the animal for which you are making a reasonable accommodation request provide emotional support or ameliorate (improve) one or more symptoms or effects of your disability?  **Yes** or  **No**

f. If the answer to 3(e) is yes, please submit a statement from a health or social service professional stating that:

- you have a disability (*i.e.*, you have a physical or mental impairment); and
- the animal would provide emotional support or other assistance that would ameliorate (improve) one or more symptoms or effects of your disability and how the animal ameliorates (improves) the symptoms or effects.

4. If you are requesting a physical change to the interior of your unit, please describe the modifications you are requesting.

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5. If you are requesting a physical change to the exterior of your unit or to a public or common use area, please describe the modification you are requesting. \_\_\_\_\_

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6. If you are requesting a different accommodation, please describe it here: \_\_\_\_\_

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Signature: \_\_\_\_\_

Date: \_\_\_\_\_

You will receive a response to your request in 10 calendar days. If your request is not granted, you will receive a written explanation and what additional information, if any, we need to make a decision about your request.

If an individual with a disability believes that they have been denied a reasonable accommodation or otherwise discriminated against on the basis of disability they have the right to file a lawsuit in court or contact one of the following agencies to file a complaint:

New York City Commission on Human Rights  
22 Reade Street  
New York, NY 10007  
(718) 722-3131  
[NYC.gov/HumanRights](http://nyc.gov/HumanRights)

US Department of Housing and Urban Development Office of  
Fair Housing and Equal Opportunity  
26 Federal Plaza, Rm 3532  
New York, NY 10278  
(212) 542-7519  
<http://hud.gov/complaints>

New York State Division of Human Rights  
1 Fordham Plaza, 4th Fl.  
Bronx, NY 10458  
(718) 741-8400  
<https://dhr.ny.gov/how-file-complaint>

# Sample Form B: Service and Emotional Support Animal Requests

## Sample Health Professional Form

Resident Name: \_\_\_\_\_

Address: \_\_\_\_\_

\_\_\_\_\_

Telephone Number: \_\_\_\_\_

I, \_\_\_\_\_ (applicant name) intend to request that the [landlord] permit me to keep an assistance animal as a reasonable accommodation for my disability. In connection with that application, I am requesting that you complete this form regarding my disability.

Applicant Signature: \_\_\_\_\_

Date: \_\_\_\_\_

Name of Applicant: \_\_\_\_\_

Relationship to Tenant: \_\_\_\_\_

### **To be Completed by Health Professional**

("Health professional" means a person who provides medical care, therapy or counseling to persons with disabilities, including, but not

limited to, doctors; physician assistants; psychiatrists; psychologists; or social workers.)

Name (please print): \_\_\_\_\_

Address: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Telephone Number: \_\_\_\_\_

A disability within the meaning of the New York City Human Rights Law is any physical, medical, mental or psychological impairment, or a history or record of such impairment. Does the individual identified above have a disability?  **Yes** or  **No**

Does or would a service or emotional animal be able to do work or perform tasks to ameliorate symptoms or effects of the individual's disability?  **Yes** or  **No**

If Yes, please describe: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

For animals that do not perform work or do tasks for the individual, would the animal provide emotional support or other assistance that would ameliorate one or more symptoms or effects of the disability?  **Yes** or  **No**

If YES, please describe: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

If you would like to submit additional supporting materials (other than medical records), please provide them with this form.

Name: \_\_\_\_\_

Signature: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

\_\_\_\_\_

**Sample Animal Registration Form**

This form must be completed before or as soon as reasonably possible after an assistance animal moves into the residence.

Thank you for your cooperation!

**Background**

Tenant Name: \_\_\_\_\_

Apartment Number: \_\_\_\_\_

Service/Emotional Support Animal Name: \_\_\_\_\_

Animal Type: \_\_\_\_\_



## Vaccinations

\* **For dogs only:** Attach documentation of vaccination to this form. Documentation can consist of proof of vaccination from veterinarian or proof of current dog license.

## Emergency Contacts

Emergency Contact #1

Name: \_\_\_\_\_

Phone Number: \_\_\_\_\_

Address: \_\_\_\_\_  
\_\_\_\_\_

Emergency Contact #2

Name: \_\_\_\_\_

Phone Number: \_\_\_\_\_

Address: \_\_\_\_\_  
\_\_\_\_\_

## Tenant Acknowledgement of Rules and Request for Approval

Please initial and sign below where indicated after reviewing your lease and reading the Assistance Animal Policy and Guidelines included with this registration form.

\_\_\_\_\_ (Initial) I have read the above Reasonable Accommodation Policy regarding Service and Emotional Support Animals and agree to follow it.

\_\_\_\_\_ (Initial) I have provided a photograph of my animal to Resident Services.

I hereby request permission to have an assistance animal.

Tenant Signature: \_\_\_\_\_

Date: \_\_\_\_\_

Print Name: \_\_\_\_\_

Apartment Number: \_\_\_\_\_

Management Signature of Approval:

\_\_\_\_\_

Management Signature: \_\_\_\_\_

Date: \_\_\_\_\_

Print Name: \_\_\_\_\_

Title: \_\_\_\_\_