

Policy: It is the policy of the Division of MHDS to comply with the federal Americans with Disabilities Act (ADA). This policy addresses the provisions of Title I of the ADA in relation to current employees. The provisions of Title I of the ADA regarding applicants for employment are addressed in MHDS policy #5.002, section 2. This policy does not create any rights, benefits, or duties that are not set forth in relevant federal or state law and regulations.

Purpose/

Reference: Title I of the ADA is designed to remove barriers that prevent qualified individuals with disabilities from enjoying the same employment opportunities available to persons without disabilities. Nondiscrimination is defined to include reasonable accommodation. When an individual's disability creates a barrier to his/her performance of essential job functions, the ADA requires employers to consider whether reasonable accommodation could eliminate the barrier. It likewise requires that employers consider accommodations that enable employees with disabilities to enjoy equal benefits and privileges of employment as enjoyed by employees without disabilities. The process of identifying an appropriate reasonable accommodation should be flexible and interactive between the employer and the employee. Employees with a disability are expected to satisfactorily perform the essential functions of their position without posing a direct threat to the health or safety of others that cannot be eliminated through reasonable accommodation. However, employees with disabilities cannot be held to higher standards of performance of the essential functions of their jobs than employees without disabilities.

Regulations to implement Title I of the ADA are found at 29 CFR 1630. The Equal Employment Opportunity Commission (EEOC) is the enforcing agency at the federal level. The Nevada Equal Rights Commission (NERC) is the state-level enforcement body, operating under an agreement with EEOC. The EEOC website (eoc.gov) contains the law, regulations, and many enforcement guidance documents on specific applications of ADA.

Procedures:

- I. Disability defined:
 - A. The ADA definition of disability differs from definitions of disability used in other programs (such as disability insurance, disability retirement, or vocational rehabilitation). There are three ways a person can be found to have a disability under the ADA:

1. The person has a physical or mental impairment that substantially limits one or more major life activities. These are activities that an average person can perform with little or no difficulty. The EEOC regulations define a physical or mental impairment to mean a physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of several body systems, or a mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities;
2. The person has a record of such an impairment;
3. The person is regarded by the employer as having such an Impairment; and,
4. The ADA regulations provide three factors to consider in determining whether a person's impairment substantially limits a major life activity:
 - a) Its nature and severity;
 - b) How long it will last or is expected to last; and,
 - c) Its permanent or long term impact, or expected impact.

II. Medical Examinations or Inquiries regarding Employees:

- A. The EEOC makes three separate sets of requirements regarding medical examinations or inquiries by an employer, depending on the timing of the inquiry: pre-employment, pre-offer; pre-employment, post-offer; and medical exams/ inquiries of current employees. The rule for current employees is that a medical exam or inquiry must be job-related and consistent with business necessity. Examples of situations that may meet this definition include:
 1. Evidence of a job performance or safety problem that an employer believes may have a medical basis;
 2. An injury that may affect the employee's ability to perform the job; or,
 3. The need to evaluate an employee's readiness to return to work after an injury or illness.
- B. Depending on the specific situation, acceptable areas of inquiry in such examinations can include:
 1. Whether an employee has an impairment that constitutes a disability under the ADA;
 2. Whether the employee can perform essential functions of their job with or without reasonable accommodation, without posing a direct threat to health or safety that cannot be reduced or eliminated by reasonable accommodation; and,
 3. To identify effective accommodation(s) that would enable the employee to perform essential job functions and/or avoid imposing a direct threat to health or safety in their current position.

- C. If transfer to a vacant position is being considered, the physician may also be asked to recommend accommodations that may be needed for that position. The request for a medical examination should be accompanied by documentation of the position's essential functions.

III. Direct Threat:

Employers may require that a person with a disability not pose a direct threat to the health and safety of themselves or others. Direct threat is defined as a significant risk of substantial harm to health or safety that cannot be eliminated or reduced by reasonable accommodation. There must be a high probability of substantial harm, not a slightly increased risk or a speculative or remote risk. The conclusion must be based on facts rather than on generalizations, fears, stereotypes, or paternalism. It must also be based on the employee's current status rather than on the possibility of future incapacity. Factors to be considered include:

- A. Duration of risk;
- B. Nature and severity of potential harm;
- C. Likelihood that harm will occur;
- D. Imminence of potential harm; and,
- E. Reasonable accommodation must be considered to eliminate or reduce risk below the point of significant harm.

IV. Reasonable Accommodations:

- A. Reasonable accommodations are any change or adjustment to a job or work environment, or the manner in which the work is customarily performed, that permits an employee with a disability to perform the essential functions of the job; or modifications that enable the employee to enjoy equal benefits and privileges of employment as enjoyed by employees without disabilities. Reasonable accommodations may include:
 - 1. Making existing facilities accessible to individuals with disabilities;
 - 2. Obtaining or modifying equipment, furniture, etc.;
 - 3. Modifying examinations, training materials, or policies;
 - 4. Altering when or how an essential job function is performed;
 - 5. Modifying work schedules;
 - 6. Job restructuring, which may include reassigning work between coworkers, assigning uninterrupted work times, eliminating non-essential tasks, or designing procedures for task accomplishment;
 - 7. Providing qualified readers or interpreters;
 - 8. Reassignment to a vacant position (only expected when there is no reasonable accommodation that will enable the employee to perform the essential functions of their current position).

- B. It is typically expected that a person with a disability will request reasonable accommodation when needed. If an employer observes an apparent need where no accommodation has been requested, the employer may inquire regarding the need.

- C. Determining Appropriate Reasonable Accommodation(s)
 - 1. When a qualified employee with a disability has requested a reasonable accommodation to assist in the performance of a job, the following steps are recommended as needed:
 - a) Analyze the particular job involved and determine its purpose and essential functions;
 - b) Consult with the individual with a disability to ascertain the precise job-related limitations imposed by the individual's disability and how those limitations could be overcome with a reasonable accommodation;
 - c) In consultation with the employee, identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position; and
 - d) Consider the preference of the employee and select and implement the accommodation that is most appropriate considering the interests of the employee and the employer.

 - 2. The focus of this interactive process must be on the abilities and limitations of the individual, not on the employee's diagnosis or specific physical or mental condition. People with the same condition may have very different abilities and limitations resulting from that condition.

 - 3. The agency may seek assistance in this process from the Bureau of Vocational Rehabilitation, and recommendations from a healthcare provider. Note: the decision regarding whether the employee has a disability as defined by the ADA, and what type(s) of accommodation to offer, is to be made by the employer.

- B. Reassignment to a vacant position must be considered when there are no reasonable accommodations that will allow an employee with a disability to continue performing the essential functions of the current position. The employee must:
 - 1. Meet the qualifications for the position;
 - 2. Be able to perform the essential functions of the new position, with or without reasonable accommodation.

3. The employee does not need to be the best qualified individual for the position in order to obtain it as a reassignment.
4. If there is no vacant position to which the employee could be transferred within a reasonable period of time, the employer may consider medical separation under NAC 284.611.
5. The employee and agency may mutually agree to a transfer either on a temporary or permanent basis, when such a transfer would be preferable to accommodating the employee in the current position.

D. Employers are not obligated to provide accommodations that would cause an "undue hardship." Case-by-case assessment is required to assess whether a requested accommodation would cause undue hardship, which refers to significant difficulty or expense in relationship to the resources of the employer. Accommodations that are unduly extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of a business are not required.

V. Employee Responsibility:

It is the employee's responsibility to request a reasonable accommodation before performance suffers or conduct problems occur. The employer is not responsible for the absence of reasonable accommodations during the time it was not aware of the need. The employee or his/her representative (family member, friend, health professional or other representative) should request accommodations through their supervisor or personnel representative. The employee must let the employer know that s/he needs an adjustment or change at work due to a medical condition, but is not required to phrase the request in ADA terms. The request may be oral or written.

VI. Employer Responsibilities:

- A. If the employer believes an employee's disability poses a *direct threat*, the employer is to obtain related medical information (see section B).
- B. Confidentiality of medical information:
 1. All information obtained from medical examinations and inquiries must be maintained in a separate secure file and must be treated as a confidential medical record. This requirement applies to medical records for all employees, regardless of disability status.

It is the employee's choice whether to disclose his/her disability and/or accommodations made by the employer due to the disability.

The employer may not disclose the fact that the employee has a medical condition, or that a reasonable accommodation is being implemented.

- C. ADA provides that an employer cannot require a qualified individual with a disability to accept an accommodation that is neither requested nor needed by the individual.
- D. Employers cannot refuse to let an individual with a disability return to work on the basis that the employee is not fully recovered from injury, unless s/he:
 - 1. Cannot perform the essential functions of the job s/he holds, with or without reasonable accommodations; or
 - 2. Would pose a significant risk of substantial harm that could not be reduced to an acceptable level with reasonable accommodation (i.e., "direct threat").
- E. If the employer cannot make the reasonable accommodation, they must demonstrate how imposing this particular accommodation will cause an undue hardship. The State as a whole, rather than an individual agency, is seen as the employer in this determination.

VII. Performance Evaluations, Discipline and Conduct Standards:

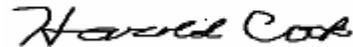
- A. An employee with a disability should be held to the same standards of performance as other employees in the same type of position, with or without reasonable accommodation.
- B. An employer may not discipline or terminate an employee with a disability if the employer has refused to provide a requested reasonable accommodation that did not constitute an undue hardship, and if the reason for this employee's unsatisfactory performance is a direct result of the employer's lack of accommodation.
- C.
- D. If an employee with a disability is unable to perform essential functions of his/her position because of refusing an accommodation offered by the employer, the employer may treat any resulting performance or conduct problems as they would if there were no disability.
- E. An employer may discipline an individual with a disability for violating a work place conduct standard even if the misconduct resulted from a disability, providing the workplace standard is job-related for the position in question and consistent with business necessity (e.g., workplace violence, P&P's).

VIII. Family Medical Leave Act and ADA:

Not all employees protected by the ADA are entitled to FMLA leave. An FMLA "serious health condition" may not be an ADA "disability". Employees must be independently "eligible" for FMLA. The MHDS Family and Medical Leave policy 5.028 should be followed to assure the employee has a qualifying illness covered under FMLA. If ADA and FMLA both exist they should be administered separately and according to policy. The agency may request information relating to the particular serious health condition as defined in the FMLA and will not be in violation of the ADA.

IX. Workers' Compensation and ADA:

An injured worker is protected by the ADA if they meet the ADA definitions of "an individual with a disability" and "qualified individual with a disability." The fact that an employee is awarded workers' compensation benefits does not automatically establish that this person is protected by ADA.



Administrator

Attachment:
ADA Interactive Process Letter

Effective Date: 9/21/07
Date Revised: 8/26/09, 3/18/10
Date Reviewed:
Date Approved by MHDS Commission: 9/21/07, 3/18/10

Employee Name, Title
Address

Dear Employee:

You have indicated to your supervisor[s] that you may have a condition that qualifies as a disability under the Americans With Disabilities Act Amendments Act of 2008 ("ADA"). The State of Nevada takes seriously its obligations as an employer in dealing with employees who are qualified individuals with disabilities as defined by the ADA. If you do qualify, and if you request a reasonable accommodation in order to perform all the essential functions of your job, the State will consider your request along with the appropriate documentation you submit. Therefore, in order to determine whether you are covered under the ADA, please have your doctor or primary health care provider review this letter and the attached essential functions and work performance standards, and provide the answers to the following questions no later than [allow at least two weeks - date].

1. Does the employee have a physical or mental impairment that substantially limits one or more major life activities (such as hearing, seeing, caring for oneself, walking, performing manual tasks, reading, speaking, learning or working) or a record of such impairment?
2. In order to determine whether the impairment substantially limits a major life activity, consider the following:
 - a. What is the nature and severity of the impairment?
 - b. What is the expected duration of the impairment?
 - c. What is the expected permanent or long-term impact of the impairment?
3. If there is an impairment that substantially limits a major life activity, can the employee perform all the essential functions of his/her job (see attached) with or without a reasonable accommodation? What, if any, are the specific work performance/functional limitations due to the disability? If a reasonable accommodation (such as modifying job tasks, modifying performance expectations, modifying work schedules, etc.) is necessary, please describe the accommodation and the basis for it in detail.

Additional information may be required from your health care provider once this initial information is submitted. The ADA regulations refer to this as "the interactive process."

Your cooperation during the interactive process is appreciated. If you have any questions, please contact [personnel manager] at [telephone number].

Enclosures

cc: