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PRACTICAL ADVICE FOR DRAFTING AND IMPLEMENTING REASONABLE ACCOMMODATION PROCEDURES UNDER EXECUTIVE ORDER 13164

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INTRODUCTION

On July 26, 2000, the tenth anniversary of the enactment of the Americans with Disabilities Act (ADA), Executive Order (E.O.) 13164 was issued, for the first time requiring that all executive branch federal agencies institute procedures for processing reasonable accommodation requests under Section 501 of the Rehabilitation Act of 1973.¹ The purpose of such procedures is to provide employees as well as supervisors and managers with an easy-to-understand, step-by-step explanation of the reasonable accommodation process.

E.O. 13164 allows each agency to design procedures that best suit its organizational needs. However, it requires that the procedures include certain basic elements, such as the processing of accommodation requests, time limits, rules for requesting supporting medical information, confidentiality, information tracking, and informal dispute resolution.² E.O. 13164 also requires that each agency (and agency component, if issuing separate procedures) submit its procedures, and any modifications it later makes to them, to the Equal Employment Opportunity Commission (EEOC).

To assist agencies in fulfilling their obligations, EEOC issued the *Policy Guidance on Executive Order 13164: Establishing Procedures to Facilitate the Provision of Reasonable Accommodation* (Oct. 20, 2000) (“13164 Policy Guidance”), available at http://www.eeoc.gov/policy/docs/accommodation_procedures.html. In addition, EEOC provided extensive voluntary technical assistance on drafting and implementation of agencies’ procedures. EEOC staff provided individualized feedback to the more than one hundred agencies and sub-components submitting procedures for review. The feedback provided detailed comments on procedures that appeared not to comply with the requirements of E.O. 13164, as well as applicable best practices set forth in the *13164 Policy Guidance*. Many agencies revised their procedures in accordance with EEOC’s feedback, and re-submitted their procedures to EEOC for further technical assistance.

¹See Executive Order 13164, *Requiring Federal Agencies to Facilitate the Provision of Reasonable Accommodation*, 65 Fed. Reg. 46565, 2000 WL 1114943 (2000).

²Under E.O. 13164, Section 3, agencies are also required to notify their collective bargaining representatives and to bargain over their reasonable accommodation procedures, to the extent required by law.

This report summarizes the key drafting and implementation tips offered to agencies. The report is divided into ten sections, addressing each of the different aspects of the reasonable accommodation process outlined in E.O. 13164, as well as effective dissemination procedures and training. Each section:

- contains a summary of the relevant basic elements of E.O. 13164 as interpreted in the *13164 Policy Guidance*, including required provisions and best practices;
- provides practical drafting advice, based on the common pitfalls EEOC found in agency reasonable accommodation procedures;
- includes illustrative EEOC federal sector appellate decisions issued under Section 501 of the Rehabilitation Act, available at www.eeoc.gov/federal/decisions.html; and
- provides training and implementation tips.

We hope that federal agencies will use the guidance in this report when drafting, revising, and implementing reasonable accommodation procedures.³ In addition, private sector and state and local government employers, although not covered by E.O. 13164, can voluntarily adopt reasonable accommodation procedures to ensure compliance with Title I of the Americans with Disabilities Act (ADA), using the EEOC *13164 Policy Guidance* and this report to design, draft and implement reasonable accommodation procedures.⁴

E.O. 13164 requires that each federal agency submit to EEOC any future modifications to its reasonable accommodation procedures. Therefore, EEOC will continue to provide technical assistance to agencies on drafting and implementation concerns.

³Issuance of procedures by federal agencies as well as appropriate dissemination and training is necessary in order to comply with Management Directive 715. See “Final Steps: Adoption, Dissemination, and Training,” *infra* at Section X.

⁴Since the Rehabilitation Act was amended in 1992 to apply the standards in the ADA to complaints of discrimination by federal employees or applicants for employment, the standards regarding provision of reasonable accommodation under Title I of the ADA and Section 501 of the Rehabilitation Act are the same.

I. INITIATING THE ACCOMMODATION PROCESS

BASIC ELEMENTS

(See 13164 Policy Guidance at questions 1-6):

Explain that accommodation requests can be made by either an applicant or an employee.

Make clear that accommodation requests can be either oral or in writing.

Do not require that accommodation requests use any particular words (like “reasonable accommodation” or “disability”).

Provide the request confirmation form as an attachment to the procedures if the procedures require an applicant or employee to complete such a form for record-keeping purposes.

Require immediate processing of all oral accommodation requests. Do not permit waiting until a written request or record-keeping confirmation form is received.

If requiring a request confirmation form, do not require an employee who needs a type of reasonable accommodation on a repeated basis (e.g., a sign language interpreter) to submit the written form each time the accommodation is needed.

Do not require that an accommodation request be made at a certain time.

Allow more than one agency official to be designated to receive accommodation requests.

Include information on all the agency officials to whom an applicant or employee may make an accommodation request.

Allow a request for reasonable accommodation to be made by either the individual with a disability or a family member, health professional, or other representative acting on the individual's behalf.

DRAFTING TIPS

Be clear who must follow the procedures.

Specify the agency components to which the procedures apply. Designate authority for handling requests and provide sufficient instructions and headquarters contact information in sub-component procedures. Remember that both agency and agency sub-component procedures, if different, must be submitted to EEOC under E.O. 13164.

Clearly communicate that processing of oral requests should begin immediately, even if written confirmation has not yet been received.

State that agency officials must begin processing the request as soon as it is received. Even if the agency's procedures require a requester to submit a request confirmation form, make clear in the procedures that officials may not wait for receipt of the form to begin processing the request. Processing the request means taking whatever steps are necessary to act on the request. This may include referral of the request to the authorized decision maker, communicating with the requester to clarify the request, obtaining and exchanging information with the requester to the extent necessary regarding needs and alternatives, searching for solutions, consulting agency and outside resources, determining whether the requester is an individual with a disability, evaluating possible accommodations, issuing a decision on the request, and if granted, providing the accommodation. This is often called the "interactive process," referring to the mutual sharing of information and ideas between the requester and the employer.

Indicate that failure to initiate the processing of an oral request may result in undue delay in providing reasonable accommodation in violation of the Rehabilitation Act.

Do not exceed limits of request confirmation forms.

State that a request for reasonable accommodation must let the employer know that an adjustment or change at work for a reason related to a medical condition is needed. The request can be made orally and does not require the use of "magic words" such as "reasonable accommodation" or "disability. While further information may be obtained by the employer when evaluating the request, nothing more is required for the individual's statement to legally constitute an accommodation request. For this reason, limit the information sought on request confirmation forms to name, contact information, date of request, date of form, office, accommodation requested and reason for request. See Attachment A (sample form for confirmation of reasonable accommodation requests). Additional information (including medical documentation) reasonably needed to process the accommodation request may be sought during the interactive process.

A written "confirmation of request" form that asks for more information than is necessary to constitute an accommodation request, or that requires submission of medical documentation, will exceed the purpose of a written confirmation form, which is merely to

track request information. See § VIII, “Information Tracking.” Asking for more information than is necessary to track the request poses two legal risks: (1) managers or supervisors may not realize that an oral or written request as defined above is sufficient to trigger the agency’s obligation to evaluate the request for accommodation; and (2) a form that automatically asks for supporting medical information may violate the Rehabilitation Act rule that medical information can only be sought in support of an accommodation request where the disability and/or the need for accommodation is not obvious or already known.

Accurately label any confirmation forms used.

Entitle the form “Confirmation of Request for Reasonable Accommodation” or in some other way make clear that it is merely for keeping track of requests. This will help to ensure that neither supervisors nor requesters mistakenly conclude that an oral request is insufficient.

Explain that accommodation can be requested at any time.

Affirmatively state that an individual may request accommodation whenever he or she chooses. For example, the request does not have to be made as soon as a disability affects work performance, or by some other specified time. Remind managers and supervisors of their obligation to process any accommodation request, regardless of when it is received.⁵ *13164 Policy Guidance* at question 4.

Specify a range of officials to whom an accommodation request can be made.

Make clear that the agency’s obligation to consider an individual’s request begins when the request is made to any of the following (see *13164 Policy Guidance* at question 5):

- his/her supervisor;
- a supervisor or manager in his/her immediate chain of command;

⁵However, reasonable accommodation is always prospective, so an employer is not required to excuse performance problems or past misconduct (in violation of a rule that is job-related for the position in question and consistent with business necessity) that has occurred prior to the accommodation request, even if the problem resulted from the individual’s disability. *EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act* (as revised Oct. 17, 2002) (“*Reasonable Accommodation Guidance*”) at questions 35-36. Once a request is made, an employer must make reasonable accommodation to enable an otherwise qualified employee with a disability to meet such a conduct standard in the future, barring undue hardship, except where the punishment for the violation that has already occurred is termination. *Id.* at question 36.

- the EEO office;
- any other office designated by the agency to oversee the reasonable accommodation process; or,
- in connection with the application process, any agency employee with whom the applicant has contact.

Requiring accommodation requests to be made only to one particular agency official, or only within one's chain of command, will incorrectly suggest to other supervisors and managers that they have no obligation to act on any other requests. To the contrary, the procedures should spell out for managers and supervisors the steps they are required to take after receiving an accommodation request they are not designated to handle, such as referring it within a specified time frame to the agency official who is authorized to take action on the request. (See Section II, below, for suggested language).

IMPLEMENTATION TIPS

Help managers and supervisors recognize requests.

Train managers and supervisors how to recognize reasonable accommodation requests so that they can refer the requests to the designated decision maker or issue a decision themselves if authorized to do so. Managers and supervisors should be specifically instructed to consider whether there is any accommodation obligation before denying any request for an adjustment or change at work for a reason related to a medical condition. See *EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act* (as revised October 17, 2002) ("*Reasonable Accommodation Guidance*") at questions 1-2, available at <http://www.eeoc.gov/policy/docs/accommodation.html>.

Training should address what legally constitutes an accommodation request. It should also include examples of frequently overlooked accommodation requests, such as requests for unpaid leave for an employee's own medical condition beyond the amount of leave available under the Family and Medical Leave Act (FMLA). See *Reasonable Accommodation Guidance* at question 21 (individual with a disability requesting 13 weeks of leave might be entitled to the 12 weeks maximum allotted under FMLA and the additional week as a reasonable accommodation under ADA). Other frequently overlooked accommodation requests include those that state the accommodation need but do not include a proposed solution, or requests that implicate both the Rehabilitation Act and other requirements (e.g., employer light duty programs or workers' compensation).

Case Illustration: *Lawler v. United States Postal Service*, EEOC Appeal No. 01A01535 (Mar. 27, 2003). After employee exhausted "temporary" light duty, employer placed him in off duty status rather than

accommodating his disability, on the ground that he did not submit forms specifically stating that he was requesting a permanent light duty position within the allotted time frame. The Commission held that failure by complainant to fill out particular forms or to request a permanent light duty position does not absolve the agency of its duty to provide a reasonable accommodation under the Rehabilitation Act where the agency was on notice of the need for accommodation. The evidence demonstrated that had the agency engaged in the interactive process, it could have identified and provided to complainant a reasonable accommodation without undue hardship.

Be aware of special considerations regarding sign language interpretation.

Make sure managers and supervisors are aware that in some situations where a hearing-impaired employee is known to need a sign language interpreter, the agency may need to provide the interpreter for crucial events such as training, safety talks, discussions on work procedures, policies or assignments, and disciplinary actions, whether or not the employee asks.

Case Illustration: *Feris v. Environmental Protection Agency*, EEOC Appeal No. 01934828 (August 10, 1995), *request for reconsideration denied*, EEOC Request No. 05950936 (July 19, 1996). Agency violated the Rehabilitation Act where it was aware that contract interpreter arrangements it had made (rather than hiring staff interpreters) were not providing complainant and others with interpretive services on important work-related occasions, yet almost three years elapsed before any concrete action was actually taken by the agency to improve the situation. The Commission held that for "a severely hearing impaired employee who can sign, reasonable accommodation, at a minimum, requires providing an interpreter for safety talks, discussions on work procedures, policies, and assignments, and for every disciplinary action so that the employee can understand what is occurring at any and every crucial time in his employment career, whether or not he asks for an interpreter."⁶

⁶See also *Holton v. United States Postal Service*, EEOC Appeal No. 01991307 (Nov. 7, 2002) (agency failed to show it would have posed an undue hardship to postpone training session when interpreter service cancelled); *Saylor v. United States Postal Service*, EEOC Appeal No. 01A05281 (November 14, 2002) (agency found liable for denial of reasonable accommodation in violation of the Rehabilitation Act where deaf employee was denied a sign language interpreter for a 45-minute safety meeting); *Wait v. Social Security Administration*, EEOC Appeal No. 01A11629 (October 2, 2003) (agency violated Rehabilitation Act by denying deaf employee's requests for an interpreter at the twice-monthly staff meetings; it was not an equally effective alternative accommodation to instead provide complainant with a meeting agenda and suggest she sit close to the supervisor); *Taylor v. Department of the Interior*, EEOC Appeal No.

Process even unconfirmed oral requests.

Train managers and supervisors to begin processing oral requests immediately, even if the agency is still awaiting a written confirmation from the requester. A written confirmation form from the requester is not needed either to evaluate and issue a decision on the request or to provide accommodation. If the requester does not fill out a required written confirmation form, an agency official can do so, since the form is merely to track requests.

Educate managers on the process for handling accommodation requests, including what to do when they receive a request they are not authorized to handle.

Train managers and supervisors on their responsibilities with respect to any accommodation request they receive. This training should include instructions on what steps to take if they receive an accommodation request they are not authorized to handle themselves, *i.e.*, the name(s) of the individual to whom they should refer the request, and the time frame for doing so. Additionally, some agencies require that the disability program manager or an equivalent overseer of the process be notified of each such referral, so that he or she can follow up to ensure the request is timely processed and all information is tracked.

01A34292 (May 3, 2004) (agency's denial of qualified note taker or captioning service for deaf employee attending out-of-town training constituted denial of reasonable accommodation).

II. Processing Accommodation Requests

BASIC ELEMENTS

(See 13164 Policy Guidance at questions 7-12):

Explain how the agency will handle a request for accommodation, including specifically what steps will be followed, and identify from whom the individual will receive a final decision.

Authorize first-line supervisors to process and approve requests whenever possible.

Require decision makers to communicate with the individual requesting accommodation where the specific limitation, problem, or barrier is unclear; an effective accommodation is not obvious; or where the parties are choosing between different possible reasonable accommodations.

List resources that individuals with disabilities and agency decision makers can consult to identify and evaluate possible accommodations.

DRAFTING TIPS

Identify decision makers and steps for referring request to authorized official.

Specify the decision maker and explain the steps managers and supervisors must follow when they receive an accommodation request on which they are not authorized to act. Ensure that the procedures: (1) identify who (by position title, such as first-line supervisor, office director, etc.) is authorized to make decisions on different types of requests; (2) explain specifically what types of requests (e.g., ordering assistive technology, removing architectural barriers, etc.) should be forwarded to the identified decision maker; and (3) provide for a referral system with time frames.

For example, procedures can include the following language: "As a first step, the staff member who receives the request must determine who will be responsible for handling it. If it is another staff member, s/he should forward it to the appropriate official within three days of receipt, with a copy of the referral to the disability program manager." In addition, the procedures could require that the staff member promptly notify the requester to whom the request has been referred for handling.

Case Illustration: *Wheeler v. Department of the Army*, EEOC Appeal No. 01A30318 (Sept. 30, 2004). Agency liable under Rehabilitation Act for denial of accommodation based on undue delay in responding to employee's original accommodation request. Official took no action on

employee's request for reserved accessible parking space because it was not within his authority to grant the request, and failed to forward it to the agency official who was authorized to act.

Explain who will communicate with the requester.

Explain who will notify the individual requesting accommodation of the decision to grant or deny it. Where an agency cannot designate in the procedures exactly which official will be processing an accommodation request because this is not known in advance, instead create a standardized mechanism for case-by-case notification. For example, procedures might include language of the following type: "Once a request is received by the decision maker, he or she will (1) acknowledge the request; (2) explain to the applicant or employee that s/he will be making the decision on the request; and (3) describe what will happen in the processing of the request."

Designate back-ups.

Provide for back-up decision makers, to permit the agency to continue receiving and processing requests and providing reasonable accommodations when the primary decision maker is unavailable.

Describe step-by-step how to evaluate and resolve an accommodation request.

Explain the steps for handling an accommodation request, including engaging in an "interactive process" to obtain and share information. These steps might include referral of the request to the authorized decision maker (see above), communicating with the requester to clarify the request, obtaining and exchanging information with the requester to the extent necessary regarding needs and alternatives, searching for solutions, consulting agency and outside resources, determining whether the requester is an individual with a disability, evaluating possible accommodations, issuing a decision on the request, and if granted, providing the accommodation.

Require an interactive process where needed, and explain how to do it.

Require the decision maker to communicate with the individual where the specific limitation, problem, or barrier is unclear, where the effective accommodation is not obvious, or when choosing among different possible accommodations.

Make clear that by failing to engage in this "interactive process" in appropriate circumstances, the agency risks providing an accommodation that is ineffective, or improperly denying reasonable accommodation, because it is unaware of alternatives that the individual with the disability or an outside expert might have suggested if consulted. Provide guidance to managers and supervisors or designated decision makers regarding how to engage in the "interactive process" upon receipt of an accommodation request.

List outside sources for information and advice.

List resources for identifying and evaluating possible accommodations that individuals with disabilities and agency decision makers may consult, and provide specific contact information. Encourage decision makers to use these resources as needed.

Denials based on “undue hardship” must consider overall employer resources.

State clearly that the overall resources and options available to the employer are legally relevant in determining whether a requested reasonable accommodation poses an undue hardship, not just the budget or resources of an individual segment, sub-component, or division within an agency or department.

Case Illustration: *Feris v. Environmental Protection Agency*, EEOC Appeal No. 01934828 (Aug. 10, 1995), *request for reconsideration denied*, EEOC Request No. 05950936 (July 19, 1996). Agency failed to establish that hiring a full-time staff interpreter to accommodate complainant and eight other deaf employees at headquarters would have posed an undue hardship, where the agency was on notice that its contract interpreter arrangement was ineffective. In reaching this conclusion, the Commission cited, among other things, evidence that the agency failed to request personnel ceiling relief to permit hiring a staff interpreter, and that the decision not to hire a staff interpreter was attributable to management priorities for allocating resources, not the budget shortfall or partial hiring freeze.

Require upper-level review before denying an accommodation based on “undue hardship.”

Require that before denying an accommodation request based on cost or operational difficulty, a decision maker must obtain review from a designated office or individual higher in the chain of command who can determine whether the proposed accommodation would in fact pose an undue hardship. Because the employer's overall resources must be considered, an agency may want to have potential decisions to deny a requested accommodation due to undue hardship made by higher-level officials with more expertise and broader authority than the official authorized to grant an accommodation request. All denials of accommodation requests must be in writing and must provide a specific explanation of the grounds for denial. See Section VII, below.

Specify who is responsible for actually providing any accommodations granted.

Specify who is responsible for actually providing an accommodation after the agency grants a request. For example, the procedures could specify that a supervisor who grants a request is also responsible to follow through and make any necessary arrangements to ensure that the accommodation is provided within the applicable time limit. Otherwise, an agency risks insufficient follow-through after a request is granted.

Avoid conflicts of interest.

Where an agency's EEO staff participates in deciding accommodation requests, an actual or perceived conflict of interest may arise if a requester subsequently files an EEO complaint and the EEO staff is responsible for determining if their own actions were in accordance with the Rehabilitation Act.

Therefore, do not assign agency EEO staff a decision making role in processing reasonable accommodation requests. Limit the role of EEO staff, if any, to administrative tasks such as referring requests to a designated decision maker or collecting and tracking information on requests.

In the alternative, if EEO staff is given a decision making role in accommodation requests, provide in the procedures that the staff member will recuse him/herself from handling any EEO complaint on the same matter. Recusal is a safeguard against actual or apparent conflicts of interest, and can be used even by small agencies that have only one or two EEO staff members by designating an agency official outside the EEO office who will be authorized to handle EEO matters where a potential conflict of interest arises.

For example, procedures might include language of the following type: "Any EEO Office staff member who has any involvement in processing a request for reasonable accommodation should recuse him/herself from investigating or decision making on any subsequent EEO counseling contact or complaint challenging the agency's handling of the accommodation request."

IMPLEMENTATION TIPS

Consider making certain accommodations available to any employee.

Although an agency is not legally required to provide an accommodation unless the requesting applicant or employee is an "individual with a disability" under the Rehabilitation Act, it may offer accommodation without making this determination. In fact, many employers choose to implement procedures for uniformly granting requests for certain types of accommodations that can be readily and inexpensively provided without determining whether the requester is an individual with a disability. In such instances, an agency is free to notify the individual that no determination has been made

as to whether he or she is an individual with a disability, and the agency's decision to grant the request is not based on the Rehabilitation Act requirements.

Designate an agency expert as a resource and coordinator.

Consider whether it would be useful to have a disability program manager or similar designated expert to serve as a resource and oversee the agency's reasonable accommodation process. See *13164 Policy Guidance* at question 9. Some agencies have designated a single individual to coordinate for the agency overall, and others have additionally assigned individuals to serve that function at the regional, local, or facility level. Agencies have utilized such individuals in a variety of ways, including:

- to advise managers and supervisors who are processing accommodation requests;
- to decide particular requests referred to them due to level of difficulty or nature of the request;
- to request and/or review medical documentation to determine if a requester is an "individual with a disability";
- to maintain medical information in confidential files, and oversee information tracking; and
- to provide ongoing assessment of the agency's reasonable accommodation program.

Provide training for all agency officials responsible for processing requests.

Make sure appropriate training is provided to all agency officials responsible for (1) determining whether the requester is an "individual with a disability" under the Rehabilitation Act, and (2) engaging in the interactive process.

Search for a solution even if the employee has not proposed one.

Where an individual requesting reasonable accommodation is able to identify the problem, but not a solution, some employers make the mistake of refusing to act on such requests, or placing the burden solely on the employee to find an accommodation solution. Instead, the employer should engage in the interactive process and try to identify a solution, consulting outside resources if necessary.

Search for alternatives if the employee's proposed solution is ruled out.

Where an individual requests a particular accommodation that is not effective or would pose an undue hardship, or is otherwise not legally required (e.g., removing an essential job function), some employers mistakenly discontinue the interactive process. The employer should continue the interactive process, exploring alternatives until either a reasonable accommodation is found or the employer determines no accommodation is available.

Ensure that managers and supervisors are aware of the range of possible types of accommodations, including: making physical modifications to the workplace; acquiring equipment or adaptive devices; modifying existing equipment; modifying policies; restructuring a job (swapping or eliminating marginal functions), granting part-time work, modifying a work schedule; providing sign language interpreters or readers, granting leave (use of accrued paid leave, or permitting unpaid leave), permitting telework, or reassignment to a vacant position.

Require decision makers to consult with a higher-up before denying a request based on undue hardship.

Require decision makers to consult with an appropriate official before denying a proposed accommodation on the basis of cost or operational difficulty. Consultation with the appropriate official in the chain of command, the disability program manager, or other individual who can determine whether, based on the employer's resources overall, the proposed accommodation would pose a significant difficulty or expense will reduce the risk that managers or supervisors will deny a request based solely on the resources of their individual office budgets or based merely on speculation.

Case Illustration: *Calero-Cerezo v. U.S. Department of Justice*, 355 F.3d 6 (1st Cir. 2004). Summary judgment for employer denied, where, among other things, there was no evidence offered in support of the employer's generalized contention that plaintiff's accommodation request for a transfer was unworkable and unprecedented, and there was no evidence that any variants of plaintiff's proposal were considered or would have posed an undue hardship.

Consider implementing centralized funding mechanisms.

Consider implementing funding mechanisms that will avoid charging individual offices for the cost of accommodations, for example:

- enter into a partnership with the Department of Defense Computer/ Electronic Accommodations Program (CAP), <http://www.tricare.osd.mil/cap>, which offers assistive technology, devices, and services **at no cost** to the partner agency;

- establish a central fund for all accommodation costs not covered by a CAP contract, based on funds allocated by the agency or by annual contributions from the sub-components (note: in the absence of a central fund, agencies might consider advising their sub-components to anticipate expenses for reasonable accommodations and include those expenses as a part of their budget planning requests each fiscal year);
- create a central pool of staff assistant slots, not included in a requesting office's personnel ceiling, to provide readers, interpreters, and other assistants throughout the agency, as authorized under the non-competitive Schedule A authority, 5 C.F.R. § 213.3102 (II). See, e.g., Attachment B (sample provision for making staff assistant slots available).

Review and revise policies that may hinder prompt processing of requests.

Review and modify, in advance of a specific request, any policies that might affect the agency's ability to respond promptly to requests for reasonable accommodation. See *13164 Policy Guidance* at question 15. Among the policies that should be reviewed are those that affect:

- purchasing or leasing of equipment;
- hiring of, or contracting for, readers, interpreters, or other assistants; and
- flexibility to approve leave or to restructure work schedules.

Ensure individualized assessment of safety risks.

Ensure that managers and supervisors conduct an individualized assessment of objective information before denying a requested accommodation because of safety concerns. An individualized assessment requires a case-by-case determination of whether the specific risk posed by the individual poses a high probability of substantial harm. Agencies may also require that proposed denials based on direct threat concerns be reviewed by specially-trained higher-level officials.

Case Illustration: *Evanovich v. United States Postal Service*, EEOC Appeal No. 07A20029 (May 13, 2004). Agency violated Rehabilitation Act by refusing to accommodate employee who needed to perform his duties while sitting in a chair rather than standing. While the agency asserted that the requested accommodation of a chair would present a tripping hazard to other employees, it made no effort to evaluate the actual risk of potential harm from use of a chair in the particular location where this employee worked, and whether an alternative effective accommodation existed.

III. TIME LIMITS

BASIC ELEMENTS

(See 13164 Policy Guidance at questions 13-14):

Specify the time frame in which a reasonable accommodation request will be granted or denied, absent extenuating circumstances.

Make time limits for processing requests *and providing* reasonable accommodations as short as reasonably possible.

Require expedited processing when necessary, for example to enable an individual to apply for a job or to participate in a specific agency activity that is scheduled to occur shortly.

List any “extenuating circumstances” that may cause delay, limited to factors that could not reasonably have been anticipated or avoided in advance of the request for accommodation.

Require that the individual be notified of the reason for any delay in responding to a request for or providing a reasonable accommodation, and that the individual be kept informed of the date on which the agency expects to complete the process.

Require the agency to investigate and implement temporary measures to assist the individual with a disability during any period of processing delay.

DRAFTING TIPS

Make time limits mandatory.

Specifically designate a time period within which all accommodation requests must be processed absent extenuating circumstances. Use of mandatory time frames as required by E.O. 13164 is more effective than mere goals in ensuring timely processing of requests and avoiding delays which can constitute a denial of accommodation in violation of the Act.

Require prompt processing regardless of time limit.

Make clear that no matter what period of time is allowed, requests should be handled as promptly as possible. The procedures should explain and illustrate through examples

that a failure to process some accommodation requests in a timely fashion may result in “undue delay” in providing requested accommodation to a qualified individual with a disability, thereby violating the Rehabilitation Act.

Case Illustration: *Reagins v. United States Postal Service*, EEOC Appeal No. 01974481 (Apr. 6, 2000). Agency liable for denial of reasonable accommodation where it initially placed complainant on leave without pay rather than search for a reassignment within her medical restrictions. The Commission noted that reassignment could have been provided by the agency when accommodation was originally requested, as demonstrated by the fact that once complainant started to collect workers’ compensation lost wages benefits and it became in the agency’s financial interest to search for a vacancy, the agency then immediately offered her a permanent limited duty position.

Use a reasonably quick time period.

Provide a reasonably quick time period for processing requests. To address any concerns about time that elapses while awaiting requested documentation or information from the requester or his/her health care provider, the procedures can provide that the time limit will be frozen while waiting, and that the clock will restart when the response is received. Whether by using such a mechanism or by another means, make sure that some designated time period applies once the agency receives the response.

For example, an agency’s procedures provide that a decision on a request for reasonable accommodation will be made within 15 days of the request, but that the time limit is frozen while awaiting requested medical information. Three days after an accommodation is requested, the agency determines that documentation is needed to substantiate whether the employee has a disability and needs the requested accommodation. If the agency requests the needed medical documentation that day, the agency will have 12 days within which to process and make a decision on the accommodation request once it has received appropriate documentation from the employee. This procedure allows an agency to exclude from the time frame the period during which it is waiting to receive information it has requested from the individual or his or her health care provider, but also ensures that once the agency receives medical information, a time frame applies to its review of the material, completion of the interactive process, and issuance of a decision on the accommodation request.

State when each time frame begins to run, and make sure there are no gaps.

State with specificity when each time frame begins to run. For example, if an agency’s procedures set a 15-day time limit for processing the request, but fail to specify whether the time limit begins to run from the date the request was initially made or the date it is referred to the decision maker, there will be uncertainty as to how the time limit applies.

Make sure that time periods apply throughout the processing of an accommodation request. For example, if an agency's procedures set a 15-day time limit for processing the request, but freeze the time limit indefinitely while reviewing medical documentation, there will be an open-ended gap in the process during review of medical documentation to which no time limit applies at all. This undermines the purpose of having time frames in place to avoid undue delay in processing requests.

It may also be helpful to specifically designate someone, such as a Disability Program Manager, to oversee adherence to these time frames and to identify this person in the procedures. See "Designate an agency expert as a resource and coordinator" in Section II, above (discussion of some possible roles and responsibilities for a Disability Program Manager or equivalent position).

Define "extenuating circumstances" to time frames clearly.

Define the term "extenuating circumstances," see *13164 Policy Guidance* at question 14, and give examples which illustrate that the concept is very limited, including only such things as waiting for needed medical information from an individual's health care provider, waiting for equipment that is on back-order and cannot be otherwise obtained, or other factors outside an agency's control.

Absent clearly and accurately defined examples of what are and are not extenuating circumstances, managers may think departure from the established time limits is warranted where in fact it is not. For instance, listing review of needed medical documentation as an "extenuating circumstance" is misleading. Waiting to receive medical documentation from a third party can be an "extenuating circumstance," but review of the documentation once received should be subject to a time limit. Similarly, it would be erroneous to list the conduct of an examination or review of medical documentation from the agency's own physician or other expert as an "extenuating circumstance." Generally, delay by the agency's chosen medical expert is not an "extenuating circumstance," because he or she is generally considered to be within the agency's control, even if performing services on a contract basis. In any event, as a practical matter, if delays are occurring with respect to review by a contract medical expert, the agency may address this in the terms of the contract.

Require expedited processing where needed.

Require expedited processing in the event of a time-sensitive accommodation request, and provide examples in the procedures to assist managers and supervisors in understanding when this might be necessary, such as to enable an individual to apply for a job or participate in a specific agency activity that is scheduled to occur shortly.

Require processing of request and delivery of accommodation within the designated time limit.

Provide a time limit that addresses both the time allotted to process the request and deliver or implement the accommodation if granted. Procedures that are unclear about whether the processing time allotted includes actual delivery of the accommodation may result in undue delay.

Provide for temporary measures in the event of delay.

Require that in the event of a delay, the responsible agency official should confer with the individual and consider providing temporary measures.

For example, where an employee requests a schedule or shift change as an accommodation due to the side effects of medication, the agency is free to grant the accommodation on a temporary, provisional basis while considering the request, *e.g.*, obtaining medical documentation and determining whether or not the employee is an individual with a disability who needs the accommodation requested. Similarly, where the agency grants a request for certain computer software for a vision-impaired individual but there will be a delay in obtaining it, the services of a reader might be provided in the interim. In a situation where the agency agrees to make certain structural renovations, it might permit the individual to telework temporarily until the facility is accessible. Including examples such as these in procedures will assist managers and supervisors to understand when and how temporary measures might be utilized.

IMPLEMENTATION TIPS

Wherever possible requests should be processed in less time than the limit allows.

Ensure that managers and supervisors understand that the provision of a maximum time limit in the procedures does not mean that they can or should take the full length of time allotted in each case. Many requests can be processed within days, and failure to do so could constitute undue delay in violation of the Rehabilitation Act. Encourage agency officials not to take the full processing time allotted in a situation where a request can be readily granted and provided in much less time than the procedures allow.

IV. MEDICAL INFORMATION

BASIC ELEMENTS

(See 13164 Policy Guidance at questions 16-19):

Require medical documentation only when needed to evaluate the accommodation request.

Explain that the agency may request, and an individual requesting an accommodation is required to provide, appropriate medical information related to the functional impairment and the requested accommodation where the disability and/or need for accommodation is not obvious or already known.

Explain that the agency has a right to request relevant supplemental medical information if the information submitted does not clearly explain (i) the nature of the disability, or (ii) the need for the reasonable accommodation, or otherwise clarify how the requested accommodation will assist the employee to perform the essential functions of the job or to enjoy the benefits and privileges of the workplace, or assist an applicant with the application process.

Explain the agency's right to have medical information reviewed by its own medical expert at the agency's expense.

Identify the types of medical information or documentation the decision makers may and may not request.

Encourage decision-making officials to identify to an individual who has provided insufficient documentation the information still needed.

State the circumstances under which the agency may ask the individual requesting accommodation to be examined by the agency's physician at the agency's expense.

DRAFTING TIPS

Expressly warn against asking for medical information in support of every accommodation request.

Expressly state that the agency may not request medical information in support of every accommodation request, but rather may require reasonable information/documentation where the disability and/or need for accommodation is not obvious or otherwise known. Make clear that when this standard is met, the agency may only seek that documentation which is reasonably necessary to establish that the requester is an individual with a disability and needs the accommodation requested.

Don't inadvertently ask for more medical information than is permitted.

Be careful not to inadvertently require medical documentation beyond what the Rehabilitation Act allows. For example, procedures should not:

- use a form (either a confirmation of request form or a request for medical information form) that requires every individual requesting accommodation to submit supporting medical documentation;
- advise decision makers to ask for medical information far exceeding what is reasonably necessary to assess a given request, such as all information defined in 5 C.F.R. § 339.102;
- use a medical release form that constitutes a general release for all medical records; or,
- use a pre-printed form to request medical information that is not reasonably necessary to determine if the requester is an individual with a disability and needs accommodation.

For example, an error can easily occur if in response to an employee's request for a different type of keyboard due to carpal tunnel syndrome, the decision maker requests medical information using a pre-printed general medical inquiry form that asks for medical information on a variety of unrelated physical and mental conditions. If the decision maker fails to delete those portions of the form that ask for records not related to carpal tunnel syndrome, even unintentionally, the agency has violated the Rehabilitation Act, because that medical information is not relevant to the accommodation request.

Case Illustration: *McDonnell v. Navy*, EEOC Appeal No. 01A04036 (Sept. 13, 2002). Agency violated Rehabilitation Act by delaying provision of accommodation for four weeks while it awaited supporting medical

documentation from employee, where employee had previously submitted sufficient documentation to demonstrate he was an individual with a disability and needed the accommodation requested. Agency violated Rehabilitation Act both by making an improper disability-related inquiry for unnecessary medical documentation, and by delaying the provision of accommodation in the meantime.

Case Illustration: *Gamelin v. United States Postal Service*, EEOC Appeal No. 01A22307 (Jan. 5, 2004). The Commission rejected the agency's contention that diabetic employee's doctors' letters were insufficiently detailed to show her need for a schedule change. The letters explained that a change from her current six-day, split-shift schedule to a five-day, 40-hour per week schedule would permit her to avoid serious hypoglycemic reactions by allowing her to get adequate rest and have more regularly scheduled times for eating, sugar testing, and insulin management.

Explain what types of medical information or documentation can be sought.

Explain the types of medical information or documentation that may be requested where necessary to determine if the requester is an individual with a disability and needs the accommodation requested, see *13164 Policy Guidance* at question 17, such as:

- the past, present, and expected future nature, severity and duration of the impairment (e.g., functional limitations, symptoms, side effects of any treatments, etc.);
- the activities the impairment limits;
- the extent of the limitations; and
- why the individual requires reasonable accommodation or the particular reasonable accommodation requested, and how the reasonable accommodation will assist the individual to apply for a job, perform the essential functions of the job, or enjoy a benefit of the workplace.

Avoid using any pre-printed medical information forms where possible. Instead, provide in the procedures that the agency official processing the request should determine on a case-by-case basis whether information regarding any of the above is reasonably needed in order to determine if the requester is an individual with a disability and needs the accommodation requested.

Address how and when to obtain review by the agency's own medical expert.

Explain in detail when and how agencies may have medical documentation reviewed by a medical expert and/or require the requester to go to a health care provider of the

agency's choice. Explain that the agency will pay the cost of having its own medical expert conduct an examination or review documentation.

For example, procedures might include language of the following type: "If the information submitted in response to the agency's initial request for medical documentation does not clearly explain the nature of the disability or the need for reasonable accommodation, the agency may request reasonable supplemental documentation. The processing official should explain to the requesting individual *why* the documentation is insufficient and what information is needed. The processing official can allow the individual an opportunity to provide the information, or may alternatively ask the individual to sign a limited release and then either submit a list of specific questions to the individual's health care professional or have the agency's own physician contact the individual's health care provider. **If this does not result in sufficient information**, the agency may require the requester to go to a health care provider of the agency's choice **at the agency's expense.**" See *generally 13164 Policy Guidance* at text preceding question 16 and at questions 18-19.

"Freeze" time frames while awaiting medical information.

Provide in the procedures that when a decision maker requests appropriate medical documentation all time frames freeze until the requester provides the documentation the agency has requested. This will address any agency concerns about timely processing, yet will avoid misleading agency officials to conclude incorrectly that they have no legal obligation to take action on the accommodation request if the medical documentation is submitted by the requester after the agency's specified deadline. See Section III (Time Limits, Drafting Tips).

Require action even if medical information is received belatedly.

Make clear that while agency officials need not provide an accommodation while awaiting reasonably requested supporting medical documentation, they must continue processing the accommodation request when the documentation is ultimately received, even if the documentation is received after the time limit expires.

Consider different ways to utilize a disability program manager or other expert.

To ensure that medical documentation requests are handled appropriately, some agencies' procedures provide that if a supervisor concludes medical information is necessary to process an accommodation request, the request must be forwarded to a trained disability program manager, reasonable accommodation coordinator, or other trained expert to review the request and, if necessary, obtain and review the medical documentation. This method has three benefits:

- it leaves difficult legal decisions (such as whether a requester is a qualified individual with a disability) in the hands of someone with training and experience in the area;
- it avoids the discomfort some individuals experience when they have to provide medical information to supervisors and managers; and
- it lessens the chance that the Rehabilitation Act's confidentiality rules will be violated because it limits the number of people with access to confidential medical information.

Some agencies provide that while supervisors are not required to do so, they may choose to seek the assistance of a trained agency expert to help obtain and/or evaluate the documentation.

IMPLEMENTATION TIPS

Training on when and how much medical information may be requested.

It is imperative that all staff given authority to review and evaluate medical documentation receive training on how to comply with the Rehabilitation Act rules regarding when and how much medical information and documentation may be required. An agency must also ensure that all staff are aware that failing to abide by these rules is an independent violation of the Rehabilitation Act, and that the rules protect all applicants and employees, not just individuals with disabilities. See *Reasonable Accommodation Guidance* at question 8 and examples.

Case Illustration: *Vindiola v. United States Postal Service*, EEOC Appeal No. 07A20046 (Sept. 16, 2003). While the agency's initial request for fitness-for-duty information was reasonable following complainant's seizure at work during which he was injured, the agency exceeded the scope of the disability-related inquiries and medical exams permitted under the Rehabilitation Act when it made follow-up requests for unrelated medical history records, including all mental health records.

Training on legal definition of "individual with a disability."

All individuals authorized by an agency's procedures to determine whether a requester is an "individual with a disability" under the Rehabilitation Act should receive specific advance training regarding the definition of disability, taking into account relevant EEOC guidance and federal sector appellate decisions as well as U.S. Supreme Court case law.

Advance explanation to management regarding what information they will be provided.

If an agency adopts a system in which any needed medical information will be reviewed and assessed solely by a disability program manager or other expert, it should provide appropriate advance explanation to supervisors and managers about the implications. Due to Rehabilitation Act confidentiality rules, the expert will not share with them the details of the medical condition, but rather will only share information the supervisor or manager needs to know, *i.e.*, about the necessary work restrictions and accommodations. Absent this explanation to supervisors and managers, they may mistakenly believe that they have a right to learn the specifics of an employee's medical condition and may be reluctant to cooperate in providing accommodation without receiving this information.

V. CONFIDENTIALITY OF MEDICAL INFORMATION

BASIC ELEMENTS

(See 13164 Policy Guidance at questions 20 and 26):

Explain that all medical information must be kept confidential, meaning maintained in files separate from the individual's personnel file.

Explain to whom and under what circumstances medical information may be disclosed.

DRAFTING TIPS

List the limited circumstances under which confidential medical information may be disclosed.

Specify that medical information, whether obtained through the reasonable accommodation process or otherwise, may only be disclosed in the limited circumstances described at question 20 of the Policy Guidance. Explain that "medical information" includes the fact that someone is receiving an accommodation or has a disability, as well as any information concerning an individual's medical condition or history, regardless of whether the information was provided voluntarily or in response to a disability-related question. See *EEOC Enforcement Guidance: Preemployment Disability-Related Inquiries and Medical Examinations* (Oct. 10, 1995), available at <http://www.eeoc.gov/policy/docs/preemp.html>.

Procedures that provide less detailed explanations of the confidentiality obligation by, for example, stating only that medical information must be kept confidential or may be disclosed "only in accordance with applicable law," do not provide specific enough information to allow managers and supervisors to understand their confidentiality obligations.

Provide examples.

Ensure that supervisors and managers understand how the confidentiality rules apply by providing real-life examples in the procedures, such as:

- An individual requests assistive technology for his computer as a reasonable accommodation. The technology expert at the agency is consulted regarding the appropriate computer equipment. Although the expert may need to know the requester's functional limitations to determine technical needs, she likely does not

need to know the requester's underlying medical condition unless she is also the decision maker on whether the request will be granted.

- An individual requests and receives a special lumbar-support chair as a reasonable accommodation. The other employees in the office ask their supervisor why their coworker is receiving "special treatment." The supervisor would violate the Rehabilitation Act if he revealed that the coworker received the chair as a reasonable accommodation. There is no exception to the Rehabilitation Act's requirement of confidentiality that allows disclosure of medical information in this circumstance. See *Reasonable Accommodation Guidance* at question 42 (discussing suggested ways managers can respond to co-worker questions of this sort, for example by emphasizing that it is the employer's policy to assist any employee who encounters difficulties in the workplace, pointing out that many of the workplace issues confronted by employees are personal, and that, in these circumstances, it is the employer's policy to respect employee privacy).

IMPLEMENTATION TIPS

Train managers and supervisors to forward medical documentation to the appropriate official.

Managers and supervisors should be trained to submit any medical documentation obtained in connection with a request for reasonable accommodation to the designated manager who maintains medical documentation for the employer. If no such individual has been designated, the manager or supervisor should be instructed to keep the documentation in a separate medical file.

Educate managers and supervisors about the extent of the confidentiality obligation.

Make sure supervisors and managers understand that the Rehabilitation Act confidentiality obligation is not limited to the medical diagnosis. The fact that someone has requested an accommodation, or that something is being provided as an accommodation, also constitutes confidential medical information. See *Reasonable Accommodation Guidance* at question 42.

Make clear that the confidentiality obligation applies to everyone.

Supervisors and managers should be made aware that the confidentiality rules apply to all applicants and employees, whether or not they are individuals with disabilities. This actually simplifies matters for supervisors and managers because they can operate on the premise that all medical information, regardless of how they obtained it or to whom it applies, must be kept confidential.

Case Illustration: *Higgins v. Department of the Air Force*, EEOC Appeal No. 01A13571 (May 27, 2003). The Commission held, in accordance with EEOC policy guidance, that the Rehabilitation Act requires managers and supervisors to keep confidential the medical information of all applicants and employees, whether or not they are individuals with disabilities.

Emphasize that violations of the confidentiality requirement are serious.

Supervisors and managers may feel that the confidentiality requirement is less stringent than the Rehabilitation Act's other nondiscrimination requirements and that a violation of confidentiality will not result in liability for the agency. Training should emphasize that a violation of the Rehabilitation Act's medical confidentiality requirements exposes the agency to liability, even if no other action is taken against the individual whose medical information is disclosed.

Case Illustration: *Brunnell v. United States Postal Service*, EEOC Appeal No. 07A10009 (July 5, 2001). Agency violated Rehabilitation Act by placing medical information in complainant's official personnel file. The agency was ordered to pay compensatory damages and complainant's costs incurred in prosecuting the claim, as well as to train managers and supervisors on the relevant law and to consider disciplinary action against the responsible agency official.

Case Illustration: *Tyson v. United States Postal Service*, EEOC Appeal No. 01992086 (Aug. 23, 2002). Agency violated Rehabilitation Act by disclosing complainant's medical condition and symptoms in a letter mailed to other installations seeking a vacancy to which he could be reassigned. Although the other managers needed to be alerted to complainant's work restrictions and his need for accommodation, they had no need to know his condition or symptoms.

Case Illustration: *Gianikos v. United States Postal Service*, EEOC Appeal No. 01A21992 (Oct. 16, 2003), *request for reconsideration denied*, EEOC Request No. 05A40208 (Jan. 22, 2004). Complainant's former supervisor violated the Rehabilitation Act by disclosing complainant's medical condition on an evaluation form sent to other facilities at which he was seeking a position. Complainant did not need to show that the disclosure was the cause of his non-selection to establish a violation of the Rehabilitation Act. The agency was ordered to remove all documentation containing medical information from complainant's work folder and train various management officials, with the issues of compensatory damages and attorney's fees remanded to an Administrative Judge.

VI. REASSIGNMENT

BASIC ELEMENTS

(See 13164 Policy Guidance at questions 21-23):

Explain when reassignment will be required as a reasonable accommodation if the agency determines that no reasonable accommodation will permit the employee with a disability to perform the essential functions of his or her current position.

Identify the agency personnel responsible for conducting the search for a reassignment, and require these individuals to consult with the affected employee as necessary to determine:

- whether there are limits on the search the employee would like the agency to conduct;
- whether the employee is qualified for a particular job; and
- whether the employee would need a reasonable accommodation to perform the essential functions of a new position.

DRAFTING TIPS

Explain that reassignment may not be considered unless the employee cannot be accommodated in his or her current position, or the employee voluntarily agrees.

Make clear that reassignment is the accommodation of last resort, *i.e.*, unless the employee voluntarily agrees, the employer cannot resort to reassignment unless the employee cannot be accommodated in his or her current position. State that an individual with a disability should not be required to accept a reassignment if there is an accommodation that would allow the individual to remain in his or her current job and does not pose an undue hardship. For more detailed information regarding the nature and scope of the reassignment obligation, see *Reasonable Accommodation Guidance* at text preceding question 25 and at questions 25-31.

Case Illustration: *Coe v. United States Postal Service*, EEOC Appeal No. 01A20972 (Aug. 11, 2003). Agency violated Rehabilitation Act by reassigning complainant to another facility due to her medical restrictions (knee arthritis), instead of providing the accommodations she had requested to enable her to remain in her clerk job (a ramp and a modified

work schedule). The agency failed to show that the requested accommodations would have posed an undue hardship. Unless the employee voluntarily agrees to the reassignment as an accommodation solution, reassignment is the accommodation of last resort. *See also Angin & Angin v. United States Postal Service*, EEOC Appeal Nos. 01980302 and 01982262 (Aug. 22, 2001).

Explain when reassignment must be considered prior to termination.

Reassignment must be considered as an accommodation prior to terminating an individual with a disability who cannot be accommodated in his or her current position. *See 13164 Policy Guidance* at questions 21-22. Reassignment should be considered even if not specifically requested, if the employee cannot be accommodated in his or her position. For more detailed information, *see Reasonable Accommodation Guidance* at text preceding question 25 and at questions 25-31.

Case Illustration: *Philippe v. Social Security Administration*, EEOC Appeal No. 01A12653 (May 15, 2003). Agency violated Rehabilitation Act when it denied complainant's accommodation request for transfer that would permit her to have a shorter commute needed to avoid exacerbating her seizure disorder. Compensatory damages available because agency failed to make good faith effort to accommodate.

Case Illustration: *Rowlette v. Social Security Administration*, EEOC Appeal No. 01A10816 (Aug. 1, 2003). Complainant, a claims examiner with stress-induced eating disorder, could no longer perform an essential function of her job (interviewing members of the public). Agency violated Rehabilitation Act by terminating complainant instead of reassigning her. Testimony by complainant, her former supervisor, and an agency staffing specialist established that various positions for which complainant was qualified were available for reassignment during the relevant time period.

Include practical guidance regarding reassignment.

Offer detailed practical guidance regarding reassignment as an accommodation to ensure that decision makers and requesters have a clear idea of what will happen in the process and when it will happen. Address details such as:

- the circumstances when it would be appropriate to consider reassignment as a reasonable accommodation;
- the process for initiating a search and developing search parameters, including identifying the decision maker responsible for conducting the search, the type of search that would be done (*i.e.*, identifying vacant positions which were equivalent to, or at a lower grade than the previous position, that the individual with the

disability was qualified to perform), and the scope and the duration of the vacancy search;⁷

- extending an offer for the reassigned position;
- processing acceptance or rejection of the agency offer; and
- what happens when no positions are identified (*i.e.*, a final decision explaining why an accommodation cannot be provided).

Insufficient practical guidance on the steps for considering reassignment may lead a supervisor or manager mistakenly to conclude that a reassignment is not available in a particular situation, resulting in a violation of the Rehabilitation Act.

Case Illustration: *Dalton v. Department of the Interior*, EEOC Appeal No. 01940693 (Jan. 4, 1995). When complainant's office was transferred from Washington, D.C. to Colorado, he advised the agency that medical risks posed by his disability precluded a cross-country move. Prior to issuing a termination notice, the deciding official never personally investigated reassignment in the Washington area, but merely assumed that Personnel had looked into it. The Chief of the Personnel Division stated that he "may" have talked with appellant about the possibility of locating an alternative position for him in Washington, and that he was "pretty sure" that there were no positions open with the bureau in the Washington DC area. Under these facts, EEOC held that the agency failed in its duty to reasonably investigate options for reassigning appellant to a vacant position for which he was qualified.

Emphasize the importance of communication.

Emphasize the importance of communicating with the employee to find out his or her current job tasks and skills level, the limits the employee may want to place on the vacancy search, and the other types of jobs within the agency that the employee may be able to perform. Lack of communication between the decision maker and requester may lead to a mistaken denial of an accommodation request (if, for example, the decision maker is not fully aware of the requester's skills and abilities) or to unnecessary use of

⁷An employer's obligation to offer reassignment to a vacant position is not limited to vacancies within an employee's office, branch, agency, department, facility, personnel system (if the employer has more than a single personnel system), or geographical area. This is true even if the employer has a policy of prohibiting transfers from one office, branch, agency, department, facility, personnel system, or geographical area to another. The extent to which an employer must search for a vacant position will be an issue of undue hardship. See *Reasonable Accommodation Guidance* at question 27.

resources (such as searching for a vacant position in geographic area(s) to which the requester is unwilling to be reassigned even if a vacancy is available there).

IMPLEMENTATION TIPS

Ask what reassignments the requester is willing to accept.

If reassignment is being considered, the responsible official should explain to the employee why the agency has concluded that the employee cannot be accommodated in his or her current position, and should find out (and document) what parameters, if any, the employee has with respect to the reassignment. For example, the responsible official should inquire whether:

- the employee is willing to be reassigned outside the facility or outside the commuting area, and if so, to what locations;
- the employee is willing to be reassigned to a different type of position for which he or she may be qualified, and if so to what type(s);
- the employee is willing to be reassigned to a different sub-component of the department, and if so, to which one(s);
- the employee is willing, if no position is available at his or her current grade level, to be reassigned to a lower-grade position, and if so, down to what grade.

The agency can then conduct the search within the parameters the employee has set. This method takes account of the employee's preferences while at the same time potentially minimizing the scope of the vacancy search the employer needs to conduct.

VII. DENIALS OF REASONABLE ACCOMMODATION

BASIC ELEMENTS

(See 13164 Policy Guidance, Sections F and H):

Explain that denials of requests for reasonable accommodation must be in writing and specifically explain the reasons a request was denied (e.g., why the medical documentation is inadequate to establish that the individual has a disability or needs reasonable accommodation, why the requested accommodation would not be effective, or why the accommodation would pose an undue hardship).

Make clear that denials of requests for reasonable accommodation must include information about the individual's right to file an EEO complaint and to invoke other statutory processes, as appropriate, as well as the availability of the informal dispute resolution process.

DRAFTING TIPS

Explain that denials of reasonable accommodation requests must specifically describe the reasons for denial.

Provide a clear explanation in the procedures as to how specific the reasons for denial should be. Attach to the procedures a form entitled "Denial of Reasonable Accommodation Request" and state that decision makers should use the attached form. Decision makers should be told that in addition to checking the box that correctly describes the reasons for the denial in question (e.g., "accommodation ineffective," "accommodation would cause undue hardship," etc.), they should provide a detailed description of *why* the accommodation would, for example, be ineffective or cause undue hardship. See, e.g., Attachment C (sample denial form that requires decision makers to fill out a checklist as well as provide a narrative explanation).

Procedures which fail to provide a denial form or which use a less detailed form may cause supervisors and managers to omit or misstate important information.

Explain that denials must be in writing and include certain specific information.

State that denials, in addition to being in writing and including the specific reasons for the denial, must also include the following information:

- the identity of the employee or office that made the decision;

- if a specific requested accommodation has been denied and another offered in its place, the reasons for the denial and the reasons the agency believes the chosen accommodation will be effective;
- information about the individual's right to file an EEO complaint and to invoke other statutory processes; and
- information about the availability of the informal dispute resolution process.

The best way to make certain that all denials are in writing and include the necessary information is to require decision makers to use a pre-printed denial form and attach that denial form to the procedures. See, e.g., Attachment C (sample denial form with pre-printed information regarding filing rights; this form can be adapted to incorporate information regarding an agency's own particular reconsideration procedures).

IMPLEMENTATION TIPS

Encourage decision makers to consult with an expert.

Notwithstanding that an agency's procedures may give supervisors or managers the authority to deny requests on their own, a good practice even for experienced decision makers is never to deny an accommodation request without consulting a knowledgeable resource. The agency's disability program manager or other reasonable accommodation expert has access to numerous resources and usually has more experience than other decision makers at the agency. While a particular requested reasonable accommodation may seem like a clear case of "undue hardship" to a supervisor or manager, the agency expert, with access to objective information about the agency's available resources, may see the situation differently.

Case Illustration: *Forde v. United States Postal Service*, EEOC Appeal No. 01A12670 (Oct. 9, 2003). Agency failed to establish that restructuring complainant's job by assigning certain marginal functions to co-workers would pose an undue hardship. The agency manager testified that assigning someone else the tasks that complainant could not perform "would impact [the manager's] operation," but provided no description of the impact. The manager also testified that this accommodation would affect other employees, and that she was "not saying that it could not be done, but it's normally not done." The Commission found these to be conclusory statements that were insufficient to demonstrate the impact the agency's operations or its other employees. In reaching this conclusion, the Commission also relied on testimony establishing that employees traded functions on a frequent basis and that employees had, in the past, been excused from various duties.

VIII. INFORMATION TRACKING

BASIC ELEMENTS

(See 13164 Policy Guidance at Section G):

Ensure that the agency's systems of record keeping track the processing of requests for reasonable accommodation.

Explain that while the an agency is not required to maintain a particular record keeping system, documents, or databases, all agencies must be able to identify at least the following information:

- **the number of reasonable accommodations, by type, that have been requested for the application process and whether those requests have been granted or denied;**
- **the jobs (occupational series, grade level, and agency component) for which reasonable accommodations have been requested;**
- **the types of reasonable accommodations that have been requested for each of those jobs;**
- **the number of reasonable accommodations, by type, for each job that have been approved, and the number of accommodations, by type, that have been denied;**
- **the number of requests for reasonable accommodations, by type, that relate to the benefits or privileges of employment, and whether those requests have been granted or denied;**
- **the reasons for denial of requests for reasonable accommodation;**
- **the amount of time taken to process each request for reasonable accommodation; and**
- **the sources of technical assistance that have been consulted in trying to identify possible reasonable accommodations.**

DRAFTING TIPS

Require the completion of a Reasonable Accommodation Reporting Form.

Explain that after a reasonable accommodation request is granted or denied, the decision maker should complete a Reasonable Accommodation Reporting form, which tracks all the required information. Attach the form to the procedures. Provide instructions on who is to complete the form and when, and that it be sent, along with any other documentation collected during the reasonable accommodation process, to an individual designated to cull and maintain the information, such as the agency disability program manager. See, e.g., Attachment D (sample Reasonable Accommodation Reporting Form).

Provide time periods for maintaining records.

Explain that records related to a particular individual who has requested accommodation will be maintained for the duration of the employee's tenure. This helps ensure that an individual is not asked to provide medical information that has previously been submitted.

Explain that information or any cumulative records used to track the employer's performance with regard to reasonable accommodation will be retained for at least three years. Tracking performance over a three year period is critical to enable an agency to assess whether it has adequately processed and provided reasonable accommodation.

IMPLEMENTATION TIPS

Designate someone to maintain and analyze the collected information.

Assign someone to analyze the information collected to measure the performance of a reasonable accommodation program, determine areas that require further training or revisions to the procedures, and hold decision makers accountable.

For example, some agencies have implemented a computerized tracking system for all the information required by E.O. 13164, with the ability to generate statistical reports analyzing the data in various ways.

IX. INFORMAL DISPUTE RESOLUTION

BASIC ELEMENTS

(See 13164 Policy Guidance, at Section H):

Encourage the use of informal dispute resolution processes that allow individuals with disabilities to obtain prompt reconsideration of denials of reasonable accommodation.

DRAFTING TIPS

Provide for multiple levels of reconsideration.

Make clear that the reconsideration process should provide for reconsideration by the original decision maker AND a second level of reconsideration by an agency official who was not involved in the original decision. Providing independent review will enhance applicants' and employees' trust in the fairness of the process.

Explain the right to file an EEO complaint and the other statutory rights.

Explain that decision makers should use a pre-printed denial form, attached to the procedures, whenever a request is denied. In addition to explaining the reasons for the denial, as discussed above, the form contains a complete statement of the notice of rights, such as the right to file a complaint in the EEO process. This avoids the risk of the decision maker forgetting to provide the notice of rights in some cases, or of incorrectly explaining the rights. It also ensures that the requester will be aware that invoking the reconsideration process does not toll the time frame for filing an EEO complaint, or other time frames which begin running upon receipt of the agency's original decision denying accommodation.

IMPLEMENTATION TIPS

Ensure alternative dispute resolution process is accessible.

All alternative dispute resolution processes must be accessible to individuals with disabilities. Such employer-provided dispute resolution mechanisms are a benefit or privilege of employment for those employees eligible to participate, and as such the employer may be obligated to provide reasonable accommodation if requested for the dispute resolution process itself.

X. Final Steps: Adoption, Dissemination and Training

E.O. 13164 required that federal agencies establish reasonable accommodation procedures and submit them to the EEOC by July 2001. Any agency that has not submitted procedures to the EEOC, made any necessary revisions based on EEOC's feedback, and completed final adoption and issuance of reasonable accommodation procedures is not in compliance with E.O. 13164. In addition, since maintaining a model EEO program under EEOC Management Directive 715 requires adoption and dissemination of complete reasonable accommodation procedures, an agency that has failed to do so is not in compliance with the Management Directive.

EEOC's *13164 Policy Guidance*, at § I.C., explains that each agency must make copies of its reasonable accommodation procedures readily available to all employees, and must also educate employees about its procedures.

While agencies are not required to state in the procedures how dissemination or training on the procedures will occur, agencies may choose to do so. Regardless, each agency must take whatever steps are necessary to disseminate their reasonable accommodation procedures, and any accompanying forms, in a variety of ways to ensure access by all applicants and employees, and to provide appropriate training.

- Suggested means of dissemination include providing copies to new employees as part of the standard orientation process, and providing copies and updates to all managers, supervisors, and human resources staff at periodic meetings or equal employment opportunity training, posting the procedures in appropriate locations on the agency's Intranet and/or on its Internet website, and making the procedures available in designated locations such as agency libraries, EEO offices, and personnel/human resources offices.
- Where procedures are posted electronically, it may be helpful to e-mail a notice to all employees providing a web link to the document. In addition, periodic e-mails to all employees or specifically for managers and supervisors, containing special directions, reminders, or updates is a helpful means of effectively disseminating the procedures and operational advice.
- As detailed throughout the prior sections of this report, appropriate training on each step in an agency's procedures, and the relevant Rehabilitation Act provisions as interpreted in EEOC federal sector appellate decisions and in EEOC guidance, is critical to successful implementation. Such training should be provided to all agency staff that has any role in the reasonable accommodation process.

CONCLUSION

Written procedures are an excellent tool for managing the reasonable accommodation process and ensuring compliance with Section 501 of the Rehabilitation Act. Many of the strategies outlined in this report will enhance agency efforts to be model employers pursuant to 29 C.F.R. § 1604.203(a) and to achieve the federal sector EEO goals set forth in EEOC Management Directive 715.

The development and maintenance of reasonable accommodation procedures pursuant to E.O. 13164 is an ongoing process, in which agencies will learn through practical experience what revisions may be useful, and periodically update their existing procedures. With respect to any future changes to agency procedures, the Executive Order requires that each agency or agency component submit to the EEOC any modifications to its reasonable accommodation procedures at the time the modifications are adopted. EEOC is available on an ongoing basis, however, to provide technical assistance as requested to agencies that are contemplating revisions to their procedures.

Submission of procedures as well as requests for technical assistance should be directed to:

Director, Federal Sector Programs
Office of Federal Operations
Equal Employment Opportunity Commission
1801 L Street, N.W.
Washington, D.C. 20507
Telephone: (202) 663-4599
TTY: (202) 663-4593

July 2005

SELECTED EEOC RESOURCES ON DISABILITY ISSUES

Policy Guidance on Exec. Order 13164: Establishing Procedures to Facilitate the Provision of Reasonable Accommodation

http://www.eeoc.gov/policy/docs/accommodation_procedures.html

Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the ADA (as revised, 10/17/02)

<http://www.eeoc.gov/policy/docs/accommodation.html>

Enforcement Guidance: Disability-Related Inquiries & Medical Examinations of Employees Under the ADA

<http://www.eeoc.gov/policy/docs/guidance-inquiries.html>

Policy Guidance on Exec. Order 13145: To Prohibit Discrimination in Federal Employment Based on Genetic Information

<http://www.eeoc.gov/policy/docs/guidance-genetic.html>

Instructions for EEOC Field Offices: Analyzing ADA Charges After Supreme Court Decisions Addressing "Disability" and "Qualified"

<http://www.eeoc.gov/policy/docs/field-ada.html>

Enforcement Guidance on Application of the ADA to the Contingent Workers Placed By Temporary Agencies & Other Staffing Firms

<http://www.eeoc.gov/policy/docs/guidance-contingent.html>

Enforcement Guidance on the ADA and Psychiatric Disabilities

<http://www.eeoc.gov/policy/docs/psych.html>

Enforcement Guidance on the Effect of Representations Made in Applications for Benefits on the Determination of Whether a Person is a "Qualified Individual with a Disability" Under the ADA

<http://www.eeoc.gov/policy/docs/qidreps.html>

Enforcement Guidance: Workers' Compensation & the ADA

<http://www.eeoc.gov/policy/docs/workcomp.html>

Enforcement Guidance: Preemployment Disability-Related Questions & Medical Examinations

<http://www.eeoc.gov/policy/docs/preemp.html>

Compliance Manual Section 902: Definition of the Term Disability

<http://www.eeoc.gov/policy/docs/902cm.html>

Interim Enforcement Guidance on the Application of the ADA to Disability-Based Distinctions in Employer Provided Health Insurance
<http://www.eeoc.gov/policy/docs/health.html>

FMLA, ADA, and Title VII
<http://www.eeoc.gov/policy/docs/fmlaada.html>

Q&A: Intellectual Disabilities in the Workplace & the ADA
http://www.eeoc.gov/facts/intellectual_disabilities.html

Q&A: Epilepsy in the Workplace & the ADA
<http://www.eeoc.gov/facts/epilepsy.html>

Q&A: Diabetes in the Workplace & the ADA
<http://www.eeoc.gov/facts/diabetes.html>

Job Applicants and the ADA
<http://www.eeoc.gov/facts/jobapplicant.html>

Telework as a Reasonable Accommodation
<http://www.eeoc.gov/facts/telework.html>

The ADA: A Primer for Small Business
<http://www.eeoc.gov/ada/adahandbook.html>

Obtaining and Using Employee Medical Information as Part of Emergency Evacuation Procedures
<http://www.eeoc.gov/facts/evacuation.html>

Interim Report on Best Practices for the Employment of People with Disabilities in State Government
http://www.eeoc.gov/initiatives/nfi/int_states_best_practices_report.html

How to Comply with the ADA: A Guide for Restaurants & Other Food Service Employers
http://www.eeoc.gov/facts/restaurant_guide.html

Q & A for Mediation Providers: Mediation and the ADA
http://www.eeoc.gov/mediate/ada/ada_mediators.html

Q & A for Parties to Mediation: Mediation and the ADA
http://www.eeoc.gov/mediate/ada/ada_parties.html

**CONFIRMATION OF REQUEST
FOR REASONABLE ACCOMMODATION**

1.

Applicant's or Employee's Name

Applicant's or Employee's Tel. No.

Today's Date _____

Employee's Office

Date of Request _____

2. **ACCOMMODATION REQUESTED.** *(Be as specific as possible, e.g., adaptive equipment, reader, interpreter)*

3. **REASON FOR REQUEST.**

If accommodation is time sensitive, please explain:

Return Form to Disability Program Manager

(Disability Program Manager will assign number)

4. **Log No.:** _____

ATTACHMENT B:
SAMPLE LANGUAGE REGARDING CREATION OF STAFF ASSISTANT SLOTS

1. **STAFF ASSISTANT SLOTS.** The [name of federal agency] will make staff assistants available, if appropriate. Staff assistants are sign language interpreters, readers, and assistants who perform physical tasks that an employee cannot perform because of a disability. For example, an investigator with limited or no upper extremity mobility may need assistance in physically organizing a charge file. The investigator will perform the essential functions of the position -- e.g., conduct the investigation and draft documents -- and the assistant would only perform the physical task.
2. **REQUEST FOR STAFF ASSISTANT SLOTS.** Requests for hiring a staff assistant must be referred to the Disability Program Manager from the staff member who received the request. The Disability Program Manager will first determine whether staff assistants already hired by the agency can fulfill an employee's needs. The Disability Program Manager also will determine if an employee's needs could be met by contracting for services (e.g., a contract interpreter), and if so, will make the necessary arrangements. If the Disability Program Manager approves the request to hire a staff assistant, the employee's Office Director, in consultation with the Office of Human Resources, if necessary, should prepare a Request for Personnel Action (SF-52) and a position description. The employee with a disability must play an integral part in the interview and selection process of an interpreter, reader, or assistant.
3. **USE OF STAFF ASSISTANTS.** The staff assistant slots are to be used **only** to hire interpreters, readers, and assistants as a reasonable accommodation for employees with disabilities. Staff hired shall be shared to provide assistance to more than one employee with a disability, where appropriate. These staff assistants **may not** be assigned any other duties unless the person they were hired to assist has no work for them to perform at that time. Before assigning other duties to the assistant, the employee with the disability shall be consulted to determine when assistant services are not needed. If the supervisor is not the employee with a disability, s/he must consult with the employee with a disability regarding the staff assistant's performance evaluation.

In no case should a staff assistant be called upon -- by management or by the employee(s) to whom he or she is assigned -- to perform the essential functions of the job held by the employee with the disability.

4. **HIRING AUTHORITY.** Readers, interpreters, or assistants hired to fill approved positions may be appointed under the non-competitive Schedule A authority, 5 C.F.R. 213.3102 (II). Persons with disabilities hired as readers, interpreters, or assistants may also be hired under the 213.3102 (u) authority.
5. **RELEASE OF POSITIONS.** When the need for a staff assistant is reduced or eliminated, the Administrative Officer or Personnel Management Specialist shall notify the Disability Program Manager, who will take appropriate steps.

ATTACHMENT C: SAMPLE FORM
DENIAL OF REASONABLE ACCOMMODATION REQUEST

(Must complete numbers 1-4; complete number 5, if applies)

1. Name of Individual requesting reasonable accommodation:
2. Type(s) of reasonable accommodation requested:
3. Request for reasonable accommodation denied because (may check more than one box):
 - ☐ Accommodation Ineffective
 - ☐ Accommodation Would Cause Undue Hardship
 - ☐ Medical Documentation Inadequate
 - ☐ Accommodation Would Require Removal of an Essential Function
 - ☐ Accommodation Would Require Lowering of Performance or Production Standard
 - ☐ Other (Please identify) _____
4. Detailed Reason(s) for the denial of reasonable accommodation (Must be specific, e.g., *why* accommodation is ineffective or causes undue hardship):
5. If the individual proposed one type of reasonable accommodation which is being denied, but rejected an offer of a different type of reasonable accommodation, explain both the reasons for denial of the requested accommodation and why you believe the chosen accommodation would be effective.

(Over)

If an individual wishes to request reconsideration of this decision, s/he may take the following steps:

[outline reconsideration steps in agency procedures, e.g.:

- *First, ask the decision maker to reconsider his/her denial. Additional information may be presented to support this request.*
- *If the decision maker does not reverse the denial:*
 - *and the decision maker was the individual's supervisor, the individual can ask the Office Director to do so.*
 - *and the decision maker was the Office Director, the individual can ask the Disability Program Manager to do so.*
 - *and the decision maker was the Disability Program Manager, the individual can ask the official designated by the Director of the Equal Employment Opportunity Office to do so.]*

7. If a federal applicant or employee wishes to file an EEO complaint, or pursue MSPB and union grievance procedures, s/he must take the following steps:

- For an EEO complaint pursuant to 29 C.F.R. § 1614, contact an EEO counselor in the Equal Employment Opportunity office *within 45 days from the date of this notice of denial of reasonable accommodation*; or
- For a collective bargaining claim, file a written grievance in accordance with the provisions of the Collective Bargaining Agreement; or
- Initiate an appeal to the Merit Systems Protection Board *within 30 days of an appealable adverse action* as defined in 5 C.F.R. § 1201.3.

Name of Deciding Official

Signature of Deciding Official

Date reasonable accommodation denied _____

ATTACHMENT D: SAMPLE FORM

REASONABLE ACCOMMODATION INFORMATION REPORTING FORM

(to be completed by the manager or other official who processed the accommodation request)

1. Reasonable accommodation: (check one)

_____ Approved

_____ Denied (If denied, attach copy of the written denial letter/memo that was sent to individual)

2. **Date reasonable accommodation requested:**

Who received request: _____

3. **Date reasonable accommodation request referred to decision maker** (*i.e., supervisor, Office Director, Disability Program Manager, Personnel Management Specialist*):

Name of decision maker: _____

4. **Date reasonable accommodation approved or denied:**

5. **Date reasonable accommodation provided** (*if different from date approved*):

6. **If time frames outlined in the Reasonable Accommodation Procedures were not met, please explain why.**

7. **Job held or desired by individual requesting reasonable accommodation** (*including occupational series, grade level, and office*):

(Over)

8. Reasonable accommodation needed for: (*check one*)

☐ **Application Process**

☐ **Performing Job Functions or Accessing the Work Environment**

☐ **Accessing a Benefit or Privilege of Employment (e.g., attending a training program or social event)**

9. Type(s) of reasonable accommodation requested (e.g., adaptive equipment, staff assistant, removal of architectural barrier):

10. Type(s) of reasonable accommodation provided (*if different from what was requested*):

11. Was medical information required to process this request? If yes, explain why.

12. Sources of technical assistance, if any, consulted in trying to identify possible reasonable accommodations (e.g., Job Accommodation Network, disability organization, Disability Program Manager):

13. Comments:

Submitted by: _____

Phone: _____