

CSBA Sample

Administrative Regulation

Reasonable Accommodation

USE CSBA SAMPLE AS IS

AR 4032
Personnel

***Note: Pursuant to the federal Americans with Disabilities Act (ADA) (42 USC 12101-12213) and the state's Fair Employment and Housing Act (FEHA) (Government Code 12900-12996), the district has a duty to reasonably accommodate qualified employees and job applicants with known disabilities, except when such accommodation would cause an undue hardship to the district. This accommodation is not required for individuals who are not otherwise qualified for the job. ***

***Note: Pursuant to 28 CFR 35.150 and 35.160, the district must also afford individuals with disabilities (including community members, students, and employees) an equal opportunity to participate in or enjoy the benefits of a service, program, or activity. Therefore, the district may need to provide auxiliary aids and services to ensure that existing services and facilities are readily accessible to and usable by individuals with disabilities. See BP 0410 - Nondiscrimination in District Programs and Activities, BB 9320 - Meetings and Notices, and BB 9322 - Agenda/Meeting Materials. ***

***Note: The following optional administrative regulation is consistent with the recommendations contained in the Equal Employment Opportunity Commission's (EEOC) Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act and clarifies a district's responsibility under the ADA. ***

Except when undue hardship would result to the district, the Superintendent or designee shall provide reasonable accommodation:

1. In the job application process, to any qualified job applicant with a disability
2. To enable any qualified employee with a disability to perform the essential functions of the position he/she holds or desires to hold or to enjoy equal benefits or other terms, conditions, and privileges of employment as other similarly situated employees without disabilities

Note: Government Code 12940, as amended by AB 987 (Ch. 122, Statutes of 2015), prohibits retaliation against any employee or job applicant who requests accommodation for his/her physical or mental disability, even if the request was not granted.

No employee or job applicant who requests an accommodation for his/her physical or mental disability shall be subjected to discrimination or to any punishment or sanction, regardless of whether the request for accommodation was granted. (Government Code 12940)(DF1)

***Note: Pursuant to 28 CFR 35.107, each district having 50 or more (full- or part-time) employees must designate at least one employee to coordinate its efforts to comply with the ADA, including complaint investigation. This coordinator may be the same individual designated by the district pursuant to 34 CFR 106.8 to coordinate efforts to comply with and investigate complaints regarding Title IX (discrimination on the basis of gender). Districts that have not so designated an individual in AR 4030 - Nondiscrimination in Employment should modify the following paragraph to include the title of the individual designated by the district. ***

The district designates the position specified in AR 4030 - Nondiscrimination in Employment as the coordinator of its efforts to comply with the Americans with Disabilities Act (ADA) and to investigate any and all related complaints.

(cf. 4030 - Nondiscrimination in Employment)

Definitions

***Note: The following section contains some basic definitions of terminology used in the ADA. P.L. 110-325 amended 42 USC 12101 to expand the definition of "disability" and requires EEOC to revise its regulations and guidance to reflect the amendment. However, because FEHA has long provided additional protections under California law, the amendments will not likely have much impact in California. ***

***Note: Government Code 12926 and 12926.1 provide definitions of "physical disability" and "mental disability" that require a "limitation of a major life activity," but do not require a "substantial limitation." Government Code 12926 and 12926.1, and the amended federal law, provide that a condition limiting a major life activity shall be determined without respect to any mitigating measures (e.g., medications, assistive devices), unless the mitigating measure itself limits an individual's ability to participate in a major life activity. ***

***Note: The terminology used in the law is complex and is often the subject of litigation. The district should consult legal counsel if a question arises as to whether an individual has a qualifying disability and/or if an accommodation cannot be provided due to "undue hardship." ***

Disability, with respect to an individual, is defined as any of the following: (Government Code 12926; 20 CFR 1630.2)

1. A physical or mental impairment that limits one or more of the major life activities
2. A record of such an impairment
3. Being regarded as having such an impairment

Limits shall be determined without regard to mitigating measures such as medications, assistive devices, prosthetics or reasonable accommodations, unless the mitigating measure itself limits a

major life activity. (Government Code 12926)

***Note: Pursuant to 29 CFR 1630.2 and the EEOC's Enforcement Guidance, evidence as to whether a job function is "essential" includes the district's judgment, written job descriptions, the consequences of not requiring the incumbent to perform the function, the terms of a collective bargaining agreement, and work experience of past and current employees in the job. These considerations underscore the importance of developing and maintaining detailed, up-to-date job descriptions, preferably signed by individuals holding the position. ***

Essential functions are the fundamental job duties of the position the individual with a disability holds or desires. The term does not include the marginal functions of the position. (Government Code 12926; 29 CFR 1630.2)

Reasonable accommodation means: (Government Code 12926; 29 CFR 1630.2)

1. For a qualified job applicant with a disability, modifications or adjustments to the job application process that enable him/her to be considered for the position he/she desires
2. For a qualified employee with a disability, modifications or adjustments to the work environment, or to the manner or circumstances under which the position the employee holds or desires is customarily performed, that enable him/her to perform the essential functions of that position or to enjoy equal benefits and privileges of employment as are enjoyed by the district's other similarly situated employees without disabilities

***Note: Pursuant to 29 CFR 1630.15, the district may require that, in order to be qualified for a job, a person must not pose a "direct threat" to the health and safety of himself/herself or others in the workplace. In 2002, the U.S. Supreme Court in *Chevron USA v. Echazabal* upheld the regulation as it relates to the health and safety of the employee requesting the accommodation. ***

***Note: Pursuant to 29 CFR 1630.2, a "direct threat" is a significant risk that cannot be eliminated or reduced by reasonable accommodation. Before finding that a person is not qualified by reason of posing such a threat, the district must consider whether reasonable accommodation could reduce the risk of harm to an acceptable level. If no such accommodation exists, the district may refuse to hire the applicant or may discharge the employee. ***

Qualified individual with a disability means a job applicant or employee with a disability who: (29 CFR 1630.15, 1630.2)

1. Satisfies the requisite skill, experience, education, and other job-related requirements of the employment position he/she holds or desires
2. Can perform the essential functions of the position with or without reasonable accommodation
3. Would not pose a significant risk of substantial harm, which cannot be eliminated or

reduced by reasonable accommodation, to himself/herself or others in the job he/she holds or desires

***Note: In *US Airways, Inc. v. Barnett*, the U.S. Supreme Court laid out the burdens of proof for an individual with a disability and an employer in an ADA lawsuit alleging failure to provide reasonable accommodation. Once the employee shows that a requested accommodation is reasonable on its face, the burden shifts to the employer to provide case-specific evidence proving that reasonable accommodation would cause an undue hardship in the particular circumstances. ***

***Note: 29 CFR 1630.2 lists factors relevant to the determination of undue hardship; see section below entitled "Granting Reasonable Accommodation." ***

Undue hardship is a determination based on an individualized assessment of current circumstances that shows that the provision of a specific accommodation would cause significant difficulty or expense to the district. (29 CFR 1630.2)

Request for Reasonable Accommodation

***Note: The EEOC's Enforcement Guidance clarifies that, in requesting reasonable accommodation, the employee or job applicant is not required to mention the ADA, use the term "reasonable accommodation," or put the request in writing. Government Code 12940 requires that the district and employee or job applicant engage in an informal, interactive process to clarify the individual's needs and identify the appropriate reasonable accommodation. ***

***Note: Generally, according to the EEOC's Enforcement Guidance, a district is not obligated to ask an employee whether a reasonable accommodation is needed when the employee has not informed the district that an accommodation is necessary. However, the district should initiate the reasonable accommodation interactive process without being asked if the district (1) knows that the employee has a disability; (2) knows, or has reason to know, that the employee is experiencing workplace problems because of the disability; and (3) knows, or has reason to know, that the disability prevents the employee from requesting a reasonable accommodation. ***

***Note: With regard to job applicants, the EEOC's Enforcement Guidance states that the district may tell applicants what the hiring process involves and may ask applicants whether they will need reasonable accommodation for the process. Generally, the district may not ask an applicant whether he/she needs a reasonable accommodation for the job. ***

When requesting reasonable accommodation, an employee or his/her representative shall inform the employee's supervisor that he/she needs a change at work for a reason related to a medical condition. The supervisor shall inform the coordinator of the employee's request as soon as practicable.

When requesting reasonable accommodation for the hiring process, a job applicant shall inform the coordinator that he/she will need a reasonable accommodation during the process.

***Note: According to the EEOC's Enforcement Guidance, the district may ask the individual for reasonable documentation about his/her disability when the need for accommodation is not obvious. The following paragraph is consistent with the EEOC's Enforcement Guidance. ***

When the disability or the need for accommodation is not obvious, the coordinator may ask the employee to supply reasonable documentation about his/her disability. In requesting this documentation, the coordinator shall specify the types of information that are being sought about the employee's condition, the employee's functional limitations, and the need for reasonable accommodation. The employee may be asked to sign a limited release allowing the coordinator to submit a list of specific questions to his/her health care or vocational professional.

***Note: The EEOC's Enforcement Guidance states that if the employee provides insufficient documentation, the district may require the employee to undergo a medical examination, as specified below. However, before requiring the employee to submit to such an examination, the district should specify why the documentation is insufficient and give him/her an opportunity to provide the missing information in a timely manner. ***

If the documentation submitted by the employee does not indicate the existence of a qualifying disability or explain the need for reasonable accommodation, the coordinator shall request additional documentation that specifies the missing information. If the employee does not submit such additional documentation in a timely manner, the coordinator may require him/her to submit to an examination by a health care professional selected and paid for by the district.

The district may make a medical or psychological inquiry of a job applicant or require him/her to submit to a medical or psychological examination after he/she has been given a conditional offer of employment but before the commencement of his/her job duties, provided the inquiry or examination is job-related, consistent with business necessity, and required for all incoming employees in the same job classification. (Government Code 12940)

***Note: Pursuant to 42 USC 2000ff-1-2000ff-11, the Genetic Information Nondiscrimination Act (P.L. 110-233), it is unlawful for a district to request, require, or purchase an employee's or his/her family member's individual genetic information except in complying with the medical certification requirements for family care and medical leave purposes or with the employee's prior, knowing, voluntary, and written authorization. See AR 4161.8/4261.8/4361.8 - Family Care and Medical Leave. Any such information received by the district must be kept confidential. ***

The coordinator shall not request any job applicant's or employee's genetic information except as authorized by law. (42 USC 2000ff-1, 2000ff-5)

(cf. 4161.8/4261.8/4361.8 - Family Care and Medical Leave)

***Note: Pursuant to 42 USC 12112, any information regarding the medical history or condition of a qualified individual with a disability must be treated as a confidential medical record. However, the district should inform supervisors of reasonable accommodation granted to qualified

individuals with disabilities. In addition, when such an individual's disability may require emergency medical treatment, first aid and safety personnel should be informed. In *A.M. v. Albertsons, LLC*, a California appeals court held an employer liable when the employer failed to inform a supervisor about the accommodation allowed one of her subordinates and the subordinate suffered some injury when she was denied the accommodation on one occasion. ***

In accordance with law, the coordinator shall take steps to ensure the confidentiality of information related to medical conditions or history. As applicable, he/she shall notify the supervisor or manager of the qualified individual of any reasonable accommodation granted the individual and may notify first aid and safety personnel when the disability of the qualified individual may require emergency treatment. (42 USC 12112)

(cf. 4112.6/4212.6/4312.6 - Personnel Records)

Granting Reasonable Accommodation

***Note: The following process is consistent with 29 CFR 1630.2 and the EEOC's Enforcement Guidance. ***

Upon receiving a request for reasonable accommodation from a qualified individual with a disability, the coordinator shall:

1. Determine the essential functions of the job involved
2. Engage in an informal, interactive process with the individual to review the request for accommodation, identify the precise limitations resulting from the disability, identify potential accommodations, and assess their effectiveness

***Note: According to the EEOC's Enforcement Guidance, the district is not required to provide the reasonable accommodation preferred by the individual. Rather, the district must provide an accommodation that is "effective." An "effective accommodation" is one which enables the employee to perform the essential functions of the job or to gain equal access to a benefit or privilege of employment. ***

***Note: Pursuant to 42 USC 12112, the district must provide reasonable accommodation to qualified individuals unless the district can prove that to do so would cause undue hardship as defined in the section entitled "Definitions" above. The burden of proving undue hardship rests with the district and what may be an undue hardship for one district may not be an undue hardship for another, depending on factors such as cost and district size. The EEOC's Enforcement Guidance clarifies that even if the cost of an accommodation would cause undue hardship to a district, the qualified individual should have the option to pay for the portion of the cost that constitutes undue hardship, or to personally provide the accommodation. ***

3. Develop a plan for reasonable accommodation which will enable the individual to perform the essential functions of the job or gain equal access to a benefit or privilege of employment

without imposing undue hardship on the district

A determination of undue hardship should be based on several factors, including: (29 CFR 1630.2)

- a. The nature and net cost of the accommodation needed, taking into consideration the availability of tax credits and deductions and/or outside funding
- b. The overall financial resources of the facility making the accommodation, the number of persons employed at this facility, and the effect on expenses and resources of the facility
- c. The overall financial resources, number of employees, and the number, type, and location of facilities of the district
- d. The type of operation of the district, including the composition, structure, and functions of the workforce and the geographic separateness and administrative or fiscal relationship of the facility making the accommodation to other district facilities
- e. The impact of the accommodation on the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business

The coordinator may confer with the site administrator, any medical advisor chosen by the district, and/or other district staff before making a final decision as to the accommodation.

Reasonable Accommodation Committee

***Note: At the suggestion of the Office for Civil Rights, some districts have established a reasonable accommodation committee to help in planning for the reasonable accommodation requested by an applicant or employee. The following optional section should be modified to reflect district practice. ***

The coordinator may appoint a committee to review or assist in the development of appropriate plans to reasonably accommodate qualified individuals who request modifications or adjustments in their work duties or environment because of known physical or mental disabilities.

Committee members shall be selected on the basis of their knowledge of the specific functions and duties required in the position, the physical work environment, available accommodations, and other relevant issues. The committee may include a district administrator, site administrator, medical advisor or rehabilitation specialist, and as necessary, a certificated and/or classified employee. Membership may change on a case-by-case basis.

At the coordinator's discretion, the employee or applicant requesting accommodation may participate in the committee's meetings. If the employee or applicant is excluded from the committee's meetings, the coordinator shall communicate with him/her so that he/she has the

opportunity to interact and contribute to planning the reasonable accommodation.

Appeal Process

Any qualified individual with a disability who is not satisfied with the decision of the coordinator may appeal in writing to the Superintendent or designee. This appeal shall be made within 10 working days of receiving the decision and shall include:

1. A clear, concise statement of the reasons for the appeal
2. A statement of the specific remedy sought

The Superintendent or designee shall consult with the coordinator and review the appeal, together with any available supporting documents. The Superintendent or designee shall give the individual his/her decision within 15 working days of receiving the appeal.

Any further appeal for reasonable accommodation shall be considered a complaint concerning discrimination in employment and may be taken to the Governing Board in accordance with the district's procedure for such complaints.

***Note: The employee or applicant also may appeal directly to the Office for Civil Rights at any point. ***

Legal Reference:

CIVIL CODE

51 Unruh Civil Rights Act

GOVERNMENT CODE

12900-12996 Fair Employment and Housing Act

UNITED STATES CODE, TITLE 29

701-794e Vocational Rehabilitation Act

UNITED STATES CODE, TITLE 42

2000ff-1-2000ff-11 Genetic Information Nondiscrimination Act of 2008

12101-12213 Americans with Disabilities Act

CODE OF FEDERAL REGULATIONS, TITLE 28

35.101-35.190 Americans with Disabilities Act, especially:

35.107 Designation of employee

36.101-36.608 Nondiscrimination on the basis of disability by public facilities

CODE OF FEDERAL REGULATIONS, TITLE 29

1630.2 Definitions

COURT DECISIONS

A.M. v. Albertsons, LLC, (2009) Cal.App.4th 455

Colmenares v. Braemar Country Club, Inc., (2003) 29 Cal.4th 1019

Chevron USA v. Echazabal, (2002) 536 U.S. 73, 122 S.Ct. 2045

US Airways, Inc. v. Barnett, (2002) 535 U.S. 391, 122 S.Ct. 1516

Management Resources:

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION PUBLICATIONS

Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act, October 2002

WEB SITES

Department of Fair Employment and Housing: <http://www.dfeh.ca.gov>

Equal Employment Opportunity Commission: <http://www.eeoc.gov>

U.S. Department of Education, Office for Civil Rights: <http://www.ed.gov/about/offices/list/ocr>

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