

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

REASONABLE ACCOMMODATION PROCEDURES FOR INDIVIDUALS WITH DISABILITIES

I. General Provisions

A. Introduction

The Federal Mine Safety and Health Review Commission ("Commission") is committed to providing reasonable accommodations for qualified employees or applicants with disabilities¹ to ensure that individuals with disabilities enjoy equal access to all employment opportunities, unless doing so would create undue hardship for the Commission. Reasonable accommodation is any change in the workplace or the way things are customarily done that provides an equal employment opportunity to an individual with a disability.

The Commission will process requests for reasonable accommodation and will provide reasonable accommodation where appropriate, in a prompt and efficient manner in accordance with the time frames set forth in these procedures.

B. Scope

These procedures apply to a Commission employee with a disability who requires accommodation to perform the essential functions of his or her current position or who needs accommodation in order to enjoy the benefits and privileges of employment equal to those enjoyed by employees without disabilities. This includes those employees and applicants who require personal assistance services during work hours. The procedures also apply to an employment applicant who needs assistance in the application process ("applicant").

A qualified individual with a disability is an employee or applicant with a disability who satisfies the skill, experience, education and other job-related requirements for the position held or desired, and who, with or without reasonable accommodation, can perform

¹ All references to "disability" in these procedures refer to those physical or mental impairments that substantially limit a major life activity. A "major life activity" includes caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working. A physical or mental impairment means: (1) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems; or (2) any mental or psychological disorder. Body systems include, but are not limited to, the neurological, musculoskeletal, special sense organs, respiratory, cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin and endocrine systems. Under the Rehabilitation Act of 1973 (the applicable law regarding federal government employees or applicants with disabilities), as amended by the Americans with Disabilities Act Amendments Act of 2008 ("ADAAA"), the definition of "disability" is to be interpreted broadly.

the essential functions of that position. Essential functions are those job duties that are so fundamental to the position that the individual cannot do the job without performing them. The employee's critical performance elements may indicate essential functions.

II. Process for Requesting Reasonable Accommodation

All supervisors and managers must be familiar with these procedures.

A. Disability Program Committee

The agency's reasonable accommodation program is overseen by the Disability Program Coordinator ("DPC"), Timothy Greten. All requests for reasonable accommodation will be handled by the DPC, who can be reached by email at tgreten@fmshrc.gov or by phone at (202) 434-9909.

B. Individual Makes Initial Request for Reasonable Accommodation

1. An individual applying for a position at the Commission ("applicant") may request reasonable accommodation for the application process orally or in writing to any employee of the Commission involved in the application process. That Commission employee handling the application should contact the DPC within three business days of receipt of the initial oral or written request.
2. A Commission employee with a disability may request a reasonable accommodation at any time, orally or in writing. Requests should be made directly to the DPC. Requests may also be made to the requester's supervisor or manager; the supervisor or manager must forward the request to the DPC, no later than three business days after receipt.
3. A family member, health professional, or other representative may request an accommodation on behalf of a Commission employee or applicant. The request should be submitted to the DPC.
4. Requesters need not fill out any specific form to begin the reasonable accommodation process. The DPC will ensure that a Confirmation of Request for Reasonable Accommodation form (Appendix A) is completed once in receipt of the request. Also, a reasonable accommodation request does not have to use any special words such as "reasonable accommodation," "disability" or "Rehabilitation Act," or specify a particular accommodation sought. A request for reasonable accommodation is any communication in which an individual asks or states that he or she has a medical condition which requires a change in working conditions. A supervisor, manager, or DPC who receives such a communication should ask the individual whether he or she is requesting a reasonable accommodation if the nature of the initial communication is unclear.
5. In the event that an employee will require an accommodation on a repeat basis (for example, a sign language interpreter), the employee should indicate this in the initial request. Once the initial request has been approved, the employee is not required to submit a request to the DPC for approval on each subsequent occasion. The employee may

instead obtain the accommodation by notifying the appropriate individual (either the DPC or the employee's supervisor, as appropriate).

C. **Evaluating the Request and the Interactive Process**

1. The DPC will contact the applicant or employee who has made the request within ten business days after the initial oral or written request is received to begin discussing the accommodation request.

2. The DPC is responsible for processing the request, engaging in an interactive process, and making the decision to grant or deny the requested accommodation or offer some alternative form of accommodation.

3. The DPC will consult the employee's supervisor/manager or in the case of an applicant, the Administrative Office, to gather relevant information necessary to respond to a request and to assess whether a particular accommodation will be effective. No reasonable accommodation involving performance of the job will be provided without first consulting an employee's supervisor/manager or in the case of applicants, the Administrative Office.

4. The procedure for processing the request involves a dialogue between the DPC and the employee or applicant and may include consultation with other Commission officials. The interactive process refers to the mutual sharing of information and ideas between the employee or applicant requesting accommodation and the DPC. After a request for accommodation has been made, the next step is for the parties to begin the interactive process to determine what, if any, accommodation should be provided. This means that the individual requesting the accommodation and the DPC must communicate with each other about the request, how a disability is prompting a need for an accommodation, and alternative accommodations that may be effective in meeting an individual's needs. *See* Appendix E for suggested resources for developing effective accommodations. In addition, the Commission has entered into a partnership with the Computer/Electronic Accommodations Program ("CAP"), which is part of the Department of Defense, to provide needs assessment and assistive computer/electronic technology, devices and services. *See* Appendix E for contact information. The DPC will serve as the point of contact with CAP and will ensure that all forms necessary for CAP assistance are processed in a timely manner.

D. **Requests for Medical Information**

1. If the need for the accommodation is not obvious or already known, the DPC may request medical information that supports the existence of the disability, the functional limitations imposed by the disability, and how the proposed accommodation will remedy the situation.² A disability is obvious or already known when it is clearly visible or the individual previously provided sufficient medical information showing that the condition met the definition

² The Genetic Information Nondiscrimination Act, 42 U.S.C. § 2000ff-1(b), prohibits an agency from requesting genetic information of an employee or a family member of an employee. When making a request for medical information, the Commission will include a warning to the health care provider not to provide genetic information.

of disability. *See* footnote 1.

2. The Commission has the right to have medical information reviewed by a medical expert of the Commission's choosing at the Commission's expense.

3. In some instances, the DPC may need to request additional information to determine if an individual's impairment is a disability or to determine what would be an effective accommodation. If the information is still insufficient to support the request, the DPC may give an individual a list of questions to give to the health care provider to answer. If the information is still deficient, the DPC may request an individual to go to an appropriate medical provider of the Commission's choice at the Commission's expense. In such a case, an individual will be required to sign a release permitting the medical provider to answer questions on the nature of the disability and the need for accommodation. *See* Appendix B for release form.

4. Requesting additional medical information will stay the time for processing the reasonable accommodation request until sufficient medical information is provided to the DPC.

E. Confidentiality of Medical Information Submitted to the Commission

Under the Rehabilitation Act, medical information obtained in connection with the reasonable accommodation process must be kept confidential and may only be disclosed to individuals who have a verifiable need to know of the medical information. All medical information, including information about functional limitations and reasonable accommodation needs that the Commission obtains in connection with a request for reasonable accommodation, must be kept by the Administrative Office in a Medical Folder, separate from the individual's Official Personnel or Applicant Folder. The same requirements apply to electronic files. A Commission employee who obtains or relies on such medical information is strictly bound by these confidentiality requirements.

The DPC may share certain information with an employee's supervisor/manager or other Commission officials only to the degree necessary to make appropriate determinations on a reasonable accommodation request. Under these circumstances, the DPC will inform the recipients of the information about the confidentiality requirements. In certain situations, the DPC will not necessarily need to reveal the name of the requester and/or the office in which the requester works, or even the name of the disability, but instead only reveal the employee's or applicant's functional limitations.

In addition to disclosures of information needed to process a request for accommodation, other disclosures of medical information are permitted as follows: first aid and safety personnel may be informed when appropriate, if the disability might require emergency treatment or assistance in evacuation; and government officials may be given information necessary to investigate the agency's compliance with the Rehabilitation Act.

F. Time Frames for Decision on a Request for Reasonable Accommodation

The reasonable accommodation process begins as soon as the oral or written request for the accommodation is received by the requester's supervisor/manager, a Commission official, or

the DPC. The oral or written request should be forwarded or referred to the DPC within three business days of receipt. The DPC will contact the applicant or employee who has made the request within ten business days after the initial oral or written request is received to begin discussing the accommodation request.

Absent extenuating circumstances,³ requests for reasonable accommodation will be granted or denied, and the accommodation provided (if approved), within 30 days from when the oral or written request is received. Extenuating circumstances cover situations where the reasonable accommodations request cannot be processed in a timely fashion. These would include: delay by the requesting individual or health care provider in providing medical information, government furloughs, delay by the CAP in scheduling an appointment to review the individual's needs, and the lengthy absence of the individual.

It is the policy of the Commission that a request for accommodation be acted on as soon as possible. If extenuating circumstances delay the processing of a request or delivery of a reasonable accommodation, the Commission will notify the applicant or employee of the reason for the delay and, to the extent possible, the date on which the Commission expects to complete the process or provide the accommodation. Where an accommodation is found to be reasonable but extenuating circumstances delay its delivery, the Commission shall, where possible, provide an interim accommodation. Where an accommodation is found to be reasonable and there are no extenuating circumstances justifying delay, failure to promptly provide the requested accommodation may result in a violation of the Rehabilitation Act. (*See* section J, below).

If a request for an accommodation requires expedited review and a decision, the DPC should process the request as quickly as possible.

G. **Resolution of the Reasonable Accommodation Request**

All decisions regarding a request for reasonable accommodation will be communicated to an applicant or employee orally and in writing by use of the "Resolution of Request" form. *See* Appendix C. If the DPC grants a request for accommodation, the DPC will discuss implementation of the accommodation with the requester. If the request is approved, but the accommodation cannot be provided immediately, the DPC will inform the individual in writing of the projected time for providing the accommodation.

If the Commission offers a different accommodation than the one requested, the Resolution form must explain both the reasons for the denial of the individual's specific requested accommodation and why the Commission believes that the chosen accommodation will be effective. If the alternative accommodation is not accepted, the DPC will record the individual's rejection of the alternative accommodation on the Resolution form.

³ When extenuating circumstances are present, the time for processing a request for reasonable accommodation and providing the accommodation will be extended as reasonably necessary.

The Commission will consider providing the employee with reassignment to a vacant position for which the employee is qualified as a “last resort,” if there are no effective accommodations that would enable the employee to perform the essential functions of his/her current job, or if all other possible accommodations would impose undue hardship.⁴ In considering whether there are positions available for reassignment, the DPC will work with the Office of the Executive Director (OED) and the employee requesting the reassignment to identify any vacant positions for which the employee may be qualified, with or without accommodation, or any such positions which OED has reason to believe will become vacant within 60 days from the date the search is initiated.

If CAP provides the accommodation, the DPC will provide confirmation to CAP within five business days of delivery of the equipment or service and inform CAP whether the accommodation has been received and is operational.

If the DPC denies a request for accommodation, the DPC will give the Resolution form to the requester and discuss the reasons for the denial. The Resolution form must clearly state the specific reasons for the denial (e.g., the accommodation poses an undue hardship, the medical documentation was inadequate and additional documentation was not provided, the proposed accommodation would require lowering a performance or production standard or eliminate an essential function of the position).

The written denial of the request will set forth the Commission's procedures for reconsidering a request for accommodation as well as inform the individual of the right to file an Equal Employment Opportunity ("EEO") complaint or an appeal with the Merit Systems Protection Board ("MSPB").

H. **Informal Reconsideration Process**

Individuals are encouraged to use our informal dispute resolution process to obtain prompt reconsideration of denials of reasonable accommodation. All requests for reconsideration must be made to the Chairman within ten business days of the date of receipt of the written denial. The Chairman shall respond in writing to the request for reconsideration within ten business days of receipt of the request, but in extraordinary circumstances the time for decision may be extended. If the decision is not reversed, the reasons for the denial must be specified. Requesting reconsideration does not suspend any time limits for initiating Federal claims.

I. **Monitoring the Accommodation**

⁴ Undue hardship may arise when a specific proposed accommodation causes substantial difficulty or expense. If the specific proposed accommodation creates an undue hardship, then the Commission does not have to provide that particular accommodation. Determination of undue hardship is always made on a case-by-case basis, considering factors that include the nature and cost of the proposed accommodation needed and its impact on the operations of the Commission. All resources available to the Commission as a whole are considered when evaluating the cost and impact of an accommodation.

Once the request has been granted, the DPC must evaluate whether the accommodation is working and effective 30 days after it has been operational. The DPC may monitor the effectiveness and/or necessity of an accommodation with the employee and the manager/supervisor. If the employee or supervisor/manager believes that any accommodation needs modification, the employee or the supervisor/manager may contact the DPC at any time and the DPC will revisit the effectiveness and/or necessity of the accommodation.

J. Federal Claims

1. If an individual is dissatisfied with the resolution of the request for accommodation or the reconsideration decision, the employee/applicant may pursue a claim under only one of the following processes:

a. For an EEO complaint alleging disability discrimination, contact the Commission's EEO Director within 45 days from the date of receipt of the written notice of denial (the EEO Director will arrange EEO counseling for the employee, which is a prerequisite for filing an EEO complaint); or

b. For adverse actions over which the MSPB has jurisdiction, initiate an appeal to the MSPB within 30 days of an appealable adverse action as set forth in 5 C.F.R. § 1201.3.

2. If a Commission EEO Officer has had any involvement in the processing of the request for reasonable accommodation, that officer will be disqualified from any involvement in the consideration of the EEO complaint associated with the request.

K. Tracking, Reporting and Training

1. At any point during the reasonable accommodation process, employees and applicants may request information regarding the status of their requests by contacting the DPC.

2. Upon completion of the accommodation review process, the DPC must complete the Commission's "Reasonable Accommodation Information Reporting Form." See Appendix D. This form, together with any other written information relating to the request of accommodation, shall be provided to the Administrative Office.

3. The Commission's Administrative Office will maintain records related to a requesting individual for the duration of that person's employment and retain the records for three years thereafter. The records shall be maintained in a dedicated and locked filing space separate from the Employee's Official Personnel files. The same requirements apply to electronic records.

4. Appropriate training on this policy must be provided to all managers, supervisors and employees.

5. The Commission will track the following elements:

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

III. Personal Assistance Services

Personal assistance services are services that aid an individual with a disability in performing activities of daily living, which would typically be performed independently if not for the disability. Examples include assistance in removing a coat, eating, or using the restroom. Such assistance would not include performing job-related tasks or providing medical services.

If a Commission employee requires, or an applicant would require, personal assistance services during work hours due to a targeted disability,⁵ and such services would (together with other reasonable accommodations) enable the employee to perform the essential functions of their position, the Commission shall provide such services unless doing so would impose undue hardship on the agency. When selecting a professional personal assistance service provider, the requesting individual's preferences will be considered to the

⁵ Targeted disabilities, as defined by the Office of Personnel Management's Self-Identification of Disability Form (SF256), are limited to the following: developmental disability; traumatic brain injury; deafness or serious difficulty hearing; blindness or serious difficulty seeing (even when wearing glasses); missing extremities; significant mobility impairment; partial or complete paralysis; epilepsy or other seizure disorders; intellectual disability; significant psychiatric disorder; dwarfism; significant disfigurement.

extent permitted by law. The provider may have other tasks within the Commission and/or provide services to more than one individual, but only to the extent that such other responsibilities do not result in a failure to provide timely personal assistance.

Requests for personal assistance services shall be submitted to the DPC. Such requests will be processed under the same procedures for processing reasonable accommodation requests described above.

The Commission emphasizes its commitment to prohibiting discrimination on the basis of disability. If an employee or applicant believes that any adverse action has been taken based on their need or perceived need for personal assistance services, the employee/applicant may pursue a claim under the process described above (see III).

IV. Other Matters

A. Inquiries and Distribution

The forms used by the DPC for the processing of reasonable accommodation requests are included in this document as attachments. *See* Appendices A-D. A list of resources for legal and technical assistance is also attached. *See* Appendix E. These procedures and supplemental materials shall be distributed to all new employees as part of their orientation, and redistributed yearly to all employees. They are also posted on the Commission's website, and on employee bulletin boards in all offices. Upon request, these materials can be provided in alternate formats as necessary.

Any employee wanting further information concerning these procedures (either generally or in regard to the processing of a specific reasonable accommodation request) may contact the Commission's DPC. For general inquiries, an employee may also contact the Commission's EEO Director.

B. Effective Date

These procedures replace the Commission's Reasonable Accommodation Procedures for Individuals with Disabilities dated April 26, 2016. These revised procedures are effective as of June 13, 2018.