

## New Disability Discrimination Guidance Sheds Light on New York City's "Cooperative Dialogue" Requirements

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The New York City Commission on Human Rights ("Commission") recently issued a 146-page guide titled "[Legal Enforcement Guidance on Discrimination on the Basis of Disability](#)" ("Guidance"), to educate employers on their responsibilities to job applicants and employees with respect to both preventing disability discrimination and accommodating a disability. The Guidance also addresses the new law on "[cooperative dialogue](#)" ("Law"), which goes into effect on October 15, 2018.

The Law amends the New York City Human Rights Law ("NYCHRL") to require covered entities—including employers and public accommodations—to engage in a cooperative dialogue with individuals who may be entitled to a reasonable accommodation under the NYCHRL.<sup>1</sup> Under the Law, a person may require an accommodation related to religious needs; a disability; pregnancy, childbirth, or a related medical condition; or the needs of a victim of domestic violence, sex offenses, or stalking.

Under the Law, employers must engage in a cooperative dialogue within "a reasonable time" with a person who has requested an accommodation or "who the [employer] has notice may require such an accommodation." The term "cooperative dialogue" means the process by which a covered entity and an individual who may be entitled to an accommodation exchange information to identify the individual's needs, his or her requested accommodation(s), and potential alternatives to the requested accommodation(s).

### What Does a "Cooperative Dialogue" Entail?

The cooperative dialogue may take place in person, in writing, by phone, or through electronic means, and it must be conducted in good faith and in a "transparent and expeditious manner." An employer may request additional information about the

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<sup>1</sup> For more information about the "cooperative dialogue" law, please see the Epstein Becker Green Act Now Advisory titled "[New York City Employers Will Be Required to Engage in Reasonable Accommodations Dialogue](#)."

employee's specific impairment if the employer does not have sufficient information to understand or evaluate the employee's need for an accommodation. Further, an employer need not agree to the requested accommodation if the employer can propose a reasonable alternative that meets the specific needs of the employee.

A cooperative dialogue is considered ongoing until either (i) a reasonable accommodation is granted or (ii) the employer concludes that:

- there is only one accommodation that is reasonable and will not result in undue hardship for the employer, but the applicant or employee refuses to accept that particular accommodation;
- the employee or applicant has refused the less expensive of two reasonable accommodations;<sup>2</sup> or
- no accommodation exists that will allow the applicant or employee to perform the essential functions of the job or that will not impose undue hardship.<sup>3</sup>

At this point, the employer must notify the employee, in a timely manner and in writing, of its decision, in a final determination identifying any accommodation that is either granted or denied. Importantly, the determination that no reasonable accommodation would enable the person requesting an accommodation to satisfy the essential requisites of a job or enjoy the right or rights in question may only be made after the parties have engaged, or the employer has attempted to engage, in a cooperative dialogue. In other words, *even if there are no reasonable accommodations available, the request cannot be denied until after the cooperative dialogue has taken place.*

Keep in mind that employers must engage in the cooperative dialogue process each time an employee (or applicant) makes a new request for an accommodation.

Importantly, the Guidance advises employers on the criteria that the Commission will consider in evaluating whether an employer has engaged in good faith in a cooperative dialogue with an individual requesting an accommodation. These factors include whether the employer:

- has a policy that informs employees how to request accommodations,
- responded to the request in a timely manner given the urgency and reasonableness of the request, and

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<sup>2</sup> The Guidance makes clear the following: "If there are two possible reasonable accommodations and one costs more or is more burdensome than the other, the covered entity may choose the less expensive or burdensome accommodation."

<sup>3</sup> A request for accommodation also may be denied where (i) the individual's request for an accommodation is determined not to be related to a disability or other covered matter, (ii) the individual requesting the accommodation fails to provide adequate documentation of the need for the accommodation (where applicable), or (iii) accommodation would pose a direct threat to the health or safety of the individual or others.

- attempted to obstruct or delay the cooperative dialogue to intimidate or deter the request.

The Guidance strongly encourages employers to include information on its cooperative dialogue and reasonable accommodation policies and processes in an employee handbook.

## **Model Documents**

The Guidance contains an [appendix](#) with sample documents on a variety of topics, including:

- **Reasonable Accommodation Request Form** (for use when an applicant or employee requests a reasonable accommodation).
- **Grant or Denial of Reasonable Accommodation Request Form** (for use by the employer to notify an applicant or employee once it has decided whether to grant or deny a request for a reasonable accommodation).
- **Letter to Employee on Leave** (sent towards the end of an employee's leave to determine if the employee (i) is returning to work when the leave expires, (ii) will be requesting additional leave, and/or (iii) will be requesting a different workplace accommodation).
- **Service Animal One-Pager** (provides permissible questions that an employer may ask in response to an accommodation request regarding a service animal).

## **What Employers Should Do Now**

- Review current policies and practices to ensure that they are consistent with the procedural and documentation requirements set forth in both the Law and Guidance.
- Update employee handbooks, as appropriate, to reflect any modifications made to company practices and policies as a result of the obligations imposed by the Law.
- Train human resources staff and supervisors on the requirements of the Law and company procedures, including:
  - the elements of a “cooperative dialogue”;
  - the need to engage in this dialogue prior to making a determination about a requested accommodation; and

- upon making a final determination, the necessity of providing a written response to the employee who requested the accommodation.
- Ensure that human resources and supervisory personnel understand the interplay of the Law with another recently enacted statute—the [Temporary Schedule Change for Personal Events Law](#),<sup>4</sup> which became effective on July 18, 2018.<sup>4</sup> Many requests for workplace accommodations involving shifts in working time and/or locations will implicate both laws.

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<sup>4</sup> For more information about the law, please see the Epstein Becker Green *Act Now* Advisory titled [“New York City Gives Employees the Right to Change Work Schedules Temporarily for “Personal Events.”](#)”