

**United States Section
International Boundary and Water Commission**

Directives Management System

Volume I : Mission Support
Part 0700 : Executive Office of the Commissioner
Chapter 0702 : Equal Employment Opportunity
Directive : Personal Assistance Services (PAS) Directive
Citation : SD.I.07029
Proponent : Equal Employment Opportunity
Effective Date : 30 March 2018

1. **Purpose:** To provide employment opportunities for persons with disabilities who need Personal Assistance Service (PAS) who otherwise would not be able to perform the essential functions of their job, and to allow employees with disabilities to perform or be more productive.
2. **Authority.**
 - A. 29 C.F.R. § 1614.203(d)(5).
 - B. 29 CFR Part 1614, Affirmative Action for Individuals with Disabilities in Federal Employment; Final Rule.
3. **Overview.**
 - A. On January 3, 2017, the Equal Employment Opportunity Commission (EEOC or Commission) amended the regulations implementing Section 501 of the Rehabilitation Act of 1973 (Section 501), the law that prohibits the federal government from discriminating in employment on the basis of disability and requires it to engage in affirmative action for people with disabilities.
 - B. As part of the agencies' obligation to engage in affirmative action, federal agencies are required by the new regulations to provide Personal Assistance Services (PAS) to individuals who need them because of certain disabilities. See 29 C.F.R. § 1614.203(d)(5). PAS are services that help individuals who, because of targeted disabilities, require assistance to perform basic activities of daily living, like eating and using the restroom.
 - C. Federal agencies are required to provide PAS beginning on January 3, 2018. This is called the "applicability date." The delayed applicability date will allow agencies to modify their existing practices.
4. **Need to Require Agencies to Provide PAS.** Unless doing so would impose an undue hardship, agencies must provide personal assistance services during work hours or job-

related travel for employees who qualify. These services refer to non-medical services that help an employee perform basic activities like eating or using the restroom and differ from services that help the individual perform job-related tasks, medical services, and services that are typically performed by someone who has the job title of "personal assistant."

5. **Expected Cost of PAS.** The number of individuals with the types of disabilities that require assistance in activities of daily living and who will apply for federal employment is very low. However, in the unlikely event that the resources available to the agency as a whole are insufficient to grant a particular individual's request for PAS, the agency may deny the request on the grounds that it would impose an undue hardship. The process of determining whether providing PAS is an undue hardship is the same as the agency uses to determine whether a reasonable accommodation poses an undue hardship.
6. **Affirmative Action Plan.** USIBWC is required to prepare annually, and submit to EEOC for approval, an affirmative action plan that includes a copy of its PAS procedures and information on its efforts to implement them.
7. **Definition of PAS.**
 - A. "PAS" means "assistance with performing activities of daily living that an individual would typically perform if he or she did not have a disability, and that is not otherwise required as a reasonable accommodation, including, for example, assistance with removing and putting on clothing, eating, and using the restroom." The regulations do not attempt to list every activity that might constitute PAS. For example, someone providing PAS might push a wheelchair or assist someone with getting into or out of a vehicle at the worksite.
 - B. PAS do not include, for example, performing medical procedures (e.g., administering shots) or medical monitoring (e.g., monitoring blood pressure).
 - C. PAS do not help individuals with disabilities perform their specific job functions, such as reviewing documents or answering questions that come through a call-in center. PAS differs from services that help an individual to perform job-related tasks, such as sign language interpreters who enable individuals who are deaf to communicate with coworkers, and readers who enable individuals who are blind or have learning disabilities to read printed text. Those services are required as reasonable accommodations, if the individual needs them because of a disability and providing them does not impose undue hardship on the agency. An agency's obligation to provide reasonable accommodations is unaffected by the new regulations.
8. **Nature and Scope of Legal Obligation.** As part of the agencies' obligation to engage in affirmative action, federal agencies are required by the new regulations to provide Personal Assistance Services (PAS) to individuals who need them because of certain disabilities. See 29 C.F.R. § 1614.203(d)(5).

9. Eligibility of Individual.

A. USIBWC is only required to provide PAS to an individual if:

(1) the individual is an employee of the agency

(2) the individual has a targeted disability

(3) the individual requires the services because of his or her targeted disability; the individual will be able to perform the essential functions of the job, without posing a direct threat to safety, once PAS and any required reasonable accommodations have been provided; and

(4) providing PAS will not impose undue hardship on the agency.

B. USIBWC must provide PAS to an employee if the conditions listed above have been met, regardless of when the employee was hired. Even if an existing employee who is entitled to PAS under the regulations has arranged for his or her own PAS in the past, the agency will be responsible for providing PAS beginning on the regulations' applicability date, provided that the conditions listed above have been met.

C. Furthermore, under the new regulations, USIBWC must, as a matter of affirmative action, provide PAS for employees to participate in employer-sponsored events, to the same extent as they must provide reasonable accommodations. The Rehabilitation Act requires reasonable accommodations that enable employees with disabilities to enjoy "benefits and privileges of employment," equal to those enjoyed by similarly situated employees without disabilities. Benefits and privileges of employment include physical access to spaces available to all employees (such as cafeterias or break rooms), employer-sponsored training, and employer-sponsored social events.

10. Prohibition Against Taking Adverse Action. The USIBWC is prohibited from making adverse employment decisions based on unfounded concerns about the known disability of an employee, applicant of employment to USIBWC or anyone else with whom the applicant or employee has a relationship or association. The law forbids discrimination when it comes to any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoff, training, fringe benefits, and any other term or condition of employment.

11. Scope of Obligation.

A. All federal agencies, including federal agencies with fewer than 1000 employees, are subject to the new regulations, including the sections that require PAS. There are no waiver provisions for small agencies or blanket exclusions; all agencies are expected to budget for PAS just as they would for reasonable accommodations under the Rehabilitation Act.

B. These regulations apply only to the federal government and do not apply to private businesses. The PAS requirement does not apply to federal contractors, recipients of federal funds, or state and local government employers. Note, though, that federal contractors are subject to a different set of affirmative action requirements under Section 503 of the Rehabilitation Act. The new Section 501 regulations do not affect those requirements.

12. **Undue Hardship.**

A. To deny a PAS request based on undue hardship, agencies must:

- (1) Examine the nature, extent, and cost of providing PAS services in relation to an agency's overall resources; and
- (2) Consider the impact of the requirement to provide personal assistance services on the operation of the agency's business.

B. It is unlikely that an agency could assert undue hardship based on cost alone since, as with services required as reasonable accommodations as a matter of nondiscrimination, all available agency resources will be considered in determining whether PAS is too costly.

C. An agency may be able to establish undue hardship if, for example, the presence of the provider would introduce a significant difficulty. Agencies don't have to provide PAS to someone if it would interfere with successful job performance, or if the employee did not meet the qualifications for the job, even with PAS. Practitioners should also be aware that PAS will evolve "as technology changes," meaning what's used today may no longer be necessary tomorrow.

D. The EEOC also said "agencies will be allowed to deny a request for personal assistance services if the difficulty or cost of providing them would be an undue hardship. The process of determining whether providing personal assistance services is an undue hardship can be the same the agency uses to determine whether a reasonable accommodation poses an undue hardship.

13. **Relationship between Reasonable Accommodation and PAS.** As with reasonable accommodation, an individual may request PAS by informing a supervisor, human resources professional, or other suitable individual that he or she needs assistance with daily life activities because of a medical condition. The individual does not need to mention Section 501 or the EEOC's regulations explicitly, or use terms such as "PAS" or "affirmative action" to trigger the agency's obligation to consider the request.

14. **Work-Related Travel as a Reasonable Accommodation.** When an assignment of work-related travel results in an employee's inability to rely on his or her usual source of PAS during both work and off-work hours, agencies are required to provide PAS at all times during that work-related travel, independent of the new regulations, as a reasonable accommodation (absent undue hardship). Additionally, even if an

employee's usual PAS provider is available during work-related travel, USIBWC is required to pay any additional costs related to providing PAS while on travel, such as transportation costs for the PAS provider, as a reasonable accommodation.

15. **Teleworking.** USIBWC is required to provide PAS during telework if the conditions listed in 3.2 have been met and the individual is entitled to telework under the agency's telework policy or as a reasonable accommodation. USIBWC will not revoke an individual's permission to telework because he or she is entitled to PAS under the new regulations.

16. **Denial of request of PAS.**

A. The USIBWC is only required to provide PAS if the requesting employee is entitled to them under the regulations. Therefore, USIBWC may deny a request for PAS if:

(1) the requestor is not an employee of the agency;

(2) the requestor does not have a targeted disability;

(3) the targeted disability does not create a need for PAS;

(4) the requester is not able to perform the essential functions of the job, even with PAS and any reasonable accommodations;

(5) the requester would create a direct threat to safety on the job, even with PAS and any reasonable accommodations; or

(6) providing PAS would impose undue hardship on the agency.

17. **Safety Threats.** The determination that an individual poses a "direct threat" shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. The assessment must apply reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence.

18. **Process for Requesting PAS.** The regulations require agencies to have procedures for processing requests for PAS. Agencies may satisfy this requirement by stating in their reasonable accommodation procedures that the process for requesting PAS, the process for determining whether such services are required, and the agency's right to deny such requests when the provision of PAS would pose an undue hardship are the same as for reasonable accommodations.

19. **Role of EEO and/or HR.** The EEO Officer, as the Disability Program Manager is responsible for processing requests for PAS and arranging for PAS, provided that s/he are given sufficient resources and training to comply with the new regulations. However, the regulations provide that the process for requesting PAS, the process for determining whether such services are required, and the agency's right to deny such requests when

provision of the services would pose an undue hardship, are the same as for reasonable accommodations. See 29 C.F.R. § 1614.203(d)(5)(v).

20. Determining/Documenting Need.

- A. Unless a disability and its appropriate accommodation are obvious, medical documentation will almost always play a role in assessing whether an individual is entitled to reasonable accommodation and what constitutes an appropriate accommodation. Medical information can also become an issue with regard to leave requests and an employee's ability to safely perform the functions of a job. Agencies must not be cavalier in collecting, handling, or storing medical information. Mishandling medical documentation can lead to liability under the Rehabilitation Act, even if the complainant ultimately proves not to be an individual with a disability.
- B. The USIBWC may require only the reasonable documentation that is needed to establish that a person has an ADA disability, and that the disability necessitates a reasonable accommodation. Thus, the USIBWC, in response to a request for reasonable accommodation, cannot ask for documentation that is unrelated to determining the existence of a disability and the necessity for an accommodation. In most cases, an employer cannot ask for an individual's entire medical record because it is bound to have information unrelated to the disability at issue and the need to accommodate that disability.
- C. Unless an individual requests reasonable accommodation in the application process where the need is not obvious, a request for medical information or a medical examination cannot be made before an agency at least extends a conditional offer of employment, regardless of the agency's motives.
- D. Under appropriate circumstances, the USIBWC may request information or documentation regarding:
 - (1) The nature, severity, and duration of the individual's impairment.
 - (2) The activity or activities that the impairment limits.
 - (3) The extent to which the impairment limits the individual's ability to perform the activity or activities.
 - (4) Why the individual requires reasonable accommodation or the particular reasonable accommodation requested, as well as 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.

21. Interactive Process.

- A. In addressing reasonable accommodation, the parties should engage in an informal and flexible interactive process to identify the precise limitations of the individual and

what accommodations could overcome those limitations. 29 CFR 1630.2 (o)(3).

- B. In many instances, the appropriate reasonable accommodation may be so obvious to either or both the employer and the qualified individual with a disability that it may not be necessary to proceed in this step-by-step fashion.

22. Confidentiality and Privacy. All medical records are subject to the confidentiality provisions of the Privacy Act. This means that usually physician treatment records are appropriate for disclosure for medical personnel only. Managers have a right to access information only on a need-to-know basis in order to make staffing decisions. Confidentiality is also addressed in the EEOC's ADA regulations at 29 CFR 1630.14.

23. Selection and Evaluation of PAS Providers.

A. Definition of PAS Service Provider. PAS means assistance with performing activities of daily living that an individual would typically perform if he or she did not have a disability, and that is not otherwise required as a reasonable accommodation, including, but not limited to, assistance with removing and putting on clothing, eating, and using the restroom. Such services do not include medical care.

B. Qualifications. In many cases, the employee who needs PAS will be able to recommend a provider. Employers may also be able to get a referral from a local center for independent living or a state vocational rehabilitation agency.

Some federal agencies, such as the EEOC, the Department of Labor, the Department of Transportation, and the Department of Justice's Civil Rights Division, already have been voluntarily providing PAS in the workplace. For federal employers who are new to providing PAS, they may be able to tap into providers used by these other agencies.

C. Selection of PAS Providers (Use of federal employees or contractors). The USIBWC ultimately chooses the provider, but the Section 501 regulations state that when selecting someone who will provide personal assistance services to a single individual, federal agencies must give primary consideration to the individual's preferences to the extent permitted by law. Because of the private nature of PAS, other employers who provide PAS may want to take the same approach.

D. Use of Federal Employees. USIBWC may use federal employees, independent contractors, or a combination of employees and contractors. Agencies also have discretion as to how to classify their PAS providers concerning pay grade, benefits, and leave.

E. Using existing employees to provide PAS. It is not appropriate to require someone who does not provide PAS or similar services as part of his or her job to assist another employee with tasks such as eating and using the restroom.

However, the regulations do not prohibit agencies from assigning the responsibility

to perform a personal assistance service to an existing employee who already performs a similar service as part of his or her regular job. Agencies that utilize this strategy should ensure that the resulting number of providers is sufficient to provide PAS in a timely manner to any agency employee who is entitled to them.

F. Use of Independent Contractor to Provide PAS. USIBWC may use federal employees, independent contractors, or a combination of employees and contractors. USIBWC also have discretion as to how to classify their PAS providers concerning pay grade, benefits, and leave.

G. Use of Pool of PAS Providers/Assign One PAS Provider to Each Employee. USIBWC is permitted to utilize a pool of PAS providers, rather than assign one PAS provider to each employee who needs one as long as each individual who is entitled to PAS under the regulations receives them in a timely manner. If utilizing a pool of providers would foreseeably result in some individuals not receiving services when they are needed, the USIBWC should increase the number of available providers or arrange for dedicated PAS providers.

H. Consideration of Employee's Choice of a Particular PAS Provider.

A. If the USIBWC is hiring a PAS provider who will be assigned to a single individual, and if that individual prefers a particular provider (e.g., because the provider has worked with him or her in the past), the USIBWC must give primary consideration to the employee's choice to the extent permitted by law. However, it may not be possible to honor the individual's preferences in all cases. The USIBWC may choose a different provider if, for example:

- (1) the individual's preferred provider is not qualified or less qualified than another applicant;
- (2) if the USIBWC decides to utilize a pool of shared providers instead of dedicated providers, for reasons of cost or convenience; or
- (3) if the agency decides to have appropriate existing employees provide PAS, again, for reasons of cost or convenience.

I. Use of Own PAS Provider/Family Member. An individual may request permission to bring his or her own PAS provider to work as a reasonable accommodation if the individual does not request that the USIBWC assume the cost of providing the services. However, if the individual wants the USIBWC to assume the cost of providing the services, the USIBWC may have reasons to choose a different provider.

J. Security Clearance for PAS Provider. If an individual's PAS provider would have access to classified information, the agency should find a provider who has, or who likely could get, the appropriate security clearance. The EEOC acknowledges that, under some circumstances, finding such a provider may be sufficiently difficult as to

constitute an undue hardship. If an individual with a targeted disability is unable to perform essential job functions because an appropriate provider cannot be found, the agency may consider the individual to be unqualified for the position.

- K. Unavailability of PAS Provider.** USIBWC should instruct PAS providers to notify it of any absences as soon as possible, so that it can make alternative arrangements. Such arrangements could include, for example, contracting with different providers on a short-term basis, adjusting the schedules of shared PAS providers if the agency utilizes any, or allowing the individual to telework if the employee can work at home without the need for PAS provided by the agency.
- L. Assignment of Non-PAS Job Functions to PAS Providers.** USIBWC is permitted to assign non-PAS job functions to PAS providers. Many agencies that currently provide PAS employ individuals who also do other work-related tasks. Sometimes these work-related tasks are those that are required as a reasonable accommodation. Other times, the work-related tasks are the type that any assistant would provide. However, if the USIBWC does assign additional duties to its PAS providers, it should ensure that those duties do not interfere with provision of PAS, and that all individuals who are entitled to PAS continue to receive them in a timely manner.
- M. Finding PAS Providers.** Applicants for PAS provider positions may be found in the same way that applicants for other positions are located-by advertising the opening on USAJOBS and other job posting boards. Additional resources include local vocational rehabilitation offices, American Job Centers, centers for independent living, home care agencies, and the individual who requested PAS. Additionally, some contractors are available through GSA Advantage.

24. Funding PAS

- A. Budgeting for PAS.** The resources available to the USIBWC as a whole are considered when determining whether the USIBWC can provide PAS without undue hardship.

There are no legal prohibitions against using agency funds to purchase some kinds of personal services that may be needed by an individual with a targeted disability. Although federal agencies are generally not permitted to expend appropriated funds on personal expenses for employees, see 3 Comp. Gen. 433 (1924), those restrictions do not apply to services that agencies are legally required to provide in order to comply with Section 501. (See 4 GAO-RB pt. C, s. 13 (2015) (explaining that "agencies may expend appropriated funds to accomplish the purposes of the Rehabilitation Act when acting under the Act's authority and the regulatory standards that govern its application")).

- B. Reliance on Outside Sources to Pay for PAS.**

(1) USIBWC is entitled to consider all available resources when arranging for PAS,

including outside sources that are already providing PAS or are willing to provide PAS at their own expense, such as a state or veterans' rehabilitation agency. However, USIBWC is ultimately responsible for ensuring that the services are provided in a timely manner and cannot rely on the fact that an outside source has promised to, or is otherwise obligated to, provide PAS as a reason for denying an employee's request.

- (2) USIBWC is required to pay an employee's family member who provides PAS at work, but who also performs PAS off the job if that family member is hired as a professional PAS provider at a federal agency, the agency must compensate the family member as either a contractor or federal employee.

25. Complaint resolution process for employees and providers. Any employee, former employee, applicant for employment, or certain contract employee who believes that he or she has been discriminated against because of race, color, religion, sex, national origin, genetic information, age, physical or mental disability, and/or reprisal in an employment matter, including Equal Pay Act complaints, subject to the control of the USIBWC, may initiate the EEO complaint process.

26. Employee and Contractor Complaint Resolution Process.

A. In order to establish timelines in the formal complaint process, the aggrieved must initiate contact with an EEO official or counselor:

- (1) Within 45 days of the action or practice alleged to be discriminatory;
- (2) In the case of a personnel action, within 45 days of the effective date of the action; and/or
- (3) Within 45 days from when the aggrieved became aware of the alleged discriminatory action or practice.

B. The 45-day time limit will be extended when the aggrieved shows that:

- (1) He or she was not notified of the time limits and was not otherwise aware of the time limits;
- (2) He or she did not know and reasonably should not have known that the perceived discriminatory action or practice occurred;
- (3) Despite due diligence, he or she was prevented by circumstances beyond his or her control from contacting an EEO official or counselor within the prescribed time limits; or
- (4) For other reasons considered sufficient by the USIBWC or the EEOC.

C. The requirement for EEO counselor contact is satisfied when an aggrieved initiates

contact with an EEO officer, specialist, or assistant, even if that person is not a counselor, for the express purpose of proceeding with a matter of concern.

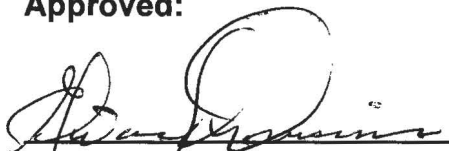
27. Enforcement. Agencies that fail to meet any of the regulation's requirements risk having their affirmative action plans disapproved. EEOC will work with agencies to achieve compliance with all such requirements. However, where such efforts are not successful, the Chair of the EEOC may issue a notice to the head of any such noncompliant agency and publicly identify the agency. See 29 CFR § 1614.102 (e). As set forth in the preamble, the regulation takes no position on the availability of a private remedy for affirmative action obligations. The EEOC believes that its procedural regulations governing complaints of discrimination in the federal sector, found at 29 CFR §1614, subpart A, are the most appropriate place to address this question.

28. Resources.

- A. 29 CFR Part 1614, Affirmative Action for Individuals With Disabilities in Federal Employment; Final Rule;
- B. EEOC's ADA regulations at 29 CFR 1630.14;
- C. 5 USC 552;
- D. EEOC's Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans With Disabilities Act (2002);
- E. Hadley Guide to Federal Sector Equal Employment Law and Practice: Reasonable Medical Documentation;
- F. Guidance on Executive Order 13164 - Establishing Procedures to Facilitate the Provision of Reasonable Accommodation;
- G. EEOC Enforcement Guidance: Pre-employment Disability-Related Questions and Medical Examinations; and
- H. Hadley Guide to Federal Sector Equal Employment Law and Practice: "Direct Threat" or "Elevated Risk" Defense.

29. Supersession. This is a new guidance.

Approved:



Edward Drusina, P.E.
Commissioner

3/30/2018
Date