



Questions & Answers: : Federal Agencies' Obligation to Provide Personal Assistance Services Under Section 501 of the Rehabilitation Act

This technical assistance document was issued upon approval of the Chair of the U.S. Equal Employment Opportunity Commission.

OLC Control Number: EEOC-NVTA-2017-3

Concise Display Name: Questions & Answers: : Federal Agencies' Obligation to Provide Personal Assistance Services Under Section 501 of the Rehabilitation Act

Issue Date: 01-03-2017

General Topics: Federal

Summary: This document provides practical information for federal agencies in complying with the regulatory affirmative action obligation to provide personal assistance services to certain employees who need them because of a disability.

Citation:	Rehabilitation Act, 29 CFR Part 1614
Document Applicant:	Federal Agencies, Federal Employees, Applicants for Federal Employment
Previous Revision:	No

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September 18, 2017

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.

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. This document answers some of the most common questions about this new regulatory requirement.

Background

1. What do the new regulations say about PAS?

The regulations require federal agencies to provide PAS, in addition to reasonable accommodations, to certain employees who have targeted disabilities unless doing so would impose an undue hardship on the agency.

They also state that an agency cannot discriminate against an individual based on the need for PAS.

2. Why do the regulations include the requirement to provide PAS?

Some individuals with targeted disabilities cannot work unless PAS are provided to them in the workplace. The services will allow such individuals to enjoy the opportunity and independence offered by paid employment. They also will reduce the amount of taxpayer funds spent on public disability benefits by allowing such individuals to receive paid jobs in the competitive workplace.

3. When must agencies start complying with the new PAS requirement?

Agencies will be required to provide PAS beginning on January 3, 2018, one year after the regulations were issued. This is called the "applicability date." The delayed applicability date will allow agencies to modify their existing practices. EEOC will provide agencies with training and technical assistance during the time leading up to the applicability date.

4. Are there any reporting requirements regarding the agency's implementation of the PAS procedures?

Yes. Each agency will be 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.

Do the New Regulations Apply to My Organization?

5. Do the new regulations apply to all federal agencies?

Yes. 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.

6. Does the PAS requirement apply to private businesses?

No. These regulations apply only to the federal government and do not apply to private businesses.

7. Does the PAS requirement apply to federal contractors, recipients of federal funds, or state and local government employers?

No. 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.

What Are PAS?

8. Do the new regulations define PAS?

Yes. The regulations state that "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.

9. Do PAS include medical services?

No. PAS do not include, for example, performing medical procedures (e.g., administering shots) or medical monitoring (e.g., monitoring blood pressure).

10. Do PAS include helping an individual with a targeted disability to perform his or her own job functions?

No. PAS allow individuals to perform activities of daily living that an individual would typically perform if he or she did not have a disability. 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 differ 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.

When Must an Agency Provide PAS?

11. Do the new regulations place limits on an agency's obligation to provide PAS?

Yes. Agencies are only required to provide PAS to an individual if-

- the individual is an employee of the agency;
- the individual has a targeted disability;
- 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
- providing PAS will not impose undue hardship on the agency.

12. What are "targeted disabilities"?

Targeted disabilities are a subset of conditions that would be considered disabilities under the Rehabilitation Act. The federal government has recognized that qualified individuals with certain disabilities face significant barriers to employment, which for some people may include lack of access to PAS in the workplace, that are above and beyond the barriers faced by people with the broader range of disabilities. The federal government calls these "targeted disabilities."

A list of targeted disabilities can be found here:

https://www.opm.gov/Forms/pdf_fill/sf256.pdf

https://www.opm.gov/Forms/pdf_fill/sf256.pdf). Note, however, that not everyone with a targeted disability will be entitled to PAS under the new regulations, because only some individuals with targeted disabilities require assistance with basic activities like eating and using the restroom. Medical

conditions that are more likely to result in the need for PAS include, for example, missing limbs or paralysis due to spinal cord injury.

13. Does the requirement apply to both existing employees and to new employees?

Yes. Agencies must provide PAS to an employee if the conditions listed in the answer to Question 11 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 in the answer to Question 11 have been met.

14. Are agencies required to provide PAS during work-related travel?

When an agency's 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, agencies are 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. Are agencies required to provide PAS to help employees commute to work?

No. Agencies are only required to provide PAS when the individual is working, unless he or she is on work-related travel (see answer to Question 14).

16. Are agencies required to provide PAS during telework?

Yes, if the conditions listed in the answer to Question 11 have been met and the individual is entitled to telework under the agency's telework policy or as a reasonable accommodation. Agencies are cautioned not to revoke an individual's permission to telework because he or she is entitled to PAS under the new regulations.

17. Are agencies required to provide PAS during employer-sponsored events such as holiday parties?

Yes. Under the new regulations, federal agencies 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.

Who Will Perform the Services?

18. Are PAS providers federal employees or contractors?

Agencies 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.

19. May agencies ask existing employees to provide PAS?

It depends on the situation. 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.

20. Are agencies permitted to utilize a pool of PAS providers, rather than assign one PAS provider to each employee who needs one?

Yes, 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 agency should increase the number of available providers or arrange for dedicated PAS providers.

21. Must an agency consider an employee's choice of a particular PAS provider?

If an agency 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 agency 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. An agency may choose a different provider if, for example, the individual's preferred provider is not qualified or less qualified than another applicant, if the agency decides to utilize a pool of shared providers instead of dedicated providers, for reasons of cost or convenience (see answer to Question 20), or if the agency decides to have appropriate existing employees provide PAS, again, for reasons of cost or convenience (see answer to Question 19).

22. Is the agency required to find a PAS provider of the same gender as the employee?

Although PAS include assistance with activities that may be considered personal, PAS providers render this assistance in a professional capacity. The central question is whether the individual can provide the necessary services. Generally, providers of one gender are no more qualified than those of another to provide such services. However, as noted in the answer to Question 21, when hiring a PAS provider who will be assigned to a single individual, the agency must give primary consideration to the employee's preferences to the extent permitted by law.

23. Is an employee permitted to bring his or her own PAS provider to work instead of having the agency provide one?

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 agency assume the cost of providing the services. However, if the individual wants the agency to assume the cost of providing the services, the agency may have reasons to choose a different provider (see answer to Question 21).

24. What if the position held or sought by the individual with a targeted disability requires a security clearance?

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 Commission 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.

25. What happens if the person who provides PAS for an employee is unavailable?

An agency 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.

26. Are agencies permitted to assign non-PAS job functions to PAS providers?

Yes. 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 (see the answer to Question 10). Other times, the work-related tasks are the type that any assistant would provide. However, if an agency 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.

27. Where can an agency find 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.

What Is the Process for Getting PAS?

28. How does an employee request 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.

29. Is providing PAS an HR/OCHCO function or an EEO/OCR function?

Each agency may determine whether to assign the responsibility of processing requests for PAS and arranging for PAS to HR/OCHCO or EEO/OCR staff, provided that they 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). Agencies therefore may find it most effective to assign responsibility for providing PAS to a Disability Program Manager, if the agency has one, or to the individual(s) responsible for processing requests for reasonable accommodation.

30. Are agencies required to have written procedures for processing requests for PAS?

Yes. Many federal employees will be unfamiliar with the new PAS requirement, so it is important to have written procedures in place by the time the regulations come into effect. An agency may create separate PAS procedures or, alternatively, state in its 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 provision of the services would pose an undue hardship, are the same as for reasonable accommodations.

31. When may an agency deny a request for PAS?

The agency is only required to provide PAS if the requesting employee is entitled to them under the regulations. Therefore, an agency may deny a request for PAS if-

- the requestor is not an employee of the agency;
- the requestor does not have a targeted disability;
- the targeted disability does not create a need for PAS;
- the requester is not able to perform the essential functions of the job, even with PAS and any reasonable accommodations;
- the requester would create a direct threat to safety on the job, even with PAS and any reasonable accommodations; or
- providing PAS would impose undue hardship on the agency.

32. How does an agency determine whether an individual has a targeted disability that creates a need for PAS?

To determine whether a requesting individual is entitled to PAS, and, if so, the nature of the required services, an agency should ask the employee what types of PAS he or she needs using the same type of informal, interactive process used for reasonable accommodation. The agency should expect the process to be brief in most cases. An employee is not likely to request assistance with activities such as eating or using the restroom unless it is truly necessary, and, in general, such assistance is only necessary for individuals who have obvious targeted disabilities like paralysis and missing limbs. Where it is obvious that an employee has a targeted disability and needs the requested services, the agency may not require the individual to provide medical documentation in support of the request.

For further information on the interactive process, see the EEOC's ***Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans With Disabilities Act*** (<https://www.eeoc.gov/policy/docs/accommodation.html#requesting>).

33. How does an agency determine whether providing PAS would impose undue hardship on the agency?

Under the new regulations, the term "undue hardship" has the same meaning that it has in the reasonable accommodation context. Granting a request for PAS will impose undue hardship on an agency if it would result in "significant difficulty or expense." The regulations emphasize that, as with reasonable accommodation, the determination of whether granting an individual's request for PAS would impose "significant" difficulty or expense must take into account all resources available to the agency as a whole.

34. Are there enforcement provisions in the event that an agency denies a request for PAS?

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.

35. Are there confidentiality requirements and/or privacy considerations involved in providing PAS?

Yes. The Rehabilitation Act prohibits the disclosure of medical information except in certain limited situations. Generally, information that is otherwise confidential under the Rehabilitation Act may be shared only with individuals involved in the PAS process who need to know the information to consider PAS for a specific individual.

36. May an employer require an individual requesting PAS to self-identify as a person with a targeted disability on a form, such as OPM's SF 256?

No. An agency cannot require an employee to complete a self-identification form regarding whether he or she is an individual with a disability, such as OPM's voluntary "Self-Identification of Disability" form (SF-256) or any other self-identification form. The agency also cannot make completion of the form a condition of receiving PAS. Note, however, that the agency still may be able to

count an individual who is receiving PAS in its annual disability workforce analysis, even if the individual does not self-identify as having a disability. See 29 C.F.R. § 1614.203(d)(6)(ii).

How are PAS Funded?

37. Which part of the agency's budget pays for PAS?

Agencies may structure their own budgets as they see fit. However, the resources available to the agency as a whole are considered when determining whether an agency can provide PAS without undue hardship. In the Commission's experience, it is easier for individuals within an agency to determine whether the agency as a whole has sufficient resources to cover a disability-related expense, such as the cost of a reasonable accommodation, if such funds are drawn from a centralized account. The EEOC has produced several resources explaining the undue hardship standard. See, e.g., EEOC, *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans With Disabilities Act* (2002),

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

38. Is an agency required to provide PAS if the individual can rely on outside sources to provide them at no cost or a reduced cost?

Agencies are 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, agencies are 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.

39. Is an agency required to pay an employee's family member who provides PAS at work, but who also performs PAS off the job without compensation?

Yes. 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.

40. Are there legal prohibitions against using agency funds to purchase some kinds of personal services that may be needed by an individual with a targeted disability?

No. 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"))).

41. Won't PAS be too expensive?

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.