



Centers for Medicare & Medicaid Services (CMS) Policy and Procedure on Personal Assistance Services For Individuals with Targeted Disabilities

It is the policy of the Centers for Medicare & Medicaid Services (CMS), U.S. Department of Health and Human Services, to provide personal assistance services (PAS) to employees with targeted disabilities as an aspect of affirmative action as required by Title 29 Code of Federal Regulations (C.F.R.) § 1614.203(d)(5). PAS is in addition to professional services that may be required as a reasonable accommodation under 29 C.F.R. § 1630. At CMS, Daily Living Assistance at Work (DLAW) is the name of the function that will provide PAS. In this policy, use of the term “DLAW” is also intended to mean the PAS required by 29 C.F.R. § 1614.203(d)(5).

Adverse action against job applicants or employees based on their need for, or perceived need for, DLAW is prohibited.

This Policy and Procedure, which includes procedures for processing requests for DLAW, will be posted on www.cms.gov, the CMS intranet, and will be made available to all job applicants and employees in written and accessible formats.

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Legal requirement

Effective January 3, 2018, pursuant to 29 C.F.R. 1614.203(d)(5), CMS, as an aspect of its affirmative action plan, will provide PAS during work hours and job-related travel to employees who need them because of a targeted disability, unless doing so would impose an undue hardship on the Agency. DLAW is the name of the CMS function that will provide the required personal assistance services.

References:

- Section 501 of the Rehabilitation Act of 1973
- 29 C.F.R. § 1614.203(d)(5)

DLAW is limited to employees with “targeted disabilities”

DLAW services are limited to employees who have a targeted disability and who also require assistance with basic life activities because of the targeted disability. “Targeted disabilities” is a defined subset of conditions that present barriers to employment above and beyond the barriers faced by people with the broader range of disabilities. The federal government calls these "targeted disabilities." They are:

- developmental disabilities, for example, cerebral palsy or autism spectrum disorder;
- traumatic brain injuries;
- deafness or serious difficulty hearing, benefiting from, for example, American Sign Language;
- blindness or serious difficulty seeing even when wearing glasses;
- missing extremities (arm, leg, hand and/or foot);
- significant mobility impairments, benefitting from the utilization of a wheelchair, scooter, walker, leg brace(s) and/or other supports;
- partial or complete paralysis (any cause);
- epilepsy and other seizure disorders;

- intellectual disabilities (formerly described as mental retardation);
- significant psychiatric disorders, for example, bipolar disorder, schizophrenia, PTSD, or major depression;
- dwarfism; and
- significant disfigurement, for example, disfigurements caused by burns, wounds, accidents, or congenital disorders.

Not all employees with a targeted disability will qualify for DLAW. Only employees with targeted disabilities who require assistance with basic life activities are entitled to DLAW. The U.S. Equal Employment Commission (EEOC) suggests that medical conditions that are more likely to result in the need for DLAW include, for example, missing limbs or paralysis due to spinal cord injury.

DLAW is limited to non-medical assistance with activities of daily living

DLAW services are limited to "assistance with performing activities of daily living that an [employee] 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." DLAW does not include:

- medical procedures or monitoring (for example, administering shots or monitoring blood pressure);
- helping an employee perform job functions, such as reviewing documents or answering questions that come through a call center; or
- services provided as reasonable accommodation for job-related tasks, such as sign language interpreters or printed text readers.

(For questions about CMS's Reasonable Accommodation Program, contact ReasonableAccommodationProgram@cms.hhs.gov.)

When DLAW will be provided to an employee with a targeted disability

CMS will provide DLAW services to an employee only if:

- the employee is an employee of the Agency;
- the employee has a targeted disability;
- the employee requires the services because of his or her targeted disability;
- the employee will be able to perform the essential functions of the job, without posing a direct threat to safety, once DLAW and any required reasonable accommodations have been provided; and
- providing DLAW will not impose undue hardship on the Agency.

Specific situations:

Work-related travel. Personal assistance services may be requested for work-related travel, if an employee is not able to use his/her usual source of personal assistance services.

Commuting. CMS will not provide DLAW to help employees commute to work. Agencies are only required to provide DLAW when the employee is working, unless he or she is on work-related travel.

Employer-sponsored events. CMS will provide DLAW for employees to participate in employer-sponsored events (such as holiday parties) to the same extent as it would provide reasonable accommodations.

Personnel who will perform the services

DLAW will be performed by a provider as defined in 29 C.F.R. 1614.203(a)(4). CMS may also assign this provider to perform unrelated duties as long as the provider can do so and still provide required DLAW services in a timely manner. CMS may use federal employees, independent contractors, or a combination of employees and contractors. When selecting who will provide DLAW to a single employee, CMS will give primary consideration to the employee's preferences to the extent permitted or required by law. However, CMS may require a DLAW provider

to provide DLAW services to more than one employee, and may choose a different provider if the employee's selected provider is less qualified than another potential DLAW provider or for reasons of cost or convenience to CMS.

An assigned DLAW provider may or may not be the same gender as the employee receiving services. The EEOC states that although personal assistance services include assistance with activities that may be considered personal, 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.

How to request DLAW

An employee may request DLAW by emailing DailyLivingAssistanceatWork@cms.hhs.gov or by informing his or her supervisor or someone else in the employee's supervisory chain. Supervisors who receive a request for DLAW must immediately contact DailyLivingAssistanceatWork@cms.hhs.gov.

Individuals do not need to mention Section 501 or EEOC regulations explicitly or use terms such as "PAS," "personal assistance services," or "affirmative action" to trigger CMS's obligation to consider the request.

How CMS determines whether DLAW is required

CMS's Office of Equal Opportunity and Civil Rights (OEOCR) is the decision maker for DLAW requests. An OEOCR staff member will contact the employee to discuss the request. If it is not obvious that the employee has a targeted disability and a need for DLAW, OEOCR will request medical documentation.

The OEOCR staff person will then engage the employee in an interactive process to determine what daily living assistance is necessary. OEOCR will keep the supervisor advised of the request and the outcome of the request. OEOCR will issue an approval or denial of the DLAW request and ask the employee to sign to acknowledge receipt. OEOCR will provide a copy to the supervisor, and instruct the supervisor that the copy constitutes confidential medical information under the Rehabilitation Act, and if retained, must be kept in locked files separate from the employee's personnel file.

When CMS would deny a DLAW request

CMS is only required to provide DLAW if the requesting employee is entitled to DLAW under the regulations. Therefore, a request for DLAW may be denied 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 DLAW;
- the requestor is not able to perform the essential functions of the job, even with DLAW and any reasonable accommodations;
- the requestor would create a direct threat to safety on the job, even with DLAW and any reasonable accommodations; or
- providing DLAW would impose undue hardship on the Agency.

Procedures available if an employee is dissatisfied with a denial of DLAW

If an employee is dissatisfied with the denial of a DLAW request, the following procedures are available:

Union Grievance

A CMS denial of a DLAW request constitutes the final Agency decision and a bargaining unit employee may file a grievance through the negotiated grievance procedure in Article 24 of the Master Labor Agreement (MLA). To file a grievance, the grievance must be submitted in writing to DailyLivingAssistanceatWork@cms.hhs.gov on the CMS Standard Grievance Form within 10 working days of receipt of the denial. Upon request, a meeting will be scheduled to hear the employee, or his or her representative's oral presentation. Within 10 working days of the oral presentation, a written decision will be issued to the designated representative, or the employee, if he or she is self-represented. If no oral presentation is requested, the written decision will be issued within 10 working days of receipt of the grievance. If the decision is not acceptable to the employee or the Union, the employee may request a review at Step 2 as set forth in the Master Labor Agreement.

Administrative Grievance

An employee can grieve the denial within 30 calendar days after receipt of the denial, in accordance with the provisions of the Employee Grievance Procedure, HHS Instruction 771-1. Any such grievance must be in writing and must be addressed to DailyLivingAssistanceatWork@cms.hhs.gov.

EEO complaint

If an employee believes that a denial of a DLAW request is based on discrimination prohibited by EEO law (race, color, religion, age, sex, national origin, sexual orientation, disability, genetic information, or reprisal), the employee can file an EEO complaint. To file an EEO complaint, the employee must initiate contact with an EEO counselor within 45 calendar days of receipt of the decision, in accordance with the EEO statutory procedures set out in 29 C.F.R. 1614. Employees can call the Office of Equal Opportunity and Civil Rights at (410) 786-5110 or send an email to EEOComplaints@cms.hhs.gov for information on how to proceed.

If an employee files a formal EEO complaint, the employee cannot file a grievance under the MLA about the same issue. An employee is deemed to have exercised his or her grievance option when the employee files a formal EEO complaint OR when the employee files a grievance in accordance with Article 24 of the MLA, whichever occurs first.