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Family Responsibility Discrimination Now Unlawful in New York

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In 2016, New York State and New York City joined a growing list of jurisdictions, including San Francisco, Washington, D.C. and Philadelphia, that have made it unlawful for an employer to discriminate against an employee on the basis of his or her family responsibilities. The new laws, which take the form of amendments to the New York State and New York City Human Rights Laws, are part of a broader initiative to provide support and protection to New York's working families.

State Human Rights Law

On Oct. 21, 2015, Governor Andrew Cuomo signed into law an amendment to New York Executive Law §296, which makes it unlawful for an employer of four or more employees to discriminate on the basis of "familial status."[1] The amendment became effective on Jan. 16, 2016. In a press release, the governor described the law as intending to remedy the fact that "employees often suffer from stereotypes relative to their status as parents or guardians of children under the age of eighteen."[2]

The bar on familial status discrimination prohibits an employer from discriminating against an employee or job applicant based upon the fact that: (1) the employee is pregnant, has a child or is in the process of securing legal custody of an individual under age 18; or (2) children under the age of 18 are domiciled with the employee and the employee is (i) the parent or designee of the parent of those children, or (ii) has legal custody over the children.[3] Thus, employees or applicants for employment are "protected from discrimination on the basis that they are, or are in the process of becoming, the parent or guardian of one or more children."[4]

The New York State Division of Human Rights (DHR) has since issued a guidance document for employers (guidance) which elaborates upon what is and is not required by the law. It cautions that employment actions may not be based on a person's familial status and notes, by way of example, that it is unlawful for an employer to decide not to hire or promote someone:

- because she or he has children at home, or has "too many" children;
- based on the belief that someone with children will not be a reliable employee;
- because she or he is a single parent;
- because she is pregnant;

On Jan. 5, Mayor Bill de Blasio signed a bill amending the New York City Human Rights Law to make workplace discrimination on the basis of 'caregiver status' unlawful.

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- because she or he is a parent, regardless of living arrangements;
- because a father has obtained custody of one or more of his children and will be the primary caretaker;
- based on the belief that mothers should stay home with their children;
- because she or he is living with and caring for a grandchild;
- because she or he is a foster parent; or
- because of any other stereotyped belief or opinion about parents or guardians of children under the age of 18.[5]

DHR's guidance points out, on the other hand, that the law does not require an employer to make reasonable accommodations for the needs of an employee's child, such as the granting of time off to parents. However, employers "must grant such time off, or other changes to the terms or conditions of employment, [for familial status reasons] to the same extent that time off, or other workplace changes, are granted to employees for personal or other reasons."[6]

City Human Rights Law

On Jan. 5, 2016, Mayor Bill de Blasio signed a bill amending the New York City Human Rights Law to make workplace discrimination on the basis of "caregiver status" unlawful. Pursuant to the amendment, which took effect on May 5, 2016, an employer of four or more employees may not, merely because someone is or is perceived to be a caregiver, refuse to hire or employ, or discharge from employment such person, or discriminate against such person in compensation or in terms, conditions or privileges of employment.[7]

As is generally the case, the protections afforded under the city's Human Rights Law are broader than those provided for under state law. Its provisions cover more than just current or expectant parents as the state law does. A "caregiver" is defined under the city's law as a "person who provides direct and ongoing care for a minor child or a care recipient."[8]

> Handbooks should be revised to state that discrimination on the basis of familial and/or caregiver status is prohibited. The terms 'familial status' or 'caregiver status' should be defined and should mirror the laws applicable to the jurisdiction where the employer is located.

The term "minor child" is defined as a biological, adopted or foster child, a legal ward, or a child of a caregiver standing in loco parentis, and the term "care recipient" is defined as a person with a disability who: (i) is a covered relative, or a person who resides in the caregiver's household; and (ii) relies on the caregiver for medical care or to meet the needs of daily living. "Covered relatives" include a caregiver's child, spouse, domestic partner, parent, sibling, grandchild or grandparent, or the child or parent of the caregiver's spouse or domestic partner, or any other individual in a familial relationship with the caregiver as designated by the rules of the Commission on Human Rights.[9]

On April 26, 2016, the city's Commission on Human Rights issued fact sheets relating to caregiver discrimination. These documents make it clear that, like the state law, the city law does not require employers to offer reasonable accommodations to employees because of their caregiving responsibilities. However, it does require employers to "provide certain benefits, like flexible scheduling" to caregivers if it extends such benefit to other employees.[10]

Notably, the city law's lack of a reasonable accommodation mandate is a marked departure from earlier versions of the bill. City councilpersons had originally proposed requiring employers to make reasonable accommodations for caregivers who were caring for an individual with a disability, caring for a child or facilitating a child's involvement in education, or providing emergent care to the elderly.[11] It remains to be seen whether such protections might work their way into future amendments to the city Human Rights Law.

Compliance Issues

Employers should make compliance with the new laws a priority.

The logical starting point is to make the prevention of family responsibility discrimination an institutional commitment that is set forth in company policy. Handbooks should be revised to state that discrimination on the basis of familial and/or caregiver status is prohibited. The terms "familial status" or "caregiver status" should be defined and should mirror the laws applicable to the jurisdiction where the employer is located. Policies should also identify the individuals within the company to whom such discrimination can be reported, and describe a general procedure for the investigation of complaints.

Training is also essential. Supervisors must be instructed that, when considering requests for accommodations, the same standards should be applied to employees with family responsibilities as employees making the request for other reasons. For example, if employees are permitted to have a flexible schedule in order to fulfill personal commitments such as attendance at school, employees must be granted the same accommodation in order to tend to family responsibilities. If there is a legitimate business reason for denying an accommodation to an individual with family responsibilities, the reasons should be explained to the employee and documented in the employer's records.

In making other employment decisions, such as those relating to compensation and advancement within the company, supervisors must be sure to focus on employees' performance. An unfounded perception that an employee with caregiving responsibilities is inferior to an employee without them is a fertile breeding ground for an employment discrimination lawsuit. This is not to say that an employer is required to turn a blind eye to a caregiver's chronic lateness or subpar performance. Such problems should be addressed in the same manner whether or not caused by an employee's family responsibilities, just as superior performance should be rewarded irrespective of an employee's obligations at home.

As a final point, it is important for employers to recognize that these laws are gender neutral. Employers must not be more willing to accommodate women than they are men, even if, traditionally, it has been less common for men to seek leaves of absence, flexible working arrangements or reduced hours.

Conclusion

The needs of working families are at the forefront of national conversation. The amendments to New York State and New York City Human Rights Laws are indicative of that, and there will undoubtedly be a considerable amount of litigation under both laws. The best strategy for employers is to ensure that those with supervisory responsibility are familiar with the company's obligations, and to document both compliance initiatives and the legitimate reasons for the company's employment decisions.

1. N.Y. Exec. Law §296(1)(a) (2016).
2. Press Release: Governor Cuomo Signs Legislation to Protect and Further Women's Equality in New York State, Oct. 21, 2015, https://www.governor.ny.gov/news/governor-cuomo-signs-legislation-protect-and-further-women-s-equality-new-york-state (last visited May 11, 2016).
3. N.Y. Exec. Law §292(26) (2016).
4. New York State Division of Human Rights, Guidance on Familial Status Discrimination for Employers in New York State, http://dhr.ny.gov/sites/default/files/pdf/guidance-familial-status-employers.pdf (last visited May 11, 2016).
5. Id. at p. 2.
6. Id. at pp. 2-3.
7. N.Y.C. Admin. Code §8-107 (2016).
8. N.Y.C. Admin. Code §8-102 (30) (2016).
9. Id.
10. New York City Commission on Human Rights, Protections for Employees with Caregiving Responsibilities, http://www.nyc.gov/html/cchr/downloads/pdf/materials/Caregiver_Fact-Sheet-Employer.pdf (last visited May 11, 2016).
11. Report of the New York City Governmental Affairs Division, Committee on Human Rights, dated Sept. 21, 2016, http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=1672736&GUID=D78A68CB-0CA2-4777-9784-1B1CC79C4C9A (last visited May 11, 2016).