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NYC bars employment discrimination based on height and weight

On May 26, New York City Mayor Eric Adams signed into law amendments to the City’s antidiscrimination law, adding “height” and “weight” to a growing list of protected characteristics. The amendments will go into effect in November 2023.

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Background

The NYC Human Rights Law (NYCHRL) provides broad protections against employment discrimination, harassment, and retaliation for employees, applicants, interns, independent contractors, and freelancers based on their membership in a protected class. In addition to historically protected categories such as age, race, and gender, the law also protects personal appearance characteristics such as hair texture, style, length, or the use of head coverings that are commonly associated with racial, religious, ethnic, or cultural identities.

Expanded worker protections

On May 26, NYC Mayor Eric Adams signed into law amendments to the NYCHRL, expanding worker protections against discrimination. The amendments, which add “height” and “weight” to the growing list of characteristics protected by the City’s antidiscrimination law, will go into effect on November 22, 2023.

Buck comment. Notably, Michigan — as well as cities such as Washington, D.C. and San Francisco — already prohibit height and/or weight discrimination. Lawmakers in New York state, New Jersey, Massachusetts, and Vermont are considering similar measures.

Prohibited conduct

The amendments generally prohibit NYC employers from discriminating against individuals because of their actual or perceived height or weight or allowing individuals to be harassed because of those

characteristics. Among other things, the amended law makes it unlawful for an employer, its employee or agent because of an applicant's or employee's body size to:

- Represent that any employment or position is not available when, in fact, it is available;
- Refuse to hire, employ, bar, or discharge from employment such person; or
- Discriminate against such person in compensation or in terms, conditions, or privileges of employment.

Employment agencies and labor organizations are subject to similar restrictions.

Exceptions and affirmative defenses

While the amendments generally prohibit employers from basing employment decisions on an applicant's or employee's height and/or weight, they allow employers to do so when:

- Required by federal, state, or local law or regulation;
- Permitted by NYC Commission on Human Rights regulations as an identified job or category of jobs for which: (a) a person's height or weight could prevent the performance of the essential requisites of the job, and (b) the Commission has not found alternative action that covered entities could reasonably take to allow persons who do not meet the height or weight criteria to perform the essential requisites of the job or category of jobs; or
- Permitted by NYC Commission on Human Rights regulations as an identified job or category of jobs for which consideration of height or weight criteria is reasonably necessary for the execution of the normal operations of such covered entity.

Even if none of the above exceptions apply, the following affirmative defenses will be available to employers: (1) the individual's height or weight prevents them from performing the essential functions of the job, and there is no reasonable alternative that would allow the individual to do so, or (2) the employer's decision is reasonably necessary for normal business operations.

Buck comment. While employers may consider height and weight where they can demonstrate that body size is an essential job qualification, customer preferences or similar considerations likely will not support appearance-based employment decisions.

Notably, the amendments expressly allow employers to offer incentives that support weight management as part of voluntary wellness programs.

In closing

It remains to be seen how future guidance and regulations from the NYC Commission on Human Rights will shape the City's new antidiscrimination requirements. In the meantime, employers should begin to consider changes that may be needed to their employee handbooks, policies, hiring practices and decision-making protocols in light of the expanded worker protections.

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