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New York City Expands Human Rights Law to Prohibit Employment Discrimination Against Caregivers

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Earlier this month, New York City Mayor Bill de Blasio signed legislation that expands the New York City Human Rights Law, making New York City the latest municipality¹ to protect caregivers from discrimination in their terms or conditions of employment.² The amendments take effect May 4, 2016.³

While several states, including New York, Minnesota, and Oregon, prohibit discrimination on the basis of "familial" status, the New York City law goes beyond protecting the status of being pregnant or having minor children,⁴ and prohibits discrimination in employment against anyone because they provide direct and ongoing care for a minor or other covered "care recipient."

The amendments add "caregiver" as a protected class under the New York City Administrative Code, and prohibit employers from discriminating based on one's status as a caregiver or perceived status as a caregiver.⁵ Protected classes already covered under the New York City Human Rights Law include actual or perceived age, race,

1 San Francisco adopted an ordinance in 2013 prohibiting caregiver discrimination and providing predictable working arrangements for caregivers. See San Francisco Administrative Code Ch. 12Z; Jessica Rothenberg, *San Francisco Adopts Ordinance That Prohibits Caregiver Discrimination and Provides Flexible Work Arrangements for Caregivers*, Littler Insight (Oct. 23, 2013). Approximately 55 municipalities provide some type of "Family Responsibilities Discrimination" protection under a variety of statutes. See, e.g., D.C. Human Rights Act §§ 2-1401.01, 2-1401.02(12), 2-1402.11, 2-1411.02.

Additionally, as early as 2007, the U.S. Equal Employment Opportunity Commission issued enforcement guidance regarding disparate treatment of workers with caregiver responsibilities as a form of discrimination on the basis of pregnancy and disability. See EEOC, *Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities* (2007), available at <http://www.eeoc.gov/policy/docs/caregiving.html>.

2 N.Y.C. Int. 0108-2014.

3 *Id.* § 4.

4 Under the New York State Human Rights Law, for example, the protected classification of "familial status" is defined as "(a) any person who is pregnant or has a child or is in the process of securing legal custody of any individual who has not attained the age of eighteen years, or (b) one or more individuals (who have not attained the age of eighteen years) being domiciled with (1) a parent or other person having legal custody of such individuals or individuals, or (2) the designee of such parent. N.Y. Exec. L. § 292.26.

5 N.Y.C. Int. 0108-2014, §3, amending N.Y.C. Admin Code § 8-107.1, subparagraphs (a), (b), (c) and (d).

creed, color, national origin, gender, disability, marital status, partnership status, sexual orientation or alienage or citizenship status of any person.⁶

Definitions

The nested definitions under the amendments are critical to their protections. A "caregiver" means "a person who provides direct and ongoing care for a minor child or care recipient." A "care recipient" means a person with a disability who (i) is a "covered relative" or (ii) is a person who resides in the caregivers' household. A "covered relative" is broadly defined as 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."⁷

Thus, persons falling in the protected category include anyone who provides ongoing care for a minor, any disabled relative and any non-relative who lives in the caregiver's household. However, the amendments do not protect non-family-member caregivers or home companions employed to work or live in the home of a disabled person to whom they provide ongoing care.

Prohibited Conduct

As with other protected classes under the New York City Human Rights Law, employers cannot discriminate on the basis of caregiver status in decisions as to hiring, compensation or the terms and conditions of employment. Employment agencies are prohibited from discriminating against persons with caregiver responsibilities in handling applications or in referring applicants to employers. Labor organizations are prohibited from excluding, expelling from their membership, or otherwise discriminating against individuals because of their caregiver status. Employers, employment agencies and labor organizations may not circulate any advertisement or solicitation, use any employment application, or make any inquiry in connection with employment that expresses any limitation or discriminates based on caregiver status.

Takeaways for New York City Employers

- The amendments protecting caregivers from discrimination are intended to prohibit employers, employment agencies or labor unions from refusing to hire, or from rejecting, excluding, terminating, demoting, refusing to promote or otherwise treating individuals unfavorably in their terms or conditions of employment because they have caregiver responsibilities.
- The caregiver protections do not prevent employers from holding employees with caregiver obligations to the same attendance, punctuality or performance standards as other employees. Individuals with caregiver responsibilities still must be able to perform the essential functions of their job.
- The New York City law does not contain a "flexible scheduling" requirement to accommodate caregivers, as the San Francisco law does.⁸ Enforcement Guidance from the New York City Commission on Human Rights is expected before the statute takes effect in May. In implementing this statute, the City Commission may interpret the law as requiring employers to consider caregiver employees' scheduling requests as a reasonable accommodation if they do not present an undue hardship, and do not prevent the employees from performing the essential duties of their jobs. For now, employers should treat leave of absence and flexible schedule requests to accommodate an employee's caregiver

6 N.Y.C. Admin Code § 8-107.1.

7 N.Y.C. Int. 0108-2014, *amending* N.Y.C. Admin Code §8-102.

8 San Francisco Administrative Code, Sec. 12Z.4 – 12.6.

responsibilities with the same consideration as they would such scheduling accommodation and leave of absence requests for childcare needs.

- Human resources and recruiting personnel should be educated regarding the protections for caregivers. Training should also be provided to management and supervisors who may be hiring persons with caregiver responsibilities or receiving caregiver accommodation requests.
- Employment and recruiting policies and employment handbooks should be reviewed to ensure they do not contain unnecessary restrictions on employees' outside commitments or off-the-job whereabouts.

Employers who need guidance regarding applying these new protections should consult with experienced employment counsel prior to the amendments taking effect on May 4, 2016.