19-2266

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Brooklyn Center for Psychotherapy, Inc.,
Plaintiff–Appellant,
-against-

Philadelphia Indemnity Insurance Co.,
Defendant–Appellee.

On Appeal from U.S. District Court for the Eastern District of New York

---

BRIEF AND SPECIAL APPENDIX FOR PLAINTIFF-APPELLANT

Jeffrey J. Sherrin, Esq.
Michael Y. Hawrylchak, Esq.
O'CONNELL & ARONOWITZ, P.C.
54 State Street, 9th Floor
Albany, New York 12207
Telephone: (518) 462-5601
Fax: (518) 462-2670

JEFFREY J. SHERRIN
MICHAEL Y. HAWRYLCHAK
Of Counsel

Dated: September 16, 2019

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the undersigned counsel for Plaintiff–Appellant certifies as follows: Plaintiff–Appellant Brooklyn Center for Psychotherapy, Inc. has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes & Other Authorities:

JURISDICTIONAL STATEMENT

The United States District Court for the Eastern District of New York had jurisdiction over this case under 28 U.S.C. § 1332, because Plaintiff–Appellant Brooklyn Center for Psychotherapy, Inc. ("Brooklyn Center") is incorporated in New York with a principal place of business in New York, Defendant–Appellee Philadelphia Indemnity Insurance Co. ("PIIC") is incorporated in Pennsylvania with a principal place of business in Pennsylvania, and the amount in controversy is in excess of $75,000.

The District Court issued its Memorandum Decision and Order directing the dismissal of this case with prejudice on July 2, 2019. JA474–83. The final judgment, disposing of all parties' claims, was entered on July 3, 2019. JA484. Brooklyn Center filed its Notice of Appeal on July 23, 2019 (JA485–86), less than 30 days after entry of judgment. This Court has jurisdiction over this appeal under 28 U.S.C. § 1291, and the appeal is timely under Federal Rule of Appellate Procedure 4(a).

STATEMENT OF ISSUES

Whether the District Court erred in concluding that allegations of disability discrimination by failure to accommodate did not trigger insurance defense coverage under Brooklyn Center's insurance policy with PIIC.

STATEMENT OF THE CASE

The instant action is an insurance coverage dispute between Brooklyn Center and PIIC, arising out of PIIC's refusal to defend Brooklyn Center in another action, *Fanni Goldman v. Brooklyn Center for Psychotherapy, Inc.*, 15-CV-2572 (PKC) (PK), filed in the Eastern District of New York on May 5, 2015.

A. The *Goldman* Complaint

The plaintiff in the underlying action, Fanni Goldman, represents that she is a deaf individual who primarily communicates in ASL. JA021 ¶ 1. Brooklyn Center is a psychiatric clinic which provides mental health services. JA013 ¶ 1. Goldman alleged, *inter alia*, that Brooklyn Center unlawfully discriminated against her based on her disability by failing to accommodate her "by ensuring effective communication with her" when she requested an appointment for her son. JA021 ¶ 1.

Goldman's lawsuit alleged disability discrimination in violation of Title III of the Americans with Disabilities Act (42 U.S.C. § 12182), Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794), the New York State Human Rights Law ("NYSHRL") (N.Y. Exec. Law § 296), and the New York City Human Rights Law ("NYCHRL") (N.Y.C. Admin. Code § 8-107). JA014 ¶ 6. Goldman accused Brooklyn Center of, among other things, denying her services based on her disability, causing her emotional distress, fear, anxiety, indignity, and humiliation.

JA014 ¶ 8. As a result of these alleged wrongs, the *Goldman* Complaint sought compensatory damages as well as declaratory and injunctive relief, together with punitive damages, attorneys' fees, and costs. JA014 ¶ 7.

B. The Policy

Brooklyn Center purchased an insurance policy (the "Policy") with PIIC, Policy No. PHPK1257626, which provides liability coverage and also states that PIIC would provide, at its cost, legal counsel to defend Brooklyn Center against covered claims. JA014–15 ¶ 9. Following receipt of the *Goldman* Complaint, Brooklyn Center contacted PIIC, advised it of the lawsuit, and requested defense. JA015 ¶ 10.

On May 18, 2015, PIIC declined to provide Brooklyn Center with defense costs or indemnification, claiming that the *Goldman* Complaint's allegations of disability discrimination were not allegations of "bodily injury, property damage, or personal injury caused by an occurrence as defined under the policy," and that the Policy provides "no coverage for claims arising out of disability discrimination." JA015 ¶ 11, JA042.

On August 7, 2018, Brooklyn Center again demanded defense and indemnification in the *Goldman* action, alleging that PIIC's Disclaimer of Coverage constituted a breach of the Policy. JA015 ¶ 14, JA045. On September 10, 2018, PIIC denied Brooklyn Center defense and indemnification for the second time.

JA015 ¶ 15, JA052. This second refusal argued that none of the claims asserted in the *Goldman* Complaint constituted a covered "occurrence" under the terms of the Policy. JA052.

C. The *Goldman* Trial

The *Goldman* action was tried in the Eastern District of New York from January 14, 2019 through January 17, 2019. In order for Goldman to have prevailed on her ADA claim, the jury was instructed that she must establish, by a preponderance of the evidence, first, "that Plaintiff has a disability"; second, "that Defendant owns and/or operates a place of public accommodation"; and third, "that Defendant discriminated against Plaintiff based on her disability by denying her a full and equal opportunity to enjoy the services that Defendant provides." JA450.

With respect to the Rehabilitation Act, the jury was instructed, in pertinent part, that: "a Rehabilitation Act claim contains all the elements of an [ADA] claim. Therefore, if you determine that Ms. Goldman has not satisfied all three elements of her ADA claim, then you must also find that Defendant is not liable under the Rehabilitation Act. Alternatively, if you determine that Ms. Goldman has satisfied all three elements of the ADA claim, then you must also find that Defendant is liable under the Rehabilitation Act." JA452–53.

As to Goldman's claim under the NYSHRL, the jury was instructed: "you should find that Plaintiff has proven unlawful discrimination under the NYSHRL

only if you determine that she has proven . . . that Defendant directly or indirectly denied Plaintiff's son services because of Plaintiff's disability." JA454. As to the NYCHRL, Goldman must prove "that Defendant treated Plaintiff less well than other individuals seeking mental health services at least in part because of her disability." JA454.

Following deliberations, the jury returned a verdict for Brooklyn Center on all claims, finding that it had not violated any of the federal or state anti-discrimination statutes under which Goldman had sued. JA463–64. On January 17, 2019, judgment was entered in favor of the Insured. Clerk's Judgment, ECF No. 96, 15-cv-2572 (PKC) (PK).

As a result of PIIC's refusal to provide a defense or to pay defense costs, Brooklyn Center incurred substantial legal costs in defending itself against the *Goldman* Complaint. JA017–18 ¶ 32.

D. The Instant Action

On October 4, 2018, Brooklyn Center filed this action against PIIC in state court. JA009. PIIC subsequently removed the action to the Eastern District of New York. JA005–07.

Brooklyn Center's Complaint alleged three causes of action against PIIC: that the denial of indemnification constituted a breach by PIIC of the Policy between

Brooklyn Center and PIIC (JA017 ¶ 28);[1] that PIIC's denial of coverage for defense costs against the *Goldman* Complaint constituted a breach of the Policy between Brooklyn Center and PIIC (JA018 ¶ 33); and that PIIC's refusal to defend or indemnify Brooklyn Center constituted bad faith insurance practices (JA018 ¶ 38). Brooklyn Center now appeals only on the breach of contract claim for refusal to cover the costs of defending against the *Goldman* Complaint.

As to the claim for breach of duty to defend, Brooklyn Center sought a declaratory judgment that PIIC must provide a defense and pay all costs of such defense as to all claims made by Goldman in her complaint and an order directing PIIC to reimburse Brooklyn Center for all legal fees, costs, and disbursements incurred to date and through such time that PIIC undertakes to pay such defense costs directly. JA019 ¶ 2. Because Brooklyn Center prevailed in the underlying *Goldman* action, it now seeks only payment of its legal fees, costs, and disbursements.

On February 11, 2019, PIIC moved under Rule 12(b)(6) to dismiss Brooklyn Center's action for failure to state on claim on which relief could be granted. JA073. On July 2, 2019, the District Court (Donnelly, J.) issued a Memorandum Decision and Order, granting the motion to dismiss on all claims. JA474–83. The District

[1] The cause of action for indemnification against PIIC became moot after the jury found Brooklyn Center was not liable for any discrimination on January 17, 2019.

Court entered judgment the following day, dismissing Brooklyn Center's complaint in its entirety with prejudice. JA484.

On July 23, 2019, Brooklyn Center filed this appeal. JA485.

SUMMARY OF ARGUMENT

Brooklyn Center's complaint alleges that PIIC's refusal to cover the cost of legal defense against the *Goldman* Complaint constitutes a breach of the Policy. The core allegations are simple: Brooklyn Center purchased from PIIC the Policy, which required PIIC to defend it against certain legal claims (JA014–15 ¶ 9); the *Goldman* Complaint was filed against Brooklyn Center (JA014 ¶ 5); Brooklyn Center demanded defense against the *Goldman* Complaint under the Policy (JA015 ¶ 10); and PIIC refused defense, asserting that the claims in the *Goldman* Complaint are not covered by the Policy (JA015 ¶ 11).

Each of the four statutory causes of action for disability discrimination in the *Goldman* Complaint can support multiple theories of liability, including both disparate treatment and failure to accommodate. The *Goldman* Complaint alleged facts sufficient to show discrimination under a failure-to-accommodate theory for each cause of action.

Like disparate *impact* claims, but unlike disparate *treatment* claims, a claim of discrimination for failure-to-accommodate requires no showing of discriminatory intent. As a matter of law and logic, insurance coverage for failure-to-accommodate

claims should not be deemed barred as against public policy, just as coverage of disparate impact claims is not prohibited, again unlike disparate treatment claims.

The coverage and exclusion language of the Policy has been interpreted by New York courts to track New York public policy with respect to coverage of intentional acts. Thus, the questions of whether failure-to-accommodate claims are barred by New York public policy and whether failure-to-accommodate claims fall outside the Policy's coverage collapse into a single inquiry.

An insurer's duty to defend attaches whenever a complaint alleges *any* covered claim, regardless of whether the complaint also alleges claims outside the policy's coverage. Because the *Goldman* Complaint alleged failure-to-accommodate claims, PIIC was obligated to defend Brooklyn Center, regardless of whether the Complaint also alleged claims of disparate treatment.

Moreover, each of the *Goldman* Complaint's failure-to-accommodate claims was supported by factual allegations sufficient to support a theory of negligent or unintentional failure to accommodate. Even if a theoretical failure-to-accommodate claim that allowed for no possibility of unintentional discrimination might fall outside of the Policy's coverage, the possibility that the *Goldman* Complaint's failure-to-accommodate claims could be proven without demonstrating discriminatory intent triggered PIIC's duty to defend.

ARGUMENT

I. Standard of Review

A. Motion to Dismiss

This action was dismissed for failure to state a claim on which relief can be granted. JA474–83. The grant of a motion to dismiss for failure to state a claim upon which relief can be granted is reviewed by this Court *de novo*. *Harris v. Mills*, 572 F.3d 66, 71 (2d Cir. 2009).

Federal Rule of Civil Procedure 12(b)(6) allows for the dismissal of a complaint that fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). In evaluating a motion to dismiss under Rule 12(b)(6), a court must "construe plaintiffs' complaint liberally, accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the plaintiff's favor." *Holmes v. Grubman*, 568 F.3d 329, 335 (2d Cir. 2009) (internal quotation marks omitted). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id*.

"[O]nly the facts alleged in the pleadings, documents attached as exhibits or incorporated by reference in the pleadings and matters of which judicial notice may be taken are considered." *Samuels v. Air Transp. Local 504*, 992 F.2d 12, 15 (2d Cir. 1993). "Even where a document is not incorporated by reference, the court may nevertheless consider it where the complaint relies heavily upon its terms and effect, which renders the document 'integral' to the complaint." *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002) (internal quotation marks omitted).

B. Duty to Defend

Brooklyn Center's Complaint alleges that PIIC breached its duty to defend against the *Goldman* Complaint pursuant to the Policy. "[A]n insurer can be relieved of its duty to defend if it establishes as a matter of law that there is no possible factual or legal basis on which it might eventually be obligated to indemnify its insured under any policy provision." *Allstate Ins. Co. v. Zuk*, 78 N.Y.2d 41, 45 (1991). "The duty to defend rests solely on whether the complaint in the underlying action contains any allegations that arguably or potentially bring the action within the protection purchased." *Avondale Indus., Inc. v. Travelers Indem. Co.*, 887 F.2d 1200, 1204 (2d Cir. 1989). "Any doubt as to whether the allegations state a claim within the coverage of the policy must be resolved in favor of the insured and against the carrier." *Euchner-USA, Inc. v. Hartford Cas. Ins. Co.*, 754 F.3d 136, 141 (2d Cir. 2014) (quotation marks omitted).

"[T]he court's duty is to compare the allegations of the complaint to the terms of the policy to determine whether a duty to defend exists." *A. Meyers & Sons Corp. v. Zurich Am. Ins. Grp.*, 74 N.Y.2d 298, 302–03 (1989). "The initial interpretation of a contract is a matter of law for the court to decide." *Am. Empire Surplus Lines Ins. Co. v. Colony Ins. Co.*, 744 F. App'x 32, 33 (2d Cir. 2018) (internal quotation marks and alteration omitted).

II. A claim for failure to make reasonable accommodations is a covered occurrence under the Policy.

Under New York Insurance Law, coverage of discrimination claims depends on the nature of the discrimination claim at issue. Claims of disparate treatment and disparate impact are treated entirely differently as a matter of public policy and insurance contract interpretation. Insurance coverage of disparate treatment claims is prohibited by New York public policy, and incidents of disparate treatment have been held not to be covered "occurrences" for purposes of insurance policy interpretation. Coverage of disparate impact claims, on the other hand, is permitted under New York public policy, and incidents of disparate impact are considered "occurrences".

New York courts have not squarely addressed the issue of insurance coverage of claims based on failure to provide reasonable accommodations, but caselaw and

public policy strongly support treating failure to accommodate the same as disparate impact for purposes of insurance coverage.

A. The key dispute in this case is whether *any* claim in the Goldman Complaint could fall within the coverage of the Policy.

The Policy, under Commercial General Liability, Coverage A Bodily Injury and Property Damage Liability, provides, as relevant here, that "[PIIC] will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies. [PIIC] will have the right and duty to defend the insured against any 'suit' seeking those damages." JA271.

This coverage is limited, however, to cases where "[t]he 'bodily injury' or 'property damage' is caused by an 'occurrence' that takes place in the 'coverage territory'". JA271. The Policy further defines bodily injury to mean "bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time" (JA283), and defines an occurrence to mean "an accident, including continuous or repeated exposure to substantially the same general harmful conditions" (JA284). Finally, the Policy has a specific exclusion for "'[b]odily

injury' or 'property damage' expected or intended from the standpoint of the insured." JA272.[2]

It is well-established in New York that 'bodily injury' as defined in the Policy applies to claims for emotional distress. *Lavanant v. General Accident Insurance Co.*, 79 N.Y. 2d 623 (1992); *Jewish Community Center of Staten Island v. Trumbull Ins. Co.*, 957 F. Supp.2d 215, 236 (E.D.N.Y. July 22, 2013). The *Goldman* Complaint, alleging that Goldman suffered from emotional distress, including fear, anxiety, and humiliation as a result of Brooklyn Center's alleged refusal to provide her with an ASL interpreter (JA024 ¶ 25), therefore alleges a bodily injury.

The primary point of disagreement is whether any claim in the *Goldman* Complaint could be an "occurrence" as defined in the Policy. In *Agoado Realty Corp. v. United International Insurance Co.*, 95 N.Y. 2d 141, 145 (2000), the New York Court of Appeals considered an insurance policy that, like the Policy here, defined an "occurrence" as an "accident," and contained an exclusion for bodily injury that is "expected or intended from the standpoint of the insured."

The Court of Appeals explained the scope of the term "accident," holding that "in deciding whether a loss is the result of an accident, it must be determined, *from the point of view of the insured*, whether the loss was unexpected, unusual and

[2] In the District Court, the briefs also addressed coverage under Coverage B Personal and Advertising Injury Liability. For purposes of this appeal, we are seeking to establish coverage only under Coverage A.

unforeseen." *Id.* (emphasis in original). Thus, the exclusion for injury that is "expected or intended," is simply the flip side of the scope of coverage for an "accident," defined as an injury that was "unexpected, unusual and unforeseen."

New York Courts have further explained that an intentional act may nevertheless result in injuries that are "accidental" for purposes of insurance coverage, through a "chain of unintended though expected or foreseeable events that occurred after an intentional act." *City of Johnstown, N.Y. v. Bankers Standard Ins. Co.*, 877 F.2d 1146, 1150 (2d Cir. 1989) (quoting *Brooklyn Law School v. Aetna Casualty & Sur. Co.*, 849 F.2d 788, 789 (2d Cir.1988) (quoting *Continental Ins. Co. v. Colangione*, 107 A.D.2d at 979, 484 N.Y.S.2d at 930–31)). "[N]either does a calculated risk amount to an expectation of damage." *Id.*

New York's Superintendent of Insurance has explained these decisions as in line with New York public policy. "Liability insurance coverage for intentional wrongs is, and has always been, prohibited." Circular Letter No. 6, N.Y.S. Ins. Dep't (May 31, 1994). But, "whether coverage is permissible or not turns most centrally upon the relationship between the wrongdoer's act and the resultant harm: if that relationship may be said to be sufficiently fortuitous, rather than intended, coverage is permitted." *Id.*

PIIC has contended, and the District Court held, that the *Goldman* Complaint alleges only intentional discrimination and therefore can not be said to plead an "occurrence," defined as an "accident." JA469; JA481.

B. New York insurance law draws a bright line between disparate treatment and disparate impact.

New York case law has not squarely addressed the issue of insurance coverage for failure-to-accommodate claims. It is therefore necessary to look to the broader New York law governing insurance coverage to determine how established principles apply to the type of claims at issue in this case.

New York has well-established rules addressing insurance coverage of disparate treatment and disparate impact claims. Disparate treatment "is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion or other protected characteristics. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment." *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609 (1993) (quoting *Teamsters v. United States*, 431 U.S. 324, 335–336, n. 15 (1997)) (alteration omitted). Disparate impact, by contrast, "involve[s] employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another . . .

Proof of discriminatory motive is not required under a disparate-impact theory." *Id.* (alteration omitted).

While disparate treatment, by definition, involves an intention to treat someone differently on the basis of protected characteristics, disparate impact requires no such intention. An employer, for example, could adopt a policy concerning employee promotion that results in disparate outcomes for groups identified on the basis of protected characteristics — in other words, a policy giving rise to liability for discrimination — without any discriminatory intent by the employer. *See Briscoe v. City of New Haven*, 967 F. Supp. 2d 563, 589 (D. Conn. 2013) ("One of the forms that proscribed discrimination can take is an employment practice, taken in good faith and for non-discriminatory reasons, which nonetheless has a disparate impact upon persons of a protected group.").

And the adoption of a particular practice does not by itself create disparate impact liability. There is only liability if that practice in fact results in "a significantly adverse or disproportionate impact on persons of a particular type." *Mhany Mgmt., Inc. v. Cty. of Nassau*, 819 F.3d 581, 617 (2d Cir. 2016).

Insurance coverage for disparate treatment is barred as a matter of New York pubic policy and insurance policy interpretation. New York's Superintendent of Insurance has explained that "discrimination based upon disparate treatment is an intentional wrong whose resultant harm flows directly from the acts committed, and

liability coverage for it is impermissible." Circular Letter No. 6, N.Y.S. Ins. Dep't (May 31, 1994). *See also Rosenberg Diamond Dev. Corp. v. Wausau Ins. Co.*, 326 F. Supp. 2d 472, 475 (S.D.N.Y. 2004), *aff'd sub nom. Rosenberg Diamond Dev. Corp. v. Employers Ins. Co. of Wausau*, 144 F. App'x 122 (2d Cir. 2005) (steering renters to apartments in different neighborhoods on the basis of race); *Hubel v. Madison Mut. Ins. Co.*, No. 2001-5404, 2003 WL 21435624, at *4 (N.Y. Sup. Ct. May 16, 2003) ("There is nothing accidental about a single, specific and express decision not to rent to a prospective tenant."); *Mary & Alice Ford Nursing Home Co. v. Fireman's Ins. Co. of Newark, N.J.*, 86 A.D.2d 736, 737–38, *aff'd sub nom. Mary & Alice Ford Nursing Home Co. Inc. v. Fireman's Ins. Co. of Newark, New Jersey*, 57 N.Y.2d 656 (1982) ("intentionally discriminatory" firing because of disability is not a covered occurrence).

By contrast, coverage of disparate impact claims is not barred by New York public policy because "the strong public policy against discrimination of any kind is, in fact, furthered by permitting coverage of" such claims where "the discriminatory result does not directly proceed from specific discriminatory acts against individuals." Circular Letter No. 6, N.Y.S. Ins. Dep't (May 31, 1994). Courts have similarly interpreted standard insurance policy language as covering disparate impact claims. *See Am. Mgmt. Ass'n v. Atl. Mut. Ins. Co.*, 168 Misc. 2d 971, 976 (Sup. Ct.), *aff'd*, 234 A.D.2d 112 (1996) (claims for disparate impact are

covered even where "[i]t is undisputed that [the insurer's] policy does not provide insurance coverage for intentional acts of discrimination").

The difference between disparate treatment and disparate impact also illustrates what "intended" or "expected" effects mean for purposes of insurance coverage. Even though virtually every disparate impact claim involves intentional actions — for example, the adoption of a policy for hiring and promotion — this doesn't bring these claims outside of insurance coverage because the ultimate wrong — the disparate impact — wasn't intended.

C. Failure to accommodate is closely analogous to disparate impact.

Causes of action for disability discrimination are not limited to disparate treatment and disparate impact as theories of liability, but also allow recovery under a failure-to-accommodate theory. *See Fulton v. Goord*, 591 F.3d 37, 43 (2d Cir. 2009) (noting in an ADA and Rehabilitation Act case that "[a] qualified individual can base a discrimination claim on any of three available theories: (1) intentional discrimination (disparate treatment); (2) disparate impact; and (3) failure to make a reasonable accommodation." (internal quotation marks omitted)).

Failure to accommodate is a third distinct type of discrimination claim, different from disparate treatment and disparate impact, with distinct elements of proof, *see Fulton*, 591 F.3d at 44 (noting fact-intensive inquiry necessary for failure to accommodate claims), and New York courts have not squarely decided whether

failure-to-accommodate claims should be treated like disparate treatment or disparate impact for purposes of insurance coverage.

Nevertheless, although they are distinct theories, disparate impact and failure to accommodate share considerable similarities. Like, disparate impact, failure-to-accommodate requires no showing of discriminatory intent or animus. Like disparate impact, failure to accommodate can be proven through a policy adopted at one time (for example, minimum job qualification standards) that results in a discriminatory effect at a later time (for example, a disparate hiring rate for members of different racial groups, or the disqualification of a disabled applicant unable to perform certain less essential job tasks).

Significantly, like disparate impact, failure-to-accommodate theories can result in liability even where it was difficult or impossible to predict in advance that a policy or practice would be deemed discriminatory. Indeed, a failure-to-accommodate claim alleging the absence of an accommodation (for example, ASL interpretation) that has a particular negative impact on a protected group (for example, the deaf), is, in essence, a disparate impact claim which relaxes the requirement of proving a comparison class less affected by the lack of accommodation. *See Henrietta D. v. Bloomberg*, 331 F.3d 261, 276 (2d Cir. 2003).

In enacting the earliest federal legislation to combat disability discrimination, the problem "was perceived by Congress to be most often the product, not of

invidious animus, but rather of thoughtlessness and indifference — of benign neglect". *Alexander v. Choate*, 469 U.S. 287, 295 (1985). Congress believed that many of the primary targets of this legislation — for example, architectural barriers, inaccessible public transportation, and unnecessary job qualifications — were not created "with the aim or intent of excluding the handicapped." *Id.* Legislative responses to disability discrimination, and subsequent caselaw interpreting that legislation, have allowed plaintiffs to establish liability through both disparate-impact and failure-to-accommodate theories, without any showing of discriminatory intent.

In reasoning that insurance against disparate impact claims should not be barred as a matter of public policy, New York's Superintendent of Insurance noted that, in contrast with disparate treatment claims, "specific discriminatory acts against individuals . . . are not an element of the wrong and need play no part in the facts alleged." Circular Letter No. 6, N.Y.S. Ins. Dep't (May 31, 1994). The same is true of failure-to-accommodate claims. The Superintendent went on to explain the public policy benefits of allowing coverage.

> [T]he strong public policy against discrimination of any kind is, in fact, furthered by permitting coverage of the kinds described. By bringing to employers' attention practices that can potentially result in unlawful discrimination, insurers' loss prevention programs and underwriting standards should discourage such practices. Any employer who does not diligently attempt to modify employment procedures accordingly may well be denied

> insurance coverage. When unlawful acts of discrimination occur nonetheless, coverage will help ensure just compensation for victims.

Id. The same is true of failure-to-accommodate claims. Insurers could play a beneficial role in encouraging or requiring the provision of effective disability accommodations and provide a backstop for those who are nevertheless harmed.

For purposes of insurance coverage, failure-to-accommodate claims should treated as analogous to disparate impact. *See also* Educ. Testing Serv. v. Liberty Mut. Fire Ins. Co., No. C-96-2790-VRW, 1997 WL 220315, at *4 (N.D. Cal. Apr. 18, 1997) ("There are many similarities between the theories of 'failure to reasonably accommodate' and 'disparate impact' since failure to provide accommodation would mean the handicapped employee would be working under the same rules and standards and conditions that all other employees were working under, obviously, not disparate treatment, but the impact on the handicapped would be disparate. Failure to provide reasonable accommodation where it can be done without undue hardship on the employer would eliminate the disparate impact."); Francis J. Mootz III, Insurance Coverage of Employment Discrimination Claims, 52 U. Miami L. Rev. 1, 33–34 (1997) ("[I]n 1994 the New York Department of Insurance clarified its longstanding prohibition on insurance coverage for discrimination by making clear that there is no public policy bar to insuring disparate impact discrimination. Courts and regulators have adopted this same approach when

dealing with other anti-discrimination statutory schemes that assess liability without proof of an intent to discriminate." (footnotes omitted).

D. Discriminatory effect need not be the expected or intended result of a failure to provide reasonable accommodations.

Liability for discrimination on the basis of a failure to accommodate is a "fact-intensive inquiry." *Vale v. Great Neck Water Pollution Control Dist.*, 80 F. Supp. 3d 426, 438 (E.D.N.Y. 2015). "'Reasonable' is a relational term: it evaluates the desirability of a particular accommodation according to the consequences that the accommodation will produce. This requires a fact-specific, case-by-case inquiry, not only into the benefits of the accommodation but into its costs as well. With such a context-sensitive inquiry, what is reasonable might vary among qualified individuals." *Fulton v. Goord*, 591 F.3d 37, 44 (2d Cir. 2009) (internal quotation marks and citations omitted). "[A]n accommodation is reasonable only if its costs are not clearly disproportionate to the benefits that it will produce." *Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131, 138 (2d Cir. 1995). And the exact same accommodation might be deemed reasonable for one person, but unnecessary for another. *See Fulton*, 591 F.3d at 44 (accommodation could be reasonable to allow access to inmate's spouse, but unnecessary for a similarly disabled relative or acquaintance).

"Reasonable accommodation may take many forms." *Noll v. Int'l Bus. Machines Corp.*, 787 F.3d 89, 95 (2d Cir. 2015). "[E]mployers are not required to provide a perfect accommodation or the very accommodation most strongly preferred by the employee. . . . the employer providing the accommodation has the ultimate discretion to choose between effective accommodations, and may choose the less expensive accommodation or the accommodation that is easier for it to provide." *Id.*

It is critical to remember that the injury in a meritorious failure-to-accommodate claim is not the denial of an accommodation, but the lack of access to services resulting from that denial. *See* 42 U.S.C.A. § 12182 (requiring modifications when "necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities"); N.Y. Exec. Law § 296 (requiring modifications when "necessary to afford facilities, privileges, advantages or accommodations to individuals with disabilities" or when such persons would be "excluded or denied services because of the absence of auxiliary aids and services"); N.Y.C. Admin. Code § 8-107 (requiring reasonable accommodations "to enable a person with a disability to satisfy the essential requisites of a job or enjoy the right or rights in question").

Here, the *Goldman* complaint alleged that the failure to provide an ASL interpreter constituted a discriminatory failure to accommodate. ASL interpreters

are "a common form of reasonable accommodation," *Noll*, 787 F.3d at 96, but they are not necessarily required in every case in which they are requested. For example, in *Howard v. United Parcel Service, Inc.*, 101 F. Supp. 3d 343, 346 (S.D.N.Y. 2015), *aff'd sub nom. Howard v. United Parcel Serv.*, 648 F. App'x 38 (2d Cir. 2016), a deaf employee's request for an ASL interpreter was rejected. The court held that he had been provided with other reasonable accommodations, and thus was not entitled to "the accommodation plaintiff subjectively believes best serves his needs." *Id.* at 355. *See also Berry-Mayes for Estate of Berry v. New York Health & Hosps. Corp.*, No. 14-CV-9891 (PKC), 2016 WL 8461191, at *9 (S.D.N.Y. Sept. 19, 2016) (endorsing the use of "appropriate auxiliary aids" including written notes, and holding that "[i]t is consistent with the ADA and the Rehabilitation Act for a hospital to provide an interpreter only in particular situations during a patient's hospitalization."), *aff'd in part sub nom. Berry-Mayes v. New York City Health & Hosps. Corp.*, 712 F. App'x 111 (2d Cir. 2018) (noting that patient had "at least *some* ability to communicate other than through sign language").

In short, there is no blanket duty for every place of public accommodation to have a full-time ASL interpreter on staff or to procure one in response to every request. This is significant because it necessarily severs the direct causal link between the decision not to provide an accommodation and the resulting harm.

In holding that the *Goldman* complaint failed to allege unintentional discrimination, the District Court quoted New York cases for the proposition that "[w]hen a defendant commits an affirmative act, the action is not an accident even if the results were unintended." JA479. *See Accessories Biz, Inc. v. Linda & Jay Keane, Inc.*, 533 F. Supp. 2d 381, 387 (S.D.N.Y. 2008) ("[I]f the act is intentional, so is the harm, and the courts will not inquire into the perpetrator's subjective intent to cause the injury.") (citing *Allstate Ins. Co. v. Mugavero*, 79 N.Y.2d 153, 160 (1992)); *Hubel v. Madison Mut. Ins. Co.*, No. 2001-5404, 2003 WL 21435624, at *6 (N.Y. Sup. Ct. Onondaga Cnty. May 16, 2003) ("[O]nce the intentional act has been alleged, then harm is inherent and coverage does not apply.") (citing *Jacobs v. Aetna Casualty and Surety Company*, 216 A.D.2d 942, 943 (4th Dept. 1995)). But, in so doing, the District Court relied on isolated language stripped of its full context.

First, the doctrine relied on here has its origins in cases dealing with intentional wrongful acts. In *Mugavero*, the court held that a defendant accused of the violent sexual abuse of children could not claim that the resulting injuries were unintentional. 79 N.Y.2d at 162. Likewise, in *Jacobs*, the court held that injuries directly resulting from an intentional assault could not be considered "unexpected or unintentional." 216 A.D.2d at 943.

Failure-to-accommodate claims, on the other hand, need not involve *any* inherently wrongful act. The decision not to provide some particular

accommodation is not in and of itself wrongful, and may not provide a basis for any liability unless the denial of the requested accommodation is determined to be unreasonable in light of the specific facts surrounding the particular request for accommodation.

A legal rule should not be blindly applied to dissimilar circumstances. Transplanting a rule developed to deal with acts that are not only intentional torts but *malum in se* crimes to cases involving the highly fact-dependent question of reasonable accommodation should not be done without due attention to the significant differences.

Second, a significant body of New York case law takes the contrary position; "[T]hough an intentional act may ultimately cause certain damages, those damages may, under New York law, be considered 'accidental' if the "total situation could be found to constitute an accident." *City of Johnstown, N.Y. v. Bankers Standard Ins. Co.*, 877 F.2d 1146, 1150 (2d Cir. 1989) (surveying New York caselaw). "It is not enough that an insured was warned that damages might ensue from its actions, or that, once warned, an insured decided to take a calculated risk and proceed as before. Recovery will be barred only if the insured intended the damages, or if it can be said that the damages were, in a broader sense, 'intended' by the insured because the insured knew that the damages would flow directly and immediately from its intentional act." *Id.* (internal citations omitted).

See also Circular Letter No. 6, N.Y.S. Ins. Dep't (May 31, 1994) ("[C]ourt decisions suggest that the question of whether coverage is permissible or not turns most centrally upon the relationship between the wrongdoer's act and the resultant harm: if that relationship may be said to be sufficiently fortuitous, rather than intended, coverage is permitted. In other cases — such as sexual battery against children — where harm is so direct and inescapable a result of the act that no fortuity can reasonably or objectively be said to exist, coverage is impermissible."

Third, taken literally, this principle would bar coverage of disparate impact cases as well, contrary to New York public policy and caselaw. A disparate impact claim, almost definitionally, arises out of an intentional act — the decision to enact a facially neutral policy or practice. Even many negligence claims would be barred under a naïve application of this doctrine; the decision to turn left at an intersection is undoubtedly an intentional act, but it would be perverse to hold, as a matter of law, that the driver necessarily intended the ensuing collision.

Although New York courts have not spoken directly to the issue of coverage of failure-to-accommodate claims, courts in other states with similar prohibitions on the coverage of intentional torts have done so. In *Republic Indemnity Co. v. Superior Court*, 224 Cal. App. 3d 492, 502 (Ct. App. 1990), a California appellate court held that failure-to-accommodate claims are not barred by California law, because the prohibition requires "specific intent to injure or harm, not merely a general intent to

perform the act." A line of cases following *Republic* have agreed that for purposes of insurance coverage, "intentional required some sort of wrongful conduct, not just any purposeful act." *Berns v. Sentry Select Ins. Co.*, 766 F. App'x 515, 517 (9th Cir. 2019) (internal quotation marks omitted); *see also Coit Drapery Cleaners, Inc. v. Sequoia Ins. Co.*, 14 Cal. App. 4th 1595, 1610 (1993) (distinguishing the "unintentional acts of discrimination resulting from a failure to accommodate an employee" in *Republic* from intentional sexual harassment).

On the other hand, a federal district court applying California law held that a failure-to-accommodate claim could not be covered, because "[w]hen the employer intentionally implements such a policy or commits a similar affirmative act, the employment action is not an accident for purposes of insurance coverage even if the results were not intended." *Educ. Testing Serv. v. Liberty Mut. Fire Ins. Co.*, No. C-96-2790-VRW, 1997 WL 220315, at *5 (N.D. Cal. Apr. 18, 1997). Notably, the court relied on a California appellate decision that had held *disparate impact* claims could not be insured, *Loyola Marymount Univ. v. Hartford Accident & Indem. Co.*, 219 Cal. App. 3d 1217 (Ct. App. 1990), noting the close connection between failure to accommodate and disparate impact. *Educ. Testing*, 1997 WL 220315, at *4–5 ("Like a claim of disparate impact, a claim for failure to accommodate implicates a facially neutral employment policy.").

Little weight should be given to a case that holds failure-to-accommodate claims uncovered by relying on a case that runs directly contrary to New York law and public policy.

III. The claims and allegations in the *Goldman* Complaint were sufficient to trigger PIIC's duty to defend.

A. An insurer's duty to defend is very broad.

In New York, it is well-established that an insurer's duty to defend is broader than its duty to indemnify. *Automobile Ins. Co. of Hartford v. Cook*, 7 N.Y.3d 131 (2006). As the duty to defend is "exceedingly broad," an insurer must defend "whenever the allegations within the four corners of the underlying complaint potentially give rise to a covered claim," or whenever the insurer "has actual knowledge of facts establishing a reasonable possibility of coverage." *Frontier Insulation Contractors, Inc. v. Merchants Mut. Ins. Co.*, 91 N.Y.2d 169, 175 (1997). If there is even a "reasonable possibility of coverage," the insurer "will be called upon to provide a defense." *Euchner–USA, Inc. v. Hartford Cas. Ins. Co.*, 754 F.3d 136, 141 (2d Cir. 2014) (quoting *Auto. Ins. Co. of Hartford*, 7 N.Y.3d at 137). Even though an insurer may not ultimately be obligated to indemnify its insured because it is established at trial that the event falls outside the coverage of the insurance policy or because it is determined that the insured is not liable to the injured party,

the insurer may still be obligated to defend the insured party. *See Ruder & Finn, Inc. v. Seaboard Sur. Co.*, 52 N.Y.2d 663, 669–670 (1981).

The burden of proving that the claims against the insured are not covered by the policy lies with the insurer. *See International Paper Co. v. Continental Cas. Co.*, 35 N.Y.2d 322, 327 (1974). "[B]efore an insurance company is permitted to avoid policy coverage, it must . . . establish[ ] that the exclusions or exemptions apply in the particular case, and that they are subject to no other reasonable interpretation." *Avondale Industries, Inc. v. Travelers Indem. Co.*, 887 F.2d 1200, 1204 (2d Cir. 1989) (citing *Seaboard Surety Co. v. Gillette Co.*, 64 N.Y.2d 304, 311 (1984)). To avoid the duty therefore the insurer must demonstrate that the allegations in the underlying complaints are "solely and entirely" within specific and unambiguous exclusions from the policy's coverage. *Id.* (citing *International Paper Co.*, 35 N.Y.2d at 325). Any doubts about policy language should be construed narrowly against the insurance company and in favor of the policyholder. *See Index Fund, Inc. v. Insurance Co. of N. Am.*, 580 F.2d 1158, 1162 (2d Cir.1978), *cert. denied*, 440 U.S. 912 (1979).

It is therefore irrelevant that allegations in the *Goldman* Complaint can support a claim for intentional discrimination. The only thing that matters is whether the complaint could allow proof of any possible claim that does fall within the insurance coverage.

B. Failure-to-accommodate claims are covered occurrences, categorically.

The District Court recognized that Goldman's claims were properly characterized as failure-to-accommodate claims. JA479 & n.7. The District Court also recognized that failure-to-accommodate claims, like disparate impact claims, can be covered unintentional acts for purposes of New York Insurance Law. JA480. The court nevertheless denied coverage here because it found that the specific failure-to-accommodate claims in the Goldman Complaint alleged only intentional discrimination. JA480–81.

In so holding, the district court overlooked the allegations in the Goldman Complaint that support claims of unintentional discrimination (*see* Section III.D, *infra*), but even if the District Court were correct that the allegations in support of Goldman's failure-to-accommodate claims constituted intentionally discriminatory acts exclusively, its conclusion would not follow, because it is the nature of the *claim* that matters for purposes of New York Insurance Law.

Disparate impact claims, like failure-to-accommodate claims, do not require any showing of discriminatory intent. But even though it is not an element of the claim, a disparate impact claim could be the result of discriminatory intent; a business could, for example, enact a facially neutral hiring policy that results in a sharply disparate impact, expecting and intending that the policy would have such a

discriminatory result. Disparate Impact doesn't require *absence* of intent; intent is simply irrelevant to the claim.

New York law, however, has chosen to draw a bright line between disparate treatment and disparate impact for purposes of insurance coverage. *See Am. Mgmt. Ass'n v. Atl. Mut. Ins. Co.*, 168 Misc. 2d 971, 976 (Sup. Ct.), *aff'd*, 234 A.D.2d 112 (1996); *Rosenberg Diamond Dev. Corp. v. Wausau Ins. Co.*, 326 F. Supp. 2d 472, 475 (S.D.N.Y. 2004), *aff'd sub nom. Rosenberg Diamond Dev. Corp. v. Employers Ins. Co. of Wausau*, 144 F. App'x 122 (2d Cir. 2005) (distinguishing between disparate treatment claims and disparate impact claims, which "could be insured"). *See also* Circular Letter No. 6, N.Y.S. Ins. Dep't (May 31, 1994) (endorsing coverage of disparate impact claims, because discriminatory acts "are not an element of the wrong and *need play no part* in the facts alleged" (emphasis added)).

C. The *Goldman* Complaint pleaded a failure-to-accommodate theory of liability for each of the statutory causes of action.

Each of the four statutory causes of action in the Goldman Complaint can be proved under a failure-to-accommodate theory. *See* Title III of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12181; Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794); New York Human Rights Law § 290; New York City Human Rights Law (N.Y.C. Admin. Code § 8-101, *et seq.*). Moreover, Goldman explicitly pleaded a failure-to-accommodate theory in support of each of these

causes of action. JA016 ¶ 39, JA028 ¶ 49, JA029 ¶ 60, JA031 ¶ 71. *Goldman v. Brooklyn Ctr. for Psychotherapy, Inc.*, No. 15CV2572PKCLB, 2018 WL 1385888, at *4 (E.D.N.Y. Mar. 19, 2018) ("Plaintiff's discrimination claim is based on a reasonable accommodation theory.").

This case stands in contrast with *Town Crier, Inc. v. Hume*, 721 F. Supp. 99, 104 (E.D. Va. 1989), *aff'd*, 907 F.2d 1140 (4th Cir. 1990), which denied insurance coverage even though the complaint alleged the elements of an unintentional tort, because the complaint failed to plead a *claim* for an unintentional tort. The Court noted "the vital distinction between the claims or causes of action asserted on the one hand and allegations on the other" because "[o]nly claims or causes of action give rise to relief"). *Id.* Here, claims for failure to accommodate are explicit in the *Goldman* Complaint.

Having pleaded failure-to-accommodate claims, the only question that remains is whether Goldman pleaded sufficient allegations to satisfy the elements of these claims. Although the *Goldman* Complaint also includes allegations of intentional discrimination, for purposes of the failure-to-accommodate theory of liability, these allegations are superfluous. Goldman could have omitted each and every allegation of intentional discrimination and still stated valid claims for failure to accommodate, and, crucially, Goldman could have prevailed at trial on her failure-to-accommodate claims, even if she failed to prove *any* of the allegations of

intentional discrimination. It would be perverse to allow a plaintiff to nullify a defendant's insurance coverage simply by pleading extraneous elements that it need not prove at trial. *Cf. Fitzpatrick v. Am. Honda Motor Co.*, 78 N.Y.2d 61, 68–69 (1991) ("[A]n insured's right to a defense should not depend solely on the allegations a third party chooses to put in the complaint. . . . This observation is particularly apt in the context of New York's liberal pleading rules, which permit the pleadings to be amended to conform to the proof at any time, provided that no prejudice is shown.").

D. The *Goldman* Complaint pleaded allegations capable of supporting a non-intentional failure-to-accommodate claim for each of the statutory causes of action.

Even if this Court is not persuaded that failure-to-accommodate claims should be categorically treated as covered occurrences under New York law, the allegations in the *Goldman* Complaint are broad enough to support claims of non-intentional discrimination.

First, the *Goldman* Complaint includes a number of allegations that do not require any intention to discriminate. For example, the Complaint alleges that Brooklyn Center "fail[ed] to accommodate by ensuring effective communication" (JA021 ¶ 1); "fail[ed] to ensure effective communication through the provision of onsite qualified sign language interpreters" (JA026 ¶ 39); "den[ied] [Goldman] meaningful access to the services, programs, and benefits [Brooklyn Center] offers

to other individuals (JA028 ¶ 49); "fail[ed] to accommodate [Goldman]'s disability" (JA029 ¶ 60); "fail[ed] to ensure effective communication through an onsite interpreter" (JA029 ¶ 61); and "fail[ed] to accommodate [Goldman]'s disability" (JA031 ¶ 71). None of these allegations requires any intention to discriminate.

Second, the *Goldman* Complaint includes allegations that expressly admit of the possibility of negligence. The Complaint alleges that Brooklyn Center "knew *or should have known* of its obligations . . . to provide accommodations to individuals with disabilities" (JA024 ¶ 23 (emphasis added)) and "knew *or should have known* that it had an obligation . . . to provide reasonable accommodations" (JA024 ¶ 24 (emphasis added)). This is significant because the phrase "knew or should have known" is a classic element of negligence claims. *See Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 759 (1998) ("An employer is negligent with respect to sexual harassment if it knew or should have known about the conduct and failed to stop it."); *Romano v. SLS Residential, Inc.*, 812 F.Supp.2d 282, 295 (S.D.N.Y. June 22, 2011) ("Under New York law, a claim for negligent hiring, retention, or supervision…requires 'a plaintiff [to] show:…(2) that the employer 'knew or should have known of the employee's propensity for the conduct which caused the injury' prior to the injury's occurrence").

Third, the Goldman Complaint includes allegations that the alleged discrimination was a result of Brooklyn Center's "policy and practice." JA024 ¶ 22,

JA025 ¶¶ 27, 28, JA026–27 ¶ 40, JA028 ¶ 50. These allegations allow for the possibility that any failure to accommodate was the result of decisions made at some earlier point in time, rather than an in-the-moment decision driven by discriminatory animus.

To be sure, the Goldman Complaint also includes numerous allegations that could support a claim of intentional discrimination. But the standard for insurance defense coverage is not whether the allegations of the *Goldman* Complaint can support some claim that would not be covered by the Policy, but whether, read liberally, it can support *any* plausible covered non-intentional claim. Here, the Complaint supplies allegations that would have allowed Goldman to show at trial that Brooklyn Center, through mistake, miscalculation, or oversight, but without ill will or bad intent, adopted official policies that failed to go far enough in accommodating the reasonable needs of persons with disabilities. And such a theory, were it proven, would have been more than enough to prevail under any of the four pleaded anti-discrimination claims.

The Seventh Circuit's decision in *Solo Cup Co. v. Federal Insurance Co.*, 619 F.2d 1178 (7th Cir. 1980), is instructive. *Solo* involved a dispute over an EEOC claim alleging discrimination on the basis of sex. Because the EEOC claim could support a theory of disparate treatment or disparate impact, and "EEOC would in all

likelihood have been permitted to proceed under either theory," the duty to defend attached. *Id.* at 1185.

Finally, courts have found that a complaint that sounds primarily in intentional conduct can nevertheless support a claim for negligence. In *Ron Tonkin Chevrolet Co. v. Continental Insurance Co.*, 126 Or. App. 712, 714 (1994), the complaint at issue involved an employee's Title VII religious discrimination claim, alleging that he was discharged "for insisting that [the employer] reasonably accommodate his religious attendance requirements." Like the disability discrimination causes of action at issue here, a Title VII religious discrimination claim can be proved under an intentional discrimination theory, or by showing failure to accommodate. *Id.* at 715. Because an accommodation claim "need not be intentional," the court held that the employee's "complaint could admit proof of conduct covered by [the employer]'s insurance policy, and that, as a matter of law, [the insurer] was required to defend that action." *Id.* at 716. *Cf. Baker v. 221 N. 9 St. Corp.*, No. 08-CV-03486 KAM MDG, 2010 WL 3824167 (E.D.N.Y. Sept. 23, 2010) (material facts that sound in intentionality — testimony that defendant struck plaintiff with a pint glass "in self-defense" — may nonetheless support a negligence claim).

Here, various allegations that Brooklyn Center refused, denied, or withheld accommodations or services could, liberally construed, be interpreted to support a theory that Brooklyn Center refused, denied, or withheld *on the basis of policies*

adopted without discriminatory intent. *See* JA021 ¶ 1,JA024 ¶ 22, JA025 ¶¶ 27, 28, JA026 ¶ 39, JA026–27 ¶ 40, JA028 ¶¶ 49, 50, JA029 ¶ 60, JA031 ¶ 71.[3] *See Amerisure Ins. Co. v. Laserage Tech. Corp.*, 2 F. Supp. 2d 296, 304 (W.D.N.Y. 1998) (finding a duty to defend after carefully parsing the complaint and identifying "certain paragraphs" that did not require intentionality and one cause of action that allowed liability "without regard to intent").

[3] *Brooklyn Law School v. Aetna Casualty & Surety Co.*, 849 F.2d 788, 789–90 (2d Cir. 1988) establishes only that a complaint alleging only conspiracy cannot support a claim for "unintentional conduct or intentional conduct producing unintentional injury" because "[a] complaint that the insured has conspired to commit certain acts necessarily charges intentional conduct on the part of the defendant–insured."

CONCLUSION

For the reasons set forth above, the Judgment of the District Court should be reversed, and the case should be remanded for further proceedings.

Dated: September 16, 2019
Albany, New York

O'CONNELL & ARONOWITZ. P.C.

By: /s/ *Michael Y. Hawrylchak*

Jeffrey J. Sherrin
Michael Y. Hawrylchak
Attorneys for Plaintiff–Appellant
54 State Street
Albany, New York 12207
Tel: (518) 462-5601
Fax: (518) 462-2670
Email: jsherrin@oalaw.com

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limit of Local Rule 32.1(a)(4)(A) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 8,514 words, as determined by Microsoft Word.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

By: /s/ *Michael Y. Hawrylchak*
Michael Y. Hawrylchak
Attorney for Plaintiff–Appellant

SPECIAL APPENDIX

SPECIAL APPENDIX

TABLE OF CONTENTS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

BROOKLYN CENTER FOR PSYCHOTHERAPY, INC.,

Plaintiff,

- against -

PHILADELPHIA INDEMNITY INSURANCE COMPANY,

Defendant.

MEMORANDUM DECISION AND ORDER

1:18-CV-05892 (AMG) (SMG)

ANN M. DONNELLY, District Judge:

On October 4, 2018,[1] Brooklyn Center for Psychotherapy brought this action against Philadelphia Indemnity Insurance Company, alleging breach of duty of defense and bad faith insurance practices associated with an underlying disability discrimination lawsuit.[2] The defendant-insurer moved to dismiss, claiming that the insurance policy does not cover the action. For the following reasons, the defendant-insurer's motion to dismiss is granted.

BACKGROUND[3]

The plaintiff, Brooklyn Center for Psychotherapy, purchased a commercial general liability policy[4] from the defendant insurance company. (ECF No 1-2 ¶ 9.) The insurance policy

[1] The case was removed to federal court on October 22, 2018. (ECF No. 1.)
[2] The plaintiff's complaint also alleges breach of contract to provide insurance indemnification. (ECF No. 1 ¶ 28.) However, the plaintiff dropped this cause of action because the jury found the Center was not liable for discrimination. (ECF No. 14 at 7 n.1.)
[3] All facts are taken from the complaint and its attachments. (ECF No. 1.) For purposes of this motion, I accept as true the factual allegations in the complaint and draw all reasonable inferences in the plaintiff's favor. *See Town of Babylon v. Fed. Hous. Fin. Agency*, 699 F.3d 221, 227 (2d Cir. 2012).
[4] At the motion to dismiss stage, the Court may consider documents integral to or incorporated by reference in the complaint. *See* FED. R. CIV. P. 10(c); *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002). Since the insurance policy is integral to and incorporated by reference into the complaint, the Court considers it here. *See, e.g.*, *Chernosky v. Amica Mut. Ins. Co.*, No. 3:17-CV-01047 (VLB), 2018 WL 529956, at *1 (D. Conn. Jan. 24, 2018) (considering insurance policy on motion to dismiss).

provides coverage in two situations: for "bodily injury and property damage" caused by an "occurrence" taking place in the "coverage territory," ("Coverage A"), and for "personal and advertising injury" caused by "an offense arising out of [the] business" in the "coverage territory," ("Coverage B"). (ECF No. 1-2 at 28, 29.)

On May 5, 2015, Fanni Goldman, who is deaf, sued Brooklyn Center for Psychotherapy in this court, claiming that she sought treatment for her son, and that the Center discriminated against her by refusing to provide her a sign language interpreter, in violation of Title III of the Americans with Disabilities Act, 42 U.S.C. § 12181, *et seq.*, Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, and parallel state statute and city code provision, N.Y. Human Rights Law § 290, *et seq.*, and N.Y.C. Administrative Code § 8-101, *et seq.* (ECF No. 1-3 ¶¶ 7, 11, 30, 42, 52-53, 63, 73-75.)

The parties dispute whether the insurance policy covered the lawsuit. Approximately two weeks after Ms. Goldman filed her complaint, the defendant-insurer declined to defend the matter, disclaiming coverage for claims "arising out of disability discrimination." (ECF No. 1-2 at 33.) On August 7, 2018, Brooklyn Center for Psychotherapy responded that the insurer's disclaimer of coverage was erroneous and a breach of its obligations under the insurance policy. (*Id.* at 36.) The defendant-insurer reaffirmed its position on September 10, 2018. (*Id.* at 43.)

Ms. Goldman's case went to trial in January of 2019. (ECF No. 14 at 11.) A jury found for Brooklyn Center for Psychotherapy, concluding that Ms. Goldman failed to prove unlawful discrimination. (ECF No. 14 at 11.) The plaintiff seeks coverage for legal fees, costs, and disbursements incurred in its defense of the case.[5] (*Id.* at 7.)

[5] The Honorable Pamela K. Chen denied the plaintiff's motion for costs and legal fees, concluding that the plaintiff brought the action in "good faith[,]" and the litigation was "close, difficult, and protracted . . . ." *Goldman v. Brooklyn Ctr. Of Psychotherapy, Inc.*, No. 15-CV-2572 (PKC) (LB) (E.D.N.Y. Feb. 13, 2019).

DISCUSSION

To survive a motion to dismiss, a complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Pleadings must be construed in the light most favorable to the plaintiff. *Hayden v. Paterson*, 594 F.3d 150, 160 (2d Cir. 2010). At the motion to dismiss stage, the court "is generally limited to the facts as presented within the four corners of the complaint, to documents attached to the complaint, or to documents incorporated within the complaint by reference." *Williams v. Time Warner, Inc.*, 440 F. App'x 7, 9 (2d Cir. 2011) (quoting *Taylor v. Vt. Dep't of Educ.*, 313 F.3d 768, 776 (2d Cir. 2002)).

I. Breach of Contract to Provide a Defense

An insurer's duty to defend is broad, *Rosenberg Diamond Dev. Corp. v. Employers Ins. Co. of Wausau*, 144 F. App'x 122, 124-25 (2d Cir. 2005) (summary order) (citations omitted), and depends on a comparison of the allegations in the complaint to the terms of the insurance policy, *Darwin Nat. Assur. Co. v. Westport Ins. Corp.*, No. 13-CV-02076 (PKC), 2015 WL 1475887, at *11 (E.D.N.Y. Mar. 31, 2015) (citations omitted). An insurer must defend the action if the complaint, liberally construed, "contains any allegations that arguably or potentially bring the action within the protection purchased." *JD2 Env., Inc. v. Endurance Am. Ins. Comp.*, No. 14-CV-8888 (JPO), 2017 WL 751157, at *3 (S.D.N.Y. Feb. 27, 2017) (citing *Avondale Indus., Inc. v. Travelers Indem. Co.*, 887 F.2d 1200, 1204 (2d Cir. 1989)). The insurer can avoid a defense obligation only when the factual allegations provide no basis for coverage under the

policy. *Allstate Ins. Co. v. Mugavero*, 79 N.Y.2d 153, 163 (1992) (citations omitted). This is a "heavy burden[:]" the claims and allegations must fall "'solely and entirely' within specific unambiguous exclusions from the policy's coverage." *Avondale Indus., Inc.*, 887 F.2d at 1204-05 (citation omitted).

The court is not required to "accept [a party's] legal characterization of the causes of action . . . ." *Sidney Frank Import. Co., Inc. v. Farmington Cas. Co.*, No. 97-CV-9324 (LAP), 1999 WL 173263, at *3 (S.D.N.Y. Mar. 26, 1999) (citations omitted). Instead, "a court should be guided by the facts alleged in the complaint . . . ." *Id.* at *3 (citing *Allstate Ins. Co.*, 79 N.Y.2d at 162). Interpretation of insurance policies, similar to other contracts, is a matter of law. *Dama v. Prudential Ins. Co. of Am.*, No. 18-CV-03104 (ERK) (SMG), 2018 WL 6706314 (E.D.N.Y. Dec. 20, 2018).

A. Bodily and Property Coverage

Coverage A of the policy provides coverage for injury or damage caused by an "occurrence,"[6] (ECF No. 1-2 at 28), which the policy defines as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." (*Id.* at 30.) Similarly, the policy excludes coverage for injury or damage "expected or intended from the standpoint of the insured." (*Id.* at 29.)

Intentional discriminatory acts are not accidental and thus not covered by the policy. *Rosenberg Diamond Dev. Corp.*, 144 F. App'x at *1 (citing *Mary & Alice Ford Nursing Home v. Fireman's Ins. Co. of Newark,* 446 N.Y.S.2d 599, 601 (N.Y. App. Div. 1982) (no duty to indemnify, and thus no duty to defend, an intentional discrimination claim under a coverage

[6] The *Goldman* complaint alleged that Ms. Goldman suffered "humiliation, fear, anxiety, and emotional distress," (ECF No. 1-3 ¶ 30), which the parties agree is a bodily injury – defined as "bodily injury, sickness or disease (ECF No. 1-2 at 29) – in the coverage territory.

provision comparable to Coverage A), *aff'd*, 57 N.Y.2d 656 (1982)). Conversely, unintentional discrimination – for example, a facially neutral policy with a discriminatory disparate impact – is covered by the policy. *See Rosenberg Diamond Dev. Corp. v. Employers Ins. Co. of Wausau*, 326 F.Supp.2d 472, 476 (S.D.N.Y. 2004), *aff'd*, 144 F. App'x 122 (2d Cir. 2005) (explaining that requiring insurance companies to defend disparate impact claims does not offend public policy).

The defendant-insurer argues that the *Goldman* complaint alleged intentional discriminatory conduct, and therefore is not covered by the policy. (ECF No. 13 at 4.) Brooklyn Center for Psychotherapy responds that the *Goldman* complaint alleged both intentional and unintentional conduct, thus triggering a duty to defend. (ECF No. 14 at 15-16.)

The Americans with Disabilities Act and the Rehabilitation Act "prohibit discrimination against qualified disabled individuals by requiring that they receive reasonable accommodations that permit them to have access to and take a meaningful part in public services and public accommodations." *Powell v. Nat'l Bd. of Med. Examiners*, 364 F.3d 79, 85 (2d Cir. 2004) (citations and quotation marks omitted); *see also Henrietta D. v. Bloomberg*, 331 F.3d 261, 272 (2d Cir. 2003) (explaining that the two statutes' standards are similar and often considered together); *see also Hernandez v. Int'l Shoppes, LLC*, 100 F.Supp.3d 232, 256 (E.D.N.Y. 2015) (explaining that while the NYHRL and NYCHRL are generally more favorable to plaintiffs than the ADA, the analysis is the same). A violation may be found on a theory of disparate treatment, disparate impact, or failure to make a reasonable accommodation. *Fulton v. Goord*, 591 F.3d 37, 43 (2d Cir. 2009) (citation omitted). A showing of intentional discrimination is not required in disparate impact or failure to accommodate cases. *Simon v. City of New York*, No. 12-CV-1596 (CBA), 2012 WL 4863368, at *6 (E.D.N.Y. Oct. 11, 2012) (citing *Krist v. Kolombos Rest. Inc.*, 688 F.3d 89, 95 (2d Cir. 2012)).

While the *Goldman* complaint pleaded a failure to accommodate claim,[7] there is nothing unintentional about the conduct asserted in the complaint. In New York, "if the act is intentional, so is the harm, and the courts will not inquire into the perpetrator's subjective intent to cause the injury." *Accessories Biz, Inc. v. Linda and Jay Keane, Inc.*, 533 F. Supp. 2d 381, 387 (S.D.N.Y. 2008) (citing *Allstate Ins. Co. v. Mugavero*, 581 N.Y.S.2d 142, 589 (1992)). When a defendant commits an affirmative act, the action is not an accident even if the results were unintended. *See Hubel v. Madison Mut. Ins. Co.*, No. 2001-5404, 2003 WL 21435624, at *6 (N.Y. Sup., May 16, 2003) (collecting cases) ("[O]nce the intentional act has been alleged, then harm is inherent and coverage does not apply.").

According to the complaint,[8] Brooklyn Center for Psychotherapy refused to provide Ms. Goldman with a sign language interpreter on multiple occasions, (ECF No. 1-2 ¶ 14), and an employee dismissively told her to seek treatment for her son elsewhere. (*Id.* ¶¶ 15, 16, 20.) The complaint also alleged that the Center denied services to deaf people and had a policy or practice of refusing to offer on-site sign language interpreting services. (*Id.* ¶¶ 21, 22, 27, 28.) Each claimed action – the explicit refusal to give Ms. Goldman accommodation and the policy against offering interpretation services – was expected or intended by the insured.[9]

---

[7] The Court takes judicial notice of Judge Chen's characterization of Ms. Goldman's claim as a reasonable accommodation case. *Goldman v. Brooklyn Ctr. Of Psychotherapy, Inc.*, No. 15-CV-2572 (PKC) (LB), 2018 WL 1385888, at *4 (E.D.N.Y. Mar. 19, 2018) ("Plaintiff's discrimination claim is based on a reasonable accommodation theory."); *see also Nat. Res. Def. Council v. U.S. Dep't of Energy*, 362 F.Supp.3d 126, 151 n.2 (S.D.N.Y. 2019) ("The Court may take judicial notice of the entries . . . in a court's public docket") (citation omitted).

[8] The question is not whether the complaint was meritorious – the jury found that it was not (ECF No. 14 at 1) – but whether the insurance policy covered the suit.

[9] The fact that the complaint alleges that the Center's acts were both intentional and "deliberately indifferent" does not trigger the duty to defend. (ECF No. 16.) Deliberate indifference is "akin to recklessness" and "requires that a defendant knew of the risk and deliberately assumed or disregarded it." *Corr. Officers' Benevolent Ass'n, Inc. v. City of New York*, No. 17-CV-2899 (LTS), 2018 WL 2435178, *3 (S.D.N.Y. May 30, 2018) (citations omitted).

A disability discrimination claim based on a reasonable accommodation theory could trigger an insurer's duty to defend. Discrimination against people with disabilities is "most often the product, not of invidious animus, but rather of thoughtlessness and indifference – of benign neglect." *Alexander v. Choate*, 469 U.S. 287, 295 (1985). A defendant could fail to accommodate a plaintiff through negligence or carelessness. *See Tse v. New York Univ.*, No. 10-CV-7207(DAB), 2016 WL 10907062, at *21 (S.D.N.Y. Aug. 29, 2016) (citing *Brady v. Wal-Mart Stores, Inc.*, 531 F.3d 127, 135 (2d Cir. 2008) (an employer's duty to accommodate is triggered when the employee's disability is obvious even if the employee does not request specific accommodation)); *see also Brooklyn Ctr. for Indep. of Disabled v. Bloomberg*, 980 F.Supp.2d 588, 642 (S.D.N.Y. 2013) (citing *Communities Actively Living Indep. & Free v. City of Los Angeles*, No. 09-CV-0287 (CBM), 2011 WL 4595993 (C.D. Cal. Feb. 10, 2011) (finding the city failed to consider the unique needs of individuals with disabilities in its emergency preparedness program)).

The underlying complaint does not allege that Brooklyn Center for Psychotherapy was negligent or that it merely overlooked Ms. Goldman's disability.[10] Instead, the complaint alleged that when the Center learned of Ms. Goldman's disability, it turned her away, explicitly rejected her requests for accommodation, and told her to search for services elsewhere.

Nor did the *Goldman* complaint assert a disparate impact claim – a "facially neutral policy that has a discriminatory effect." *Smith v. NYCHA*, 410 Fed. App'x 404, 406 (2d Cir.

[10] The plaintiff argues that the *Goldman* complaint sounds both in intentional conduct and negligent conduct, because of the allegations that the Center "knew or should have known" to develop policies serving individuals with disabilities. (ECF No. 1-3 ¶¶ 24, 25.) As explained above, the Court need not "accept [the plaintiff's] legal characterization of the causes of action alleged in the complaint. *Hubel*, 2003 WL 21435624, at *6; *see also Doe v. Alsaud*, 12 F.Supp.3d 674, 683 (S.D.N.Y. 2014) (characterizing a "knew or known" allegation as a "bare legal conclusion[]." Instead, "the Court must look to the facts alleged to determine the nature of the claim." *Hubel*, 2003 WL 21435624, at *6 (collecting cases).

2011) (summary order); *see also Wright v. New York State Dep't of Corr.*, 831 F.3d 64, 77 (2d Cir. 2016) (failure to accommodate actions require an "individualized inquiry" to accommodate the plaintiff). In *Rosenberg*, a duty to defend claim related to an underlying Fair Housing Act lawsuit, and the complaint alleged that prospective tenants were steered towards certain properties based on their race. *Rosenberg*, 326 F.Supp.2d at 473. The court held that the insurer had no duty to defend because the underlying complaint alleged only intentional discrimination; the prospective tenants were treated differently not because of a facially neutral policy, but "simply on the basis of their race." *Id.* at 475. Similarly, the *Goldman* complaint did not allege that facially neutral circumstances had a disproportionate impact on one group. Rather, it alleged that Brooklyn Center for Psychotherapy "refuse[d] to serve deaf people[,]" had a policy of "discourag[ing] the use of onsite interpreters[,]" and deliberately rejected Ms. Goldman's individual requests for accommodation.[11] (ECF No. 1-3 ¶¶ 20, 21, 27.)

The *Goldman* complaint alleged only intentional acts resulting in discrimination. Thus, the defendant-insurer has no duty to defend under Coverage A.

B. Personal and Advertising Injury Coverage

Coverage B provides coverage for "personal and advertising injury" caused by "an offense arising out of [the] business" in the "coverage territory." (ECF No. 1-2 at 29.) By amendment, the policy includes coverage for "[d]iscrimination based on race, color, religion, sex, age or national origin . . . for which the insured is liable solely due to either disparate impact or vicarious liability." (*Id.* at 31.) The policy excludes coverage for injury "caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and

[11] The *Goldman* complaint does not allege that Brooklyn Center for Psychotherapy is vicariously liable for one-on-one discrimination by an employee. Rather, it alleges that the corporate entity had a policy of refusing to serve deaf individuals. (*Id.* ¶ 21.)

would inflict" injury, (*Id.* at 29), and "[d]iscrimination . . . done intentionally by[,] or at the direction of, or with the knowledge or consent of," the insured entity. (*Id.* at 31.)

The *Goldman* complaint asserts that Brooklyn Center for Psychotherapy acted intentionally, and discriminated against Ms. Goldman on the basis of her disability. The plaintiff's argument that the policy covers disability discrimination cases because disability discrimination is not listed explicitly in an exclusion is not persuasive. (ECF No. 14 at 21.) The policy unambiguously excludes coverage for intentional discrimination[12] or discrimination about which the insured knows. The *Goldman* complaint falls within this exclusion.

II. Bad Faith Insurance Practices

The plaintiff's claim for bad faith insurance practices is not recognized by New York law. *Maniello v. State Farm Fire and Casualty Co.*, No. 16-CV-1598, 2017 WL 496069, at *4 (E.D.N.Y. 2017) (citing *Sikarevich Family L.P. v. Nationwide Mut. Ins. Co.*, 30 F. Supp. 3d 166, 171 (E.D.N.Y. 2014)). "Even if [its] bad faith claim is interpreted as a cognizable claim for a breach of the covenant of good faith and fair dealing implicit in contracts, it does not constitute a distinct claim where it is premised on the same facts as a claim for breach of contract." *Id.* at *4 (citing *Harris v. Provident Life & Acc. Ins. Co.*, 310 F.3d 73, 81 (2d Cir. 2002)). As noted, the insurer did not breach the insurance policy; thus, the plaintiff's bad faith insurance practices claim is dismissed.

[12] While discrimination is not defined specifically in the policy, employment-related discrimination is defined as "the actual or alleged treatment of a person or group of persons based upon[,]" among other identities, "physical disability," "mental disability," or "on any basis which is prohibited by federal, state, or local law." (ECF No. 12-3 at 172.)

CONCLUSION

The defendant-insurer's motion to dismiss the plaintiff's breach of duty of defense and bad faith insurance practices claims is granted. The Clerk is respectfully directed to enter judgment in favor of the defendant-insurer, dismissing this case with prejudice.

SO ORDERED.

Dated: Brooklyn, New York
July 2, 2019

/s/ Ann M. Donnelly
ANN M. DONNELLY
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
---------- X

BROOKLYN CENTER FOR PSYCHOTHERAPY, INC.,

Plaintiff,

JUDGMENT
18-CV-5892 (AMD) (SMG)

-against-

PHILADELPHIA INDEMNITY INSURANCE COMPANY,

Defendant.
---------- X

A Memorandum, Decision, and Order of Honorable Ann M. Donnelly, United States District Judge, having been filed on July 2, 2019, granting the defendant-insurer's motion to dismiss the plaintiff's breach of duty of defense and bad faith insurance practices claims; it is

ORDERED and ADJUDGED that the defendant-insurer's motion to dismiss the plaintiffs breach of duty of defense and bad faith insurance practices claims is granted; that judgment is hereby entered in favor of the defendant-insurer; and that this case is dismissed with prejudice.

Dated: Brooklyn, NY
July 3, 2019

Douglas C. Palmer
Clerk of Court

By: /s/*Jalitza Poveda*
Deputy Clerk

United States Code Annotated
Title 29. Labor
Chapter 16. Vocational Rehabilitation and Other Rehabilitation Services (Refs & Annos)
Subchapter V. Rights and Advocacy (Refs & Annos)

29 U.S.C.A. § 794

§ 794. Nondiscrimination under Federal grants and programs

Effective: October 1, 2016
Currentness

(a) Promulgation of rules and regulations

No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

(b) "Program or activity" defined

For the purposes of this section, the term "program or activity" means all of the operations of--

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 7801 of Title 20), system of career and technical education, or other school system;

(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship--

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance.

(c) Significant structural alterations by small providers

Small providers are not required by subsection (a) to make significant structural alterations to their existing facilities for the purpose of assuring program accessibility, if alternative means of providing the services are available. The terms used in this subsection shall be construed with reference to the regulations existing on March 22, 1988.

(d) Standards used in determining violation of section

The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201 to 12204 and 12210), as such sections relate to employment.

CREDIT(S)

(Pub.L. 93-112, Title V, § 504, Sept. 26, 1973, 87 Stat. 394; Pub.L. 95-602, Title I, §§ 119, 122(d)(2), Nov. 6, 1978, 92 Stat. 2982, 2987; Pub.L. 99-506, Title I, § 103(d)(2)(B), Title X, § 1002(e)(4), Oct. 21, 1986, 100 Stat. 1810, 1844; Pub.L. 100-259, § 4, Mar. 22, 1988, 102 Stat. 29; Pub.L. 100-630, Title II, § 206(d), Nov. 7, 1988, 102 Stat. 3312; Pub.L. 102-569, Title I, § 102(p)(32), Title V, § 506, Oct. 29, 1992, 106 Stat. 4360, 4428; Pub.L. 103-382, Title III, § 394(i)(2), Oct. 20, 1994, 108 Stat. 4029; Pub.L. 105-220, Title IV, § 408(a)(3), Aug. 7, 1998, 112 Stat. 1203; Pub.L. 107-110, Title X, § 1076(u)(2), Jan. 8, 2002, 115 Stat. 2093; Pub.L. 113-128, Title IV, § 456(c), July 22, 2014, 128 Stat. 1675; Pub.L. 114-95, Title IX, § 9215(mmm)(3), Dec. 10, 2015, 129 Stat. 2188.)

29 U.S.C.A. § 794, 29 USCA § 794
Current through P.L. 116-56.

United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 126. Equal Opportunity for Individuals with Disabilities (Refs & Annos)
Subchapter III. Public Accommodations and Services Operated by Private Entities (Refs & Annos)

42 U.S.C.A. § 12182

§ 12182. Prohibition of discrimination by public accommodations

Currentness

(a) General rule

No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

(b) Construction

(1) General prohibition

(A) Activities

(i) Denial of participation

It shall be discriminatory to subject an individual or class of individuals on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements, to a denial of the opportunity of the individual or class to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of an entity.

(ii) Participation in unequal benefit

It shall be discriminatory to afford an individual or class of individuals, on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements with the opportunity to participate in or benefit from a good, service, facility, privilege, advantage, or accommodation that is not equal to that afforded to other individuals.

(iii) Separate benefit

It shall be discriminatory to provide an individual or class of individuals, on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements with a good, service, facility, privilege, advantage, or accommodation that is different or separate from that provided to other individuals, unless such

action is necessary to provide the individual or class of individuals with a good, service, facility, privilege, advantage, or accommodation, or other opportunity that is as effective as that provided to others.

(iv) Individual or class of individuals

For purposes of clauses (i) through (iii) of this subparagraph, the term "individual or class of individuals" refers to the clients or customers of the covered public accommodation that enters into the contractual, licensing or other arrangement.

(B) Integrated settings

Goods, services, facilities, privileges, advantages, and accommodations shall be afforded to an individual with a disability in the most integrated setting appropriate to the needs of the individual.

(C) Opportunity to participate

Notwithstanding the existence of separate or different programs or activities provided in accordance with this section, an individual with a disability shall not be denied the opportunity to participate in such programs or activities that are not separate or different.

(D) Administrative methods

An individual or entity shall not, directly or through contractual or other arrangements, utilize standards or criteria or methods of administration--

(i) that have the effect of discriminating on the basis of disability; or

(ii) that perpetuate the discrimination of others who are subject to common administrative control.

(E) Association

It shall be discriminatory to exclude or otherwise deny equal goods, services, facilities, privileges, advantages, accommodations, or other opportunities to an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association.

(2) Specific prohibitions

(A) Discrimination

For purposes of subsection (a), discrimination includes--

(i) the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges,

advantages, or accommodations, unless such criteria can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered;

(ii) a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations;

(iii) a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden;

(iv) a failure to remove architectural barriers, and communication barriers that are structural in nature, in existing facilities, and transportation barriers in existing vehicles and rail passenger cars used by an establishment for transporting individuals (not including barriers that can only be removed through the retrofitting of vehicles or rail passenger cars by the installation of a hydraulic or other lift), where such removal is readily achievable; and

(v) where an entity can demonstrate that the removal of a barrier under clause (iv) is not readily achievable, a failure to make such goods, services, facilities, privileges, advantages, or accommodations available through alternative methods if such methods are readily achievable.

(B) Fixed route system

(i) Accessibility

It shall be considered discrimination for a private entity which operates a fixed route system and which is not subject to section 12184 of this title to purchase or lease a vehicle with a seating capacity in excess of 16 passengers (including the driver) for use on such system, for which a solicitation is made after the 30th day following the effective date of this subparagraph, that is not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(ii) Equivalent service

If a private entity which operates a fixed route system and which is not subject to section 12184 of this title purchases or leases a vehicle with a seating capacity of 16 passengers or less (including the driver) for use on such system after the effective date of this subparagraph that is not readily accessible to or usable by individuals with disabilities, it shall be considered discrimination for such entity to fail to operate such system so that, when viewed in its entirety, such system ensures a level of service to individuals with disabilities, including individuals who use wheelchairs, equivalent to the level of service provided to individuals without disabilities.

(C) Demand responsive system

For purposes of subsection (a), discrimination includes--

(i) a failure of a private entity which operates a demand responsive system and which is not subject to section 12184 of this title to operate such system so that, when viewed in its entirety, such system ensures a level of service to individuals with disabilities, including individuals who use wheelchairs, equivalent to the level of service provided to individuals without disabilities; and

(ii) the purchase or lease by such entity for use on such system of a vehicle with a seating capacity in excess of 16 passengers (including the driver), for which solicitations are made after the 30th day following the effective date of this subparagraph, that is not readily accessible to and usable by individuals with disabilities (including individuals who use wheelchairs) unless such entity can demonstrate that such system, when viewed in its entirety, provides a level of service to individuals with disabilities equivalent to that provided to individuals without disabilities.

(D) Over-the-road buses

(i) Limitation on applicability

Subparagraphs (B) and (C) do not apply to over-the-road buses.

(ii) Accessibility requirements

For purposes of subsection (a), discrimination includes (I) the purchase or lease of an over-the-road bus which does not comply with the regulations issued under section 12186(a)(2) of this title by a private entity which provides transportation of individuals and which is not primarily engaged in the business of transporting people, and (II) any other failure of such entity to comply with such regulations.

(3) Specific construction

Nothing in this subchapter shall require an entity to permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations of such entity where such individual poses a direct threat to the health or safety of others. The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services.

CREDIT(S)

(Pub.L. 101-336, Title III, § 302, July 26, 1990, 104 Stat. 355.)

42 U.S.C.A. § 12182, 42 USCA § 12182
Current through P.L. 116-56.

End of Document

McKinney's Consolidated Laws of New York Annotated
Executive Law (Refs & Annos)
Chapter Eighteen. Of the Consolidated Laws
Article 15. Human Rights Law (Refs & Annos)

McKinney's Executive Law § 296

§ 296. Unlawful discriminatory practices

Effective: July 25, 2019 to October 7, 2019
Currentness

<[Text of section, historical notes, references and Notes of Decisions (Part I) for Executive Law §296 are displayed in this document. For Notes of Decisions (Part II), see Executive Law § 296, post.]>

1. It shall be an unlawful discriminatory practice:

(a) For an employer or licensing agency, because of an individual's age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, marital status, or domestic violence victim status, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

(b) For an employment agency to discriminate against any individual because of age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, or marital status, in receiving, classifying, disposing or otherwise acting upon applications for its services or in referring an applicant or applicants to an employer or employers.

(c) For a labor organization, because of the age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, or marital status of any individual, to exclude or to expel from its membership such individual or to discriminate in any way against any of its members or against any employer or any individual employed by an employer.

(d) For any employer or employment agency to print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for employment or to make any inquiry in connection with prospective employment, which expresses directly or indirectly, any limitation, specification or discrimination as to age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, or marital status, or any intent to make any such limitation, specification or discrimination, unless based upon a bona fide occupational qualification; provided, however, that neither this paragraph nor any provision of this chapter or other law shall be construed to prohibit the department of civil service or the department of personnel of any city containing more than one county from requesting information from applicants for civil service examinations concerning any of the aforementioned characteristics, other than sexual orientation, for the purpose of conducting studies to identify and resolve possible problems in recruitment and testing of members of minority groups to insure the fairest possible and equal opportunities for employment in the civil service for all persons, regardless of age, race, creed, color, national origin, sexual

orientation or gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, or marital status.

(e) For any employer, labor organization or employment agency to discharge, expel or otherwise discriminate against any person because he or she has opposed any practices forbidden under this article or because he or she has filed a complaint, testified or assisted in any proceeding under this article.

(f) Nothing in this subdivision shall affect any restrictions upon the activities of persons licensed by the state liquor authority with respect to persons under twenty-one years of age.

(g) For an employer to compel an employee who is pregnant to take a leave of absence, unless the employee is prevented by such pregnancy from performing the activities involved in the job or occupation in a reasonable manner.

1-a. It shall be an unlawful discriminatory practice for an employer, labor organization, employment agency or any joint labor-management committee controlling apprentice training programs:

(a) To select persons for an apprentice training program registered with the state of New York on any basis other than their qualifications, as determined by objective criteria which permit review;

(b) To deny to or withhold from any person because of race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, age, disability, familial status, or marital status, the right to be admitted to or participate in a guidance program, an apprenticeship training program, on-the-job training program, executive training program, or other occupational training or retraining program;

(c) To discriminate against any person in his or her pursuit of such programs or to discriminate against such a person in the terms, conditions or privileges of such programs because of race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, age, disability, familial status or marital status;

(d) To print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for such programs or to make any inquiry in connection with such program which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, age, disability, familial status or marital status, or any intention to make any such limitation, specification or discrimination, unless based on a bona fide occupational qualification.

2. (a) It shall be an unlawful discriminatory practice for any person, being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation, resort or amusement, because of the race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability or marital status of any person, directly or indirectly, to refuse, withhold from or deny to such person any of the accommodations, advantages, facilities or privileges thereof, including the extension of credit, or, directly or indirectly, to publish, circulate, issue, display, post or mail any written or printed communication, notice or advertisement, to the effect that any of the accommodations, advantages, facilities and privileges of any such place shall be refused, withheld from or denied to any person on account of race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability or marital status, or that the patronage or custom thereat of any person of or purporting to be of any particular race, creed, color, national origin, sexual orientation,

gender identity or expression, military status, sex or marital status, or having a disability is unwelcome, objectionable or not acceptable, desired or solicited.

(b) Nothing in this subdivision shall be construed to prevent the barring of any person, because of the sex of such person, from places of public accommodation, resort or amusement if the division grants an exemption based on bona fide considerations of public policy; nor shall this subdivision apply to the rental of rooms in a housing accommodation which restricts such rental to individuals of one sex.

(c) For the purposes of paragraph (a) of this subdivision, "discriminatory practice" includes:

(i) a refusal to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford facilities, privileges, advantages or accommodations to individuals with disabilities, unless such person can demonstrate that making such modifications would fundamentally alter the nature of such facilities, privileges, advantages or accommodations;

(ii) a refusal to take such steps as may be necessary to ensure that no individual with a disability is excluded or denied services because of the absence of auxiliary aids and services, unless such person can demonstrate that taking such steps would fundamentally alter the nature of the facility, privilege, advantage or accommodation being offered or would result in an undue burden;

(iii) a refusal to remove architectural barriers, and communication barriers that are structural in nature, in existing facilities, and transportation barriers in existing vehicles and rail passenger cars used by an establishment for transporting individuals (not including barriers that can only be removed through the retrofitting of vehicles or rail passenger cars by the installation of a hydraulic or other lift), where such removal is readily achievable;

(iv) where such person is a local or state government entity, a refusal to remove architectural barriers, and communication barriers that are structural in nature, in existing facilities, and transportation barriers in existing vehicles and rail passenger cars used by an establishment for transporting individuals (not including barriers that can only be removed through the retrofitting of vehicles or rail passenger cars by the installation of a hydraulic or other lift), where such removal does not constitute an undue burden; except as set forth in paragraph (e) of this subdivision; nothing in this section would require a public entity to: necessarily make each of its existing facilities accessible to and usable by individuals with disabilities; take any action that would threaten or destroy the historical significance of an historic property; or to make structural changes in existing facilities where other methods are effective in achieving compliance with this section; and

(v) where such person can demonstrate that the removal of a barrier under subparagraph (iii) of this paragraph is not readily achievable, a failure to make such facilities, privileges, advantages or accommodations available through alternative methods if such methods are readily achievable.

(d) For the purposes of this subdivision:

(i) "Readily achievable" means easily accomplishable and able to be carried out without much difficulty or expense. In determining whether an action is readily achievable, factors to be considered include:

(A) the nature and cost of the action needed under this subdivision;

(B) the overall financial resources of the facility or facilities involved in the action; the number of persons employed at such facility; the effect on expenses and resources or the impact otherwise of such action upon the operation of the facility;

(C) the overall financial resources of the place of public accommodation, resort or amusement; the overall size of the business of such a place with respect to the number of its employees; the number, type and location of its facilities; and

(D) the type of operation or operations of the place of public accommodation, resort or amusement, including the composition, structure and functions of the workforce of such place; the geographic separateness, administrative or fiscal relationship of the facility or facilities in question to such place.

(ii) "Auxiliary aids and services" include:

(A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

(B) qualified readers, taped texts or other effective methods of making visually delivered materials available to individuals with visual impairments;

(C) acquisition or modification of equipment or devices; and

(D) other similar services and actions.

(iii) "Undue burden" means significant difficulty or expense. In determining whether an action would result in an undue burden, factors to be considered shall include:

(A) The nature and cost of the action needed under this article;

(B) The overall financial resources of the site or sites involved in the action; the number of persons employed at the site; the effect on expenses and resources; legitimate safety requirements that are necessary for safe operation, including crime prevention measures; or the impact otherwise of the action upon the operation of the site;

(C) The geographic separateness, and the administrative or fiscal relationship of the site or sites in question to any parent corporation or entity;

(D) If applicable, the overall financial resources of any parent corporation or entity; the overall size of the parent corporation or entity with respect to the number of its employees; the number, type, and location of its facilities; and

(E) If applicable, the type of operation or operations of any parent corporation or entity, including the composition, structure, and functions of the workforce of the parent corporation or entity.

(iv) "Reasonable modifications in policies, practices, procedures" includes modification to permit the use of a service animal by a person with a disability, consistent with federal regulations implementing the Americans with Disabilities Act, Title III, at 28 CFR 36.302(c).

(e) Paragraphs (c) and (d) of this subdivision do not apply to any air carrier, the National Railroad Passenger Corporation, or public transportation facilities, vehicles or services owned, leased or operated by the state, a county, city, town or village, or any agency thereof, or by any public benefit corporation or authority.

2-a. It shall be an unlawful discriminatory practice for the owner, lessee, sub-lessee, assignee, or managing agent of publicly-assisted housing accommodations or other person having the right of ownership or possession of or the right to rent or lease such accommodations:

(a) To refuse to sell, rent or lease or otherwise to deny to or withhold from any person or group of persons such housing accommodations because of the race, creed, color, disability, national origin, sexual orientation, gender identity or expression, military status, age, sex, marital status, lawful source of income or familial status of such person or persons, or to represent that any housing accommodation or land is not available for inspection, sale, rental or lease when in fact it is so available.

(b) To discriminate against any person because of his or her race, creed, color, disability, national origin, sexual orientation, gender identity or expression, military status, age, sex, marital status, lawful source of income or familial status in the terms, conditions or privileges of any publicly-assisted housing accommodations or in the furnishing of facilities or services in connection therewith.

(c) To cause to be made any written or oral inquiry or record concerning the race, creed, color, disability, national origin, sexual orientation, gender identity or expression, membership in the reserve armed forces of the United States or in the organized militia of the state, age, sex, marital status, lawful source of income or familial status of a person seeking to rent or lease any publicly-assisted housing accommodation; provided, however, that nothing in this subdivision shall prohibit a member of the reserve armed forces of the United States or in the organized militia of the state from voluntarily disclosing such membership.

(c-1) To print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for the purchase, rental or lease of such housing accommodation or to make any record or inquiry in connection with the prospective purchase, rental or lease of such a housing accommodation which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, age, disability, marital status, lawful source of income or familial status, or any intent to make any such limitation, specification or discrimination.

(d)(1) To refuse to permit, at the expense of the person with a disability, reasonable modifications of existing premises occupied or to be occupied by the said person, if the modifications may be necessary to afford the said person full enjoyment of the premises, in conformity with the provisions of the New York state uniform fire prevention and building code, except that, in the case of a rental, the landlord may, where it is reasonable to do so, condition permission for a modification on the renter's agreeing to restore the interior of the premises to the condition that existed before the modification, reasonable wear and tear excepted.

(2) To refuse to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford a person with a disability equal opportunity to use and enjoy a dwelling, including reasonable modification to common use portions of the dwelling, or

(3) In connection with the design and construction of covered multi-family dwellings for first occupancy after March thirteenth, nineteen hundred ninety-one, a failure to design and construct dwellings in accordance with the accessibility requirements of the New York state uniform fire prevention and building code, to provide that:

(i) The public use and common use portions of the dwellings are readily accessible to and usable by disabled persons with disabilities;

(ii) All the doors are designed in accordance with the New York state uniform fire prevention and building code to allow passage into and within all premises and are sufficiently wide to allow passage by persons in wheelchairs; and

(iii) All premises within covered multi-family dwelling units contain an accessible route into and through the dwelling; light switches, electrical outlets, thermostats, and other environmental controls are in accessible locations; there are reinforcements in the bathroom walls to allow later installation of grab bars; and there are usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space, in conformity with the New York state uniform fire prevention and building code.

(e) Nothing in this subdivision shall restrict the consideration of age in the rental of publicly-assisted housing accommodations if the division grants an exemption based on bona fide considerations of public policy for the purpose of providing for the special needs of a particular age group without the intent of prejudicing other age groups.

(f) Nothing in this subdivision shall be deemed to restrict the rental of rooms in school or college dormitories to individuals of the same sex.

3. (a) It shall be an unlawful discriminatory practice for an employer, licensing agency, employment agency or labor organization to refuse to provide reasonable accommodations to the known disabilities, or pregnancy-related conditions, of an employee, prospective employee or member in connection with a job or occupation sought or held or participation in a training program.

(b) Nothing contained in this subdivision shall be construed to require provision of accommodations which can be demonstrated to impose an undue hardship on the operation of an employer's, licensing agency's, employment agency's or labor organization's business, program or enterprise.

In making such a demonstration with regard to undue hardship the factors to be considered include:

(i) The overall size of the business, program or enterprise with respect to the number of employees, number and type of facilities, and size of budget;

(ii) The type of operation which the business, program or enterprise is engaged in, including the composition and structure of the workforce; and

(iii) The nature and cost of the accommodation needed.

(c) [As added by L.2015, c. 365, § 2. Another par. (c) was added by a different law.] Nothing in this subdivision regarding "reasonable accommodation" or in the chapter of the laws of two thousand fifteen which added this paragraph shall alter, diminish, increase, or create new or additional requirements to accommodate protected classes pursuant to this article other than the additional requirements as explicitly set forth in such chapter of the laws of two thousand fifteen.

(c) [As added by L.2015, c. 369, § 2. Another par. (c) was added by a different law.] The employee must cooperate in providing medical or other information that is necessary to verify the existence of the disability or pregnancy-related condition, or that is necessary for consideration of the accommodation. The employee has a right to have such medical information kept confidential.

3-a. It shall be an unlawful discriminatory practice:

(a) For an employer or licensing agency to refuse to hire or employ or license or to bar or to terminate from employment an individual eighteen years of age or older, or to discriminate against such individual in promotion, compensation or in terms, conditions, or privileges of employment, because of such individual's age.

(b) For any employer, licensing agency or employment agency to print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for employment or to make any inquiry in connection with prospective employment, which expresses, directly or indirectly, any limitation, specification or discrimination on account of age respecting individuals eighteen years of age or older, or any intent to make any such limitation, specification, or discrimination.

(c) For any employer, licensing agency or employment agency to discharge or otherwise discriminate against any person because he or she has opposed any practices forbidden under this article or because he or she has filed a complaint, testified or assisted in any proceeding under this article.

(d) Notwithstanding any other provision of law, no employee shall be subject to termination or retirement from employment on the basis of age, except where age is a bona fide occupational qualification reasonably necessary to the normal operation of a particular business, where the differentiation is based on reasonable factors other than age, or as otherwise specified in paragraphs (e) and (f) of this subdivision or in article fourteen-A of the retirement and social security law.

(e) Nothing contained in this subdivision or in subdivision one of this section shall be construed to prevent the compulsory retirement of any employee who has attained sixty-five years of age, and who, for a two-year period immediately before retirement, is employed in a bona fide executive or a high policymaking position, if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of such plans, of the employer of such employee, which equals, in the aggregate, at least forty-four thousand dollars; provided that for the purposes of this paragraph only, the term "employer" includes any employer as otherwise defined in this article but does not include (i) the state of New York, (ii) a county, city, town, village or any other political subdivision or

civil division of the state, (iii) a school district or any other governmental entity operating a public school, college or university, (iv) a public improvement or special district, (v) a public authority, commission or public benefit corporation, or (vi) any other public corporation, agency, instrumentality or unit of government which exercises governmental power under the laws of the state. In applying the retirement benefit test of this paragraph, if any such retirement benefit is in a form other than a straight life annuity with no ancillary benefits, or if employees contribute to any such plan or make rollover contributions, such benefit shall be adjusted in accordance with rules and regulations promulgated by the division, after an opportunity for public hearing, so that the benefit is the equivalent of a straight life annuity with no ancillary benefits under a plan to which employees do not contribute and under which no rollover contributions are made.

(f) Nothing contained in this subdivision, in subdivision one of this section or in article fourteen-A of the retirement and social security law shall be construed to prevent the compulsory retirement of any employee who has attained seventy years of age and is serving under a contract for unlimited tenure, or a similar arrangement providing for unlimited tenure, at a nonpublic institution of higher education. For purposes of such subdivisions or article, the term “institution of higher education” means an educational institution which (i) admits as regular students only persons having a certificate of graduation from a school providing secondary education, or the recognized equivalent of such a certificate, (ii) is lawfully authorized to provide a program of education beyond secondary education, and (iii) provides an educational program for which it awards a bachelor's degree or provides not less than a two-year program which is acceptable for full credit toward such a degree.

(g) In the event of a conflict between the provisions of this subdivision and the provisions of article fourteen-A of the retirement and social security law, the provisions of article fourteen-A of such law shall be controlling.

But nothing contained in this subdivision, in subdivision one of this section or in article fourteen-A of the retirement and social security law shall be construed to prevent the termination of the employment of any person who, even upon the provision of reasonable accommodations, is physically unable to perform his or her duties or to affect the retirement policy or system of any employer where such policy or system is not merely a subterfuge to evade the purposes of said subdivisions or said article; nor shall anything in such subdivisions or such article be deemed to preclude the varying of insurance coverages according to an employee's age.

The provisions of this subdivision shall not affect any restriction upon the activities of persons licensed by the state liquor authority with respect to persons under twenty-one years of age.

3-b. It shall be an unlawful discriminatory practice for any real estate broker, real estate salesperson or employee or agent thereof or any other individual, corporation, partnership or organization for the purpose of inducing a real estate transaction from which any such person or any of its stockholders or members may benefit financially, to represent that a change has occurred or will or may occur in the composition with respect to race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability, marital status, or familial status of the owners or occupants in the block, neighborhood or area in which the real property is located, and to represent, directly or indirectly, that this change will or may result in undesirable consequences in the block, neighborhood or area in which the real property is located, including but not limited to the lowering of property values, an increase in criminal or anti-social behavior, or a decline in the quality of schools or other facilities.

4. It shall be an unlawful discriminatory practice for an educational institution to deny the use of its facilities to any person otherwise qualified, or to permit the harassment of any student or applicant, by reason of his race, color, religion, disability, national origin, sexual orientation, military status, sex, age or marital status, except that any such institution which establishes or maintains a policy of educating persons of one sex exclusively may admit students of only one sex.

5. (a) It shall be an unlawful discriminatory practice for the owner, lessee, sub-lessee, assignee, or managing agent of, or other person having the right to sell, rent or lease a housing accommodation, constructed or to be constructed, or any agent or employee thereof:

(1) To refuse to sell, rent, lease or otherwise to deny to or withhold from any person or group of persons such a housing accommodation because of the race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, age, disability, marital status, lawful source of income or familial status of such person or persons, or to represent that any housing accommodation or land is not available for inspection, sale, rental or lease when in fact it is so available.

(2) To discriminate against any person because of race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, age, disability, marital status, lawful source of income or familial status in the terms, conditions or privileges of the sale, rental or lease of any such housing accommodation or in the furnishing of facilities or services in connection therewith.

(3) To print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for the purchase, rental or lease of such housing accommodation or to make any record or inquiry in connection with the prospective purchase, rental or lease of such a housing accommodation which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, age, disability, marital status, lawful source of income or familial status, or any intent to make any such limitation, specification or discrimination.

The provisions of this paragraph (a) shall not apply (1) to the rental of a housing accommodation in a building which contains housing accommodations for not more than two families living independently of each other, if the owner resides in one of such housing accommodations, (2) to the restriction of the rental of all rooms in a housing accommodation to individuals of the same sex or (3) to the rental of a room or rooms in a housing accommodation, if such rental is by the occupant of the housing accommodation or by the owner of the housing accommodation and the owner resides in such housing accommodation or (4) solely with respect to age and familial status to the restriction of the sale, rental or lease of housing accommodations exclusively to persons sixty-two years of age or older and the spouse of any such person, or for housing intended and operated for occupancy by at least one person fifty-five years of age or older per unit. In determining whether housing is intended and operated for occupancy by persons fifty-five years of age or older, Sec. 807(b) (2) (c) (42 U.S.C. 3607 (b) (2) (c)) of the federal Fair Housing Act of 1988, as amended, shall apply.

(b) It shall be an unlawful discriminatory practice for the owner, lessee, sub-lessee, or managing agent of, or other person having the right of ownership or possession of or the right to sell, rent or lease, land or commercial space:

(1) To refuse to sell, rent, lease or otherwise deny to or withhold from any person or group of persons land or commercial space because of the race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, age, disability, marital status, or familial status of such person or persons, or to represent that any housing accommodation or land is not available for inspection, sale, rental or lease when in fact it is so available;

(2) To discriminate against any person because of race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, age, disability, marital status, or familial status in the terms, conditions or privileges of the sale, rental or lease of any such land or commercial space; or in the furnishing of facilities or services in connection therewith;

(3) To print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for the purchase, rental or lease of such land or commercial space or to make any record or inquiry in connection with the prospective purchase, rental or lease of such land or commercial space which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, age, disability, marital status, or familial status; or any intent to make any such limitation, specification or discrimination.

(4) With respect to age and familial status, the provisions of this paragraph shall not apply to the restriction of the sale, rental or lease of land or commercial space exclusively to persons fifty-five years of age or older and the spouse of any such person, or to the restriction of the sale, rental or lease of land to be used for the construction, or location of housing accommodations exclusively for persons sixty-two years of age or older, or intended and operated for occupancy by at least one person fifty-five years of age or older per unit. In determining whether housing is intended and operated for occupancy by persons fifty-five years of age or older, Sec. 807(b) (2) (c) (42 U.S.C. 3607(b) (2) (c)) of the federal Fair Housing Act of 1988, as amended, shall apply.

(c) It shall be an unlawful discriminatory practice for any real estate broker, real estate salesperson or employee or agent thereof:

(1) To refuse to sell, rent or lease any housing accommodation, land or commercial space to any person or group of persons or to refuse to negotiate for the sale, rental or lease, of any housing accommodation, land or commercial space to any person or group of persons because of the race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, age, disability, marital status, lawful source of income or familial status of such person or persons, or to represent that any housing accommodation, land or commercial space is not available for inspection, sale, rental or lease when in fact it is so available, or otherwise to deny or withhold any housing accommodation, land or commercial space or any facilities of any housing accommodation, land or commercial space from any person or group of persons because of the race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, age, disability, marital status, lawful source of income or familial status of such person or persons.

(2) To print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for the purchase, rental or lease of any housing accommodation, land or commercial space or to make any record or inquiry in connection with the prospective purchase, rental or lease of any housing accommodation, land or commercial space which expresses, directly or indirectly, any limitation, specification, or discrimination as to race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, age, disability, marital status, lawful source of income or familial status; or any intent to make any such limitation, specification or discrimination.

(3) With respect to age and familial status, the provisions of this paragraph shall not apply to the restriction of the sale, rental or lease of any housing accommodation, land or commercial space exclusively to persons fifty-five years of age or older and the spouse of any such person, or to the restriction of the sale, rental or lease of any housing accommodation or land to be used for the construction or location of housing accommodations for persons sixty-two years of age or older, or intended and operated for occupancy by at least one person fifty-five years of age or older per unit. In determining whether housing is intended and operated for occupancy by persons fifty-five years of age or older, Sec. 807 (b) (2) (c) (42 U.S.C. 3607 (b) (2) (c)) of the federal Fair Housing Act of 1988, as amended, shall apply.

(d) It shall be an unlawful discriminatory practice for any real estate board, because of the race, creed, color, national origin, sexual orientation, gender identity or expression, military status, age, sex, disability, marital status, lawful source of income

or familial status of any individual who is otherwise qualified for membership, to exclude or expel such individual from membership, or to discriminate against such individual in the terms, conditions and privileges of membership in such board.

(e) It shall be an unlawful discriminatory practice for the owner, proprietor or managing agent of, or other person having the right to provide care and services in, a private proprietary nursing home, convalescent home, or home for adults, or an intermediate care facility, as defined in section two of the social services law, heretofore constructed, or to be constructed, or any agent or employee thereof, to refuse to provide services and care in such home or facility to any individual or to discriminate against any individual in the terms, conditions, and privileges of such services and care solely because such individual is a blind person. For purposes of this paragraph, a "blind person" shall mean a person who is registered as a blind person with the commission for the visually handicapped and who meets the definition of a "blind person" pursuant to section three of chapter four hundred fifteen of the laws of nineteen hundred thirteen [1] entitled "An act to establish a state commission for improving the condition of the blind of the state of New York, and making an appropriation therefor".

(f) The provisions of this subdivision, as they relate to age, shall not apply to persons under the age of eighteen years.

(g) It shall be an unlawful discriminatory practice for any person offering or providing housing accommodations, land or commercial space as described in paragraphs (a), (b), and (c) of this subdivision to make or cause to be made any written or oral inquiry or record concerning membership of any person in the state organized militia in relation to the purchase, rental or lease of such housing accommodation, land, or commercial space, provided, however, that nothing in this subdivision shall prohibit a member of the state organized militia from voluntarily disclosing such membership.

6. It shall be an unlawful discriminatory practice for any person to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this article, or to attempt to do so.

7. It shall be an unlawful discriminatory practice for any person engaged in any activity to which this section applies to retaliate or discriminate against any person because he or she has opposed any practices forbidden under this article or because he or she has filed a complaint, testified or assisted in any proceeding under this article.

8. It shall be an unlawful discriminatory practice for any party to a conciliation agreement made pursuant to section two hundred ninety-seven of this article to violate the terms of such agreement.

9. (a) It shall be an unlawful discriminatory practice for any fire department or fire company therein, through any member or members thereof, officers, board of fire commissioners or other body or office having power of appointment of volunteer firefighters, directly or indirectly, by ritualistic practice, constitutional or by-law prescription, by tacit agreement among its members, or otherwise, to deny to any individual membership in any volunteer fire department or fire company therein, or to expel or discriminate against any volunteer member of a fire department or fire company therein, because of the race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, marital status, or familial status, of such individual.

(b) Upon a complaint to the division, as provided for under subdivision one of section two hundred ninety-seven of this article, and in the event the commissioner finds that an unlawful discriminatory practice has been engaged in, the board of fire commissioners or other body or office having power of appointment of volunteer firefighters shall be served with any order required, under subdivision four of section two hundred ninety-seven of this article, to be served on any or all respondents

requiring such respondent or respondents to cease and desist from such unlawful discriminatory practice and to take affirmative action. Such board shall have the duty and power to appoint as a volunteer firefighter, notwithstanding any other statute or provision of law or by-law of any volunteer fire company, any individual whom the commissioner has determined to be the subject of an unlawful discriminatory practice under this subdivision. Unless such board has been found to have engaged in an unlawful discriminatory practice, service upon such board of such order shall not constitute such board or its members as a respondent nor constitute a finding of an unlawful discriminatory practice against such board or its members.

10. (a) It shall be an unlawful discriminatory practice for any employer, or an employee or agent thereof, to impose upon a person as a condition of obtaining or retaining employment, including opportunities for promotion, advancement or transfers, any terms or conditions that would require such person to violate or forego a sincerely held practice of his or her religion, including but not limited to the observance of any particular day or days or any portion thereof as a sabbath or other holy day in accordance with the requirements of his or her religion, unless, after engaging in a bona fide effort, the employer demonstrates that it is unable to reasonably accommodate the employee's or prospective employee's sincerely held religious observance or practice without undue hardship on the conduct of the employer's business. Notwithstanding any other provision of law to the contrary, an employee shall not be entitled to premium wages or premium benefits for work performed during hours to which such premium wages or premium benefits would ordinarily be applicable, if the employee is working during such hours only as an accommodation to his or her sincerely held religious requirements. Nothing in this paragraph or paragraph (b) of this subdivision shall alter or abridge the rights granted to an employee concerning the payment of wages or privileges of seniority accruing to that employee.

(b) Except where it would cause an employer to incur an undue hardship, no person shall be required to remain at his or her place of employment during any day or days or portion thereof that, as a requirement of his or her religion, he or she observes as his or her sabbath or other holy day, including a reasonable time prior and subsequent thereto for travel between his or her place of employment and his or her home, provided however, that any such absence from work shall, wherever practicable in the reasonable judgment of the employer, be made up by an equivalent amount of time and work at some other mutually convenient time, or shall be charged against any leave with pay ordinarily granted, other than sick leave, provided further, however, that any such absence not so made up or charged, may be treated by the employer of such person as leave taken without pay.

(c) It shall be an unlawful discriminatory practice for an employer to refuse to permit an employee to utilize leave, as provided in paragraph (b) of this subdivision, solely because the leave will be used for absence from work to accommodate the employee's sincerely held religious observance or practice.

(d) As used in this subdivision: (1) “undue hardship” shall mean an accommodation requiring significant expense or difficulty (including a significant interference with the safe or efficient operation of the workplace or a violation of a bona fide seniority system). Factors to be considered in determining whether the accommodation constitutes an undue economic hardship shall include, but not be limited to:

(i) the identifiable cost of the accommodation, including the costs of loss of productivity and of retaining or hiring employees or transferring employees from one facility to another, in relation to the size and operating cost of the employer;

(ii) the number of individuals who will need the particular accommodation to a sincerely held religious observance or practice; and

(iii) for an employer with multiple facilities, the degree to which the geographic separateness or administrative or fiscal relationship of the facilities will make the accommodation more difficult or expensive.

Provided, however, an accommodation shall be considered to constitute an undue hardship if it will result in the inability of an employee to perform the essential functions of the position in which he or she is employed.

(2) "premium wages" shall include overtime pay and compensatory time off, and additional remuneration for night, weekend or holiday work, or for standby or irregular duty.

(3) "premium benefit" shall mean an employment benefit, such as seniority, group life insurance, health insurance, disability insurance, sick leave, annual leave, or an educational or pension benefit that is greater than the employment benefit due the employee for an equivalent period of work performed during the regular work schedule of the employee.

In the case of any employer other than the state, any of its political subdivisions or any school district, this subdivision shall not apply where the uniform application of terms and conditions of attendance to employees is essential to prevent undue economic hardship to the employer. In any proceeding in which the applicability of this subdivision is in issue, the burden of proof shall be upon the employer. If any question shall arise whether a particular position or class of positions is excepted from this subdivision by this paragraph, such question may be referred in writing by any party claimed to be aggrieved, in the case of any position of employment by the state or any of its political subdivisions, except by any school district, to the civil service commission, in the case of any position of employment by any school district, to the commissioner of education, who shall determine such question and in the case of any other employer, a party claiming to be aggrieved may file a complaint with the division pursuant to this article. Any such determination by the civil service commission shall be reviewable in the manner provided by article seventy-eight of the civil practice law and rules and any such determination by the commissioner of education shall be reviewable in the manner and to the same extent as other determinations of the commissioner under section three hundred ten of the education law.

11. Nothing contained in this section shall be construed to bar any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization, from limiting employment or sales or rental of housing accommodations or admission to or giving preference to persons of the same religion or denomination or from taking such action as is calculated by such organization to promote the religious principles for which it is established or maintained.

12. Notwithstanding the provisions of subdivisions one, one-a and three-a of this section, it shall not be an unlawful discriminatory practice for an employer, employment agency, labor organization or joint labor-management committee to carry out a plan, approved by the division, to increase the employment of members of a minority group (as may be defined pursuant to the regulations of the division) which has a state-wide unemployment rate that is disproportionately high in comparison with the state-wide unemployment rate of the general population. Any plan approved under this subdivision shall be in writing and the division's approval thereof shall be for a limited period and may be rescinded at any time by the division.

13. It shall be an unlawful discriminatory practice (i) for any person to boycott or blacklist, or to refuse to buy from, sell to or trade with, or otherwise discriminate against any person, because of the race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability, or familial status, of such person, or of such person's partners, members, stockholders, directors, officers, managers, superintendents, agents, employees, business associates, suppliers or customers, or (ii) for any person wilfully to do any act or refrain from doing any act which enables any such person to take such action. This subdivision shall not apply to:

(a) Boycotts connected with labor disputes; or

(b) Boycotts to protest unlawful discriminatory practices.

14. In addition to reasonable modifications in policies, practices, or procedures, including those defined in subparagraph (iv) of paragraph (d) of subdivision two of this section or reasonable accommodations for persons with disabilities as otherwise provided in this section, including the use of an animal as a reasonable accommodation, it shall be an unlawful discriminatory practice for any person engaged in any activity covered by this section to deny access or otherwise to discriminate against a blind person, a person who is deaf or hard of hearing or a person with another disability because he or she is accompanied by a dog that has been trained to work or perform specific tasks for the benefit of such person by a professional guide dog, hearing dog or service dog training center or professional guide dog, hearing dog or service dog trainer, or to discriminate against such professional guide dog, hearing dog or service dog trainer engaged in such training of a dog for use by a person with a disability, whether or not accompanied by the person for whom the dog is being trained.

15. It shall be an unlawful discriminatory practice for any person, agency, bureau, corporation or association, including the state and any political subdivision thereof, to deny any license or employment to any individual by reason of his or her having been convicted of one or more criminal offenses, or by reason of a finding of a lack of "good moral character" which is based upon his or her having been convicted of one or more criminal offenses, when such denial is in violation of the provisions of article twenty-three-A of the correction law. Further, there shall be a rebuttable presumption in favor of excluding from evidence the prior incarceration or conviction of any person, in a case alleging that the employer has been negligent in hiring or retaining an applicant or employee, or supervising a hiring manager, if after learning about an applicant or employee's past criminal conviction history, such employer has evaluated the factors set forth in section seven hundred fifty-two of the correction law, and made a reasonable, good faith determination that such factors militate in favor of hire or retention of that applicant or employee.

16. It shall be an unlawful discriminatory practice, unless specifically required or permitted by statute, for any person, agency, bureau, corporation or association, including the state and any political subdivision thereof, to make any inquiry about, whether in any form of application or otherwise, or to act upon adversely to the individual involved, any arrest or criminal accusation of such individual not then pending against that individual which was followed by a termination of that criminal action or proceeding in favor of such individual, as defined in subdivision two of section 160.50 of the criminal procedure law, or by an order adjourning the criminal action in contemplation of dismissal, pursuant to section 170.55, 170.56, 210.46, 210.47, or 215.10 of the criminal procedure law, or by a youthful offender adjudication, as defined in subdivision one of section 720.35 of the criminal procedure law, or by a conviction for a violation sealed pursuant to section 160.55 of the criminal procedure law or by a conviction which is sealed pursuant to section 160.59 or 160.58 of the criminal procedure law, in connection with the licensing, housing, employment, including volunteer positions, or providing of credit or insurance to such individual; provided, further, that no person shall be required to divulge information pertaining to any arrest or criminal accusation of such individual not then pending against that individual which was followed by a termination of that criminal action or proceeding in favor of such individual, as defined in subdivision two of section 160.50 of the criminal procedure law, or by an order adjourning the criminal action in contemplation of dismissal, pursuant to section 170.55 or 170.56, 210.46, 210.47 or 215.10 of the criminal procedure law, or by a youthful offender adjudication, as defined in subdivision one of section 720.35 of the criminal procedure law, or by a conviction for a violation sealed pursuant to section 160.55 of the criminal procedure law, or by a conviction which is sealed pursuant to section 160.58 or 160.59 of the criminal procedure law. An individual required or requested to provide information in violation of this subdivision may respond as if the arrest, criminal accusation, or disposition of such arrest or criminal accusation did not occur. The provisions of this subdivision shall not apply to the licensing activities of governmental bodies in relation to the regulation of guns, firearms and other deadly weapons or in relation to an application for employment as a police officer or peace officer as those terms are defined in subdivisions thirty-three and thirty-four of section 1.20 of the criminal procedure law; provided further that the provisions of this subdivision shall not apply to an application for employment

or membership in any law enforcement agency with respect to any arrest or criminal accusation which was followed by a youthful offender adjudication, as defined in subdivision one of section 720.35 of the criminal procedure law, or by a conviction for a violation sealed pursuant to section 160.55 of the criminal procedure law, or by a conviction which is sealed pursuant to section 160.58 or 160.59 of the criminal procedure law. For purposes of this subdivision, an action which has been adjourned in contemplation of dismissal, pursuant to section 170.55 or 170.56, 210.46, 210.47 or 215.10 of the criminal procedure law, shall not be considered a pending action, unless the order to adjourn in contemplation of dismissal is revoked and the case is restored to the calendar for further prosecution.

17. Nothing in this section shall prohibit the offer and acceptance of a discount to a person sixty-five years of age or older for housing accommodations.

18. It shall be an unlawful discriminatory practice for the owner, lessee, sub-lessee, assignee, or managing agent of, or other person having the right of ownership of or possession of or the right to rent or lease housing accommodations:

(1) To refuse to permit, at the expense of a person with a disability, reasonable modifications of existing premises occupied or to be occupied by the said person, if the modifications may be necessary to afford the said person full enjoyment of the premises, in conformity with the provisions of the New York state uniform fire prevention and building code except that, in the case of a rental, the landlord may, where it is reasonable to do so, condition permission for a modification on the renter's agreeing to restore the interior of the premises to the condition that existed before the modification, reasonable wear and tear excepted.

(2) To refuse to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford said person with a disability equal opportunity to use and enjoy a dwelling, including reasonable modification to common use portions of the dwelling, or

(3) In connection with the design and construction of covered multi-family dwellings for first occupancy after March thirteenth, nineteen hundred ninety-one, a failure to design and construct dwellings in accordance with the accessibility requirements for multi-family dwellings found in the New York state uniform fire prevention and building code to provide that:

(i) The public use and common use portions of the dwellings are readily accessible to and usable by persons with disabilities;

(ii) All the doors are designed in accordance with the New York state uniform fire prevention and building code to allow passage into and within all premises and are sufficiently wide to allow passage by persons in wheelchairs; and

(iii) All premises within covered multi-family dwelling units contain an accessible route into and through the dwelling; light switches, electrical outlets, thermostats, and other environmental controls are in accessible locations; there are reinforcements in the bathroom walls to allow later installation of grab bars; and there are usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space, in conformity with the New York state uniform fire prevention and building code.

19. (a) Except as provided in paragraph (b) of this subdivision, it shall be an unlawful discriminatory practice of any employer, labor organization, employment agency, licensing agency, or its employees, agents, or members:

(1) to directly or indirectly solicit, require, or administer a genetic test to a person, or solicit or require information from which a predisposing genetic characteristic can be inferred as a condition of employment, preemployment application, labor organization membership, or licensure; or

(2) to buy or otherwise acquire the results or interpretation of an individual's genetic test results or information from which a predisposing genetic characteristic can be inferred or to make an agreement with an individual to take a genetic test or provide genetic test results or such information.

(b) An employer may require a specified genetic test as a condition of employment where such a test is shown to be directly related to the occupational environment, such that the employee or applicant with a particular genetic anomaly might be at an increased risk of disease as a result of working in said environment.

(c) Nothing in this section shall prohibit the genetic testing of an employee who requests a genetic test and who provides written and informed consent to taking a genetic test for any of the following purposes:

(1) pursuant to a workers' compensation claim;

(2) pursuant to civil litigation; or

(3) to determine the employee's susceptibility to potentially carcinogenic, toxic, or otherwise hazardous chemicals or substances found in the workplace environment only if the employer does not terminate the employee or take any other action that adversely affects any term, condition or privilege of employment pursuant to the genetic test results.

(d) If an employee consents to genetic testing for any of the aforementioned allowable reasons, he or she must be given and sign an authorization of consent form which explicitly states the specific purpose, uses and limitations of the genetic tests and the specific traits or characteristics to be tested.

20. Repealed by L.2010, c. 565, § 2, eff. Oct. 31, 2010.

21. Nothing in this section shall prohibit the offer and acceptance of a discount for housing accommodations to a person with a disability, as defined in subdivision twenty-one of section two hundred ninety-two of this article.

Credits

(L.1951, c. 800. Amended L.1952, c. 284, § 2; L.1952, c. 285, § 6; L.1955, c. 340, § 3; L.1958, c. 738, §§ 1, 2; L.1958, c. 960, § 23; L.1961, c. 414, § 4; L.1961, c. 609; L.1962, c. 164, § 1; L.1963, c. 480; L.1963, c. 481, § 2; L.1964, c. 948, § 1; L.1965, c. 506; L.1965, c. 516, §§ 1, 2; L.1965, c. 851, § 3; L.1967, cc. 202, 298; L.1967, c. 628, § 1; L.1967, c. 667, § 2; L.1968, c. 10, § 1; L.1968, c. 577; L.1969, c. 359, §§ 7, 8; L.1969, cc. 443, 458; L.1969, c. 1070, § 1; L.1970, c. 807; L.1971, cc. 299, 461, 674, 1194; L.1973, c. 656, § 1; L.1974, c. 27, § 1; L.1974, c. 173, § 5; L.1974, c. 550, § 1; L.1974, c. 988, §§ 2 to 7; L.1975, c. 662, § 1; L.1975, c. 803, §§ 3 to 10; L.1976, c. 177, § 1; L.1976, c. 632, § 2; L.1976, c. 877, § 4; L.1976, c. 931, § 6; L.1977, c. 730, §§ 1 to 3; L.1978, c. 204, §§ 1, 2; L.1978, c. 215, § 1; L.1980, c. 689, §§ 1, 2; L.1980, c. 830, § 1; L.1983, c. 657, § 1; L.1984, c. 98, § 2; L.1984, c. 296, §§ 1, 2; L.1984, c. 414, § 1; L.1985, c. 208, § 2; L.1985, c. 527, § 1; L.1986, c. 404, § 11; L.1989, c. 298,

§ 1; L.1990, c. 483, § 1; L.1991, c. 74, §§ 1, 2; L.1991, c. 368, §§ 3 to 5; L.1993, c. 478, § 1; L.1994, c. 593, §§ 1, 2; L.1996, c. 204, §§ 4, 5; L.1997, c. 269, §§ 3, 4, eff. Jan. 1, 1998; L.1999, c. 405, pt. D, §§ 2 to 8, eff. Aug. 6, 1999; L.2000, c. 166, §§ 12 to 26, eff. July 18, 2000; L.2002, c. 2, §§ 5 to 13, eff. Jan. 16, 2003; L.2002, c. 539, §§ 1, 2, eff. Nov. 16, 2002; L.2003, c. 106, §§ 13 to 19, eff. July 1, 2003; L.2005, c. 75, §§ 2, 3, eff. Aug. 29, 2005; L.2007, c. 133, § 2, eff. Oct. 1, 2007; L.2007, c. 394, § 1, eff. Jan. 1, 2008; L.2007, c. 639, § 1, eff. Nov. 1, 2007; L.2008, c. 534, § 1, eff. Sept. 4, 2008; L.2009, c. 56, pt. N, § 3, eff. April 7, 2009, deemed eff. March 1, 2009; L.2009, c. 56, pt. AAA, § 14, eff. April 7, 2009; L.2009, c. 80, § 1, eff. July 7, 2009; L.2010, c. 196, §§ 2 to 4, eff. July 15, 2010; L.2010, c. 536, § 6, eff. Oct. 31, 2010; L.2010, c. 565, § 2, eff. Oct. 31, 2010; L.2014, c. 536, § 2, eff. Dec. 29, 2014; L.2015, c. 89, § 2, eff. Nov. 22, 2015; L.2015, c. 141, §§ 2, 3, eff. Aug. 13, 2015, deemed eff. Dec. 29, 2014; L.2015, c. 365, §§ 1 to 4, eff. Jan. 19, 2016; L.2015, c. 369, § 2, eff. Jan. 19, 2016; L.2017, c. 59, pt. WWW, § 48-a, eff. Oct. 7, 2017; L.2018, c. 221, § 1, eff. Aug. 24, 2018; L.2019, c. 8, §§ 5 to 13, eff. Feb. 24, 2019; L.2019, c. 55, pt. II, subpt. O, § 2, eff. July 11, 2019; L.2019, c. 56, pt. T, §§ 3 to 6, eff. April 12, 2019; L.2019, c. 116, § 2, eff. July 25, 2019.)

Footnotes

1 McK. Unconsol. Laws § 8704.

McKinney's Executive Law § 296, NY EXEC § 296

Current through L.2019, chapter 248. Some statute sections may be more current, see credits for details.

New York City, N.Y., Code § 8-107
NEW YORK CITY CHARTER, CODE, AMENDMENTS & RULES
NEW YORK CITY ADMINISTRATIVE CODE
TITLE 8. CIVIL RIGHTS
CHAPTER 1. COMMISSION ON HUMAN RIGHTS.

The New York City Charter is current with files received through August 31, 2019.

§ 8-107. Unlawful discriminatory practices.

Table of Contents for §8.107

20. Relationship or association.
21. Employment; an individual's unemployment.
a. Prohibition of discrimination based on an individual's unemployment.
b. Effect of subdivision.
c. Applicability of subdivision.
d. Public education campaign.
e. Disparate impact.
22. Employment; Pregnancy, childbirth, or a related medical condition.
(a) [Discriminatory practice]
(b) Employer lactation accommodation
(c) Employer lactation room accommodation policy.
(d) Notice of rights
(e) [Gender]
23. [Interns]
24. Employment; consumer credit history.
25. Employment; inquiries regarding salary history.
26. Applicability; uniformed service.
27. Victims of domestic violence, sex offenses or stalking.
a. Emloyment.
b. Requirement to make reasonable accommodation to the needs of victims of domestic violence, sex offenses or stalking.
c. Documentation of status.
d. Affirmative defense in domestic violence, sex offenses or stalking cases.
e. Housing accommodations.
f. [Paragraph e shall not apply.]
g. [Practices bases on the actions of perpetrator.]
28. Reasonable accommodation; cooperative dialogue.
(a) Employment.
(b) Public accommodations.
(c) Housing accommodation.
(d) [Written final determination identifying any accommodation granted or denied.]
(e) [Essential requisites of a job or enjoy the right or rights in question.]
(f) [Compliance not a defense.]
29. Anti-sexual harassment rights and responsibilities; poster.
30. Anti-sexual harassment training.
(a) Definitions.
(b) Training.
(c) Compliance.
(d) [“Employer” shall not apply.]
(e) [Interns.]
(f) [Additional anti-sexual harassment training not required.]
(g) [Multiple jurisdictions.]
31. Employment; pre-employment drug testing policy.
(a) Prohibition.
(b) Exceptions.
(c) Rules.

1. Employment. It shall be an unlawful discriminatory practice:

(a) For an employer or an employee or agent thereof, because of the actual or perceived age, race, creed, color, national origin, gender, disability, marital status, partnership status, caregiver status, sexual and reproductive health decisions, sexual orientation, uniformed service or alienage or citizenship status of any person:

(1) To represent that any employment or position is not available when in fact it is available;

(2) To refuse to hire or employ or to bar or to discharge from employment such person; or

(3) To discriminate against such person in compensation or in terms, conditions or privileges of employment.

(b) For an employment agency or an employee or agent thereof to discriminate against any person because of such person's actual or perceived age, race, creed, color, national origin, gender, disability, marital status, partnership status, caregiver status, sexual and reproductive health decisions, sexual orientation, uniformed service or alienage or citizenship status in receiving, classifying, disposing or otherwise acting upon applications for its services, including by representing to such person that any employment or position is not available when in fact it is available, or in referring an applicant or applicants for its services to an employer or employers.

(c) For a labor organization or an employee or agent thereof, because of the actual or perceived age, race, creed, color, national origin, gender, disability, marital status, partnership status, caregiver status, sexual and reproductive health decisions, sexual orientation, uniformed service or alienage or citizenship status of any person, to exclude or to expel from its membership such person, to represent that membership is not available when it is in fact available, or to discriminate in any way against any of its members or against any employer or any person employed by an employer.

(d) For any employer, labor organization or employment agency or an employee or agent thereof to declare, print or circulate or cause to be declared, printed or circulated any statement, advertisement or publication, or to use any form of application for employment or to make any inquiry in connection with prospective employment, which expresses, directly or indirectly, any limitation, specification or discrimination as to age, race, creed, color, national origin, gender, disability, marital status, partnership status, caregiver status, sexual and reproductive health decisions, sexual orientation, uniformed service or alienage or citizenship status, or any intent to make any such limitation, specification or discrimination.

(e) The provisions of this subdivision and subdivision 2 of this section: (i) as they apply to employee benefit plans, shall not be construed to preclude an employer from observing the provisions of any plan covered by the federal employment retirement income security act of 1974 that is in compliance with applicable federal discrimination laws where the application of the provisions of such subdivisions to such plan would be preempted by such act; (ii) shall not preclude the varying of insurance coverages according to an employee's age; (iii) shall not be construed to affect any retirement policy or system that is permitted pursuant to paragraphs (e) and (f) of subdivision 3-a of section 296 of the executive law; (iv) shall not be construed to affect the retirement policy or system of an employer where such policy or system is not a subterfuge to evade the purposes of this chapter.

(f) The provisions of this subdivision shall not govern the employment by an employer of the employer's parents, spouse, domestic partner, or children; provided, however, that such family members shall be counted as persons employed by an employer for the purposes of the definition of employer set forth in section 8-102.

2. Apprentice training programs. It shall be an unlawful discriminatory practice for an employer, labor organization, employment agency or any joint labor-management committee controlling apprentice training programs or an employee or agent thereof:

(a) To select persons for an apprentice training program registered with the state of New York on any basis other than their qualifications, as determined by objective criteria which permit review.

(b) To deny to or withhold from any person because of such person's actual or perceived race, creed, color, national origin, gender, age, disability, marital status, partnership status, sexual and reproductive health decisions, sexual orientation, uniformed service, alienage or citizenship status or status as a victim of domestic violence or as a victim of sex offenses or stalking the right to be admitted to or participate in a guidance program, an apprentice training program, on-the-job training program, or other occupational training or retraining program, or to represent that such program is not available when in fact it is available.

(c) To discriminate against any person in such person's pursuit of such program or to discriminate against such a person in the terms, conditions or privileges of such program because of actual or perceived race, creed, color, national origin, gender, age, disability, marital status, partnership status, sexual and reproductive health decisions, sexual orientation, uniformed service, alienage or citizenship status or status as a victim of domestic violence or as a victim of sex offenses or stalking.

(d) To declare, print or circulate or cause to be declared, printed or circulated any statement, advertisement or publication, or to use any form of application for such program or to make any inquiry in connection with such program which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color, national origin, gender, age, disability, marital status, partnership status, sexual and reproductive health decisions, sexual orientation, uniformed service, alienage or

citizenship status or status as a victim of domestic violence or as a victim of sex offenses or stalking, or any intent to make any such limitation, specification or discrimination.

3. Employment; religious observance. (a) It shall be an unlawful discriminatory practice for an employer or an employee or agent thereof to impose upon a person as a condition of obtaining or retaining employment any terms or conditions, compliance with which would require such person to violate, or forego a practice of, such person's creed or religion, including but not limited to the observance of any particular day or days or any portion thereof as a sabbath or holy day or the observance of any religious custom or usage, and the employer shall make reasonable accommodation to the religious needs of such person. Without in any way limiting the foregoing, no person shall be required to remain at such person's place of employment during any day or days or portion thereof that, as a requirement of such person's religion, such person observes as a sabbath or other holy day, including a reasonable time prior and subsequent thereto for travel between such person's place of employment and such person's home, provided, however, that any such absence from work shall, wherever practicable in the judgment of the employer, be made up by an equivalent amount of time at some other mutually convenient time.

(b) "Reasonable accommodation", as used in this subdivision, shall mean such accommodation to an employee's or prospective employee's religious observance or practice as shall not cause undue hardship in the conduct of the employer's business. The employer shall have the burden of proof to show such hardship. "Undue hardship" as used in this subdivision shall mean an accommodation requiring significant expense or difficulty (including a significant interference with the safe or efficient operation of the workplace or a violation of a bona fide seniority system). Factors to be considered in determining whether the accommodation constitutes an undue economic hardship shall include, but not be limited to:

(i) The identifiable cost of the accommodation, including the costs of loss of productivity and of retaining or hiring employees or transferring employees from one facility to another, in relation to the size and operating cost of the employer;

(ii) The number of individuals who will need the particular accommodation to a sincerely held religious observance or practice; and

(iii) For an employer with multiple facilities, the degree to which the geographic separateness or administrative or fiscal relationship of the facilities will make the accommodation more difficult or expensive.

Provided, however, an accommodation shall be considered to constitute an undue hardship, for purposes of this subdivision, if it will result in the inability of an employee who is seeking a religious accommodation to perform the essential functions of the position in which the employee is employed.

4. Public accommodations. a. It shall be an unlawful discriminatory practice for any person who is the owner, franchisor, franchisee, lessor, lessee, proprietor, manager, superintendent, agent or employee of any place or provider of public accommodation:

1. Because of any person's actual or perceived race, creed, color, national origin, age, gender, disability, marital status, partnership status, sexual orientation, uniformed service or alienage or citizenship status, directly or indirectly:

(a) To refuse, withhold from or deny to such person the full and equal enjoyment, on equal terms and conditions, of any of the accommodations, advantages, services, facilities or privileges of the place or provider of public accommodation; or

(b) To represent to any person that any accommodation, advantage, facility or privilege of any such place or provider of public accommodation is not available when in fact it is available; or

2. Directly or indirectly to make any declaration, publish, circulate, issue, display, post or mail any written or printed communication, notice or advertisement, to the effect that:

(a) Full and equal enjoyment, on equal terms and conditions, of any of the accommodations, advantages, facilities and privileges of any such place or provider of public accommodation shall be refused, withheld from or denied to any person on account of race, creed, color, national origin, age, gender, disability, marital status, partnership status, sexual orientation, uniformed service or alienage or citizenship status; or

(b) The patronage or custom of any person is unwelcome, objectionable, not acceptable, undesired or unsolicited because of such person's actual or perceived race, creed, color, national origin, age, gender, disability, marital status, partnership status, sexual orientation, uniformed service or alienage or citizenship status.

b. Notwithstanding the foregoing, the provisions of this subdivision shall not apply, with respect to age or gender, to places or providers of public accommodation where the commission grants an exemption based on bona fide considerations of public policy.

c. The provisions of this subdivision relating to discrimination on the basis of gender shall not prohibit any educational institution subject to this subdivision from making gender distinctions which would be permitted (i) for educational institutions which are subject to section 3201-a of the education law or any rules or regulations promulgated by the state commissioner of education relating to gender or (ii) under sections 86.32, 86.33 and 86.34 of title 45 of the code of federal regulations for educational institutions covered thereunder.

d. Nothing in this subdivision shall be construed to preclude an educational institution-other than a publicly-operated educational institution-which establishes or maintains a policy of educating persons of one gender exclusively from limiting admissions to students of that gender.

e. The provisions of this section relating to disparate impact shall not apply to the use of standardized tests as defined by section 340 of the education law by an educational institution subject to this subdivision provided that such test is used in the manner and for the purpose prescribed by the test agency which designed the test.

f. The provisions of this subdivision as they relate to unlawful discriminatory practices by educational institutions shall not apply to matters that are strictly educational or pedagogic in nature.

5. Housing accommodations, land, commercial space and lending practices. (a) Housing accommodations. It shall be an unlawful discriminatory practice for the owner, lessor, lessee, sublessee, assignee, or managing agent of, or other person having the right to sell, rent or lease or approve the sale, rental or lease of a housing accommodation, constructed or to be constructed, or an interest therein, or any agent or employee thereof:

(1) Because of the actual or perceived race, creed, color, national origin, gender, age, disability, sexual orientation, uniformed service, marital status, partnership status, or alienage or citizenship status of any person or group of persons, or because of any lawful source of income of such person or persons, or because children are, may be or would be residing with such person or persons:

(a) To refuse to sell, rent, lease, approve the sale, rental or lease or otherwise deny to or withhold from any such person or group of persons such a housing accommodation or an interest therein;

(b) To discriminate against any such person or persons in the terms, conditions or privileges of the sale, rental or lease of any such housing accommodation or an interest therein or in the furnishing of facilities or services in connection therewith; or

(c) To represent to such person or persons that any housing accommodation or an interest therein is not available for inspection, sale, rental or lease when in fact it is available to such person.

(2) To declare, print or circulate or cause to be declared, printed or circulated any statement, advertisement or publication, or to use any form of application for the purchase, rental or lease of such a housing accommodation or an interest therein or to make any record or inquiry in conjunction with the prospective purchase, rental or lease of such a housing accommodation or an interest therein which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color, national origin, gender, age, disability, sexual orientation, uniformed service, marital status, partnership status, or alienage or citizenship status, or any lawful source of income, or whether children are, may be, or would be residing with a person, or any intent to make such limitation, specification or discrimination.

(4) The provisions of this paragraph (a) shall not apply:

(1) to the rental of a housing accommodation, other than a publicly-assisted housing accommodation, in a building which contains housing accommodations for not more than two families living independently of each other, if the owner members of the owner's family reside in one of such housing accommodations, and if the available housing accommodation has not been publicly advertised, listed, or otherwise offered to the general public; or

(2) to the rental of a room or rooms in a housing accommodation, other than a publicly-assisted housing accommodation, if such rental is by the occupant of the housing accommodation or by the owner of the housing accommodation and the owner or members of the owner's family reside in such housing accommodation.

(b) Land and commercial space. It shall be an unlawful discriminatory practice for the owner, lessor, lessee, sublessee, or managing agent of, or other person having the right of ownership or possession of or the right to sell, rent, or lease, or approve the sale, rental or lease of land or commercial space or an interest therein, or any agency or employee thereof:

(1) Because of the actual or perceived race, creed, color, national origin, gender, age, disability, sexual orientation, uniformed service, marital status, partnership status, or alienage or citizenship status of any person or group of persons, or because children are, may be or would be residing with any person or persons:

(A) To refuse to sell, rent, lease, approve the sale, rental or lease or otherwise deny or to withhold from any such person or group of persons land or commercial space or an interest therein;

(B) To discriminate against any such person or persons in the terms, conditions or privileges of the sale, rental or lease of any such land or commercial space or an interest therein or in the furnishing of facilities or services in connection therewith; or

(C) To represent to any person or persons that any land or commercial space or an interest therein is not available for inspection, sale, rental or lease when in fact it is available.

(2) To declare, print or circulate or cause to be declared, printed or circulated any statement, advertisement or publication, or to use any form of application for the purchase, rental or lease of such land or commercial space or an interest therein or to make any record or inquiry in connection with the prospective purchase, rental or lease of such land or commercial space or an interest therein which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color, national origin, gender, age, disability, sexual orientation, uniformed service, marital status, partnership status, or alienage or citizenship status, or whether children are, may be or would be residing with such person, or any intent to make any such limitation, specification or discrimination.

(c) Real estate brokers. It shall be an unlawful discriminatory practice for any real estate broker, real estate salesperson or employee or agent thereof:

(1) To refuse to sell, rent or lease any housing accommodation, land or commercial space or an interest therein to any person or group of persons or to refuse to negotiate for the sale, rental or lease, of any housing accommodation, land or commercial space or an interest therein to any person or group of persons because of the actual or perceived race, creed, color, national origin, gender, age, disability, sexual orientation, uniformed service, marital status, partnership status, or alienage or citizenship status of such person or persons, or because of any lawful source of income of such person or persons, or because children are, may be or would be residing with such person or persons, or to represent that any housing accommodation, land or commercial space or an interest therein is not available for inspection, sale, rental or lease when in fact it is so available, or otherwise to deny or withhold any housing accommodation, land or commercial space or an interest therein or any facilities of any housing accommodation, land or commercial space or an interest therein from any person or group of persons because of the actual or perceived race, creed, color, national origin, gender, age, disability, sexual orientation, uniformed service, marital status, partnership status, or alienage or citizenship status of such person or persons, or because of any lawful source of income of such person or persons, or because children are, may be or would be residing with such person or persons.

(2) To declare, print or circulate or cause to be declared, printed or circulated any statement, advertisement or publication, or to use any form of application for the purchase, rental or lease of any housing accommodation, land or commercial space or an interest therein or to make any record or inquiry in connection with the prospective purchase, rental or lease of any housing accommodation, land or commercial space or an interest therein which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color, national origin, gender, age, disability, sexual orientation, uniformed service, marital status, partnership status, or alienage or citizenship status, or any lawful source of income, or to whether children are, may be or would be residing with a person, or any intent to make such limitation, specification or discrimination.

(3) To induce or attempt to induce any person to sell or rent any housing accommodation, land or commercial space or an interest therein by representations, explicit or implicit, regarding the entry or prospective entry into the neighborhood or area of a person or persons of any race, creed, color, gender, age, disability, sexual orientation, uniformed service, marital status, partnership status, national origin, alienage or citizenship status, or a person or persons with any lawful source of income, or a person or persons with whom children are, may be or would be residing.

(d) Lending practices. (1) It shall be an unlawful discriminatory practice for any person, bank, trust company, private banker, savings bank, industrial bank, savings and loan association, credit union, investment company, mortgage company, insurance company, or other financial institution or lender, doing business in the city, including unincorporated entities and entities incorporated in any jurisdiction, or any officer, agent or employee thereof to whom application is made for a loan, mortgage or other form of financial assistance for the purchase, acquisition, construction, rehabilitation, repair or maintenance of any housing accommodation, land or commercial space or an interest therein:

(A) To discriminate against such applicant in the granting, withholding, extending or renewing, or in the fixing of rates, terms or conditions of any such financial assistance or in the appraisal of any housing accommodation, land or commercial space or an interest therein:

(i) Because of the actual or perceived race, creed, color, national origin, gender, disability, sexual orientation, age, marital status, uniformed service, partnership status, or alienage or citizenship status of such applicant, any member, stockholder, director, officer or employee of such applicant, or the occupants or tenants or prospective occupants or tenants of such housing accommodation, land or commercial space; or

(ii) Because children are, may be or would be residing with such applicant or other person.

(B) To use any form of application for a loan, mortgage, or other form of financial assistance, or to make any record or inquiry in connection with applications for such financial assistance, or in connection with the appraisal of any housing accommodation, land or commercial space or an interest therein, which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color, national origin, gender, disability, sexual orientation, uniformed service, age, marital status, partnership status, or alienage or citizenship status, or whether children are, may be, or would be residing with a person.

(2) It shall be an unlawful discriminatory practice for any person, bank, trust company, private banker, savings bank, industrial bank, savings and loan association, credit union, investment company, mortgage company, insurance company, or other financial institution or lender, doing business in the city, including unincorporated entities and entities incorporated in any jurisdiction, or any officer, agent or employee thereof to represent to any person that any type or term of loan, mortgage or other form of financial assistance for the purchase, acquisition, construction, rehabilitation, repair or maintenance of such housing accommodation, land or commercial space or an interest therein is not available when in fact it is available:

(A) Because of the actual or perceived race, creed, color, national origin, gender, disability, sexual orientation, uniformed service, age, marital status, partnership status, or alienage or citizenship status of such person, any member, stockholder, director, officer or employee of such person, or the occupants or tenants or prospective occupants or tenants of such housing accommodation, land or commercial space; or

(B) Because children are, may be or would be residing with a person.

(e) Real estate services. It shall be an unlawful discriminatory practice, because of the actual or perceived race, creed, color, national origin, gender, disability, sexual orientation, uniformed service, age, marital status, partnership status, or alienage or citizenship status of any person or because children are, may be or would be residing with such person:

(1) To deny such person access to, membership in or participation in a multiple listing service, real estate brokers' organization, or other service; or

(2) To represent to such person that access to or membership in such service or organization is not available, when in fact it is available.

(f) Real estate related transactions. It shall be an unlawful discriminatory practice for any person whose business includes the appraisal of housing accommodations, land or commercial space or interest therein or an employee or agent thereof to discriminate in making available or in the terms or conditions of such appraisal on the basis of the actual or perceived race, creed, color, national origin, gender, disability, sexual orientation, uniformed service, age, marital status, partnership status, or alienage or citizenship status of any person or because children are, may be or would be residing with such person.

(g) Applicability; persons under 18 years of age. The provisions of this subdivision, as they relate to unlawful discriminatory practices in housing accommodations, land and commercial space or an interest therein and lending practices on the basis of age, shall not apply to unemancipated persons under the age of 18 years.

(h) Applicability; discrimination against persons with children. The provisions of this subdivision with respect to discrimination against persons with whom children are, may be or would be residing shall not apply to housing for older persons as defined in paragraphs 2 and 3 of subdivision (b) of section 3607 of title 42 of the United States code and any regulations promulgated thereunder.

(i) Applicability; senior citizen housing. The provisions of this subdivision with respect to discrimination on the basis of age shall not apply to the restriction of the sale, rental or lease of any housing accommodation, land or commercial space or an interest therein exclusively to persons 55 years of age or older. This paragraph shall not be construed to permit discrimination against such persons 55 years of age or older on the basis of whether children are, may be or would be residing in such housing accommodation or land or an interest therein unless such discrimination is otherwise permitted pursuant to paragraph (h) of this subdivision.

(j) Applicability; dormitory residence operated by educational institution. The provisions of this subdivision relating to discrimination on the basis of gender in housing accommodations shall not prohibit any educational institution from making

gender distinctions in dormitory residences which would be permitted under sections 86.32 and 86.33 of title 45 of the code of federal regulations for educational institutions covered thereunder.

(k) Applicability; dormitory-type housing accommodations. The provisions of this subdivision which prohibit distinctions on the basis of gender and whether children are, may be or would be residing with a person shall not apply to dormitory-type housing accommodations including, but not limited to, shelters for the homeless where such distinctions are intended to recognize generally accepted values of personal modesty and privacy or to protect the health, safety or welfare of families with children.

(l) Exemption for special needs of particular age group in publicly-assisted housing accommodations. Nothing in this subdivision shall restrict the consideration of age in the rental of publicly-assisted housing accommodations if the state division of human rights grants an exemption pursuant to section 296 of the executive law based on bona fide considerations of public policy for the purpose of providing for the special needs of a particular age group without the intent of prejudicing other age groups; provided however, that this paragraph shall not be construed to permit discrimination on the basis of whether children are, may be or would be residing in such housing accommodations unless such discrimination is otherwise permitted pursuant to paragraph (h) of this subdivision.

(m) Applicability; use of criteria or qualifications in publicly-assisted housing accommodations. The provisions of this subdivision shall not be construed to prohibit the use of criteria or qualifications of eligibility for the sale, rental, leasing or occupancy of publicly-assisted housing accommodations where such criteria or qualifications are required to comply with federal or state law, or are necessary to obtain the benefits of a federal or state program, or to prohibit the use of statements, advertisements, publications, applications or inquiries to the extent that they state such criteria or qualifications or request information necessary to determine or verify the eligibility of an applicant, tenant, purchaser, lessee or occupant.

(n) Discrimination on the basis of occupation prohibited in housing accommodations. Where a housing accommodation or an interest therein is sought or occupied exclusively for residential purposes, the provisions of this subdivision shall be construed to prohibit discrimination on account of a person's occupation in:

(1) The sale, rental, or leasing of such housing accommodation or interest therein;

(2) The terms, conditions and privileges of the sale, rental or leasing of such housing accommodation or interest therein;

(3) Furnishing facilities or services in connection therewith; and

(4) Representing whether or not such housing accommodation or interest therein is available for sale, rental, or leasing.

(o) Applicability; lawful source of income. The provisions of this subdivision, as they relate to unlawful discriminatory practices on the basis of lawful source of income, shall not apply to housing accommodations that contain a total of five or fewer housing units, provided, however:

(i) the provisions of this subdivision shall apply to tenants subject to rent control laws who reside in housing accommodations that contain a total of five or fewer units at the time of the enactment of this local law; and provided, however

(ii) the provisions of this subdivision shall apply to all housing accommodations, regardless of the number of units contained in each, of any person who has the right to sell, rent or lease or approve the sale, rental or lease of at least one housing accommodation within New York City that contains six or more housing units, constructed or to be constructed, or an interest therein.

6. Aiding and abetting. It shall be an unlawful discriminatory practice for any person to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this chapter, or to attempt to do so.

7. Retaliation. [Effective until Nov. 10, 2019] It shall be an unlawful discriminatory practice for any person engaged in any activity to which this chapter applies to retaliate or discriminate in any manner against any person because such person has (i) opposed any practice forbidden under this chapter, (ii) filed a complaint, testified or assisted in any proceeding under this chapter, (iii) commenced a civil action alleging the commission of an act which would be an unlawful discriminatory practice under this chapter, (iv) assisted the commission or the corporation counsel in an investigation commenced pursuant to this title, or (v) provided any information to the commission pursuant to the terms of a conciliation agreement made pursuant to section 8-115 of this chapter. The retaliation or discrimination complained of under this subdivision need not result in an ultimate action with respect to employment, housing or a public accommodation or in a materially adverse change in the terms and conditions of employment, housing, or a public accommodation, provided, however, that the retaliatory or discriminatory act or acts complained of must be reasonably likely to deter a person from engaging in protected activity.

7. Retaliation. [Effective Nov. 11, 2019] It shall be an unlawful discriminatory practice for any person engaged in any activity to which this chapter applies to retaliate or discriminate in any manner against any person because such person has (i) opposed any practice forbidden under this chapter, (ii) filed a complaint, testified or assisted in any proceeding under this chapter, (iii) commenced a civil action alleging the commission of an act which would be an unlawful discriminatory practice under this chapter, (iv) assisted the commission or the corporation counsel in an investigation commenced pursuant to this title, (v) requested a reasonable accommodation under this chapter, or (vi) provided any information to the commission pursuant to the terms of a conciliation agreement made pursuant to section 8-115 of this chapter. The retaliation or discrimination complained of under this subdivision need not result in an ultimate action with respect to employment, housing or a public accommodation or in a materially adverse change in the terms and conditions of employment, housing, or a public accommodation, provided, however, that the retaliatory or discriminatory act or acts complained of must be reasonably likely to deter a person from engaging in protected activity.

8. Violation of conciliation agreement. It shall be an unlawful discriminatory practice for any party to a conciliation agreement made pursuant to section 8-115 of this chapter to violate the terms of such agreement.

9. Licenses, registrations and permits. (a) It shall be an unlawful discriminatory practice:

(1) Except as otherwise provided in paragraph c of this subdivision, for an agency authorized to issue a license, registration or permit or an employee thereof to falsely deny the availability of such license, registration or permit, or otherwise discriminate against an applicant, or a putative or prospective applicant for a license, registration or permit because of the actual or perceived race, creed, color, national origin, age, gender, marital status, partnership status, disability, sexual orientation, uniformed service or alienage or citizenship status of such applicant.

(2) Except as otherwise provided in paragraph c of this subdivision, for an agency authorized to issue a license, registration or permit or an employee thereof to declare, print or circulate or cause to be declared, printed or circulated any statement, advertisement or publication, or to use any form of application for a license, registration or permit or to make any inquiry in connection with any such application, which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color, national origin, age, gender, marital status, partnership status, disability, sexual orientation, uniformed service or alienage or citizenship status, or any intent to make any such limitation, specification or discrimination.

(3) For any person to deny any license, registration or permit to any applicant, or act adversely upon any holder of a license, registration or permit by reason of such applicant or holder having been convicted of one or more criminal offenses, or by reason of a finding of a lack of "good moral character" which is based on such applicant or holder having been convicted of one or more criminal offenses, when such denial or adverse action is in violation of the provisions of article 23-a of the correction law.

(4) For any person to deny any license, registration or permit to any applicant, or act adversely upon any holder of a license, registration or permit by reason of such applicant or holder having been arrested or accused of committing a crime when such denial or adverse action is in violation of subdivision 16 of section 296 of article 15 of the executive law.

(5) For any person to make any inquiry, in writing or otherwise, regarding any arrest or criminal accusation of an applicant for any license, registration or permit when such inquiry is in violation of subdivision 16 of section 296 of article 15 of the executive law.

(b) (1) Except as otherwise provided in this paragraph, it shall be an unlawful discriminatory practice for an agency to request or use for licensing, registration or permitting purposes information contained in the consumer credit history of an applicant, licensee, registrant or permittee for licensing or permitting purposes.

(2) Subparagraph (1) of this paragraph shall not apply to an agency required by state or federal law or regulations to use an individual's consumer credit history for licensing, registration or permitting purposes.

(3) Subparagraph (1) of this paragraph shall not be construed to affect the ability of an agency to consider an applicant's, licensee's, registrant's or permittee's failure to pay any tax, fine, penalty, or fee for which liability has been admitted by the person liable therefor, or for which judgment has been entered by a court or administrative tribunal of competent jurisdiction, or any tax for which a government agency has issued a warrant, or a lien or levy on property.

(4) Nothing in this paragraph shall preclude a licensing agency from requesting, receiving, or using consumer credit history information obtained pursuant to a lawful subpoena, court order or law enforcement investigation.

(c) The prohibition of this subdivision relating to inquiries, denials or other adverse action related to a person's record of arrests or convictions shall not apply to licensing activities in relation to the regulation of explosives, pistols, handguns, rifles, shotguns, or other firearms and deadly weapons. Nothing contained in this subdivision shall be construed to bar an agency

authorized to issue a license, registration or permit from using age, disability, criminal conviction or arrest record as a criterion for determining eligibility or continuing fitness for a license, registration or permit when specifically required to do so by any other provision of law.

(d)(1) Except as otherwise provided in this paragraph, it shall be an unlawful discriminatory practice for an agency to request or use for licensing or permitting purposes information contained in the consumer credit history of an applicant, licensee or permittee.

(2) Subparagraph (1) of this paragraph shall not apply to an agency required by state or federal law or regulations to use an individual's consumer credit history for licensing or permitting purposes.

(3) Subparagraph (1) of this paragraph shall not be construed to affect the ability of an agency to consider an applicant's, licensee's, registrant's or permittee's failure to pay any tax, fine, penalty, or fee for which liability has been admitted by the person liable therefor, or for which judgment has been entered by a court or administrative tribunal of competent jurisdiction, or any tax for which a government agency has issued a warrant, or a lien or levy on property.

(4) Nothing in this paragraph shall preclude a licensing agency from requesting, receiving, or using consumer credit history information obtained pursuant to a lawful subpoena, court order or law enforcement investigation.

(e) The provisions of this subdivision shall be enforceable against public agencies and employees thereof by a proceeding brought pursuant to article 78 of the civil practice law and rules.

10. Criminal conviction; employment. (a) It shall be an unlawful discriminatory practice for any employer, employment agency or agent thereof to deny employment to any person or take adverse action against any employee by reason of such person or employee having been convicted of one or more criminal offenses, or by reason of a finding of a lack of "good moral character" which is based on such person or employee having been convicted of one or more criminal offenses, when such denial or adverse action is in violation of the provisions of article 23-a of the correction law.

(b) For purposes of this subdivision, "employment" shall not include membership in any law enforcement agency.

(c) Pursuant to section 755 of the correction law, the provisions of this subdivision shall be enforceable against public agencies by a proceeding brought pursuant to article 78 of the civil practice law and rules, and the provisions of this subdivision shall be enforceable against private employers by the commission through the administrative procedure provided for in this chapter or as provided in chapter 5 of this title. For purposes of this paragraph only, the terms "public agency" and "private employer" have the meaning given such terms in section 750 of the correction law.

11. Arrest record; employment. It shall be an unlawful discriminatory practice, unless specifically required or permitted by any other law, for any person to:

(a) Deny employment to any applicant or act adversely upon any employee by reason of an arrest or criminal accusation of such applicant or employee when such denial or adverse action is in violation of subdivision 16 of section 296 of article 15 of the executive law; or

(b) Make any inquiry in writing or otherwise, regarding any arrest or criminal accusation of an applicant or employee when such inquiry is in violation of subdivision 16 of section 296 of article 15 of the executive law.

11-a. Arrest and conviction records; employer inquiries. (a) In addition to the restrictions in subdivision 11 of this section, it shall be an unlawful discriminatory practice for any employer, employment agency or agent thereof to:

(1) Declare, print or circulate or cause to be declared, printed or circulated any solicitation, advertisement or publication, which expresses, directly or indirectly, any limitation, or specification in employment based on a person's arrest or criminal conviction;

(2) Because of any person's arrest or criminal conviction, represent that any employment or position is not available, when in fact it is available to such person; or

(3) Make any inquiry or statement related to the pending arrest or criminal conviction record of any person who is in the process of applying for employment with such employer or agent thereof until after such employer or agent thereof has extended a conditional offer of employment to the applicant. For purposes of this subdivision, with respect to an applicant for temporary employment at a temporary help firm as such term is defined by subdivision 5 of section 916 of article 31 of the labor law, an offer to be placed in the temporary help firm's general candidate pool shall constitute a conditional offer of employment. For purposes of this subdivision, "any inquiry" means any question communicated to an applicant in writing or otherwise, or any searches of publicly available records or consumer reports that are conducted for the purpose of obtaining an applicant's criminal background information, and "any statement" means a statement communicated in writing or otherwise to the applicant for

purposes of obtaining an applicant's criminal background information regarding: (i) an arrest record; (ii) a conviction record; or (iii) a criminal background check.

(b) After extending an applicant a conditional offer of employment, an employer, employment agency or agent thereof may inquire about the applicant's arrest or conviction record if before taking any adverse employment action based on such inquiry, the employer, employment agency or agent thereof:

(i) Provides a written copy of the inquiry to the applicant in a manner to be determined by the commission;

(ii) Performs an analysis of the applicant under article 23-a of the correction law and provides a written copy of such analysis to the applicant in a manner to be determined by the commission, which shall include but not be limited to supporting documents that formed the basis for an adverse action based on such analysis and the employer's or employment agency's reasons for taking any adverse action against such applicant; and

(iii) After giving the applicant the inquiry and analysis in writing pursuant to subparagraphs (i) and (ii) of this paragraph, allows the applicant a reasonable time to respond, which shall be no less than three business days and during this time, holds the position open for the applicant.

(c) Nothing in this subdivision shall prevent an employer, employment agency or agent thereof from taking adverse action against any employee or denying employment to any applicant for reasons other than such employee or applicant's arrest or criminal conviction record.

(d) An applicant shall not be required to respond to any inquiry or statement that violates paragraph (a) of this subdivision and any refusal to respond to such inquiry or statement shall not disqualify an applicant from the prospective employment.

(e) This subdivision shall not apply to any actions taken by an employer or agent thereof pursuant to any state, federal or local law that requires criminal background checks for employment purposes or bars employment based on criminal history. For purposes of this paragraph federal law shall include rules or regulations promulgated by a self-regulatory organization as defined in section 3(a)(26) of the securities exchange act of 1934, as amended.

(f) This subdivision shall not apply to any actions taken by an employer or agent thereof with regard to an applicant for employment:

(1) As a police officer or peace officer, as those terms are defined in subdivisions 33 and 34 of section 1.20 of the criminal procedure law, respectively, or at a law enforcement agency as that term is used in article 23-a of the correction law, including but not limited to the police department, the fire department, the department of correction, the department of investigation, the department of probation, the division of youth and family services, the business integrity commission, and the district attorneys' offices; or

(2) listed in the determinations of personnel published as a commissioner's calendar item and listed on the website of the department of citywide administrative services upon a determination by the commissioner of citywide administrative services that the position involves law enforcement, is susceptible to bribery or other corruption, or entails the provision of services to or safeguarding of persons who, because of age, disability, infirmity or other condition, are vulnerable to abuse. If the department takes adverse action against any applicant based on the applicant's arrest or criminal conviction record, it shall provide a written copy of such analysis performed under article 23-a of the correction law to the applicant in a form and manner to be determined by the department.

(g) The provisions of this subdivision shall be enforceable against public agencies by a proceeding brought pursuant to article 78 of the civil practice law and rules, and the provisions of this subdivision shall be enforceable against private employers by the commission through the administrative procedure provided for in this chapter or as provided in chapter 5 of this title. For purposes of this paragraph only, the terms “public agency” and “private employer” have the meaning given such terms in section 750 of the correction law.

11-b. Arrest record; credit application. For purposes of issuing credit, it shall be an unlawful discriminatory practice, unless specifically required or permitted by any other law, to:

(a) Deny or act adversely upon any person seeking credit by reason of an arrest or criminal accusation of such person when such denial or adverse action is in violation of subdivision 16 of section 296 of article 15 of the executive law;

(b) Make any inquiry in writing or otherwise, regarding any arrest or criminal accusation of a person seeking credit when such inquiry is in violation of subdivision 16 of section 296 of article 15 of the executive law; or

(c) Because of any arrest or criminal accusation of a person seeking credit, represent to such person that credit is not available, when in fact it is available to such person.

12. Religious principles. Nothing contained in this section shall be construed to bar any religious or denominational institution or organization or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization, from limiting employment or sales or rentals of housing accommodations or admission to or giving preference to persons of the same religion or denomination or from making such selection as is calculated by such organization to promote the religious principles for which it is established or maintained.

13. Employer liability for discriminatory conduct by employee, agent or independent contractor. a. An employer shall be liable for an unlawful discriminatory practice based upon the conduct of an employee or agent which is in violation of any provision of this section other than subdivisions 1 and 2 of this section.

b. An employer shall be liable for an unlawful discriminatory practice based upon the conduct of an employee or agent which is in violation of subdivision 1 or 2 of this section only where:

(1) The employee or agent exercised managerial or supervisory responsibility; or

(2) The employer knew of the employee's or agent's discriminatory conduct, and acquiesced in such conduct or failed to take immediate and appropriate corrective action; an employer shall be deemed to have knowledge of an employee's or agent's discriminatory conduct where that conduct was known by another employee or agent who exercised managerial or supervisory responsibility; or

(3) The employer should have known of the employee's or agent's discriminatory conduct and failed to exercise reasonable diligence to prevent such discriminatory conduct.

c. An employer shall be liable for an unlawful discriminatory practice committed by a person employed as an independent contractor, other than an agent of such employer, to carry out work in furtherance of the employer's business enterprise only where such discriminatory conduct was committed in the course of such employment and the employer had actual knowledge of and acquiesced in such conduct.

d. Where liability of an employer has been established pursuant to this section and is based solely on the conduct of an employee, agent, or independent contractor, the employer shall be permitted to plead and prove to the discriminatory conduct for which it was found liable it had:

(l) Established and complied with policies, programs and procedures for the prevention and detection of unlawful discriminatory practices by employees, agents and persons employed as independent contractors, including but not limited to:

(i) A meaningful and responsive procedure for investigating complaints of discriminatory practices by employees, agents and persons employed as independent contractors and for taking appropriate action against those persons who are found to have engaged in such practices;

(ii) A firm policy against such practices which is effectively communicated to employees, agents and persons employed as independent contractors;

(iii) A program to educate employees and agents about unlawful discriminatory practices under local, state, and federal law; and

(iv) Procedures for the supervision of employees and agents and for the oversight of persons employed as independent contractors specifically directed at the prevention and detection of such practices; and

(2) A record of no, or relatively few, prior incidents of discriminatory conduct by such employee, agent or person employed as an independent contractor or other employees, agents or persons employed as independent contractors.

e. The demonstration of any or all of the factors listed above in addition to any other relevant factors shall be considered in mitigation of the amount of civil penalties to be imposed by the commission pursuant to this chapter or in mitigation of civil penalties or punitive damages which may be imposed pursuant to chapter 4 or 5 of this title and shall be among the factors considered in determining an employer's liability under subparagraph 3 of paragraph b of this subdivision.

f. The commission may establish by rule policies, programs and procedures which may be implemented by employers for the prevention and detection of unlawful discriminatory practices by employees, agents and persons employed as independent contractors. Notwithstanding any other provision of law to the contrary, an employer found to be liable for an unlawful discriminatory practice based solely on the conduct of an employee, agent or person employed as an independent contractor who pleads and proves that such policies, programs and procedures had been implemented and complied with at the time of the unlawful conduct shall not be liable for any civil penalties which may be imposed pursuant to this chapter or any civil penalties or punitive damages which may be imposed pursuant to chapter 4 or 5 of this title for such unlawful discriminatory practices.

14. Applicability; alienage or citizenship status. Notwithstanding any other provision of this section, it shall not be an unlawful discriminatory practice for any person to discriminate on the ground of alienage or citizenship status, or to make any inquiry

as to a person's alienage or citizenship status, or to give preference to a person who is a citizen or national of the United States over an equally qualified person who is an alien, when such discrimination is required or when such preference is expressly permitted by any law or regulation of the United States, the state of New York or the city, and when such law or regulation does not provide that state or local law may be more protective of aliens; provided, however, that this provision shall not prohibit inquiries or determinations based on alienage or citizenship status when such actions are necessary to obtain the benefits of a federal program. An applicant for a license or permit issued by the city may be required to be authorized to work in the United States whenever by law or regulation there is a limit on the number of such licenses or permits which may be issued.

15. Applicability; persons with disabilities. (a) Requirement to make reasonable accommodation to the needs of persons with disabilities. Except as provided in paragraph (b), it is an unlawful discriminatory practice for any person prohibited by the provisions of this section from discriminating on the basis of disability not to provide a reasonable accommodation to enable a person with a disability to satisfy the essential requisites of a job or enjoy the right or rights in question provided that the disability is known or should have been known by the covered entity.

(b) Affirmative defense in disability cases. In any case where the need for reasonable accommodation is placed in issue, it shall be an affirmative defense that the person aggrieved by the alleged discriminatory practice could not, with reasonable accommodation, satisfy the essential requisites of the job or enjoy the right or rights in question.

(c) Use of drugs or alcohol. Nothing contained in this chapter shall be construed to prohibit a covered entity from (i) prohibiting the illegal use of drugs or the use of alcohol at the workplace or on duty impairment from the illegal use of drugs or the use of alcohol, or (ii) conducting drug testing which is otherwise lawful.

16. Repealed.

17. Disparate impact.

a. An unlawful discriminatory practice based upon disparate impact is established when:

(1) The commission or a person who may bring an action under chapter 4 or 5 of this title demonstrates that a policy or practice of a covered entity or a group of policies or practices of a covered entity results in a disparate impact to the detriment of any group protected by the provisions of this chapter; and

(2) The covered entity fails to plead and prove as an affirmative defense that each such policy or practice bears a significant relationship to a significant business objective of the covered entity or does not contribute to the disparate impact; provided, however, that if the commission or such person who may bring an action demonstrates that a group of policies or practices results in a disparate impact, the commission or such person shall not be required to demonstrate which specific policies or practices within the group results in such disparate impact; provided further, that a policy or practice or group of policies or practices demonstrated to result in a disparate impact shall be unlawful where the commission or such person who may bring an action produces substantial evidence that an alternative policy or practice with less disparate impact is available to the covered entity and the covered entity fails to prove that such alternative policy or practice would not serve the covered entity as well. “Significant business objective” shall include, but not be limited to, successful performance of the job.

b. The mere existence of a statistical imbalance between a covered entity's challenged demographic composition and the general population is not alone sufficient to establish a prima facie case of disparate impact violation unless the general population is shown to be the relevant pool for comparison, the imbalance is shown to be statistically significant and there is an identifiable policy or practice or group of policies or practices that allegedly causes the imbalance.

c. Nothing contained in this subdivision shall be construed to mandate or endorse the use of quotas; provided, however, that nothing contained in this subdivision shall be construed to limit the scope of the commission's authority pursuant to sections 8-115 and 8-120 of this chapter or to affect court-ordered remedies or settlements that are otherwise in accordance with law.

18. Unlawful boycott or blacklist. It shall be an unlawful discriminatory practice (i) for any person to discriminate against, boycott or blacklist or to refuse to buy from, sell to or trade with, any person, because of such person's actual or perceived race, creed, color, national origin, gender, disability, age, marital status, partnership status, sexual orientation, uniformed service or alienage or citizenship status or of such person's partners, members, stockholders, directors, officers, managers, superintendents, agents, employees, business associates, suppliers or customers, or (ii) for any person willfully to do any act or refrain from doing any act which enables any such person to take such action. This subdivision shall not apply to:

(a) Boycotts connected with labor disputes;

(b) Boycotts to protest unlawful discriminatory practices; or

(c) Any form of expression that is protected by the First Amendment.

19. Interference with protected rights. It shall be an unlawful discriminatory practice for any person to coerce, intimidate, threaten or interfere with, or attempt to coerce, intimidate, threaten or interfere with, any person in the exercise or enjoyment of, or on account of such person having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected pursuant to this section.

20. Relationship or association. The provisions of this section set forth as unlawful discriminatory practices shall be construed to prohibit such discrimination against a person because of the actual or perceived race, creed, color, national origin, disability, age, sexual orientation, uniformed service or alienage or citizenship status of a person with whom such person has a known relationship or association.

21. Employment; an individual's unemployment. a. Prohibition of discrimination based on an individual's unemployment.

(1) Except as provided in paragraphs b and c of this subdivision, an employer, employment agency, or agent thereof shall not:

(a) Because of a person's unemployment, represent that any employment or position is not available when in fact it is available; or

(b) Base an employment decision with regard to hiring, compensation or the terms, conditions or privileges of employment on an applicant's unemployment.

(2) Unless otherwise permitted by city, state or federal law, no employer, employment agency, or agent thereof shall publish, in print or in any other medium, an advertisement for any job vacancy in this city that contains one or more of the following:

(a) Any provision stating or indicating that being currently employed is a requirement or qualification for the job;

(b) Any provision stating or indicating that an employer, employment agency, or agent thereof will not consider individuals for employment based on their unemployment.

b. Effect of subdivision. (1) Paragraph a of this subdivision shall not be construed to prohibit an employer, employment agency, or agent thereof from (a) considering an applicant's unemployment, where there is a substantially job-related reason for doing so; or (b) inquiring into the circumstances surrounding an applicant's separation from prior employment.

(2) Nothing set forth in this subdivision shall be construed as prohibiting an employer, employment agency, or agent thereof, when making employment decisions with regard to hiring, compensation, or the terms, conditions or privileges of employment, from considering any substantially job-related qualifications, including but not limited to: a current and valid professional or occupational license; a certificate, registration, permit, or other credential; a minimum level of education or training; or a minimum level of professional, occupational, or field experience.

(3) Nothing set forth in this subdivision shall be construed as prohibiting an employer, employment agency, or agent thereof from publishing, in print or in any other medium, an advertisement for any job vacancy in this city that contains any provision setting forth any substantially job-related qualifications, including but not limited to: a current and valid professional or occupational license; a certificate, registration, permit, or other credential; a minimum level of education or training; or a minimum level of professional, occupational, or field experience.

(4) (a) Nothing set forth in this subdivision shall be construed as prohibiting an employer, employment agency, or agent thereof, when making employment decisions with regard to hiring, compensation, or the terms, conditions or privileges of employment, from determining that only applicants who are currently employed by the employer will be considered for employment or given priority for employment or with respect to compensation or terms, conditions or privileges of employment. In addition, nothing set forth in this subdivision shall prevent an employer from setting compensation or terms or conditions of employment for a person based on that person's actual amount of experience.

(b) For the purposes of this subparagraph, all persons whose salary or wages are paid from the city treasury, and all persons who are employed by public agencies or entities headed by officers or boards including one or more individuals appointed or recommended by officials of the city, shall be deemed to have the same employer.

c. Applicability of subdivision. (1) This subdivision shall not apply to:

(a) Actions taken by the department of citywide administrative services in furtherance of its responsibility for city personnel matters pursuant to chapter 35 of the charter or as a municipal civil service commission administering the civil service law and other applicable laws, or by the mayor in furtherance of the mayor's duties relating to city personnel matters pursuant to chapter 35 of the charter, including, but not limited to, the administration of competitive examinations, the establishment and administration of eligible lists, and the establishment and implementation of minimum qualifications for appointment to positions;

(b) Actions taken by officers or employees of other public agencies or entities charged with performing functions comparable to those performed by the department of citywide administrative services or the mayor as described in paragraph 1 of this subdivision;

(c) Agency appointments to competitive positions from eligible lists pursuant to subsection 1 of section 61 of the civil service law; or

(d) The exercise of any right of an employer or employee pursuant to a collective bargaining agreement.

(2) This subdivision shall apply to individual hiring decisions made by an agency or entity with respect to positions for which appointments are not required to be made from an eligible list resulting from a competitive examination.

d. Public education campaign. The commission shall develop courses of instruction and conduct ongoing public education efforts as necessary to inform employers, employment agencies, and job applicants about their rights and responsibilities under this subdivision.

e. Disparate impact. An unlawful discriminatory practice based on disparate impact under this subdivision is established when: (1) the commission or a person who may bring an action under chapter 4 or 5 of this title demonstrates that a policy or practice of an employer, employment agency, or agent thereof, or a group of policies or practices of such an entity results in a disparate impact to the detriment of any group protected by the provisions of this subdivision; and (2) such entity fails to plead and prove as an affirmative defense that each such policy or practice has as its basis a substantially job-related qualification or does not contribute to the disparate impact; provided, however, that if the commission or such person who may bring an action demonstrates that a group of policies or practices results in a disparate impact, the commission or such person shall not be required to demonstrate which specific policies or practices within the group results in such disparate impact; provided further, that a policy or practice or group of policies or practices demonstrated to result in a disparate impact shall be unlawful where the commission or such person who may bring an action produces substantial evidence that an alternative policy or practice with less disparate impact is available to such entity and such entity fails to prove that such alternative policy or practice would not serve such entity as well. A "substantially job-related qualification" shall include, but not be limited to, a current and valid professional or occupational license; a certificate, registration, permit, or other credential; a minimum level of education or training; or a minimum level of professional, occupational, or field experience.

22. Employment; Pregnancy, childbirth, or a related medical condition. (a) It shall be an unlawful discriminatory practice for an employer to refuse to provide a reasonable accommodation, as defined in section 8-102, to the needs of an employee for the employee's pregnancy, childbirth, or related medical condition that will allow the employee to perform the essential requisites of the job, provided that such employee's pregnancy, childbirth, or related medical condition is known or should have been known by the employer. In any case pursuant to this subdivision where the need for reasonable accommodation is placed in issue, it shall be an affirmative defense that the person aggrieved by the alleged discriminatory practice could not, with reasonable accommodation, satisfy the essential requisites of the job.

(b) Employer lactation accommodation.

(i) Except as provided in subparagraph (iii) of this paragraph, employers shall provide the following to accommodate an employee needing to express breast milk: (1) a lactation room in reasonable proximity to such employee's work area; and (2) a refrigerator suitable for breast milk storage in reasonable proximity to such employee's work area.

(ii) If a room designated by an employer to serve as a lactation room is also used for another purpose, the sole function of the room shall be as a lactation room while an employee is using the room to express breast milk. When an employee is using the room to express milk, the employer shall provide notice to other employees that the room is given preference for use as a lactation room.

(iii) Should the provision of a lactation room as required by this paragraph pose an undue hardship on an employer, the employer shall engage in a cooperative dialogue, as required by subdivision 28 of this section.

(iv) The presence of a lactation room pursuant to this subdivision shall not affect an individual's right to breastfeed in public pursuant to article 7 of the civil rights law.

(c) Employer lactation room accommodation policy.

(i) An employer shall develop and implement a written policy regarding the provision of a lactation room, which shall be distributed to all employees upon hiring. The policy shall include a statement that employees have a right to request a lactation room, and identify a process by which employees may request a lactation room. This process shall:

(1) Specify the means by which an employee may submit a request for a lactation room;

(2) Require that the employer respond to a request for a lactation room within a reasonable amount of time not to exceed five business days;

(3) Provide a procedure to follow when two or more individuals need to use the lactation room at the same time, including contact information for any follow up required;

(4) State that the employer shall provide reasonable break time for an employee to express breast milk pursuant to section 206-c of the labor law; and

(5) State that if the request for a lactation room poses an undue hardship on the employer, the employer shall engage in a cooperative dialogue, as required by subdivision 28 of this section.

(ii) The commission shall, in collaboration with the department of health and mental hygiene, develop a model lactation room accommodation policy that conforms to the requirements of this subdivision and a model lactation room request form. The commission shall make such model policy and request form available on its website.

(iii) The existence of a lactation room accommodation policy pursuant to this subdivision shall not affect an individual's right to breastfeed in public pursuant to article 7 of the civil rights law.

(d) Notice of rights. (i) An employer shall provide written notice in a form and manner to be determined by the commission of the right to be free from discrimination in relation to pregnancy, childbirth, and related medical conditions pursuant to this subdivision to new employees at the commencement of employment. Such notice may also be conspicuously posted at an employer's place of business in an area accessible to employees. (ii) The commission shall develop courses of instruction and conduct ongoing public education efforts as necessary to inform employers, employees, employment agencies, and job applicants about their rights and responsibilities under this subdivision.

(e) This subdivision shall not be construed to affect any other provision of law relating to discrimination on the basis of gender, or in any way to diminish the coverage of pregnancy, childbirth, or a medical condition related to pregnancy or childbirth under any other provision of this section.

23. The provisions of this chapter relating to employees shall apply to interns.

24. Employment; consumer credit history. (a) Except as provided in this subdivision, it shall be an unlawful discriminatory practice for an employer, labor organization, employment agency, or agent thereof to request or to use for employment purposes the consumer credit history of an applicant for employment or employee, or otherwise discriminate against an applicant or employee with regard to hiring, compensation, or the terms, conditions or privileges of employment based on the consumer credit history of the applicant or employee.

(b) Paragraph (a) of this subdivision shall not apply to:

(1) An employer or agent thereof, that is required by state or federal law or regulations or by a self-regulatory organization as defined in section 3(a)(26) of the securities exchange act of 1934, as amended to use an individual's consumer credit history for employment purposes;

(2) Persons applying for positions as or employed:

(A) As police officers or peace officers, as those terms are defined in subdivisions 33 and 34 of section 1.20 of the criminal procedure law, respectively, or in a position with a law enforcement or investigative function at the department of investigation;

(B) In a position that is subject to background investigation by the department of investigation, provided, however, that the appointing agency may not use consumer credit history information for employment purposes unless the position is an appointed position in which a high degree of public trust, as defined by the commission in rules, has been reposed;

(C) In a position in which an employee is required to be bonded under city, state or federal law;

(D) In a position in which an employee is required to possess security clearance under federal law or the law of any state;

(E) In a non-clerical position having regular access to trade secrets, intelligence information or national security information;

(F) In a position: (i) having signatory authority over third party funds or assets valued at $10,000 or more; or (ii) that involves a fiduciary responsibility to the employer with the authority to enter financial agreements valued at $10,000 or more on behalf of the employer; or

(G) In a position with regular duties that allow the employee to modify digital security systems established to prevent the unauthorized use of the employer's or client's networks or databases.

(c) Paragraph (a) of this subdivision shall not be construed to affect the obligations of persons required by section 12-110 or by mayoral executive order relating to disclosures by city employees to the conflicts of interest board to report information

regarding their creditors or debts, or the use of such information by government agencies for the purposes for which such information is collected.

(d) Nothing in this subdivision precludes an employer from requesting or receiving consumer credit history information pursuant to a lawful subpoena, court order or law enforcement investigation.

25. Employment; inquiries regarding salary history. (a) For purposes of this subdivision, "to inquire" means to communicate any question or statement to an applicant, an applicant's current or prior employer, or a current or former employee or agent of the applicant's current or prior employer, in writing or otherwise, for the purpose of obtaining an applicant's salary history, or to conduct a search of publicly available records or reports for the purpose of obtaining an applicant's salary history, but does not include informing the applicant in writing or otherwise about the position's proposed or anticipated salary or salary range. For purposes of this subdivision, "salary history" includes the applicant's current or prior wage, benefits or other compensation. "Salary history" does not include any objective measure of the applicant's productivity such as revenue, sales, or other production reports.

(b) Except as otherwise provided in this subdivision, it is an unlawful discriminatory practice for an employer, employment agency, or employee or agent thereof:

1. To inquire about the salary history of an applicant for employment; or

2. To rely on the salary history of an applicant in determining the salary, benefits or other compensation for such applicant during the hiring process, including the negotiation of a contract.

(c) Notwithstanding paragraph (b) of this subdivision, an employer, employment agency, or employee or agent thereof may, without inquiring about salary history, engage in discussion with the applicant about their expectations with respect to salary, benefits and other compensation, including but not limited to unvested equity or deferred compensation that an applicant would forfeit or have cancelled by virtue of the applicant's resignation from their current employer.

(d) Notwithstanding subparagraph 2 of paragraph (b) of this subdivision, where an applicant voluntarily and without prompting discloses salary history to an employer, employment agency, or employee or agent thereof, such employer, employment agency, or employee or agent thereof may consider salary history in determining salary, benefits and other compensation for such applicant, and may verify such applicant's salary history.

(e) This subdivision shall not apply to:

(1) Any actions taken by an employer, employment agency, or employee or agent thereof pursuant to any federal, state or local law that specifically authorizes the disclosure or verification of salary history for employment purposes, or specifically requires knowledge of salary history to determine an employee's compensation;

(2) Applicants for internal transfer or promotion with their current employer;

(3) Any attempt by an employer, employment agency, or employee or agent thereof, to verify an applicant's disclosure of non-salary related information or conduct a background check, provided that if such verification or background check discloses the applicant's salary history, such disclosure shall not be relied upon for purposes of determining the salary, benefits or other compensation of such applicant during the hiring process, including the negotiation of a contract; or

(4) Public employee positions for which salary, benefits or other compensation are determined pursuant to procedures established by collective bargaining.

26. Applicability; uniformed service. Notwithstanding any other provision of this section and except as otherwise provided by law, it is not an unlawful discriminatory practice for any person to afford any other person a preference or privilege based on such other person's uniformed service, or to declare, print or circulate or cause to be declared, printed or circulated any statement, advertisement or publication, or to use any form of application or make any inquiry indicating any such lawful preference or privilege.

27. Victims of domestic violence, sex offenses or stalking.

a. Employment. It shall be an unlawful discriminatory practice for an employer, or an agent thereof, because of any individual's actual or perceived status as a victim of domestic violence, or as a victim of sex offenses or stalking:

(1) To represent that any employment or position is not available when in fact it is available;

(2) To refuse to hire or employ or to bar or to discharge from employment; or

(3) To discriminate against an individual in compensation or other terms, conditions, or privileges of employment.

b. Requirement to make reasonable accommodation to the needs of victims of domestic violence, sex offenses or stalking. Except as provided in paragraph d, it is an unlawful discriminatory practice for any person prohibited by paragraph a from

discriminating on the basis of actual or perceived status as a victim of domestic violence or a victim of sex offenses or stalking not to provide a reasonable accommodation to enable a person who is a victim of domestic violence, or a victim of sex offenses or stalking to satisfy the essential requisites of a job provided that the status as a victim of domestic violence or a victim of sex offenses or stalking is known or should have been known by the covered entity.

c. Documentation of status. Any person required by paragraph b to make reasonable accommodation may require a person requesting reasonable accommodation pursuant to such paragraph to provide certification that the person is a victim of domestic violence, sex offenses or stalking. The person requesting reasonable accommodation pursuant to such paragraph shall provide a copy of such certification to the covered entity within a reasonable period after the request is made. A person may satisfy the certification requirement of this paragraph by providing documentation from an employee, agent, or volunteer of a victim services organization, an attorney, a member of the clergy, or a medical or other professional service provider, from whom the individual seeking a reasonable accommodation or that individual's family or household member has sought assistance in addressing domestic violence, sex offenses or stalking and the effects of the violence or stalking; a police or court record; or other corroborating evidence. All information provided to the covered entity pursuant to this paragraph, including a statement of the person requesting a reasonable accommodation or any other documentation, record, or corroborating evidence, and the fact that the individual has requested or obtained a reasonable accommodation pursuant to this subdivision, shall be retained in the strictest confidence by the covered entity, except to the extent that disclosure is requested or consented to in writing by the person requesting the reasonable accommodation, or otherwise required by applicable federal, state or local law.

d. Affirmative defense in domestic violence, sex offenses or stalking cases. In any case where the need for reasonable accommodation is placed in issue, it shall be an affirmative defense that the person aggrieved by the alleged discriminatory practice could not, with reasonable accommodation, satisfy the essential requisites of the job or enjoy the right or rights in question.

e. Housing accommodations. It shall be an unlawful discriminatory practice for the owner, lessor, lessee, sublessee, assignee, or managing agent of, or other person having the right to sell, rent or lease or approve the sale, rental or lease of a housing accommodation, constructed or to be constructed, or an interest therein, or any agent or employee thereof, because of any individual's actual or perceived status as a victim of domestic violence, or as a victim of sex offenses or stalking:

(1) To refuse to sell, rent, lease, approve the sale, rental or lease or otherwise deny to or withhold from any person or group of persons such a housing accommodation or an interest therein, or to discriminate in the terms, conditions, or privileges of the sale, rental or lease of any such housing accommodation or an interest therein or in the furnishing of facilities or services in connection therewith because of an actual or perceived status of said individual as a victim of domestic violence, or as a victim of sex offenses or stalking; or

(2) To represent that such housing accommodation or an interest therein is not available when in fact it is available.

f. The provisions of paragraph e shall not apply:

(1) To the rental of a housing accommodation, other than a publicly-assisted housing accommodation, in a building which contains housing accommodations for not more than two families living independently of each other, if the owner or members of the owner's family reside in one of such housing accommodations, and if the available housing accommodation has not been publicly advertised, listed, or otherwise offered to the general public; or

(2) To the rental of a room or rooms in a housing accommodation, other than a publicly-assisted housing accommodation, if such rental is by the occupant of the housing accommodation or by the owner of the housing accommodation and the owner or members of the owner's family reside in such housing accommodation.

g. For the purposes of this subdivision, practices “based on,” “because of,” “on account of,” “as to,” “on the basis of,” or “motivated by” an individual's “status as a victim of domestic violence,” or “status as a victim of sex offenses or stalking” include, but are not limited to, those based solely upon the actions of a person who has perpetrated acts or threats of violence against the individual.

28. Reasonable accommodation; cooperative dialogue.

(a) Employment. It shall be an unlawful discriminatory practice for an employer, labor organization or employment agency or an employee or agent thereof to refuse or otherwise fail to engage in a cooperative dialogue within a reasonable time with a person who has requested an accommodation or who the covered entity has notice may require such an accommodation:

(1) For religious needs as provided in subdivision 3 of this section;

(2) Related to a disability as provided in subdivision 15 of this section;

(3) Related to pregnancy, childbirth or a related medical condition as provided in subdivision 22 of this section; or

(4) For such person's needs as a victim of domestic violence, sex offenses or stalking as provided in subdivision 27 of this section.

(b) Public accommodations. It shall be an unlawful discriminatory practice for any person who is the owner, franchisor, franchisee, lessor, lessee, proprietor, manager, superintendent, agent or employee of any place or provider of public accommodation to refuse or otherwise fail to engage in a cooperative dialogue within a reasonable time with a person who has requested an accommodation or who the covered entity has notice may require an accommodation related to disability as provided in subdivision 15 of this section.

(c) Housing accommodation. It shall be an unlawful discriminatory practice for an owner, lessor, lessee, sublessee, assignee, or managing agent of, or other person having the right to sell, rent or lease or approve the sale, rental or lease of a housing accommodation, constructed or to be constructed, or an interest therein, or any agency or employee thereof to refuse or otherwise fail to engage in a cooperative dialogue within a reasonable time with a person who has requested an accommodation or who the covered entity has notice may require an accommodation related to disability as provided in subdivision 15 of this section.

(d) Upon reaching a final determination at the conclusion of a cooperative dialogue pursuant to paragraphs (a) and (c) of this subdivision, the covered entity shall provide any person requesting an accommodation who participated in the cooperative dialogue with a written final determination identifying any accommodation granted or denied.

(e) The determination that no reasonable accommodation would enable the person requesting an accommodation to satisfy the essential requisites of a job or enjoy the right or rights in question may only be made after the parties have engaged, or the covered entity has attempted to engage, in a cooperative dialogue.

(f) Rights and obligations set forth in this subdivision are supplemental to and independent of the rights and obligations provided by subdivisions 3, 15, 22 and 27. A covered entity's compliance with this subdivision is not a defense to a claim of not providing a reasonable accommodation under provisions of title 8 other than this subdivision.

29. Anti-sexual harassment rights and responsibilities; poster. (a) Every employer must conspicuously display an anti-sexual harassment rights and responsibilities poster designed by the commission, in employee breakrooms or other common areas employees gather. Every employer at a minimum shall display such poster in English and in Spanish.

(b) The commission shall create a poster that sets forth in simple and understandable terms the following minimum requirements:

(1) An explanation of sexual harassment as a form of unlawful discrimination under local law;

(2) A statement that sexual harassment is also a form of unlawful discrimination under state and federal law;

(3) A description of sexual harassment, using examples;

(4) The complaint process available through, and directions on how to contact, the commission;

(5) The complaint process available through, and directions on how to contact, the state division of human rights;

(6) The complaint process available through, and directions on how to contact, the United States equal employment opportunity commission; and

(7) The prohibition against retaliation, pursuant to subdivision 7 of section 8-107.

(c) The size and style of the poster shall be at least 8 1/2 by 14 inches with a minimum 12 point type. Such poster shall be made available in English and Spanish and any other language deemed appropriate by the commission, however, any such poster shall only contain one language.

(d) Any poster required pursuant to this section shall be made available on the commission's website for employers to download for legible color reproduction in English, Spanish and any other language deemed appropriate by the commission.

(e) The commission shall develop an information sheet on sexual harassment that employers shall distribute to individual employees at the time of hire. Such information sheet may be included in an employee handbook. Such information sheet shall contain, at a minimum, the same elements of paragraph (b) of this subdivision. The information sheet shall be made available in English and Spanish and any other language deemed appropriate by the commission.

30. Anti-sexual harassment training. (a) Definitions. For purposes of this subdivision, the following terms have the following meanings:

Interactive training. The term “interactive training” means participatory teaching whereby the trainee is engaged in a trainer-trainee interaction, use of audio-visuals, computer or online training program or other participatory forms of training as

determined by the commission. However, such "interactive training" is not required to be live or facilitated by an in-person instructor in order to satisfy the provisions of this subdivision.

(b) Training. Employers with 15 or more employees shall annually conduct an anti-sexual harassment interactive training for all employees, including supervisory and managerial employees, of such employer employed within the city of New York. Such training shall be required after 90 days of initial hire for employees who work more than 80 hours in a calendar year who perform work on a full-time or part-time basis. Such training shall include, but need not be limited to, the following:

(1) An explanation of sexual harassment as a form of unlawful discrimination under local law;

(2) A statement that sexual harassment is also a form of unlawful discrimination under state and federal law;

(3) A description of what sexual harassment is, using examples;

(4) Any internal complaint process available to employees through their employer to address sexual harassment claims;

(5) The complaint process available through the commission, the division of human rights and the United States equal employment opportunity commission, including contact information;

(6) The prohibition of retaliation, pursuant to subdivision 7 of section 8-107, and examples thereof; and

(7) Information concerning bystander intervention, including but not limited to any resources that explain how to engage in bystander intervention.

(8) The specific responsibilities of supervisory and managerial employees in the prevention of sexual harassment and retaliation, and measures that such employees may take to appropriately address sexual harassment complaints.

(c) Compliance. (1) Employers shall keep a record of all trainings, including a signed employee acknowledgement. Such acknowledgment may be electronic.

(2) Employers shall maintain such records for at least three years and such records must be made available for commission inspection upon request.

(3) The commission shall develop an online interactive training module that may be used by an employer as an option to satisfy the requirements of paragraph (b) of this subdivision, provided that an employer shall inform all employees of any internal complaint process available to employees through their employer to address sexual harassment claims. Such training module shall be made publicly available at no cost on the commission's website. Such training module shall allow for the electronic provision of certification each time any such module is accessed and completed. The commission shall update such modules as needed.

(4) The training required by this subdivision is intended to establish a minimum threshold and shall not be construed to prohibit any private employer from providing more frequent or additional anti-sexual harassment training.

(d) For purposes of this subdivision the term "employer" shall not apply to (i) the United States government; (ii) the state of New York, including any office, department, independent agency, authority, institution, association, society or other body of the state including the legislature and the judiciary; or (iii) the city of New York or any local government, municipality or county or any entity governed by section 92 of the general municipal law or section 207 of the county law.

(e) For purposes of this subdivision the term "employee" shall apply to interns.

(f) An employee who has received anti-sexual harassment training at one employer within the required training cycle shall not be required to receive additional anti-sexual harassment training at another employer until the next cycle.

(g) An employer that is subject to training requirements in multiple jurisdictions may assert that it is compliant with this subdivision provided that each provision in subparagraph b of this subdivision is fulfilled in an anti-sexual harassment training that such employer makes available to its employees on an annual basis and shall be allowed to provide proof of compliance.

31. Employment; pre-employment drug testing policy. [Effective May 10, 2020] (a) Prohibition. Except as otherwise provided by law, it shall be an unlawful discriminatory practice for an employer, labor organization, employment agency, or agent thereof to require a prospective employee to submit to testing for the presence of any tetrahydrocannabinols or marijuana in such prospective employee's system as a condition of employment.

(b) Exceptions. (1) The provisions of this subdivision shall not apply to persons applying to work:

(A) As police officers or peace officers, as those terms are defined in subdivisions 33 and 34 of section 1.20 of the criminal procedure law, respectively, or in a position with a law enforcement or investigative function at the department of investigation;

(B) In any position requiring compliance with section 3321 of the New York city building code or section 220-h of the labor law;

(C) In any position requiring a commercial driver's license;

(D) In any position requiring the supervision or care of children, medical patients or vulnerable persons as defined in paragraph 15 of section 488 of the social services law; or

(E) In any position with the potential to significantly impact the health or safety of employees or members of the public, as determined by: (i) the commissioner of citywide administrative services for the classified service of the city of New York, and identified on the website of the department of citywide administrative services or (ii) the chairperson, and identified in regulations promulgated by the commission.

(2) The provisions of this subdivision shall not apply to drug testing required pursuant to:

(A) Any regulation promulgated by the federal department of transportation that requires testing of a prospective employee in accordance with 49 CFR 40 or any rule promulgated by the departments of transportation of this state or city adopting such regulation for purposes of enforcing the requirements of that regulation with respect to intrastate commerce;

(B) Any contract entered into between the federal government and an employer or any grant of financial assistance from the federal government to an employer that requires drug testing of prospective employees as a condition of receiving the contract or grant;

(C) Any federal or state statute, regulation, or order that requires drug testing of prospective employees for purposes of safety or security; or

(D) Any applicants whose prospective employer is a party to a valid collective bargaining agreement that specifically addresses the pre-employment drug testing of such applicants.

(c) Rules. The commission shall promulgate rules for the implementation of this subdivision.

<General Materials (GM) - References, Annotations, or Tables>

HISTORICAL NOTE

Section amended L.L. 39/1991 § 1, eff. Sept. 16, 1991

(combined §§ 8-107 & 8-108 added chap 907/1985 § 1 and § 8-108.1 added L.L. 2/1986 § 2 and juxtaposed per chap 907/1985 § 14)

Subd. 1 heading, open par amended L.L. 85/2005 § 3, eff. Oct. 3, 2005. [See § 8-102 Note 2]

Subd. 1 par (a), (b), (c), (d) amended L.L. 20/2019 § 3, eff. May 20, 2019. [See § 8-101 Note 2] The text used in L.L. 20/2019 § 3 is outdated text from L.L. 1/2016. NYLP used text from L.L. 119/2017 §§ 3, 4 for referencing.

Subd. 1 par (e), (f) amended L.L. 63/2018 § 5, eff. Oct. 16, 2018.

Subd. 2 heading, open par amended L.L. 85/2005 § 3, eff. Oct. 3, 2005. [See § 8-102 Note 2]

Subd. 2 par (b), (c), (d) amended L.L. 20/2019 § 4, eff. May 20, 2019. [See § 8-101 Note 2] The text used in L.L. 20/2019 § 4 is outdated. NYLP used L.L. 63/2018 text for referencing.

Subd. 3 amended L.L. 63/2018 § 7, eff. Oct. 16, 2018.

Subd. 4 heading amended L.L. 85/2005 § 3, eff. Oct. 3, 2005. [See § 8-102 Note 2]

Subd. 4 par a amended L.L. 119/2017 § 6, eff. Nov. 19, 2017.

Subd. 4 par c, e amended L.L. 63/2018 § 8, eff. Oct. 16, 2018.

Subd. 5 heading amended L.L. 85/2005 § 3, eff. Oct. 3, 2005. [See § 8-102 Note 2]

Subd. 5 par (a) heading amended L.L. 85/2005 § 3, eff. Oct. 3, 2005. [See § 8-102 Note 2]

Subd. 5 par (a) open par amended L.L. 85/2005 § 3, eff. Oct. 3, 2005. [See § 8-102 Note 2]