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Contrary to EEOC Pandemic Guidance, New York City Warns Employers *Against* Preferential Treatment of Older Workers

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By Lauri F. Rasnick

Employers are struggling to find a new normal in light of the ongoing pandemic. They are grappling with reopening businesses, implementing reductions in force and furloughs, and filling new employment needs through hiring and restructuring. They are also determining how to handle older workers—those 65 and older—who are more vulnerable to becoming seriously ill if they contract COVID-19. In recently issued general guidance ("Guidance") and supplemental COVID-19 guidance ("Supplemental Guidance") on age discrimination, the New York City Commission on Human Rights ("Commission") addresses how entrenched stereotypes and prejudice regarding age (both of older and younger employees) can impact workers in all of these areas. The Commission discusses the impact of age discrimination, provides guidance on accommodations, cautions against certain practices, and offers recommended best practices for employers to create "intergenerational" workforces, particularly in light of the unique COVID-19 issues.

The Commission Affirms the Basic Principles of the City's Broad Ban on Age Discrimination

The Guidance reminds employers of various tenets of New York City's ban on age discrimination, including that the prohibition:

- covers employers with four or more employees and/or independent contractors, and applies to all types of employees (e.g., full-time, part-time, etc.), freelancers, independent contractors, and interns (whether paid or unpaid), as well as job applicants;
- is broader in some respects than its federal or state counterpart, and is to be liberally construed;
- forbids disparate treatment discrimination (i.e., treating an employee less favorably than other workers because of the employee's age), disparate impact discrimination (i.e., applying a policy or practice that, while neutral on its face, adversely affects a group of workers because of their age), harassment, and retaliation; and

- is violated if "age discrimination constitutes even part of the employer's motivation for denying a person employment" or taking other adverse employment action.

The Commission Reiterates That Age Need Not Be Accommodated and Warns Against Giving Preferential Treatment Based on Age

As we previously reported, the federal Equal Employment Opportunity Commission ("EEOC") takes the position that neither the Age Discrimination in Employment Act ("ADEA") nor any other federal law (such as the Americans with Disabilities Act ("ADA")) requires employers to reasonably accommodate employees based on their age. The Supplemental Guidance similarly affirms that the New York City Human Rights Law ("NYCHRL" or "city law"), like federal law, does not require reasonable accommodation based on age. Thus, because age is not a protected basis for an accommodation under federal or city law, an employer is not required, for example, to provide an accommodation to an older worker who fears returning to work because of his or her age and wants to continue to telework.[1] As the Commission explains, an employer is not obligated to provide an accommodation "based solely on concerns that older workers are susceptible to [a] significant health risk." However, if an employer permits other workers to work from home, such as those with childcare responsibilities or employees with higher-risk household members, "it should also offer telework as an option to other employees, including older workers."

The EEOC and the Commission differ, however, as to whether employers can provide preferential treatment to older workers. The EEOC advises that, since no federal law prohibits employers from accommodating older workers, employers may do so, *even if the accommodation results in younger workers being treated less favorably.* The Commission takes a different view.

The Commission instructs that while city law (like federal law) does not require reasonable accommodation based on age, the NYCHRL (unlike the ADEA) prohibits employers from giving older workers "preferential treatment." Accordingly, if a covered New York City employer "is providing accommodations to its workers beyond those legally required, it must treat workers the same regardless of age," unless the employer can demonstrate that the policy or practice having an unfavorable effect on one age group "bears a significant relationship to a significant business objective and there is no alternative approach that would avoid the disparate impact on that age group."

The conflict between federal and city law arises from the fact that the NYCHRL protects individuals of ***all ages*** from discrimination, not just those 40 and older.[2] Thus, city law forbids a policy or practice that favors older workers over younger workers (or vice versa), such as providing accommodations based on age. Under the NYCHRL, for example, employers may not implement a policy that "would permit older workers to work remotely while prohibiting younger workers from doing so." This is exactly the opposite of the EEOC's guidance on the same issue.

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[1] At least two states, Colorado and Washington, impose accommodation obligations on employers, albeit limited, with respect to higher-risk employees, including older workers.

[2] New York State's Human Rights Law protects individuals 18 years old and older from age discrimination.

Like the EEOC's COVID-19 guidance, the Supplemental Guidance also reminds employers of their obligation to reasonably accommodate an employee's disability, unless doing so would pose an undue hardship on the employer or the disability "presents a direct threat that cannot be adequately mitigated by a reasonable accommodation."[3] The Supplemental Guidance stresses that employees "of all ages may have underlying health conditions that put them at higher risk for a serious illness if they become infected with COVID-19," and, thus, "a legal right to an accommodation based on disability." Accordingly, the Commission encourages employers to communicate their reasonable accommodation policies "when an employee expresses concerns about returning to work based on their age."

Note: Under the ADA, once an employee requests an accommodation for a protected reason (e.g., a disability), the employer must engage in an "interactive process" with the employee to determine if a reasonable accommodation is available that would not result in undue hardship or pose a direct threat to the safety of others or the employer's operations. Under the NYCHRL, however, employers are required to engage in a "cooperative dialogue" with an employee when they know *or have reason to know* that the employee may require a reasonable accommodation for a disability. Thus, in contrast with EEOC guidance, the Commission's Guidance states that "if an employer knows that an employee has a medical condition that the employer is aware might place them at higher risk for severe illness if they get COVID-19, the NYCHRL requires the employer to engage the employee in a cooperative dialogue about a potential accommodation, *even if the employee has not requested a reasonable accommodation*." (Emphasis added.)[4]

The Commission Confirms Proper Screening and Testing Is Permitted

Like the EEOC's guidance on COVID-19 testing, the Supplemental Guidance instructs that employers may require that workers "undergo tests such as temperature checks or diagnostic tests to confirm whether employees pose a direct threat to workplace health and safety due to infection, even though such examinations would ordinarily be prohibited in the absence of the COVID-19 pandemic."[5] The Commission emphasizes that such tests must be administered in a nondiscriminatory manner, i.e., mandated for all workers, and not just for those in a certain age (or ethnic, religious, etc.) group.

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[3] For more information on the EEOC's guidance concerning the "direct threat" exception to the duty to accommodate under the ADA, please see the Epstein Becker Green blog post titled "EEOC Provides Additional Guidance on Reasonable Accommodation Issues for 'High Risk' Employees Returning to Work," available here.

[4] See the "Protected Rights" section on the Commission's COVID-19 website, available here, where, among other things, the Commission states: "Based on current available information, the Commission considers actual or perceived infection with COVID-19 to be protected as a disability under the … NYCHRL." For more information on the "cooperative dialogue" mandate, including on how it differs from the ADA's "interactive process," please see the Epstein Becker Green *Act Now* Advisory "New Disability Discrimination Guidance Sheds Light on New York City's 'Cooperative Dialogue' Requirements," available here.

[5] The Supplemental Guidance does not address antibody testing; however, as we previously reported, the EEOC does not currently consider such testing to be lawful under the ADA because of its unreliability at this time.

Note: If an employee requests an alternative method of screening due to a medical condition or due to their religion, employers should treat it as a request for a reasonable accommodation.

The Commission Cautions Against Stereotyping Older—and Younger—Workers

The Guidance stresses the Commission's view that "the root of most discriminatory practices" is an employer's conscious or unconscious reliance on stereotypes and assumptions about age, concerning both younger and older workers, such as an assumption that older workers "lack vigorous physical or cognitive capacity to perform a job" or that young workers are "lazy" and "lack commitment" to staying at one job for very long.

In the context of the COVID-19 pandemic, the Guidance states that such unlawful stereotyping occurs when employers ***require*** only older workers to telecommute, instead of returning to the workplace, based upon "perceptions about their risk of complication from exposure to COVID-19" due to their age. According to the Guidance, such a policy constitutes unlawful age discrimination under both the ADEA and the NYCHRL because it has an adverse, disparate impact on older workers, notwithstanding that the employer may be acting out of genuine concern for the older workers' well-being.

The Supplemental Guidance also more broadly warns employers against making "assumptions about older workers' interest, willingness, or capacity to work due to the health risks posed by COVID-19." Accordingly, just as an employer may not require older employees to work remotely, they also "cannot justify [other potentially] discriminatory actions, including layoffs, by relying on stereotypes or assumptions that older workers, for example, are not 'tech savvy enough' to successfully telework."

To minimize the risk of running afoul of the law, the Commission recommends that "[d]uring the pandemic, consistent with guidance from public health authorities, employers should permit employees to carry out essential job duties through telework whenever possible."

The Guidance offers other examples of policies and practices based, at least in part, on stereotypes or assumptions that can result in disparate impact age discrimination. The following illustrations from the Guidance are particularly relevant as employers reopen or expand their business amid the pandemic:

- **Job postings and recruiting**: The Guidance states that except for fellowships or training programs, employers may not "directly or indirectly express an age limitation in a job posting unless explicitly required under federal, state, or local law." Examples of indirectly expressing an age limitation include restricting the applicant pool to only "recent college graduates" or describing the ideal candidate as a "digital native."

- **Hiring:** The Guidance states that an employer should not place a cap on job experience to exclude "overqualified" applicants, even if the employer sincerely

believes that the “overqualified” applicant would be bored with the job and/or dissatisfied with the salary. Those are assumptions. According to the Commission, although such a practice does not directly reveal an employee’s age, it is likely to result in the hiring of mostly younger workers and, like the examples above, have a disparate impact on older workers.

- **Layoffs:** The Guidance instructs that “[i]t is a violation of the NYCHRL when employers disproportionately lay off older workers if the employer does not have a legitimate non-discriminatory reason for the staff reduction.” While the Commission acknowledges that “corporate or organizational restructuring, downsizing, and financial considerations, such as budgetary constraints, are often legitimate business decisions,” it cautions that such considerations may not be used “as a pretext for unlawful discrimination based on age” and may be particularly problematic when the practice has a disparate impact on older workers.

The Commission Warns Against Disparately Treating Older Workers

Disparate treatment includes “being subjected to lesser terms or conditions of employment, including denials of work opportunities, demotions, or unfavorable scheduling because of a person’s age.” The Guidance states that for instance, an employer may not pass over an employee for a promotion because the new position requires extensive travel and the employer assumes that the employee, an older person, is not physically or mentally “up to the job.”

Disparate treatment may also involve more overt discriminatory behavior, such as a supervisor repeatedly addressing an older worker as “old man,” “pops,” and “grandpa,” or referring to a young worker as “kid” and “youngster.” The Guidance instructs that such treatment can rise to the level of harassment if an employee “is subjected to behavior that is demeaning, humiliating, or offensive because of [the employee’s] age.” Further, the Guidance stresses that “an employer’s single comment made in circumstances where that comment would signal discriminatory views about one’s age may be enough to constitute harassment.” The Commission also reminds employers that even a person who is not the target of such conduct but simply a witness to it may “feel its impact and have legal recourse.”

The Commission Reminds Employers That Retaliation Is Prohibited

The NYCHRL prohibits a covered employer from retaliating against a worker because that person engaged in protected activity. As the Guidance explains, protected activity includes engaging in good faith in any of the following activities: (i) opposing a discriminatory practice; (ii) complaining internally about age discrimination; (iii) filing a complaint with the Commission or another enforcement agency or a court; or (iv) “testifying, assisting, or participating in an investigation, proceeding or hearing related to an unlawful practice under the NYCHRL.” Unlawful retaliation also can occur when an employer takes adverse action “that is reasonably likely to deter [individuals] from engaging in such activities.”

The Commission Provides Suggested Best Practices

The Guidance provides a list of best practices, most of which are focused on recruitment and hiring policies and practices. For example, the Guidance recommends ensuring that job advertisements and requirements do not dissuade or prevent older workers from applying. The Guidance also recommends including age in diversity programs and providing training on implicit bias.

What New York City Employers Should Do Now

- Review policies and practices regarding accommodations and ensure that the company is not providing accommodations only to older workers. Multistate employers should be aware that the age discrimination ban in some states and other cities also is broader than the ADEA. For example, as noted earlier, New York State's human rights law protects individuals 18 and older from age discrimination.
- Review and, if necessary, revise job descriptions, applications, and advertisements that either directly or indirectly seek to, or may inadvertently, elicit information about an applicant's age, such as the year the applicant graduated high school or college. Also review such materials for "coded" language, such as "21st-Century skills," and for exclusionary requirements, such as "no more than five years' experience" or recommendations from colleges. To the extent possible, write job descriptions that are based on objective, job-related, and age-neutral criteria. Further, ensure that recruiters and interviewers are properly instructed on these matters.
- Train managers and supervisors on how to avoid making employment decisions based on stereotypes and assumptions about both younger workers and older workers, as well as on how to prevent age harassment and comply with the prohibition on retaliation.

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For more information about this Advisory, please contact:

Lauri F. Rasnick
New York
212-351-4854
lrasnick@ebglaw.com

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