

NEW YORK CITY'S HEIGHT AND WEIGHT DISCRIMINATION LAW IS NOW IN EFFECT

Effective November 22, 2023 the NYC Human Rights Law ("NYCHRL") was amended to protect individuals that live in, work in, or visit New York City from discrimination based on their height or weight or the combination of height and weight, referred to as "body size." The new amendments now prohibit unlawful discrimination based on height or weight in employment, housing and public accommodations such as hospitals, gyms, restaurants and theaters. We will concentrate on employment in this blog, but the new amendments will have a significant impact on public accommodations and housing.

The big unknown is that since height or weight or the combination of height and weight, referred to as "body size," is not defined in the new amendment (or by any interpretive regulations) these terms will undoubtedly be defined on a case-by-case basis – meaning a field day for Plaintiffs' Bar.

Here's what we do know at this point:

- Who is Covered by the New Law: employers with one or more employees or one or more domestic worker, housing providers, and public accommodations ("covered entities").
 - Owners and individual employers count towards the four employees.
 - The four employees do not need to work in the same location, and they do not need to all work in New York City.
 - In addition to employees, interns, independent contractors and applicants for employment are protected.
- What Conduct Violates the Law? Conduct based on an individual's height, weight, or body size, such as:
 - Refusing to hire or promote someone; refusing to provide housing, or refusing services;
 - Offering different conditions of employment or access to facilities;
 - Expressing, directly or indirectly, that an individual will, or may, be treated differently;
 - Using harassing or offensive language;
 - Creating or permitting a hostile environment; or
 - An employer that fails to allow or consider alternative actions when required by the NYCHRL
- Can Covered Entities be Obligated Under Different Parts of the Law? Yes. Covered entities may have obligations in different parts of the Law. For example, a department store or a hotel is a public accommodation as it relates to customers, and as an employer as it relates to job applicants and employees.

- Are There Exceptions to the Height and Weight Provisions of the New Law? Yes, but exceptions to the NYCHRL are construed narrowly to deter discriminatory conduct, and to promote equitable treatment. There are, however, certain limited circumstances in which employers and public accommodations may take height, weight, or body size criteria into account, such as:
 - Where it is required by federal, state, or local law or regulation; churches, synagogues and other religious institutions and schools will be exempt. In this regard, the NYC Commission on Human Rights' (the "Commission") published guidance notes that "[l]ike all provisions of the NYCHRL, height and weight will be enforced consistent with the First Amendment;" and
 - For certain jobs where a person's height or weight prevents them from performing core job functions and no alternative action would allow the individual to perform the job; or height or weight criteria are reasonably necessary for the execution of the normal operations of the employer.
 - According to the Commission "[s]tereotypes or speculative health and safety concerns regarding body size stem from entrenched bias and do not constitute permissible justifications for height or weight discrimination." We don't know where this leaves employers hiring for physically challenging jobs like ditch digging, jobs selling diet programs or, indeed for hiring exotic dancers.
- May an Employer Meet its Obligations Under the New Law by Taking an "Alternative Action?" An alternative action is a practicable measure that allows an individual to perform the core functions of his or her job. Unlike a "reasonable accommodation," an alternative action is practicable if it does not require a structural modification, material change to operations, or impose a significant cost on the covered entity. According to the Division, the following measures will generally be considered "practicable:"
 - Offering alternative seating so that employees of various body types can utilize the chair that allows them to fulfill core job functions;
 - Stocking uniforms for all heights and weights or adjusting uniform requirements if a uniform is not suitable for all body sizes; and
 - Providing a ladder or stool to allow an individual access to high shelving units.
- Are Height, Weight or Body Size Also Disabilities Under the NYCHRL? That depends on the circumstances. A disability is defined by the NYCHRL as any physical, medical, mental, or psychological impairment of the body. Height, weight, or the combination of these factors are not in and of themselves disabilities under the NYCHRL. However, where an individual's height, weight, or body size are related to a disability, that person has substantial rights under the NYCHRL's disability protections.

- What are the Penalties for Violating the New Law? Substantial: the Commission can:
 - Order a business to cease and desist from engaging in the unlawful conduct;
 - Mandate policy change;
 - Order a respondent to pay for emotional distress damages;
 - Assess civil penalties of up to \$125,000 for violations, and up to \$250,000 for violations that are the result of willful, wanton or malicious conduct, and
 - Require violators to take other actions such as training for managers and employees.
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