Division of Human Rights

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GUIDANCE ON FAMILIAL STATUS DISCRIMINATION FOR EMPLOYERS IN NEW YORK STATE

STATUTORY REQUIREMENTS

It is unlawful pursuant to the Human Rights Law for an employer to discriminate because of an individual's age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, familial status, marital status, or domestic violence victim status. N.Y. Human Rights Law § 296.1 (codified as N.Y. Executive Law, Article 15). These provisions of the Human Rights Law generally apply to employers with four or more employees. (Sexual harassment by employers with fewer than four employees is also unlawful. Also, all domestic workers are protected from sexual harassment, and harassment on the basis of gender, race, national origin or religion.)

Familial status as a protected category in employment was added to the Human Rights Law by amendment by the Laws of 2015, chapter 365, effective January 19, 2015.

THIS GUIDANCE

This Guidance is intended to fulfill the requirement of the Laws of 2015, chapter 362, directing that the Department of Labor and the Division of Human Rights

> shall make training available to assist employers in developing training, policies and procedures to address discrimination and harassment in the workplace including, but not limited to issues relating to pregnancy, familial status, pay equity and sexual harassment. Such training shall take into account the needs of employers of various sizes. The department and division shall make such training available through, including but not limited to, online means. In developing such training materials, the department and division shall afford the public an opportunity to submit comments on such training.

This Guidance is available on the Division of Human Rights website, www.dhr.ny.gov, or by calling the Division at 888-392-3644, and on the Department of Labor's website, www.labor.ny.gov, or by calling the Department of Labor at 888-469-7365.

WHAT IS THE DEFINITION OF FAMILIAL STATUS?

The Human Rights Law contains the definition of familial status at § 292.26, as follows:

> The term "familial status", when used in this article, means:
> (a) any person who is pregnant or has a child or is in the process of securing legal custody of any individual who has not attained the age of eighteen years, or
> (b) one or more individuals (who have not attained the age of eighteen years) being domiciled with:
> (1) a parent or another person having legal custody of such individual or individuals, or
> (2) the designee of such parent.

Thus, employees or applicants for employment are protected from discrimination on the basis that they are, or are in the process of becoming, the parent or guardian of one or more children.

WHAT IS FAMILIAL STATUS DISCRIMINATION?

Familial status discrimination occurs when employment decisions are based on familial status, which would include, but not be limited to, making an employment decision, such as deciding not to hire or promote someone:

- because she or he has children at home, or has “too many” children;
- based on belief that someone with children will not be a reliable employee;
- because she or he is a single parent;
- because she is pregnant
- because she or he is a parent, regardless of living arrangements;
- because a father has obtained custody of one or more of his children and will be the primary caretaker;
- based on the belief that mothers should stay home with their children;
- because she or he is living with and caring for a grandchild;
- because she or he is a foster parent; or
- because of any other stereotyped belief or opinion about parents or guardians of children under the age of 18.

The amendment to the Human Rights Law explicitly stated that no new right to reasonable accommodation was created by the addition of familial status protection. Human Rights Law § 296.3(c). Therefore, the employer is not required to accommodate the needs of the child or children, and is not required to grant time off for the parent because of a child’s needs, or to attend school meetings, concerts, sporting events, etc., as an accommodation. However, the employer must grant such time off, or other changes to the terms or conditions of employment, to the same extent that time off, or other workplace changes, are granted to employees for personal

or other reasons. For example, an employer who routinely grants workplace adjustments for employees attending school shall not deny the same to employees based on familial status.

This legislation does not expand or decrease any rights that a parent or guardian has under the federal Family Medical Leave Act (where applicable) to time off to care for family members, including a child's illness.

Parents or guardians of children are protected from discrimination on the basis of the ***status*** of being a parent or guardian, not with regard to who their children are. In other words (as is also true with marital status discrimination) anti-nepotism rules are not impacted, because anti-nepotism rules involve the ***identity*** of the employees as relatives, not their ***status*** as parent, child, or spouse. Likewise, actions taken against an employee because of who their child is, or what that child has done, do not implicate familial status discrimination.

RETALIATION IS UNLAWFUL

It is unlawful for any employer, or any agent or employee of the employer, to retaliate against an employee who has complained of familial status discrimination.

The Human Rights Law protects any individual who has engaged in "protected activity." Protected activity occurs when a person has

- filed a formal written complaint of familial status discrimination, either internally with management or human resources, or with any anti-discrimination agency,
- testified or assisted in a proceeding involving familial status discrimination under the Human Rights Law,
- opposed familial status discrimination by making a verbal or informal complaint to management,
- complained that another employee has been subjected to familial status discrimination, or
- encouraged a fellow employee to report familial status discrimination.

(Retaliation also applies to opposition to any other actions forbidden by the Human Rights Law.)

If the employee has participated in a proceeding before the Division of Human Rights, or in a court of law, that complainant or witness is absolutely protected against retaliation for any oral or written statements made to the Division or a court in the course of proceedings, regardless of the merits or disposition of the underlying complaint.

Even if the alleged discrimination does not turn out to rise to the level of a violation of the Human Rights Law, the individual is protected if he or she had a good faith belief that the practices were unlawful. However, the retaliation provision is not intended to protect persons making intentionally false charges of discrimination.

WHAT IS RETALIATION?

Retaliation consists of an adverse action or actions taken against the employee by the employer. The action need not be job-related or occur in the workplace. Unlawful retaliation can be any action, more than trivial, that would have the effect of dissuading a reasonable worker from making or supporting a charge of harassment or any other practices forbidden by the Law.

Actionable retaliation by an employer can occur after the individual is no longer employed by that employer. This can include giving an unwarranted negative reference for a former employee.

A negative employment action is not retaliatory merely because it occurs after the employee engaged in protected activity. Employees continue to be subject to all job requirements and disciplinary rules after having engaged in such activity. In order to make a claim of retaliation, the individual must be able to substantiate the claim that the adverse action was retaliatory.