

New York City Enacts Prohibition on Height and Weight Discrimination

By Jonathan A. Wexler and Taylor A. McCann

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On May 26, 2023, New York City Mayor Eric Adams signed into law an amendment to the New York City Human Rights Law prohibiting discrimination on the basis of an individual's height or weight in employment, housing, and public accommodation. A bill proposing the amendment passed the New York City Council by a 44-5 vote early last month. The amendment will take effect on November 22, 2023, 180 days after the Mayor's signature, on and after which height and weight will be protected in a manner similar to age, race, sex, and other protected classes.

The amendment includes a number of important provisions that will directly impact a variety of employment actions.

First, the amendment makes it unlawful for any New York City employer or its agent, because of the actual or perceived height or weight 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 term, conditions or privileges of employment.

Second, the amendment makes it unlawful for any New York City employer to declare, print, or circulate any statement, advertisement, or publication which expresses any actual or intended limitation, specification, or discrimination as to height or weight. Importantly, this includes the use of any form of application for employment or any inquiry in connection with prospective employment as to an applicant's height or weight.

The amendment includes exceptions which specify situations where an employer may consider height or weight in its employment decisions. Accordingly, the height and weight provisions of New York City's administrative code do not apply to an employer's action when such action is:

- (A) required by federal, state, or local law or regulation, or
- (B) permitted by regulation adopted by the New York City Commission on Human Rights ("the Commission") identifying particular jobs or categories of jobs for which (i) a person's height or weight could prevent performing the essential requisites of the job, and (ii) the Commission has not found alternative action that covered employers could reasonably take to allow persons who do not meet the height or weight criteria to perform the essential requisites of the job or category of jobs, or
- (C) permitted by regulation adopted by the Commission identifying particular jobs or categories of jobs for which consideration of height or weight criteria is reasonably necessary for the execution of the normal operations of such employer.

Furthermore, even where none of the above exceptions applies to an employer's action, the amendment provides an affirmative defense (1) where a person's height or weight prevents the person from performing the essential requisites of the job, and there is no alternative action the covered employer could reasonably take that would allow the person to perform the essential requisites of the job, or (2) where an employer's decision based on height or weight criteria is "reasonably necessary for the execution of its normal operations."

Finally, the amendment expressly allows employers to continue offering incentives that support weight management as

part of voluntary wellness programs.

New York City employers should act now to ensure compliance with the amendment's employment provisions. Employers should take time to determine whether the amendment's anti-discrimination provisions or its exceptions apply to each of its particular positions. Employers should also revisit and, if necessary, update their hiring practices and application forms, and train interviewers and hiring managers on the new requirements of the law. Additionally, employers should revise their anti-harassment policies and other human resources materials to reflect the inclusion of height and weight as protected classes.

If you have any questions about this article, please contact Jonathan A. Wexler at jwexler@vedderprice.com, Taylor A. McCann at tmccann@vedderprice.com or any other Vedder Price attorney with whom you have worked.

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