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Amendments To New York State Executive Law § 296(10) Concerning Religious Discrimination In Employment

On September 17, 2002, Governor Pataki signed into law amendments to New York State Executive Law § 296(10), clarifying the scope of an employer's obligation to accommodate an employee's religious practices and beliefs. The amendments take effect on November 16, 2002, and, in principal — (i) clarify the range of religious observance and conduct protected; (ii) delineate guidelines for determining what constitutes an undue economic hardship so as to excuse the duty to accommodate; (iii) eliminate the subjectivity of an employer's judgment in determining when and how missed work should be made up; and (iv) exempt employers from paying premium wages or benefits when work is performed outside normal schedules only as a religious accommodation.

The Legislature's Justification For Amendment

Recognizing that the New York State Court of Appeals has held that "no citizen should be required to choose between piety and gainful employment," *NYC Transit Authority v. Myers*, 89 N.Y.2d 79, 88 (1996), the New York State Legislature determined that the time was ripe to guarantee the same statutorily. Moreover, many of the protections afforded by the amendments are already granted to New York City residents pursuant to the New York City Human Rights Law; thus, the amendments to Executive Law § 296(10) simply extend the same protections to all citizens of New York State.

Clarifying The Scope Of An Employer's Duty To Accommodate

Section 296(10)(a) makes it an unlawful discriminatory practice for an employer, employee, or agent thereof to impose any term or condition of employment that would require employees or prospective employees to violate or forego a practice of their religion, unless an employer can demonstrate that it would suffer undue economic hardship. There are three significant amendments to this subsection.

Accommodating Religious Observances And Practices

The statute makes clear what was widely thought to be the case — employers must reasonably accommodate religious *observances* and *practices* whether inside or outside of the office, whereas prior to the amendments the statute only expressly mandated reasonable accommodation of an employee's religious observances. In other words, provided it is not an undue economic hardship, an employee must be allowed to, among other things, take time off from work for religious observance, or practice his or her religion in the workplace — for example, through his or her dress, hairstyle, beards, or prayer requirements.

In what may be the most significant change to the law, the Legislature has provided parameters to assist employers in determining what constitutes an undue economic hardship. Prior to the amendments, the statute left employers and employees uncertain about their rights and responsibilities because the statute failed to explain what would constitute an undue economic hardship. Section 296(10)(d) resolves some of this uncertainty by defining undue economic hardship as "an accommodation requiring *significant* difficulty or expense." (Emphasis added). In determining whether an accommodation is an undue economic hardship, an employer should, at a minimum, consider the following factors: (i) the identifiable cost of the accommodation; (ii) the number of individuals who will need the particular accommodation; and (iii) the expense or difficulty incurred by an employer with multiple facilities.

Regardless of the factors enumerated above, however, § 296(10)(d) further provides that 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. This is similar to the language that formerly appeared in § 296(10)(c). The statute, as it previously existed, made the requirement to reasonably accommodate inapplicable if the employee held a position where his or her presence was "regularly essential" on any given day, such as when the employee held positions dealing with health or safety. Although similar to the language that appeared in the statute earlier, the new amendment clarifies that the undue economic hardship defense applies to all employees, not just those holding positions that deal with health or safety.

As defined by the New York State Legislature, "undue economic hardship" is now in stark contrast to the standard under federal anti-discrimination law. Under federal law, an employer must merely demonstrate that a

religious accommodation would impose more than a "de minimis" cost. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977). While state statutory law now affirmatively requires a higher threshold for an employer to prove an undue economic hardship, it also permits an employer to demonstrate undue economic hardship by merely showing "significant difficulty." This will likely impact employers with multiple locations who will incur administrative difficulty in providing a religious accommodation, but not necessarily "significant expense."

Exemption From Paying Premium Wages And Benefits

A new exemption appears in the statute under § 296(10)(a) — "[n]otwithstanding any other provision of law to the contrary," employers are exempt from paying premium wages or benefits (defined by the statute under § 296(10)(d)) for work performed outside normal schedules if the work performed during such hours is only to accommodate religious requirements of an employee. For example, if an employee's scheduled work hours are Monday through Friday, but the employee requires Fridays off to observe the Sabbath, the employer may require the employee to work on Saturday or Sunday without paying premium wages or benefits to the employee even though Saturday is normally a premium wage or benefit day. Under such a scenario, an employer is not required to pay the employee premium wages or benefits.

However, this particular amendment may create unintended litigation. The Legislature's use of the phrase "notwithstanding any other provision of law," appears to imply that an employer need not pay overtime for an employee who works over forty hours in one week when the hours exceeding forty were worked solely because of a religious accommodation. Yet, the failure to pay overtime for time over forty hours in one week is in direct violation of the Fair Labor Standards Act. Clearly, New York State law cannot trump Federal law; thus, it remains to be seen how this issue will be ironed out. Practically, the scenario described may not occur all too often, but it is nevertheless conceivable.

Furthermore, by using the word "law" it appears that a collective bargaining agreement provision may still permissibly require an employer to pay premium wages or benefits for scenarios similar to that described above even though the law does not require an employer to do so. This appears to be consistent with the well established principles regarding freedom to contract. An employer may choose to pay premium wages or benefits in situations where it would be exempt under § 296(10)(a) in exchange for other gains when bargaining with a union.

Court Review Of An Employer's Decision

Section 296(10)(b)w, as it formerly existed, essentially allowed the employer's judgment to prevail in determining when an absence from work for religious accommodation would be made up. While the bulk of § 296(10)(b) remains unaltered — allowing employees to leave work for religious observance provided it is not an undue economic hardship — the new law repeals a clause that essentially permitted an employer's judgment to prevail in determining when an employee should make up lost time because of a religious observance or practice. In doing so, the Legislature has implicitly stated that it is necessary for the courts to review an employer's decision and that it will not allow subjective determinations to be carried through without independent review. It appears now that the courts will give a thorough review of the employer's decision on how an employee should make up absences due to religious accommodation.

Clarifying The Overall Scope Of The Law

To further clarify the scope of the law, the Legislature added § 296(10)(c), which makes it explicitly clear that an employer may not discriminate against an employee solely because leave will be used to accommodate the employee's religious observance or practice.

Conclusion

In passing the amendments to Executive Law §296(10), the Legislature has clarified an employer's obligation to reasonably accommodate religious observances and practices, whether inside or outside the workplace. With more definitive guidance of what constitutes an undue economic hardship and an exemption from paying premium wages and benefits, employers can now make more accurate decisions as to whether they are obligated to reasonably accommodate an employee's religious practice or observance. It remains uncertain, however, whether the amendments will actually reduce litigation because, as explained above, the amendments themselves may create unintended litigation.

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