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NYC Workplace Religious Freedom Act Clarifies When Employers Must Make Religious Accommodations

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On August 30, 2011, Mayor Michael Bloomberg signed legislation, called "The Workplace Religious Freedom Act" (the "Act"), clarifying the standard that almost all New York City employers must apply when evaluating an employee's request for a religious accommodation. The Act amends the New York City Human Rights Law, N.Y.C. Admin. Code §§ 8-102 and 8-107, and is effective immediately. Notably, the intent of the City law is to be more protective of employee rights for religious accommodation than presently exists under either Title VII of the Civil Rights Act of 1964 ("Title VII") or the New York State Human Rights Law.

The Act clarifies the standard that most employers in the City already have been required to apply when evaluating a request for a religious accommodation and, in most instances, will *not* change how employers evaluate those requests. City law already prohibits employers (and their employees and/or agents) from imposing any terms or conditions that would require an individual to violate or forego a practice of his or her religion as a condition of obtaining or retaining employment, and requires employers to reasonably accommodate the religious needs of the individual, *provided* the accommodation does not cause an "undue hardship in the conduct of the [employer's] business."

Prior to these new amendments, however, City law did not define undue hardship, although Admin. Code § 8-102(17) contained a nonexhaustive list of factors to be considered when evaluating whether an undue hardship was present, including:

- the nature and cost of the accommodation;
- the overall financial resources of the facility or the facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

- the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees, the number, type, and location of its facilities; and
- the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

The absence of a definition for undue hardship in the City law has, at times, resulted in employers and courts applying the "*de minimus* cost or burden" standard found in Title VII when interpreting the meaning of undue hardship under the City law. The Workplace Religious Freedom Act clarifies that the City law provides greater protections against religious discrimination than Title VII. With the passage of the Act, the City law now adopts the definition of "undue hardship" found in N.Y. Executive Law § 296(10)(d), stating that, with respect to religious accommodations, undue hardship "means an accommodation requiring significant expense or difficulty (including a significant interference with the safe or efficient operation of the workplace or a violation of a bona fide seniority system)." Like N.Y. Executive Law § 296(10)(d), the Act identifies a nonexhaustive list of factors that must be evaluated when determining whether an accommodation constitutes an "undue economic hardship." The factors include, but are not limited to:

> (i) the identifiable cost of the accommodation, including the costs of loss of productivity and of retaining or hiring employees or transferring employees from one facility to another, in relation to the size and operating cost of the employer;
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> (ii) the number of individuals with a sincerely held religious observance or practice who will need the particular accommodation; and
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> (iii) for an employer with multiple facilities, the degree to which the geographic separateness or administrative or fiscal relationship of the facilities will make the accommodation more difficult or expensive.

The Act also provides that employers in New York City can establish that a religious accommodation will result in an undue hardship by showing that it will result in the employee's inability to perform the essential functions of his or her position. The employer has the burden of establishing the undue hardship. Significantly, the text limits application of the "essential functions" language as it applies to attendance. Section 8-107(3) states:

> Without in any way limiting the foregoing, no person shall be required to remain at his or her place of employment during any day or days or portion thereof that, as a requirement of such person's religion, he or she observes as a Sabbath or other holy day, including a reasonable time prior and subsequent thereto for travel between his or her place of employment and his or her home; provided, however, that any such absence from work shall, wherever practicable in the judgment of the employer, be made up by an equivalent amount of time at some other mutually convenient time.

Although the language used to define undue hardship in the City law now tracks the language of the New York State Human Rights law, N.Y. Executive Law § 296(10)(d)), in its Report on the then-proposed Act, the City Council's Committee on Civil Rights noted an intent to provide greater protection against religious discrimination than is provided under the State law (N.Y.C. Council, Report of Committee on Civil Rights on Proposed Int. No. 632, Aug. 16, 2011). It remains to be seen, however, whether the Act will be applied to create a higher standard for employers to meet regarding a religious reasonable accommodation than applies under State law.

The remedies and penalties for engaging in unlawful religious discrimination are unchanged by the Act. The remedies for statutory violations may include reinstatement, back pay, compensatory and punitive damages and attorneys' fees. An employer violating the Act also may be subject to a civil penalty of $125,000 or, where the unlawful discrimination results from the employer's "willful, wanton or malicious act," up to $250,000.

Although the Workplace Religious Freedom Act does not apply outside of New York City, employers are reminded that Title VII and New York State law also require employers to accommodate an employee's religious beliefs and observances.

Steps Employers Can Take To Help Ensure Compliance

Employers covered by the Workplace Religious Freedom Act should consider the following action steps:

- Review their procedures and policies, particularly those that prohibit religious discrimination, govern requests for religious accommodation, and/or set requirements with respect to personal appearance, to ensure they are up-to-date and consistent with the standard under the new City law;
- Review job descriptions to ensure that the essential functions of each position are described accurately;
- Review the need to provide religious accommodations with Human Resources professionals and supervisors to ensure they know to engage in an individualized interactive process with employees who request religious accommodations and consider relevant factors, including those listed in the amended City law, before granting or denying a request. It may be best that supervisors refer such employee requests to a Human Resources professional who is familiar with the legal nuances involving reasonable accommodations;
- Be aware that a request for a religious accommodation, which might possibly have been denied in the past, may need to be revisited to ensure compliance with the City law.

Where uncertainty exists as to whether a religious accommodation poses an "undue hardship," seeking legal guidance is a good idea given the fact the burden remains with the employer and in light of the potential penalties under the law.

If you have any questions regarding this new law, please contact your Proskauer relationship attorney or any of the attorneys listed in this client alert.

Special thanks to Associate, Andrea Campbell, for her contributions to this client alert.

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