

# How To Avoid Employment Discrimination Claims

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# Federal Discrimination Laws

**Title VII of the Civil Rights Act of 1964** prohibits discrimination in the terms and conditions of employment based **on race, color, religion, sex or national origin**, and applies to most employers with more than 15 employees. **Sexual harassment** is a form of discrimination and is prohibited by Title VII.

The **Pregnancy Discrimination Act** amended Title VII to make it illegal to discriminate against a woman because of pregnancy, childbirth, or a medical condition related to pregnancy or childbirth.

**42 USC 1981** – Prohibits race discrimination

The **Equal Pay Act** prohibits employers and unions from paying different wages based on the employee's sex. It provides that if workers perform equal work in jobs requiring "equal skill, effort, and responsibility . . . performed under similar working conditions," the workers must receive equal pay. Covers virtually all employers.

# Federal Discrimination Laws

The **Age Discrimination in Employment Act** (ADEA) prohibits employers from discriminating on the basis of age and protects employees over the age of 40 from discrimination. The ADEA covers employers with 20 or more employees.

The law also prohibits neutral employment policies and practices that have disproportionately negative impact on applicants or employees age 40 or older if the policies or practices at issue are not based on a reasonable factor other than age.

The **Older Workers Benefit Protection Act** (OWBPA) prohibits employers from denying benefits to older employees, and sets forth specific criteria for the waiver of an ADEA claim.

# Federal Discrimination Law

The **Americans with Disabilities Act** (ADA) makes it illegal to discriminate against a qualified person with a disability in the private sector and in state and local governments.

The law requires that employers reasonably accommodate the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless doing so would impose an undue hardship on the operation of the employer's business.

The ADA covers employers with 15 or more employees.

Recently, the **ADA Amendments Act** (ADAAA) was enacted to clarify the definition of disability. The amendments make it easier for employees to establish that they meet the criteria for one of the statutory definitions of disability.

The **Rehabilitation Act** makes it illegal to discriminate against a qualified person with a disability in the federal government.

# Federal Discrimination Law

The **Genetic Information Nondiscrimination Act** prohibits the **use** of genetic information in employment, restricts employers from **requesting, requiring, or purchasing** genetic information, and strictly limits the **disclosure** of genetic information.

GINA covers employers with 15 or more employees

Genetic information includes information about an individual or family member's genetic tests and information about the manifestation of a disease or disorder in and individual's or family member's medical history.

# EEOC

Federal laws prohibiting discrimination are enforced by the Equal Employment Opportunity Commission (EEOC).

Generally, an individual must file a Charge of Discrimination with the EEOC before he/she can file a discrimination lawsuit in court (except for Equal Pay Act claims and claims under 42 USC 1981).

The EEOC charge needs to be filed within 180 days of the discrimination. In some cases, the deadline may be extended to 300 days.

The EEOC may request that the parties try to settle the dispute through mediation. If the case is not sent to mediation, or if mediation doesn't resolve the problem, the charge will be given to an investigator.

If an investigation finds no violation of the law, the employee will be given a Notice of Right to Sue, permitting the employee to bring a lawsuit in court.

If a violation is found, the EEOC will attempt to reach a voluntary settlement with the employer. If a settlement is not reached, the EEOC may file a lawsuit or issue the claimant a Notice of Right to Sue.

# New York Discrimination Laws

The **New York State Human Rights Law** prohibits discrimination on the basis of ***age (18 or older)***, race, ***creed***, color, ***criminal conviction***, national origin, ***sexual orientation***, ***military status***, sex, disability, predisposing genetic characteristics, ***marital status*** or ***domestic violence victim status***.

Applies to employers with 4 or more employees, and allows for unlimited compensatory damages, but not punitive damages or attorneys fees. The NYSDHR may also impose civil fines and penalties.

Also now protects domestic workers in the home.

# New York Discrimination Laws

The **New York City Human Rights Law** prohibits discrimination based on *perceived* age, race, *creed*, color national origin, gender, disability, *marital status, partnership status, sexual orientation, alienage or citizenship status, or actual or perceived status as a victim of domestic violence or as a victim of sex offenses or stalking*. The term “gender” includes *actual or perceived sex and also includes a person’s gender identity, self image, appearance, behavior or expression*.

The **NYC Civil Rights Restoration Act of 2005** restored the construction of the NYC Human Rights law to the original intent of the NYC Council and overruled cases that imposed more restrictive federal standards.

The NYCHRL Applies to employers with 4 or more employees, and allows for unlimited compensatory and punitive damages, as well as attorneys fees. The law also provides for employer’s strict liability for acts of supervisor, regardless of whether the employer was aware of the supervisor’s conduct.



# New York Discrimination Laws

**Disability** – The definition of disability under NYS and NYC law is significantly broader than under ADA.

**Religion** – NYS and NYC laws prohibit employers from requiring a person to forego a sincerely held practice of his/her religion, including the observance of holy days or the Sabbath. The laws require employers to provide a reasonable amount of time prior to and after the observance for travel between the place of employment and the employees home. The employer may require the employee to make up the time at a mutually convenient time and the employee may use his her her paid time off.

**Undue Hardship** - The standard of undue hardship under NY law is higher than under federal law, and requires employers to provide the accommodation even if it requires significant expense or difficulty.

# New York Discrimination Laws

The **New York State Correction Law** prohibits discrimination in employment based upon an applicant's previous conviction of one or more criminal offenses or lack of "good moral character" unless:

- (1) there is a direct relationship between one or more of the previous criminal offenses and the specific employment sought; or
- (2) the granting of the employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.

Factors an employer may consider concerning a previous criminal conviction:

1. The specific duties and responsibilities necessarily related to the employment sought;
2. The bearing, if any, the criminal offense will have on the person's fitness or ability to perform the position's duties;
3. The time which has elapsed since the offense;
4. The age of the person at the time of the offense;
5. The seriousness of the offense;
6. Any information produced regarding rehabilitation or good conduct; and
7. The legitimate interest of the employer in protecting property, safety and welfare.

# New York Discrimination Law

**Criminal Background Checks:** Employers must provide individual subject to criminal background checks with a copy of Article 23-A of the Corrections Law.

**Arrests:** Under NY Executive Law, employer' may not ask employees for information regarding an arrest without conviction, unless the charge is still pending. According to the NYSDHR, employers cannot ask applicants about arrests that did not result in convictions.

**Wage Assignments:** New York state law prohibits discrimination against employees and prospective employees based on wage garnishments or income execution.

**Equal Pay:** Employers may not differentiate in rates of pay solely because of sex where male and female workers are employed in the same establishment to do equal work on jobs requiring equal effort, skill and responsibility and which is performed under similar working conditions.

**New York State Whistleblower Law:** Employers are prohibited from taking any adverse employment action in retaliation against an employee who discloses or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer that violates a law, rule or regulation when that violation creates and presents a substantial and specific danger to he public health or safety. The employee must first bring the violation to the attention of a supervisor and allow the employer a reasonable opportunity to correct the violation. The employee must identify an actual violation, not just a good faith reasonable belief of a violation

# New York Discrimination Laws

**Off Duty Lawful Activities** – Under New York Labor Law, employers may not refuse to hire, discharge or discriminate because an individual:

1. Is engaged in lawful political activities outside of working hours, off of the employer's premises and without use of the employer's equipment or other property;
2. Uses lawful consumable products prior to the beginning of or after the conclusion of the employee's work hours, and off of the employer's premises and without use of the employer's equipment or property;
3. Engages in legal recreational activities outside work hours, off the employer's premises and without use of the employer's equipment or property; or
4. Is a member of a union.

# NYSDHR/NYCDHR

The New York State Division of Human Rights (NYSDHR) enforces the New York State Human Rights Law.

The New York City Commission on Human Rights (NYCCHR) enforces the New York City Human Rights Law

Election of remedy – Claimant elects whether to go to NYSDHR/NYCDHR *or* court.

Once a claim is filed with the NYSDHR, the employer must provide a positions statement. Once a claim is filed with the NYCCHR, the employer must provide an answer. Following investigation and/or mediation, a determination is issued

Determination:

- Probable cause determination goes to hearing or settlement
- No probable cause
- Determinations can be appealed to state court

# Theories of Discrimination

## Theories of Discrimination

### 1. Disparate Treatment

- Intentional discrimination
- Mixed motive discrimination
- Harassment
  - Quid Pro Quo
  - Hostile work environment
- Pattern or practice of discrimination (class actions)

### 2. Disparate impact

### 3. Retaliation

# Job Advertisements and Recruitment

Do NOT publish job advertisements that show a preference for or discourages someone from applying for a job because of his or her race, color, national origin, sex, pregnancy, age, religion, genetic information, disability or other protected category under City and State law.

Example: Help wanted ad seeking “females” or “recent college graduates” could discourage men and people over 40 from applying.

A job notice or advertisement may specify an age limit only in the rare circumstances where age is shown to be a “bona fide occupational qualification” (BFOQ) reasonably necessary to the normal operation of the business. Note: Race can never be a BFOQ.

Do NOT recruit new employees in a way that discriminates against them because of their race color, national origin, sex, pregnancy, age, religion, disability or other protected category under City and State law.

Example: Relying on word-of-mouth recruitment by an employer’s mostly Hispanic workforce may violate the law if most new hires are Hispanic.

# Application and Hiring

It is illegal for an employer to discriminate against a job applicant because of his or her race, color, national origin, sex, pregnancy, age, religion, genetic information, disability or other protected category under City and State law.

Example: An employer may not refuse to give employment applications to people of a certain race.

Example: An employer may not base hiring decisions on stereotypes and assumptions about a person's race, color, national origin, sex, pregnancy, age, religion, genetic information or disability.

Example: Employers should not ask an applicant's age as part of the interview process.



# Application and Hiring

**Disability:** An employer may ask job applicants whether they can perform the job and how they would perform the job, with or without a reasonable accommodation. After a job is offered to an applicant, the law allows an employer to condition the job offer on the applicant answering certain medical questions or successfully passing a medical exam, but only if all new employees in the same type of job have to answer the questions or take the exam.

**Example:** An employer may not ask a job applicant to answer medical questions or take a medical exam before extending a job offer.

**Example:** An employer also may not ask job applicants if they have a disability (or about the nature of an obvious disability).

**Example:** If a job applicant with a disability needs an accommodation (such as a sign language interpreter) to apply for a job, the employer is required to provide the accommodation, so long as the accommodation does not cause the employer significant difficulty or expense.

# Pre-Employment Inquiries

Information obtained and requested through the pre-employment application and interview process should be limited to what is essential for determining if a person is qualified for the job.

Information regarding race, sex, national origin, age, religion and other protected categories under City and State law should be irrelevant.

Pre-employment inquiries that relate to, or disproportionately screen out individuals based on race, color, sex, national origin, religion, age or other protected category under City and State law may be used as evidence of an employer's intent to discriminate unless the question asked can be justified by some business purpose.

# Pre-Employment Inquiries

Inquires about organizations, clubs, societies and lodges of which an applicant may be a member or any other questions which may indicate the applicant's race, color, national origin, sex, pregnancy, age, religion, genetic information, disability or other protected category under City and State law should be avoided.

Employers should not ask for a photograph of an applicant. If needed, a photograph may be obtained after an offer of employment is made and accepted.

# Job Assignments and Promotions

Employers may NOT make decisions about job assignments and promotions based on an employee's race, color, national origin, sex, pregnancy, age, religion, genetic information, disability or other protected category under City and State law.

Example: An employer may not give preference to employees of a certain race when making shift assignments.

Example: An employer may not segregate employees of a particular national origin from other employees or from customers.

# Job Assignments and Promotions

An employer may not base assignments and promotion decisions on *stereotypes and assumptions* about a person's an employee's race, color, national origin, sex, pregnancy, age, religion, genetic information or disability.

Example: If an employer requires employees to take a test before making decisions about assignments or promotions, the test may not exclude people of a particular protected class, unless the employer can show that the test is necessary and related to the job.

Example: An employer may not use a test that excludes employees age 40 or older if the test is not based on a reasonable factor other than age.

# Pay and Benefits

An employer may NOT discriminate against an employee in the payment of wages or employee benefits based on the employee's race, color, national origin, sex, pregnancy, age, religion, genetic information, disability or other protected category under City and State law.

Employee benefits include sick and vacation leave, insurance, access to overtime, overtime pay and retirement plans.

Example: An employer may not pay Hispanic workers less than African-American workers because of their national origin.

Example: Men and women in the same workplace must be given equal pay for equal work.

Note: In some situations, an employer may be allowed to reduce some employee benefits for older workers, but only if the cost of providing the reduced benefits is the same as the cost of providing benefits to younger workers.

# Discipline and Discharge

Employers may NOT take into account a person's race, color, national origin, sex, pregnancy, religion, age, genetic information, disability or other protected category under City and State law when making decisions about discipline or discharge.

Employers also may not discriminate when deciding which workers to recall after layoff.

Example: If two employees commit a similar offense, an employer may not discipline them differently because of their race, color, national origin, sex, pregnancy, religion, age, genetic information, disability or or other protected category under City and State law.

Example: When deciding which employee will be laid off, an employer may not choose the oldest worker because of their age.

# Reasonable Accommodation and Disability

Employers **MUST** provide reasonable accommodation to an employee or job applicant with a disability, unless doing so would cause significant difficulty or expense for the employer.

A reasonable accommodation is any change in the workplace or in the ways things are usually done in the workplace to help a person with a disability apply for a job, perform the duties of a job, or enjoy the benefits and privileges of employment.

Note that New York law construes the prohibition against disability discrimination much more liberally than federal law.



# Reasonable Accommodation and Disability

Example: Examples of reasonable accommodations for a disability might include:

- providing a ramp for a wheelchair user;
- providing a reader or interpreter for a blind or deaf employee or applicant;
- Providing regularly scheduled breaks during the workday to an individual with diabetes to eat properly and monitor blood sugar and insulin levels;
- Providing leave to an employee with cancer to have radiation or chemotherapy treatments.

An employer generally can only ask medical questions or require a medical exam if the employer needs medical documentation to support an employee's request for an accommodation or if the employer believes that an employee is not able to perform a job successfully or safely because of a medical condition.

# Reasonable Accommodation and Religion

Employers are required to reasonably accommodate an employee's religious beliefs or practices, unless doing so would cause difficulty or expense for the employer.

This means an employer may have to make reasonable adjustments at work that will allow the employee to practice his or her religion.

Example: Allowing an employee to voluntarily swap shifts with a co-worker so that he or she can attend religious services.

Note that New York law has specific provisions relating to time-off for religious observance.

# Harassment

It is illegal to harass an employee because of race, color, sex, pregnancy, national origin, age, religion, genetic information, disability or other protected category under City and State law.

Examples: Harassment can take the form of slurs, graffiti, offensive or derogatory comments, or other verbal or physical conduct.

Harassment outside the workplace may also be illegal if there is a link with the workplace.

Example: If a supervisor harasses an employee while driving the employee to a meeting.

The harasser can be the victim's supervisor, a supervisor in another area, a co-worker, or someone who is not an employee of the employer, such as a client or customer.

# Harassment

Unlawful **sexual harassment** includes unwelcome sexual advances, requests for sexual favors and other conduct of a sexual nature.

Simple teasing, offhand comments or isolated incidents that are not very serious are not prohibited per se. HOWEVER, if it is so frequent or severe that it creates a hostile or offensive work environment or if it results in adverse employment decisions (e.g. victim being fired or demoted), then it may be illegal sexual harassment.

Note that under NYC law, the claimant need not prove that the harassment is severe or pervasive in order to bring an action (only impacts damages).

It is also illegal to harass someone because they have complained about discrimination filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit.

# Dress Code

Dress codes at the workplace are generally permitted. However, a dress code should not treat some employees less favorably because of their national origin.

Example: A dress code that prohibits certain kinds of ethnic dress, such as traditional African or East Indian attire, but otherwise permits casual dress, would treat some employees less favorably because of their national origin.

# Dress Code

An employer may require all workers to follow a uniform dress code. However, if the dress code conflicts with an employee's religious practices and the employee requests an accommodation, the employer would have to modify the dress code unless doing so would result in undue hardship.

Example: Wearing particular head coverings or other religious dress (such as a Jewish yarmulke or a Muslim headscarf).

Example: Wearing certain hairstyles or facial hair (such as Rastafarian dreadlocks or Sikh uncut hair and beard).

Example: An employee's observance of a religious prohibition against wearing certain garments (such as pants or miniskirts).

# Other Considerations

**Constructive Discharge:** Discriminatory practices also include “constructive discharge” or forcing an employee to resign by making the work environment so intolerable a reasonable person would not be able to stay.

**Employment References:** It is illegal for an employer to give a negative or false employment reference (or refuse to give a reference) because of a person’s race, color, national origin, sex, pregnancy, religion, age, genetic information, disability or other protected category under City and State law.

**Training and Apprenticeship Programs:** Employers may not discriminate in providing training or apprenticeship programs on the basis of race, color, national origin, sex, pregnancy, age, religion, genetic information, disability or other protected category under City and State law.

Example: An employer may not deny training opportunities to African-American employees because of their race.

# Retaliation

Beware – Retaliation claims are very common and do not require that the underlying discrimination claim be proved.

## **Elements of Retaliation under Federal Law**

1. Protected activity
2. Adverse employment action
3. Causal connection

Protected activity includes:

1. Opposition to a practice believed to be unlawful discrimination, i.e., informing an employer about prohibited discrimination

Examples: Complaining to anyone about alleged discrimination against oneself or others; threatening to file a charge of discrimination; picketing in opposition to discrimination; or refusing to obey an order reasonably believed to be discriminatory.

Examples of activities that are NOT protected opposition include: actions that interfere with job performance so as to render the employee ineffective; or unlawful activities such as acts or threats of violence.

2. Participation in an employment discrimination proceeding.

Examples: filing a charge of employment discrimination; cooperating with an internal investigation of alleged discriminatory practices; or serving as a witness in an EEO investigation or litigation.

3. A protected activity can also include requesting a reasonable accommodation based on religion or disability.



# Retaliation

Examples of adverse actions:

- employment actions such as termination, refusal to hire, and denial of promotion,
- other actions affecting employment such as threats, unjustified negative evaluations, unjustified negative references, or increased surveillance, and
- any other action such as an assault or unfounded civil or criminal charges that are likely to deter reasonable people from pursuing their rights.

Adverse actions do not include petty slights and annoyances, such as stray negative comments in an otherwise positive or neutral evaluation, "snubbing" a colleague, or negative comments that are justified by an employee's poor work performance or history.

The ADA also protects individuals from coercion, intimidation, threat, harassment, or interference in their exercise of their own rights or their encouragement of someone else's exercise of rights granted by the ADA.

Under NYCHRL, claimants are not required to show that retaliation resulted in an ultimate action with respect to employment or a materially adverse change in terms and conditions of employment. The retaliation must only be reasonably likely to deter a person from engaging in protected activity.