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NYC Law Targets Appearance Bias, But Litigation Could Be Spotty

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Willkie's Andrew Spital, Jill K. Grant, and Kenneth Sommer provide compliance tips for New York City's new law barring discrimination on the basis of an individual's height or weight and suggest that litigation could be difficult.

In an effort to combat appearance bias, New York City Mayor Eric Adams recently signed into law a bill that prohibits discrimination on the basis of an individual's actual or perceived height or weight in employment, housing, and public accommodations.

In a nutshell, the law makes height and weight protected characteristics under the city's antidiscrimination laws. This means that, like race, gender, age and other protected characteristics, employers generally can't consider height or weight when making employment decisions, and harassment based on an employee's height or weight is unlawful. The law takes effect Nov. 22, 2023.

The law has a few exceptions. First, it exempts employment decisions where law or regulation requires consideration of height or weight.

Second, the law empowers the New York City Commission on Human Rights to issue regulations exempting jobs or categories of jobs that meet certain criteria, although it does not set a deadline for the commission to adopt regulations.

Third, the law provides that an employer won't be liable for decisions based on height or weight if it can show either that height or weight may prevent someone from performing the essential requirements of a job and no alternative is available or that height or weight criteria is reasonably necessary for normal business operations.

Finally, the law states that it does not prevent employers from offering weight management incentives in connection with voluntary wellness programs.

Employers' Compliance Preparation

All employers with any employees working in New York City should update their policies to prohibit discrimination and harassment based on height or weight. Employers should also educate managers and HR on the new law to ensure that height and weight aren't being factored into employment decisions. It would also be prudent to inform all employees that negative or insensitive comments about height or weight in the workplace could lead to liability and won't be tolerated.

Whether any steps beyond these are necessary will depend on the particular employer or industry. For example, employers that have implied or express height or weight requirements for particular jobs will need to consult with counsel to determine if such requirements are legal.

And employers in industries such as fashion, retail, and the performing arts—which were alleged to be rife with appearance discrimination in the public hearing on this bill—should prepare to have their hiring practices and cultures scrutinized.

Employers in these industries can enhance compliance by administering trainings on respectful workplaces, adopting robust hiring criteria and guidelines, and improving documentation of hiring and other employment decisions.

Varied Impact on Workplace Culture

Many employers already don't tolerate teasing or inappropriate jokes based on someone's weight or height, regardless of whether such behavior is unlawful. For these employers, this law may have little or no impact on their culture, although it certainly makes it all that much more imperative that employers take complaints about negative comments regarding weight or height just as seriously as they would any other protected characteristic.

On the other hand, in workplaces where there is more tolerance for impish behavior, this bill could have a substantial impact on culture, as employers will face an increased risk of harassment claims if they do not foster a more professional environment.

An Emerging Trend

By banning discrimination based on height and weight, New York City joins a growing list of jurisdictions that prohibit appearance discrimination in some form or another, including Michigan; Washington D.C.; San Francisco; Santa Cruz, Calif.; Madison, Wis.; Binghamton, N.Y.; and Urbana, Ill.

Furthermore, at least four states—New York, New Jersey, Massachusetts, and Vermont—all have legislation pending that would prohibit height and weight discrimination.

While employers should expect to see more of this type of legislation in the future, it is unclear the extent to which these new laws will usher in a wave of employment litigation.

In Michigan, for example, where height and weight discrimination has been prohibited for more than 40

years, there are relatively few cases where a plaintiff alleges such discrimination at all. And in cases where such discrimination is alleged, it is often in conjunction with allegations of mistreatment based on other protected classes. Similarly, between Oct. 1, 2021, and October 2022, the Michigan Department of Civil Rights received 6,357 complaints of discrimination, just 29 of which are categorized as weight discrimination and just eight of which are categorized as height discrimination.

That said, New York City may well see more litigation under this new law relative to Michigan based on their different industry profiles, among other factors.

Litigation Challenges

Perhaps one reason for the relatively modest amount of litigation over height and weight discrimination thus far is that these types of laws present novel and challenging issues for both sides in litigation.

For instance, typically, neither side will readily have access to key comparator evidence—the heights and weights of other candidates or employees. Furthermore, it is unclear how large of a height or weight discrepancy would be sufficient to support a claim. Relatedly, unlike many other protected characteristics, height and weight can be both relative and subjective, which may make it difficult to develop a compelling theory of discrimination.

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