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ACT NOW ADVISORY

New York City Raises the Bar for Employers to Show 'Undue Hardship' in Addressing Employees' Religious Accommodation Requests

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By Susan Gross Sholinsky, Dean L. Silverberg, Steven M. Swirsky, and Jennifer A. Goldman

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New York City employers take note: under the New York City Human Rights Law ("NYCHRL"), it is now considerably more difficult for employers to establish "undue hardship" in the context of denying an employee's request for a reasonable accommodation due to his or her religious observance or practice. While previously silent on the issue, the NYCHRL now includes a definition of the term "undue hardship," as follows: "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)." This language mirrors the definition currently included in the New York State Human Rights Law ("NYSHRL"), and along with other changes described below, was included in Local Law 54, 2011 (entitled the Workplace Religious Freedom Act) (the "Act"). The Act was unanimously passed by the New York City Council and became effective when signed by Mayor Michael Bloomberg on August 30, 2011.

The Act should not be a big surprise to employers, as the NYCHRL is one of the more employee-friendly human rights laws in the country. As many employers know, pursuant to federal, State and City law, they must "reasonably" accommodate an employee's sincerely held religious observance or practice, provided that such accommodation does not cause "undue hardship" in the conduct of the employer's business. When an employer denies an employee's request for a reasonable accommodation for religious observance or practice because it would pose an undue hardship on the company, the burden is on the employer to demonstrate that such accommodation would, indeed, cause undue hardship.

As noted above, before the Act went into effect, the NYCHRL did not define the term "undue hardship," even though the term appeared in the statute itself. As a result, courts often relied on the definition of "undue hardship" found in the federal employment anti-discrimination law, Title VII of the Civil Rights Act of 1964 ("Title VII"). Under Title VII, a religious accommodation that poses an undue hardship for the employer is one that merely creates more than a "*de minimis* cost or burden" on the business – clearly a much lower threshold.

In order to provide greater protections to employees, the Act adopted the more stringent definition of "undue hardship" currently included in the NYSHRL. Also, while the NYCHRL previously included a non-exhaustive list of factors which may be considered when

evaluating whether a particular accommodation would pose an undue hardship in general (*i.e.*, with respect to requests for both religious and disability-based accommodations), the NYCHRL now includes factors (also borrowed from the NYSHRL) to weigh specifically in connection with requests for religious accommodation, including:

(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;

(ii) The number of individuals who will need the particular accommodation to a sincerely held religious observance or practice;

(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.

These three factors incorporate several of the considerations previously included in the NYCHRL as factors to contemplate in making a reasonable accommodation, but the second factor in particular – which requires an employer to consider how many employees may need the specific accommodation requested – is one that is especially relevant to requests for religious accommodation, in contrast to requests for accommodation based on an individual employee's particular disability.

Further, and importantly, like the NYSHRL, the NYCHRL also now expressly provides that an accommodation for religious observance or practice will, indeed, be considered an undue hardship if it will result in the employee's inability to perform the essential functions of the job.

Moreover, unionized employers should note that several New York federal and state courts, as well as the U.S. Supreme Court, have ruled that the terms of a collective bargaining agreement ("CBA") need not be violated in granting reasonable accommodation requests of unionized employees. For example, courts have held that employers need not provide more favorable schedules to religiously observant employees if the terms of the CBA provide that all employees must work every other weekend (including Friday nights, Saturdays, and Sundays). Employers must, however, consider other ways to accommodate employees in these situations, such as by allowing, and even facilitating, shift swapping, or offering to transfer employees to other positions where modified schedules would not be as problematic.

On balance, however, the adoption of the State standard is likely to lead to more NYCHRL religious discrimination claims, especially because punitive damages are uncapped under the NYCHRL, as compared to the NYSHRL, where punitive damages are simply unavailable in employment cases. As such, employers in New York City should assume that religious accommodation claims will now be brought under the NYCHRL.

What Employers Should Do Now

In light of the NYCHRL's more stringent definition of undue hardship, New York City employers should:

- Carefully scrutinize, using the new definition and factors set forth above, any decision not to provide a religious accommodation because such accommodation would pose an undue hardship to the company;
- Review (and update if necessary) any employee handbooks, policies or procedures pertaining to religious accommodation;
- Train Human Resources professionals or other company officials who engage in the interactive process;
- Review any applicable CBA to determine whether a requested accommodation would violate its terms; and
- Contact legal counsel if unsure how to apply the new definition or factors.

For more information about this Advisory, please contact:

Susan Gross Sholinsky
New York
212-351-4789
sgross@ebglaw.com

Dean L. Silverberg
New York
212-351-4246
dsilverberg@ebglaw.com

Steven M. Swirsky
New York
212-351-4640
sswirsky@ebglaw.com

Jennifer A. Goldman
New York
212-351-4554
jgoldman@ebglaw.com

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