

# NYC Commission on Human Rights

## Legal Enforcement Guidance on Employment Discrimination on the Basis of Age

### I. Introduction

Age discrimination in the workplace is an undeniable reality. Stereotypes about age, whether about being “too old” or “too young,” permeate employment spaces. It is particularly insidious because much of age discrimination stems from biases entrenched in and perpetuated through media, caricatures, paternalistic assumptions, and more. Compounding the problem, “[h]istorically, Congress, the courts, and society have viewed age discrimination as less malevolent than race, gender, and other forms of discrimination. Workplace age issues are perceived more as economic issues and not as fundamental civil rights issues.”<sup>1</sup> Age discrimination is often more acute for certain populations of workers because of intersecting discrimination related to their race,<sup>2</sup> gender (including gender identity),<sup>3</sup> immigration status,<sup>4</sup> and other protected categories.

Older workers are particularly at risk of being pushed out of long-term positions.<sup>5</sup> They report that treatment at the workplace begins to deteriorate around age fifty, often contributing to decisions to retire earlier than planned.<sup>6</sup> Additionally, older workers are more likely to be laid off, and once out of a job, studies show that this same age group is much more likely to remain unemployed or under-employed than younger workers.<sup>7</sup> The COVID-19 pandemic is also likely to exacerbate existing obstacles for older workers, increasing their vulnerability to layoffs and creating additional barriers to

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<sup>1</sup> Laurie A. McCann, *When Will the ADEA Become a “Real” Civil Rights Statute?* 33 A.B.A. J. OF LAB. & EMP. L. 89, 95 (2018).

<sup>2</sup> Nicole Delaney & Joanna N. Lahey, *The ADEA at the Intersection of Age and Race*, 40 BERKELEY J. EMP. & LAB. L. 61, 62 (2019).

<sup>3</sup> See Shaleen Morales Saldarriaga, *Flaming Fifties and Beyond: An International Comparison of Age Discrimination Laws and How the United States Could Improve the Laws for Elderly Women*, 25 ELDER L.J. 101, 102–03 (2017); see also Joanne Song McLaughlin, *Limited Legal Recourse for Older Women’s Intersectional Discrimination Under the Age Discrimination in Employment Act*, 26 ELDER L.J. 287, 288–92 (2019).

<sup>4</sup> See Angely Mercado, *Dynamics of Race, Poverty Deepen the Challenges of NYC’s Aging Population*, CITY LIMITS (Apr. 26, 2019), <https://citylimits.org/2019/04/26/dynamics-of-race-poverty-deepen-the-challenges-of-nycs-aging-population-brings/>.

<sup>5</sup> Peter Gosselin, *If You’re Over 50, Chances Are the Decision to Leave a Job Won’t be Yours*, PRO PUBLICA (Dec. 28, 2018, 5:00 AM), <https://www.propublica.org/article/older-workers-united-states-pushed-out-of-work-forced-retirement>.

<sup>6</sup> See *id.*

<sup>7</sup> See Patricia Cohen, *New Evidence of Age Bias in Hiring, and a Push to Fight It*, N.Y. TIMES, June 7, 2019, <https://www.nytimes.com/2019/06/07/business/economy/age-discrimination-jobs-hiring.html>; see also Kenneth Terell, *Age Discrimination Goes Online*, AARP (Nov. 7, 2017), <https://www.aarp.org/work/working-at-50-plus/info-2017/age-discrimination-online-fd.html> (one study found that older applicants for jobs, who demonstrated the same skill set as younger employees, received significantly fewer callbacks than younger employees).

finding employment.<sup>8</sup> As of April 2020, unemployment rates for workers fifty-five and older jumped from 3.3% to 13.6%.<sup>9</sup>

Age discrimination also impacts younger workers. One survey found that employers can be reluctant to hire people under thirty because they perceive younger workers to be “unpredictable” and believe “they don’t know how to work.”<sup>10</sup> Further, during times of financial instability, for example, during the COVID-19 pandemic, younger workers have been particularly vulnerable to layoffs;<sup>11</sup> specifically, 48% of young adult workers between ages sixteen and twenty-four were employed in heavily-impacted industries, such as restaurants, coffee shops, and gyms, as compared to 24% of workers overall.<sup>12</sup>

Since 1977, the New York City Human Rights Law (“NYCHRL”) has included protections against age discrimination for all workers,<sup>13</sup> regardless of one’s age, unlike federal law that only protects older workers who are at least the age of forty.<sup>14</sup> The NYCHRL prohibits discrimination on the basis of actual or perceived age by most employers,<sup>15</sup> housing providers,<sup>16</sup> and providers of public accommodations in New York

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<sup>8</sup> See Aida Farmand & Teresa Ghilarducci, *Older Workers Are Underrepresented in “Safe” Jobs in the COVID-19 Recession*, AMERICAN SOCIETY ON AGING, <https://www.asaging.org/blog/older-workers-are-underrepresented-safe-jobs-covid-19-recession> (last accessed June 23, 2020).

<sup>9</sup> *Employment Data Digest, April 2020*, AARP PUB. POL’Y INST. 1 (May 8, 2020), <https://www.aarp.org/content/dam/aarp/ppi/2020/05/april-data-digest.pdf>.

<sup>10</sup> Caroline Beaton, *Too Young To Lead? When Youth Works Against You*, FORBES, (Nov. 11, 2016), <https://www.forbes.com/sites/carolinebeaton/2016/11/11/too-young-to-lead-when-youth-works-against-you/#71d78fad3c2a> (citing Scott Wooldridge, *Millennials: The New Victims of Age Discrimination?*, BENEFITSPRO (Sept. 30, 2015; 8:17 AM), <http://www.benefitspro.com/2015/09/30/millennials-the-new-victims-of-age-discrimination>).

<sup>11</sup> Taylor Nicole Rogers, *Gen Z Is Going to Get Slammed Even Worse than Boomers by Coronavirus Layoffs*, BUSINESS INSIDER (Mar. 26, 2020), <https://www.businessinsider.com/harris-poll-gen-z-more-likely-laid-off-over-coronavirus-2020-3>.

<sup>12</sup> Rakesh Kochhar, *Hispanic Women, Immigrants, Young Adults, Those with Less Education Hit Hardest by COVID-19 Job Losses*, PEW RESEARCH CENTER (June 9, 2020), <https://www.pewresearch.org/fact-tank/2020/06/09/hispanic-women-immigrants-young-adults-those-with-less-education-hit-hardest-by-covid-19-job-losses/>.

<sup>13</sup> See Marta B. Varela, *The First Forty Years of the Commission on Human Rights*, 23 FORDHAM URB. L. J. 983, 987 (1996); N.Y.C. Admin. Code § 8-107(1).

<sup>14</sup> 29 U.S.C.A. § 631(a).

<sup>15</sup> In the employment context, the NYCHRL covers entities including employers, labor organizations, or employment agencies, or any employee or agent thereof. N.Y.C. Admin. Code § 8-107(1). Under the NYCHRL:

[T]he term “employer” does not include any employer that has fewer than four persons in the employ of such employer at all times during the period beginning twelve months before the start of an unlawful discriminatory practice and continuing through the end of such unlawful discriminatory practice . . . [N]atural persons working as independent contractors in furtherance of an employer’s business enterprise shall be counted as persons in the employ of such employer . . .

N.Y.C. Admin. Code § 8-102.

<sup>16</sup> The NYCHRL prohibits unlawful discriminatory practices in housing, and covers entities including the “owner, lessor, lessee, sublessee, assignee, or managing agent of, or other person having the right to sell, rent or lease or approve the sale, rental or lease of a housing accommodation, constructed or to be constructed, or an interest therein, or any agent or employee thereof.” N.Y.C. Admin. Code § 8-107(5).

City.<sup>17</sup> The NYCHRL also prohibits discriminatory harassment<sup>18</sup> and bias-based profiling by law enforcement because of actual or perceived age.<sup>19</sup> Pursuant to Local Law No. 85 (2005), the NYCHRL must be construed “independently from similar or identical provisions of New York state or federal statutes,” such that “similarly worded provisions of federal and state civil rights laws [are] a floor below which the [NYCHRL] cannot fall, rather than a ceiling above which the local law cannot rise.”<sup>20</sup> Any exemptions to the NYCHRL must be construed “narrowly in order to maximize deterrence of discriminatory conduct.”<sup>21</sup>

The New York City Commission on Human Rights (the “Commission”) is the City agency charged with enforcing the NYCHRL. Individuals interested in pursuing their rights under the NYCHRL can choose to either file a complaint with the Commission’s Law Enforcement Bureau within one (1) year of the alleged discriminatory act and within three (3) years for claims of gender-based harassment,<sup>22</sup> or to file a complaint in state or federal court within three (3) years of the alleged discriminatory act.<sup>23</sup> The protections of the NYCHRL related to employment apply to all employees, freelancers, independent contractors, and interns (whether paid or unpaid).<sup>24</sup>

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Covered entities also include real estate brokers, real estate salespersons, or employees or agents thereof. *Id.* The NYCHRL defines the term “housing accommodation” to include “any building, structure or portion thereof that is used or occupied or is intended, arranged or designed to be used or occupied, as the home, residence or sleeping place of one or more human beings. Except as otherwise specifically provided, such term includes a publicly-assisted housing accommodation.” N.Y.C. Admin. Code § 8-102. However, the NYCHRL exempts from coverage:

- (1) [ ] the rental of a housing accommodation, other than a publicly-assisted housing accommodation, in a building which contains housing accommodations for not more than two families living independently of each other, if the owner [or] members of the owner’s family reside in one of such housing accommodations, and if the available housing accommodation has not been publicly advertised, listed, or otherwise offered to the general public; or
- (2) [ ] the rental of a room or rooms in a housing accommodation, other than a publicly-assisted housing accommodation, if such rental is by the occupant of the housing accommodation or by the owner of the housing accommodation and the owner or members of the owner’s family reside in such housing accommodation.

N.Y.C. Admin. Code § 8-107(5)(a)(4).

<sup>17</sup> The NYCHRL prohibits unlawful discriminatory practices in public accommodations and covers entities including any person who is the owner, franchisor, franchisee, lessor, lessee, proprietor, manager, superintendent, agent or employee of any place or provider of public accommodation. N.Y.C. Admin. Code § 8-107(4).

<sup>18</sup> N.Y.C. Admin. Code §§ 8-602–603.

<sup>19</sup> *Id.* § 14-151.

<sup>20</sup> Local Law No. 85 § 1 (2005); N.Y.C. Admin. Code § 8-130(a) (“The provisions of this title shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York state civil and human rights laws, including those laws with provisions worded comparably to provisions of this title, have been so construed.”).

<sup>21</sup> Local Law No. 35 § 2 (2016); N.Y.C. Admin. Code § 8-130(b).

<sup>22</sup> N.Y.C. Admin. Code § 8-109(e).

<sup>23</sup> *Id.* § 8-402.

<sup>24</sup> *Id.* § 8-107(23).

This document serves as the Commission’s legal enforcement guidance on the NYCHRL’s protections against employment discrimination based on actual or perceived age. The NYCHRL is uniquely broad and reflective of New York City’s commitment to eliminate all forms of discrimination,<sup>25</sup> offering more protections against age discrimination in the workplace than its state or federal analogues. For instance, the federal Age Discrimination in Employment Act (“ADEA”) has a minimum age requirement of forty to file a claim,<sup>26</sup> permits preferential treatment for older workers in certain circumstances,<sup>27</sup> and does not permit mixed-motive claims.<sup>28</sup> By contrast, the NYCHRL imposes no age restriction and permits mixed-motive claims.<sup>29</sup> For an in-depth, side-by-side comparison of the NYCHRL and the ADEA, as well as New York State law, please see the Appendix at the end of this document.<sup>30</sup> This document is not intended to serve as an exhaustive description of all forms of age-related claims of employment discrimination under the NYCHRL.

## II. Prohibitions on Age Discrimination in Employment Under the NYCHRL

Age discrimination in employment can manifest as disparate treatment, disparate impact, and/or retaliation. An individual may present a claim of disparate treatment if they are subject to discrimination “in compensation or in terms, conditions or privileges of employment” because of their actual or perceived age.<sup>31</sup> To establish disparate treatment, an individual must show that they were treated less well or subjected to an adverse action motivated, at least in part, by discriminatory animus.<sup>32</sup> An individual may demonstrate this through direct evidence of discrimination or indirect evidence that gives rise to an inference of discrimination.<sup>33</sup>

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<sup>25</sup> See *Williams v. N.Y.C. Hous. Auth.*, 61 A.D.3d 62, 66–68 (1st Dep’t 2009).

<sup>26</sup> 29 U.S.C.A. § 631(a).

<sup>27</sup> *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004) (finding the ADEA does not prevent “an employer from favoring an older employee over a younger one”). By comparison, because the NYCHRL protects workers of all ages from age discrimination, it generally does not permit favoring an older employer over a younger one.

<sup>28</sup> While courts have found that “mixed-motive” claims are not viable for most claims under the ADEA, and that ADEA plaintiffs must show that age was the “but-for cause” of the challenged adverse employment action to prevail on their age discrimination claim, *Gross v. FBL Fin. Servs. Inc.*, 557 U.S. 167, 176–77 (2009), the standard for liability under the NYCHRL is whether age discrimination played any role, in whole or in part, in the employer’s motivation, *Melman v. Montefiore Med. Ctr.*, 98 A.D.3d 107, 128 (1st Dep’t 2012).

<sup>29</sup> See *Williams*, 61 A.D.3d at 78, n.27 (for mixed-motive claims, “the question on summary judgment is whether there exist triable issues of fact that discrimination was one of the motivating factors for the defendant’s conduct. Under Administrative Code § 8-101, discrimination shall play no role in decisions relating to employment, housing or public accommodations.”).

<sup>30</sup> While this document focuses on the NYCHRL, the Commission cites to federal authority where instructive and for reasons of comparison. This document does not constitute legal enforcement guidance of federal law.

<sup>31</sup> N.Y.C. Admin. Code § 8-107(1)(a)(3).

<sup>32</sup> See *Williams*, 61 A.D.3d at 78.

<sup>33</sup> Examples of direct evidence could include explicit statements by a covered entity that an adverse action was based on a protected status, or explicitly discriminatory policies. See *In re Comm’n on Human Rights ex rel. Stamm v. E&E Bagels*, OATH Index No. 803/14, Comm’n Dec. & Order, 2016 WL 1644879, at \*4 (Apr. 21, 2016). If plaintiff makes a prima facie showing of discrimination based on indirect evidence,

It is unlawful for an employer to have a neutral policy that has a disparate impact on older workers, job applicants, or potential job applicants.<sup>34</sup> To show that a policy has a disparate impact, an individual must demonstrate that an employer covered by the NYCHRL has “a policy or practice . . . or a group of policies or practices . . . [that] result[] in a disparate impact to the detriment of” individuals based on age.<sup>35</sup> An employer has an affirmative defense if the “policy or practice bears a significant relationship to a significant business objective[;]” however, if the complainant can show that other practices would serve the business objective as well, the defense will fail.<sup>36</sup>

Stereotypes and assumptions about age are at the root of most discriminatory practices outlined below. One such pervasive belief is that age predicts overall ability, such as physical or cognitive capacity to perform a job.<sup>37</sup> Unfounded age-related judgments regarding ability are insidious in our society and must not be used as pretext for unlawful discriminatory decisions in employment. In fact, decades of social science research document that age does not predict one’s ability, performance, or intelligence.<sup>38</sup> On the contrary, having an intergenerational workforce has been shown to increase productivity and promote general wellbeing in the workplace.<sup>39</sup> From

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then the burden shifts to the employer to rebut the presumption of discrimination by demonstrating that there was a legitimate and non-discriminatory reason for its employment decision. *Id.* If the employer articulates a legitimate, non-discriminatory basis for its decision, then the burden shifts back to the plaintiff “to prove that the legitimate reasons proffered by defendant were merely a pretext for discrimination.” *Ferrante v. Am. Lung Ass’n*, 90 N.Y.2d 623, 629–30 (1997). See *Texas Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981); *Fields v. Dep’t of Educ. of New York*, No. 154283/2016, 2019 WL 1580151 (Sup. Ct. N.Y. Cty. Apr. 12, 2019).

<sup>34</sup> N.Y.C. Admin. Code § 8-107(17).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*; see *Teasdale v. N.Y.C. Fire Dep’t, FDNY*, 574 F. App’x 50, 52 (2d Cir. 2014).

<sup>37</sup> See generally Steven J. Kaminshine, *The Cost of Older Workers, Disparate Impact, and the Age Discrimination in Employment Act*, 42 FLA. L. REV. 229 (1990).

<sup>38</sup> Victoria A. Lipnic, *The State of Age Discrimination and Older Workers in the U.S. 50 Years After the Age Discrimination in Employment Act*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, § IV(A)(1) & n.132 (2018) (citing several studies) (internal citations omitted); see K. Warner Schaie, *The Longitudinal Study: A 21-year Exploration of Psychometric Intelligence in Adulthood*,” LONGITUDINAL STUDIES OF ADULT PSYCHOLOGICAL DEVELOPMENT, 33 (K.W. Schaie, ed., 1983); Glen M. McEvoy & Wayne F. Cascio, *Cumulative Evidence of the Relationship between Employee Age and Job Performance*, 74 J. OF APPL. PSYCH. 11 (1989) (finding age bears no relationship to employee performance); Ursula M. Staudinger, Steven W. Cornelius & Paul B. Baltes, *The Aging of Intelligence: Potential and Limits*, 503 ANNALS OF THE AM. ACAD. OF POL. AND SOC. SCI., 43, 46 (1989) (“[P]ersons of the same chronological age are not identical as to their mental status. There are 70-year-olds who function like 30-year-olds and vice versa.”); Diane B. Howelson, *Cognitive Skills and the Aging Brain: What to Expect*, DANA FOUNDATION: CEREBRUM (Dec. 1, 2015), <https://www.dana.org/article/cognitive-skills-and-the-aging-brain-what-to-expect/>.

<sup>39</sup> See Wes Gay, *Why A Multigenerational Workforce Is A Competitive Advantage*, FORBES (Oct. 20, 2017), <https://www.forbes.com/sites/wesgay/2017/10/20/multigeneration-workforce/#7d93430f4bfd>; see generally Dawn C. Carr & Justine A. Gunderson, *The Third Age of Life: Leveraging the Mutual Benefits of Intergenerational Engagement*, 26.3 PUB. POL’Y & AGING REP. 83 (2016), <https://academic.oup.com/ppar/article/26/3/83/2460877> (discussing intergenerational engagement, including in the workplace and in other areas of life).

cognitive and creative functions<sup>40</sup> to physical capability,<sup>41</sup> ability varies considerably from person to person regardless of age. Other common discriminatory stereotypes about older workers may include assumptions about a lack of flexibility, absence of energy, and incapacity to work as a “team player.”<sup>42</sup> Younger workers also face harmful stereotypes; for instance, “millennials,” referring to people born between 1980 and 1996, and “Generation Z,” referring to people born between 1997 and 2012, are often stigmatized as lazy, craving recognition, and lacking the loyalty to commit to one job for a long period of time.<sup>43</sup> Such stereotypes, directed toward any age group, are harmful and can fuel unlawful discriminatory behavior.

The sections below provide examples of violations of the NYCHRL based on age discrimination in recruitment, hiring, terms and conditions of employment, layoffs, termination, and retirement. The examples highlight instances of unlawful disparate treatment based on age, as well as instances where “age-neutral” policies may have a disparate impact on a particular age group.

### **A. Job Postings and Recruiting**

Under the NYCHRL, employers may not directly or indirectly express an age limitation in a job posting unless explicitly required under federal, state, or local law.<sup>44</sup> Job postings should convey the required qualifications of the position without stating implicitly or explicitly that younger candidates are preferred. Job postings must not contain explicit language that communicates a preference based on age, and should also avoid using language<sup>45</sup> that suggests that the job requires that someone be of a particular age group. For example, job postings that explicitly seek “recent college graduates” may suggest that only young adults will be considered, and may exclude

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<sup>40</sup> Diane B. Howelson, *Cognitive Skills and the Aging Brain: What to Expect*, DANA FOUNDATION: CEREBRUM (Dec. 1, 2015), <https://www.dana.org/article/cognitive-skills-and-the-aging-brain-what-to-expect/>.

<sup>41</sup> Glen P. Kenny, Herbert Groeller, Ryan McGinn, & Andreas D. Flouris, Age, Human Performance, and Physical Employment Standards, 41 APPLIED PHYSIOLOGY, NUTRITION, AND METABOLISM S92 (2016).

<sup>42</sup> See Cathy Ventrell-Monsec, *It’s Unlawful Age Discrimination—Not the “Natural Order” of the Workplace!*, 40 BERKELEY J. EMP. & LAB. L. 91, 96–98, 100–06 (2019).

<sup>43</sup> See Siobhan Kelley, Jessica Perry & Julie Totten, *Optimizing Generational Differences*, 34.3 ACC Docket, Apr. 2016, at 60, 63; Aisha Gani, *Millennials at Work: Five Stereotypes – and Why They Are (Mostly) Wrong*, THE GUARDIAN (Mar. 15, 2016), <https://www.theguardian.com/world/2016/mar/15/millennials-work-five-stereotypes-generation-y-jobs>; Mark C. Perna, *Surprise—Millennial And Gen-Z Workers Are More Loyal Than You Think*, FORBES (Mar. 3, 2020), <https://www.forbes.com/sites/markperna/2020/03/03/surprisemillennial-and-gen-z-workers-are-more-loyal-than-you-think/#3f8e27771df1>.

<sup>44</sup> Such permissible age limitations include, but are not limited to, the prohibition on individuals under eighteen years old from serving alcohol (N.Y. ALCO. BEV. CONT. LAW § 100 (McKinney 2020)) and the general requirement that a worker be at least fourteen years old to be employed in most jobs in New York State. N.Y. LAB. LAW §§ 130, 131, 132. See also N.Y. CIV. SERV. LAW § 58 (prohibiting police officers from being “less than twenty years of age as of the date of appointment nor more than thirty-five years of age as of the date when the applicant takes the written examination”).

<sup>45</sup> See Ann Brenoff, *5 Ageist Phrases to be Aware Of*, AARP (June 12, 2019), <https://www.aarp.org/disrupt-aging/stories/info-2019/ageist-phrases.html>.

older qualified candidates who are interested in an entry-level position.<sup>46</sup> While it is permissible for employers to recruit among college students or recent college graduates, they must not restrict the applicant pool based on age and must ensure that all applicants are assessed on their qualifications, regardless of age or potentially age-related factors, such as year of graduation.<sup>47</sup> In addition, placing a cap on job experience in job postings to a certain number of years suggests the employer will not consider applicants who are older and have more years of experience, and may discourage more experienced applicants from applying.

Characterizing certain necessary skills or traits in a way that is likely to discourage applicants of a certain age group from applying may expose an employer to liability under the NYCHRL.<sup>48</sup> For example, phrases such as “youthful energy” and “fresh-minded” may suggest a preference for a younger applicant and dissuade older workers from applying. In addition, expressing a preference for “digital natives”—which refers to people who became comfortable using technology at an early age and who typically were born after 1980<sup>49</sup>—suggests an impermissible limit based on age, and may indicate an unlawful discriminatory motivation to hire younger people. As an alternative, employers should frame job qualifications in an age-neutral way; for instance, for a technology-related position, a job posting could list specific skills, such as familiarity with a particular software or program that is necessary to the job, and assess candidates based on their abilities to perform those skills.

Fellowships or training programs may permissibly limit the level of experience for applicants, by, for example, stating that applicants have zero to two years of experience, where the fellowships and programs are: intended to be term-limited; are focused on bringing new entrants into the field; and include training and mentorship as a

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<sup>46</sup> U.S. Equal Emp’t Opportunity Comm’n, *Prohibited Employment Policies/Practices*, <https://www.eeoc.gov/prohibited-employment-policiespractices> (“It is illegal for an employer to publish a job advertisement that shows a preference for or discourages someone from applying for a job because of his or her . . . age . . . . For example, a help-wanted ad that seeks . . . ‘recent college graduates’ may discourage . . . people over 40 from applying and may violate the law.”).

<sup>47</sup> See 29 C.F.R. § 1625.4(a), which states that advertisements for “recent college graduate[s]” discriminate against older persons, unless an ADEA exception applies. See also *Magnello v. TJX Companies, Inc.*, 556 F. Supp. 2d 114, 123 (D. Conn. 2008). Recruiting preferences for “recent graduates” have survived challenges under the ADEA. See, e.g., *Mistretta v. Sandia Corp.*, 1977 WL 17 (D.N.M. Oct. 20 1977), *aff’d sub nom. Equal Emp’t Opportunity Comm’n v. Sandia Corp.*, 639 F.2d 600 (10th Cir. 1980) (“There is nothing inherently suspicious about on-campus recruiting programs”; engineering graduates have recent exposure to new techniques and are job hunting, so campus recruiting gives effective access to available labor market).

<sup>48</sup> See N.Y.C. Admin. Code § 8-107(1)(d).

<sup>49</sup> The term digital native has a direct relationship to the age of an individual, since digital natives are generally defined as those individuals who were born after 1980. “Digital native” does not connote an individual’s skill level or ability to use technology. See *Digital Native* (Sept. 19, 2012), TECHNOPEDIA, <https://www.techopedia.com/definition/28094/digital-native>; Kate Moran, *Millennials as Digital Natives: Myths and Realities*, NIELSEN NORMAN GROUP (Jan. 3, 2016), <https://www.nngroup.com/articles/millennials-digital-natives/>; see also Ann Brenoff, *5 Ageist Phrases to be Aware Of*, AARP (June 12, 2019), <https://www.aarp.org/disrupt-aging/stories/info-2019/ageist-phrases.html>.

core component.<sup>50</sup> Despite the disparate impact that such programs may have based on age, a covered entity may demonstrate the requisite “significant relationship to a significant business objective” where the purpose of the program is to foster professional development among new entrants into a field, build a pipeline of qualified workers, and/or encourage workers to undertake less lucrative work in fields that may be harder to break into.<sup>51</sup> Employers and other entities that administer such fellowships and programs should be able to demonstrate how their fellowships and programs satisfy a significant business objective, as they are subject to a disparate impact analysis under the NYCHRL.<sup>52</sup>

### Examples of violations

- An employer uses an online screening algorithm that excludes older applicants who report having more than ten years of experience because the employer believes they will demand higher salaries than the employer is able to pay.
- A business posts an ad which says it is seeking an “energetic person who is a cultural fit for a company of young entrepreneurs” and only invites applicants under the age of thirty for interviews.
- A job posting requires that applicants have “no more than seven years of work experience.”

## **B. Hiring**

Age discrimination is arguably most pervasive in the hiring process.<sup>53</sup> It is a violation of the NYCHRL for a covered “employer, employment agency, or labor organization” to discriminate against job applicants based on their actual or perceived age.<sup>54</sup> A discriminatory motive may be inferred where an employer unnecessarily inquires about an applicant’s age.<sup>55</sup> It is a violation of the NYCHRL if age discrimination constitutes even part of the employer’s motivation for denying a person employment.<sup>56</sup> In addition,

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<sup>50</sup> See, e.g., *Neary v. Gruenberg*, No. 16-CV-5551 (KBF), 2017 WL 4350582, at \*3 (S.D.N.Y. July 26, 2017), *aff’d*, 730 F. App’x 7 (2d Cir. 2018) (“President Barack Obama . . . establish[ed] the ‘Pathways Program’ to encourage recruitment of ‘students and recent graduates . . . as an ever-growing number of Federal employees nears retirement age’ and to ‘clear paths to civil service careers for recent graduates.’ . . . Similar to the FDIC’s CEP, the [program] provides that to qualify for the Pathways Program, applicants must have obtained a degree within the previous two years.”).

<sup>51</sup> *Cf. id.* at 10 (affirming motion to dismiss age-related claim because government employer’s proffered a rational basis for its hiring practices to replenish a workforce containing an “ever-growing number of Federal employees near[ing] retirement age with students and recent graduates,” and forty-one-year-old job applicant’s allegations were insufficient to give rise to inference of discriminatory motive).

<sup>52</sup> See N.Y.C. Admin. Code § 8-107(17).

<sup>53</sup> See Patricia Cohen, *New Evidence of Age Bias in Hiring, and a Push to Fight It*, N.Y. TIMES, June 7, 2017, <https://www.nytimes.com/2019/06/07/business/economy/age-discrimination-jobs-hiring.html>.

<sup>54</sup> N.Y.C. Admin. Code § 8-107(1)(a)(2).

<sup>55</sup> Date of birth may be requested when necessary to conduct background checks. It is a best practice for employers to wait until after an offer is made to make such an inquiry.

<sup>56</sup> *Bennett*, 92 A.D.3d at 39–41.

a hiring policy which disparately impacts older job applicants<sup>57</sup> based on job applicants' actual or perceived age violates the NYCHRL.<sup>58</sup>

Relying on inappropriate age-related factors and stereotypes to deny employment is a violation of the NYCHRL. For example, employers should not exclude candidates on the ground of "overqualification" for a position based on their years of work experience.<sup>59</sup> Indeed, doing so often "mask[s] the real reason for refusal, namely, in the eyes of the employer the applicant is too old."<sup>60</sup> If an employer is concerned that applicants with more work experience might be bored by the position or dissatisfied with the compensation, the best approach is to be clear about the responsibilities and expectations for the job, as well as the level of compensation that is available and to let the candidates decide for themselves whether the position is of genuine interest, rather than to reject someone as overqualified. Employers also must not stereotype younger applicants, for example, by relying on assumptions that younger workers will lack sufficient commitment or loyalty to a job.

It may be a violation of the NYCHRL if an employer uses hiring policies or practices which appear to be age-neutral and have a disparate impact on a particular age group.<sup>61</sup> Application processes without structured interviews or consistently-applied standards may expose employers to liability where such practices lead to a disparate impact on applicants based on age. For example, if younger applicants are consistently preferred over equally qualified older applicants and the employer uses unstructured interviews and purely subjective criteria to evaluate candidates, it may constitute a violation of the NYCHRL on the basis of age. Some element of subjectivity in hiring is permitted, but just as "an employer may not use wholly subjective and unarticulated standards to judge employee performance,"<sup>62</sup> it is also potentially unlawful where it has a disparate impact on a protected category. Where job applicants of a particular age are consistently chosen or rejected for certain job opportunities, employers should be prepared to demonstrate non-discriminatory reasons for their selection.

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<sup>57</sup> In contrast, under federal law, the question of whether job applicants may benefit from a disparate impact theory of liability pursuant to the ADEA is much less clear. See William Hrabec, *Will You Still Need Me, Will You Still Hire Me, When I'm Sixty-Four: Disparate Impact Claims and Job Applicants Under the ADEA*, 26 ELDER L.J. 395, 405–09 (2019).

<sup>58</sup> See N.Y.C. Admin. Code § 8-107(1).

<sup>59</sup> See, e.g., Alexia Elejalde-Ruiz, *Overqualified? Or Too Old? Age Discrimination Case Takes Aim at Biased Recruiting Practices*, CHICAGO TRIBUNE, Sept. 28, 2018, <https://www.chicagotribune.com/business/ct-biz-age-discrimination-lawsuit-dale-kleber-0930-story.html>.

<sup>60</sup> *Taggart v. Time, Inc.*, 924 F.2d 43, 47 (2d Cir. 1991); see also *Vaughn v. Mobil Oil Corp.*, 708 F. Supp. 595, 601 (S.D.N.Y. 1989).

<sup>61</sup> An assessment of liability would turn on whether the policy or practice bears a significant relationship to a significant business objective. N.Y.C. Admin. Code § 8-107(17).

<sup>62</sup> *DeLuca v. Sirius XM Radio, Inc.*, No. 12-CV-8239 (CM), 2017 WL 3671038, at \*15 (S.D.N.Y. Aug. 7, 2017) (quoting *Knight v. Nassau Cty. Civil Serv. Comm'n*, 649 F.2d 157, 161 (2d Cir. 1981)).

### Examples of violations

- An interviewer asks applicants she perceives to be older, “How old are you?” during their interviews and does not seriously consider anyone over the age of forty-five.
- An interviewer tells a qualified applicant who is perceived to be younger than thirty that they are looking for someone who is “committed to old-school values of loyalty” and not just some “young, fly-by-night person who’s looking to make a quick buck.”
- An employer requires graduation dates on its application for a position and has a policy of only interviewing those who have graduated college in the last ten years.<sup>63</sup>

### **C. Discrimination During Employment: Disparate Treatment, Harassment**

Disparate treatment includes being subjected to lesser terms or conditions of employment, including denials of work opportunities, demotions, or unfavorable scheduling because of a person’s age. Disparate treatment may manifest as harassment when an employee is subjected to behavior that is demeaning, humiliating, or offensive because of their age. Harassment covers a broad range of conduct.<sup>64</sup> The severity or pervasiveness of the harassment is only relevant to damages.<sup>65</sup> Even an employer’s single comment made in circumstances where that comment would signal discriminatory views about one’s age may be enough to constitute harassment.<sup>66</sup> An individual does not need to be the target of the harassment to feel its impact and have legal recourse.<sup>67</sup>

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<sup>63</sup> An employer requesting information such as date of birth, age, or graduation date on an employment application form is not a *per se* violation of the law; however, because requests that implicate age may suggest a limitation based on age, they will be closely examined to ensure they are used for a permissible purpose and not a violation of the NYCHRL. *Accord* 29 C.F.R. § 1625.5.

<sup>64</sup> An employer may assert the affirmative defense that the derogatory comment about the individual’s age would be perceived as a petty slight or a trivial inconvenience by a reasonable person in the complainant’s shoes. *Williams*, 61 A.D.3d at 79–80.

<sup>65</sup> See *Goffe v. NYU Hosp. Ctr.*, 201 F. Supp. 3d 337, 351 (E.D.N.Y. 2016) (“the federal severe or pervasive standard of liability no longer applies to NYCHRL claims, and the *severity or pervasiveness of conduct is relevant only to the scope of damages*”) (emphasis in original); *Williams*, 61 A.D.3d at 76.

<sup>66</sup> See *Cardenas v. Automatic Meter Reading Corp.*, OATH Index No. 1240/13, Comm’n Dec. & Order, 2015 WL 7260567, at \*8 (Oct. 28, 2015) *aff’d sub nom. Automatic Meter Reading Corp. v. N.Y.C.*, 63 Misc. 3d 1211(A) (Sup. Ct. N.Y. Cty. Feb. 28, 2019) (citing *Williams*, 61 A.D.3d at 80 n.30). Under federal law, a single comment is not sufficient to allege a violation of the ADEA because discriminatory comments based on age must be severe and pervasive in order to establish a claim for a hostile work environment. See, e.g., *Kassner v. 2nd Ave. Delicatessen, Inc.*, 496 F.3d 229, 240 (2d Cir. 2007) (several ageist comments made by managers to older waitresses that they should “retire early,” “take off your wig,” or “drop dead” was not enough to maintain a claim for a hostile work environment under the ADEA or Title VII because the conduct was not considered severe or pervasive).

<sup>67</sup> See *Mihalik v. Credit Agricole Cheavreux N. Am., Inc.*, 715 F.3d 102, 113–15 (2d Cir. 2013); *Leibovitz v. N.Y.C. Transit Auth.*, 252 F.3d 179, 190 (2d Cir. 2001).

Employers are strictly liable where the harasser exercises managerial or supervisory responsibility.<sup>68</sup> Employers are also strictly liable for a non-managerial employee's discriminatory conduct if the employer: (1) knew about the employee's conduct and "acquiesced in such conduct or failed to take immediate and appropriate corrective action;"<sup>69</sup> or (2) should have known about the employee's discriminatory conduct and "failed to exercise reasonable diligence to prevent such discriminatory conduct."<sup>70</sup>

### Examples of violations

- A manager frequently calls an independent contractor doing work on the premises "old man," "pops," and "grandpa."
- An employer denies training opportunities to an older worker that the worker needs to complete in order to be considered for a promotion, explaining that providing those opportunities would be "a waste of time and resources at your age." The employer provides those opportunities to a younger employee who is subsequently promoted.<sup>71</sup>
- A twenty-seven-year-old woman is regularly talked down to, has her ideas dismissed in meetings by her supervisor, and is not given major projects despite strong performance, while a colleague, who is a forty-five year old man, is not subjected to the same treatment and is given increasing responsibilities.<sup>72</sup>
- An employee in his sixties regularly endures inappropriate comments related to his age by his coworker.<sup>73</sup> The employee tells his project manager, but the manager says that the coworker is "only kidding" and takes no action.
- An employee has worked for a company for more than thirty years and is the oldest person on her team. Despite receiving consistently positive performance reviews, her new manager is giving her fewer projects and dividing up her portfolio among her younger colleagues. When she asks her manager about the change, he tells her he does not want to "overwhelm her with such a large portfolio, given her age."
- A supervisor consistently singles out the youngest member of his team, calling him "kid" and "young blood" and yelling at him in front of his colleagues, "it's time for you to grow up and put your big boy pants on."

## **D. Layoffs and Termination**

It is unlawful for employers to terminate or lay off an employee if motivated at least in part by their actual or perceived age.<sup>74</sup> Older workers are particularly vulnerable during

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<sup>68</sup> N.Y.C. Admin. Code § 8-107(13)(b)(1).

<sup>69</sup> *Id.* § 8-107(13)(b)(2).

<sup>70</sup> *Id.* § 8-107(13)(b)(3).

<sup>71</sup> See, e.g., *Cross v. N.Y.C. Transit Auth.*, 417 F.3d 241, 250 (2d Cir. 2005).

<sup>72</sup> This could be a claim of both age and gender discrimination.

<sup>73</sup> See *Dediol v. Best Chevrolet, Inc.*, 655 F.3d 435, 439–40 (5th Cir. 2011).

<sup>74</sup> See N.Y.C. Admin. Code § 8-107(1)(a)(2); *Weiss v. JPMorgan Chase & Co.*, No. 06 Civ. 4402(DLC), 2010 WL 114248, at \*1 (S.D.N.Y. Jan. 13, 2010) ("[T]he NYCHRL requires only that a plaintiff prove that age was 'a motivating factor' for an adverse employment action."); *Williams*, 61 A.D. 3d at 78 n.

employer layoffs.<sup>75</sup> It is a violation of the NYCHRL when employers disproportionately lay off older workers if the employer does not have a legitimate non-discriminatory reason for the staff reduction.<sup>76</sup> While corporate or organizational restructuring, downsizing, and financial considerations, such as budgetary constraints, are often legitimate business decisions,<sup>77</sup> they may not be used as a pretext for unlawful discrimination based on age<sup>78</sup> and, moreover, employers should be mindful of the potential disparate impact that such decisions may have on older workers.<sup>79</sup> Employers should be able to show a legitimate business purpose for, for example, eliminating an older worker's specific position, or for engaging in lay-offs that disproportionately impact workers over a certain age. Although replacing an older worker with a younger worker is not on its own a violation of the NYCHRL, it could support a claim of age discrimination against the terminated employee.<sup>80</sup> However, policies related to employee retention based on seniority policies, such as in collective bargaining agreements, are generally permissible.<sup>81</sup>

### Examples of violations

- During a company's layoffs, only one poorly performing younger employee is laid off, while everyone else who was laid off was an older employee with satisfactory or excellent performance and there is no business justification for selecting the older workers for layoff.

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27 (“[u]nder Administrative Code § 8-101, discrimination shall play no role in decisions relating to employment, housing or public accommodations”); see also Local Law No. 85 §§ 1, 7 (2005).

<sup>75</sup> Kate Rockwood, *Hiring in the Age of Ageism*, SOC'Y FOR HUMAN RESOURCES MGMT. (Jan. 22, 2018), <https://www.shrm.org/hr-today/news/hr-magazine/0218/pages/hiring-in-the-age-of-ageism.aspx>.

<sup>76</sup> See, e.g., *Kaiser v. Raoul's Rest. Corp.*, 112 A.D.3d 426, 427 (1st Dep't 2013).

<sup>77</sup> See, e.g., *Elfenbein v. Bronx Lebanon Hosp. Ctr.*, No. 08-CV-5382, 2009 WL 3459215, at \*6 (S.D.N.Y. Oct. 27, 2009) (assessing whether hospital's restructuring amounted to pretext for age discrimination under the ADEA, NYCHRL, and NYSHRL); *Matter of Laverack & Haines v. N.Y. State Div. of Human Rights*, 88 N.Y.2d 734, 738 (1996); *Roundtree v. School Dist. of Niagara Falls*, 294 A.D.2d 876, 877–78 (4th Dep't 2002) (budget deficit required a workforce reduction); *Genesky v. Local 1000*, 287 A.D.2d 594, 594–95 (2d Dep't 2001) (the termination of the plaintiff's employment was in response to budgetary constraints and thus not age discrimination).

<sup>78</sup> See *Carras v. MGS 782 Lex, Inc.*, 310 F. App'x 421, 423 (2d Cir. Dec. 19, 2008) (denying defendant's motion for summary judgment, concluding that there was a triable issue of fact as to whether the employer's cost-cutting rationale was pretext for age discrimination in violation of the ADEA, NYCHRL, and NYSHRL, especially considering other employer behavior that may suggest discriminatory animus).

<sup>79</sup> See *Bennett v. Time Warner Cable, Inc.*, 138 A.D.3d 598, 598–99 (1st Dep't 2016) (denying motion to dismiss disparate impact claim under the NYCHRL, in which plaintiffs challenged the employer's decision to eliminate general foreman position, which was generally held by workers in their fifties and sixties).

<sup>80</sup> This would be especially true where an employer unquestionably has a practice of replacing older workers with younger workers. See Olivia Carville, *IBM Fired as Many as 100,000 in Recent Years, Lawsuit Shows*, BLOOMBERG (July 31, 2019), <https://www.bloomberg.com/news/articles/2019-07-31/ibm-fired-as-many-as-100-000-in-recent-years-court-case-shows> (“The company started firing older workers and replacing them with millennials, who IBM's consulting department said ‘are generally much more innovative and receptive to technology than baby boomers.’”).

<sup>81</sup> See generally *Matter of Sauer v. Donaldson*, 49 A.D.3d 656, 656–57 (2d Dep't 2008); *Brooks v. Purcell*, 131 A.D. 2d 620, 621–22 (2d Dep't 1987); 53 N.Y. Jur. 2d EMP'T REL. § 615.

- In a situation in which there is no statutorily mandated retirement age, after an employee who is fifty-two is selected for a layoff, a supervisor tells them, “We want someone that will give us another ten or so years.”<sup>82</sup>
- An employee is repeatedly told they are getting “too old for the job” and is fired shortly thereafter.
- An older worker who consistently met expectations in their performance reviews is terminated for lacking “twenty-first century skills” by a supervisor who, at an all-staff meeting, praised the superior technological ability of younger workers because “they were born into a world of technology.”<sup>83</sup>
- A new supervisor comments that an older employee “reminds me of my grandma, who can be difficult” and terminates her a week later for a series of late arrivals and absences, but does not discipline any of the younger, less experienced workers for similar late arrivals and absences.<sup>84</sup>
- A younger worker whose work output exceeds that of her colleagues is laid off after her supervisor explained that he “just can’t relate to millennials” and he preferred to keep on someone who is a better “generational fit” for the team.

## E. Retirement

It is unlawful under the NYCHRL for an employer to force an employee to retire at a specific age,<sup>85</sup> unless there is a legally mandated retirement age.<sup>86</sup> Mandatory retirement ages violate the NYCHRL because such policies treat workers less well based on their age and are premised on discriminatory stereotypes about older workers’ ability or desire to continue working. Similarly, taking a worker’s age into account when considering whether to renew their employment contract is impermissible under the NYCHRL.<sup>87</sup>

<sup>82</sup> See *Sharp v. Acker Plant Servs. Grp., Inc.*, 726 F.3d 789, 794 (6th Cir. 2013).

<sup>83</sup> See, e.g., *Marlow v. Chesterfield Cty. Sch. Bd.*, 749 F. Supp. 2d 417, 421 (E.D. Va. 2010) (holding there was a genuine issue of material fact as to whether an employer harbored age bias against plaintiff where an employer made comments that plaintiff lacked twenty-first century skills and referred to “digital natives” born when particular technology existed versus older “digital immigrants” with “thick accents”).

<sup>84</sup> See, e.g., *Gorzynski v. JetBlue Airways Corp.*, 596 F.3d 93, 98 (2d Cir. 2010) (holding defendant employer enforced rules and disciplined employees in a discriminatory way toward older workers).

<sup>85</sup> See, e.g., *Comm’n on Human Rights ex rel. Joo v. UBM Bldg. Maint. Inc.*, OATH Index No. 384/16, 2018 WL 6978286 (Dec. 20, 2018) (finding respondent liable for forcing complainant to retire at sixty-five pursuant to a policy of not employing people over sixty-five, where there was no applicable law mandating retirement based on age).

<sup>86</sup> For example, certain civil service positions, including public safety officers in the state and local police force and fire department, have retirement ages which are mandated by law. N.Y. CIV. SERV. LAW § 54 (McKinney 2020) (age requirements for civil service positions); N.Y. RETIRE. & SOC. SEC. LAW § 384 (retirement for police officers and firefighters); 29 U.S.C.A. § 623(j) (retirement for law enforcement officers and firefighters).

<sup>87</sup> See *Delville v. Firmenich Inc.*, 920 F. Supp. 2d 446, 460 (S.D.N.Y. 2013).

Voluntary early retirement incentive programs (“ERIPs”)<sup>88</sup> that are consistent with the Older Workers’ Benefit Protection Act’s (“OWBPA”) amendments to the ADEA are permissible under the NYCHRL.<sup>89</sup> Under the OWBPA, an employer’s ERIP must be voluntary and consistent with the purposes of the ADEA.<sup>90</sup> ERIPs that categorically provide lesser benefits to older beneficiaries as compared to younger beneficiaries violate the NYCHRL.<sup>91</sup>

### Examples of violations

- An employer tracks all contract employees’ ages and makes decisions about whether to renew those employees’ contracts based on how soon the employer thinks the employees intend to retire. The employer does not renew the contract of any employees over the age of fifty, while renewing the contracts of employees younger than fifty.<sup>92</sup>
- A company has a policy requiring all employees to retire at sixty-five, when there is no relevant legal mandatory retirement age.<sup>93</sup>
- An employer has an ERIP with an age-based window defining benefits dependent on age in which those retiring at age fifty-eight would have received four years of incentive payments, those retiring at age sixty only two years of payments, and those retiring at age sixty-two or later, nothing.<sup>94</sup>

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<sup>88</sup> In an ERIP, “older employees typically are offered a financial incentive in exchange for their agreement to leave the workforce earlier than they had planned.” U.S. EQUAL EMP’T OPPORTUNITY COMM’N, EEOC COMPLIANCE MANUAL, DIRECTIVES TRANSMITTAL 915.003, CH. 3: BENEFITS, § VI(A) (2000), <https://www.eeoc.gov/policy/docs/benefits.html>. Employers may benefit from this “since the older workers who accept the incentive usually are the higher-paid individuals in the workforce” and “[t]he older employees also benefit inasmuch as they are able to retire with larger benefits earlier than otherwise would have been possible.” *Id.*

<sup>89</sup> N.Y.C. Admin. Code § 8-107(1)(e); see 29 U.S.C.A. § 623(f)(2)(B)(ii); *Abrahamson v. Bd. of Educ. of Wappingers Falls Cent. Sch. Dist.*, 374 F.3d 66, 74 (2d Cir. 2004); U.S. EQUAL EMP’T OPPORTUNITY COMM’N, EEOC COMPLIANCE MANUAL, DIRECTIVES TRANSMITTAL 915.003, CH. 3: BENEFITS, § VI(A) (2000), <https://www.eeoc.gov/policy/docs/benefits.html>.

<sup>90</sup> Workplace Flexibility 2010, Geo. Univ. L. Cent., *Early Retirement Incentive Plans and the Age Discrimination in Employment Act*, MEMOS AND FACT SHEETS 54, at 1–2 (2010) (citing 29 U.S.C. § 623(f)(2)(B)(ii)), <https://scholarship.law.georgetown.edu/legal/54>. Such explicit purposes are: “to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; and to help employers and workers find ways of meeting problems arising from the impact of age on employment.” 29 U.S.C.A. § 621(b).

<sup>91</sup> See N.Y.C. Admin. Code § 8-107(1)(a)(3); see also *Auerbach v. Bd. of Educ. of Harborfields Cent. Sch. Dist. of Greenlawn*, 136 F.3d 104, 114 (2d Cir. 1998) (discussing *Karlen v. City Colleges of Chicago*, 837 F.2d 314 (7th Cir. 1988), in which an ERIP arbitrarily discriminated based on age by offering lesser benefits to beneficiaries over age sixty-four than to younger beneficiaries); *O’Brien v. Bd. of Educ. of Deer Park Union Free Sch. Dist.*, 127 F. Supp. 2d 342, 350 (E.D.N.Y. 2001) (ERIPs “that reduce the value of the retirement benefit as the putative retiree ages are impermissible”).

<sup>92</sup> See, e.g., *Delville*, 920 F. Supp. 2d at 460.

<sup>93</sup> See, e.g., *Joo*, 2018 WL 6978286, at \*3–4.

<sup>94</sup> *Solon v. Gary Comty. Sch. Corp.*, 180 F.3d 844, 853 (7th Cir. 1999) (striking down discriminatory ERIP where “[i]n this respect, employees who retire at a younger age are treated more favorably than those who retire later, based not on years of service or some other nondiscriminatory factor, but solely on their age at retirement.”).

## F. Retaliation

A covered entity may not retaliate against an individual because they engaged in protected activity. Protected activity includes: (1) opposing a discriminatory practice prohibited by the NYCHRL;<sup>95</sup> (2) raising an internal complaint regarding a practice prohibited under the NYCHRL; (3) filing a complaint with the Commission or any other enforcement agency or court; or (4) testifying, assisting, or participating in an investigation, proceeding or hearing related to an unlawful practice under the NYCHRL.<sup>96</sup> In order to establish a *prima facie* claim for retaliation, an individual must show that: the individual engaged in a protected activity; the covered entity was aware of the activity; the individual suffered an adverse action; and there was a causal connection between the protected activity and the adverse action.<sup>97</sup> When an individual opposes what they believe in good faith to be unlawful discrimination, it is illegal to retaliate against the individual, even if the underlying conduct they opposed is not ultimately determined to violate the NYCHRL.

An action taken against an individual that is reasonably likely to deter them from engaging in such activities is considered unlawful retaliation. The action need not rise to the level of a final action or a materially adverse change to the terms and conditions of employment to be retaliatory under the NYCHRL.<sup>98</sup> The action could be as severe as demotion, removal of job responsibilities, or termination, but could also be less severe such as relocating an employee to a less desirable part of the workspace, shifting an employee's schedule, or reducing their inclusion in group projects.

## G. Remedies for Violations of the NYCHRL

Individuals who have been unlawfully discriminated against based on their age under the NYCHRL are entitled to various kinds of compensatory damages, including back pay, front pay, and damages for emotional distress.<sup>99</sup> In addition, punitive damages may be available to plaintiffs who prevail on age discrimination claims in state court. In administrative proceedings, a finding of an age discrimination violation may result in the imposition of civil penalties, which are paid to the City,<sup>100</sup> and/or other affirmative relief,

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<sup>95</sup> The NYCHRL has more liberal retaliation protections than federal law. Under federal law, retaliation must involve some kind of materially adverse change in the terms and conditions of employment, while under the NYCHRL, retaliation can involve any act which would be reasonably likely to deter a person from engaging in protected activity (e.g., changing the location of plaintiff's locker or warning her about allegedly excessive use of sick days might not qualify as retaliation under the federal law but might qualify under the NYCHRL). *Selmanovic v. NYSE Grp., Inc.*, No. 06 Civ. 3046, 2007 WL 4563431, at \*6 (S.D.N.Y. Dec. 21, 2007).

<sup>96</sup> N.Y.C. Admin. Code § 8-107(7).

<sup>97</sup> *Id.*; *Selmanovic*, 2007 WL 4563431, at \*5.

<sup>98</sup> N.Y.C. Admin. Code § 8-107(7).

<sup>99</sup> *Id.* § 8-126.

<sup>100</sup> Damages and remedies under the ADEA are more limited than under the NYCHRL. Plaintiffs who prevail on their ADEA claims are only able to receive back pay, promotion, and reinstatement of employment, and, for willful violations of the law, liquidated damages. 29 U.S.C.A. § 626(b). Unlike under the NYCHRL, claimants are not entitled to receive emotional distress damages.

such as restorative justice interventions, anti-discrimination training, and changes to workplace policies.<sup>101</sup>

### III. Best Practices for Employers

To ensure that a workplace is free from age discrimination, employers should make significant efforts to foster an intergenerational workforce. As best practices, employers should:

- Avoid putting a maximum number of years of experience in a job posting, to encourage all candidates to apply, including workers who may exceed the requirement.
- Ensure that both externally and internally facing materials, including recruitment materials, reflect the entity's age diversity and do not exclusively target a specific age group.
- Avoid hiring requirements that may have a disparate impact based on age, such as requiring that a letter of recommendation be provided from a college professor.<sup>102</sup> An employer should allow for letters of recommendation from previous employers, co-workers, and others who have relevant knowledge of the applicant's skills.
- Require that employees and supervisors take implicit bias trainings related to age discrimination.
- Eliminate job application questions that require birth dates or date of graduation, as such practices may deter or disadvantage older applicants.
- Avoid terms in job descriptions that suggest a bias based on age, such as "young," "youthful energy," "digital native" or "fresh-minded." As an alternative, consider words that reflect the job requirements in an age-neutral way.<sup>103</sup>
- Include age in diversity and inclusion efforts in order to foster a multigenerational workforce.<sup>104</sup>
- Avoid exclusively recruiting applicants from campus job fairs and instead ensure that recruitment is conducted in a way that captures a diversity of applicants, including through posting on different job search websites, through community job fairs, and through professional associations and networks.
- Invest in training and professional development to ensure all workers, including older workers, are trained in relevant skills.

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<sup>101</sup> N.Y.C. Admin. Code § 8-120(a).

<sup>102</sup> Kate Rockwood, *Hiring in the Age of Ageism*, SOC'Y FOR HUMAN RESOURCES MGMT. (Jan. 22, 2018), <https://www.shrm.org/hr-today/news/hr-magazine/0218/pages/hiring-in-the-age-of-ageism.aspx>.

<sup>103</sup> See Insperity Staff, *6 Top Tips for Preventing Ageism in the Workplace*, INSPERITY, <https://www.insperity.com/blog/preventing-age-discrimination/> (last accessed July 20, 2020).

<sup>104</sup> One survey found that only 8% of employers' diversity and inclusion strategies included the goal of increasing age diversity. Lori A. Trawinski, *Leveraging the value of an Age-Diverse Workforce*, SHRM FOUNDATION, at 1, <https://www.shrm.org/foundation/ourwork/initiatives/the-aging-workforce/Documents/Age-Diverse%20Workforce%20Executive%20Briefing.pdf> (last accessed July 20, 2020).

- Create and incorporate structured interviewing as a part of employer implicit bias training.
- When offering voluntary buyouts during layoffs, avoid targeting employees based on age, but instead offer buyouts in an age-neutral fashion and provide transparency regarding the terms of the buyouts.

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The Commission is dedicated to eradicating workplace age discrimination in New York City. If you believe you have been subjected to unlawful discrimination on the basis of your actual or perceived age or membership in another protected class, please contact the Commission at 311 or at (212) 416-0197 to file a complaint of discrimination with the Commission's Law Enforcement Bureau.

**KEY DIFFERENCES BETWEEN FEDERAL, STATE, AND CITY AGE DISCRIMINATION LAWS (AS OF JULY 2020).**

<b>STATUTE</b>	<b>Age Discrimination in Employment Act (ADEA)<sup>105</sup></b>	<b>New York State Human Rights Law<sup>106</sup></b>	<b>New York City Human Rights Law<sup>107</sup></b>
<b>AGE THRESHOLD</b>	40 years old and up <sup>108</sup>	18 years old and up <sup>109</sup>	No age limit
<b>ECONOMIC DAMAGES (FRONT PAY AND BACK PAY)</b>	Available <sup>110</sup>	Available <sup>111</sup>	Available <sup>112</sup>
<b>COMPENSATORY DAMAGES FOR EMOTIONAL DISTRESS OR PAIN AND SUFFERING</b>	Not available <sup>113</sup>	Available; no statutory cap <sup>114</sup>	Available; no statutory cap <sup>115</sup>
<b>PUNITIVE DAMAGES</b>	Liquidated damages equal to back pay which may be imposed to penalize willful violations <sup>116</sup>	Punitive damages available, civil penalties up to \$100,000 are available in administrative and judicial proceedings <sup>117</sup>	Punitive damages available in judicial proceedings, with no statutory cap. <sup>118</sup> Civil penalties available up to \$125,000, or \$250,000 for willful violations, in administrative proceedings <sup>119</sup>

<sup>105</sup> 29 U.S.C.A. §§ 621–634.

<sup>106</sup> N.Y. EXEC. LAW § 290 et seq. (McKinney 2020).

<sup>107</sup> N.Y.C. Admin. Code § 8-101 et seq.

<sup>108</sup> 29 U.S.C.A. § 631.

<sup>109</sup> N.Y. EXEC. LAW § 296(3-a).

<sup>110</sup> 29 U.S.C.A. § 626(b).

<sup>111</sup> See N.Y. EXEC. LAW § 297(4).

<sup>112</sup> See N.Y.C. Admin. Code § 8-120.

<sup>113</sup> 29 U.S.C.A. § 626(b); *Comm’r v. Schleier*, 515 U.S. 323, 326 (1995); see *Collazo v. Nicholson*, 535 F.3d 41, 45 (1st Cir. 2008).

<sup>114</sup> See N.Y. EXEC. LAW § 297(4)(c).

<sup>115</sup> See N.Y.C. Admin. Code § 8-120.

<sup>116</sup> 29 U.S.C.A. § 626(b).

<sup>117</sup> N.Y. EXEC. LAW §§ 297(4)(c)(iv–vii).

<sup>118</sup> N.Y.C. Admin. Code § 8-502(a).

<sup>119</sup> N.Y.C. Admin. Code § 8-126(a).

<b>BURDEN OF PROOF, GENERALLY</b>	In cases against private employers and state and local government employers, age must be a but-for cause of the adverse employment action. <sup>120</sup> In cases against federal employers, employment decisions must be entirely free from age discrimination (although but-for causation must be shown to obtain certain forms of relief) <sup>121</sup>	Must show employer subjected employee to “inferior terms, conditions or privileges of employment” because of their age <sup>122</sup>	Must show employer treated employee less well because of their age <sup>123</sup>
<b>PROVING THAT DEFENDANT’S REASON FOR ADVERSE EMPLOYMENT ACTION WAS PRETEXT FOR AGE DISCRIMINATION</b>	To show employer’s explanation is pretext, plaintiff must show that age was the “but-for cause” of the challenged adverse employment action <sup>124</sup>	Plaintiff can establish employer’s proffered reason was pretext when it is shown both that reason was false and that discrimination was the real reason <sup>125</sup>	Only requires some evidence that <i>at least one</i> of the reasons proffered by the defendant is false, misleading, or incomplete to defeat a motion to dismiss <sup>126</sup>
<b>HOSTILE WORK ENVIRONMENT</b>	Conduct must be “severe or pervasive”	Conduct must subject plaintiff to “inferior terms, conditions or privileges” because of age. <sup>127</sup> It is an affirmative defense that the conduct was	Conduct must treat plaintiff “less well” because of age. It is an affirmative defense that the behavior was a “petty slight or trivial inconvenience” <sup>129</sup>

<sup>120</sup> See *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009).

<sup>121</sup> *Babb v. Wilkie*, 589 U.S. \_\_\_, 140 S. Ct. 1168, 1171 (2020).

<sup>122</sup> N.Y. EXEC. LAW § 296(1)(h).

<sup>123</sup> *Parsons v. JPMorgan Chase Bank, N.A.*, No. 16-CV-0408 (NGG)(JO), 2018 WL 4861379, at \*12 (E.D.N.Y. Sept. 30, 2018).

<sup>124</sup> *Ehrbar v. Forest Hills Hosp.*, 131 F. Supp. 3d 5 (E.D.N.Y. 2015).

<sup>125</sup> *Ferrante v. Am. Lung Ass’n*, 90 N.Y.2d 623, 630 (1997).

<sup>126</sup> *Bennett*, 92 A.D.3d at 43.

<sup>127</sup> N.Y. EXEC. LAW § 296(1)(h).

<sup>129</sup> *Williams*, 61 A.D.3d at 78, 80.

		nothing more than “petty slights or trivial inconveniences” <sup>128</sup>	
<b>AVAILABILITY OF DISPARATE IMPACT THEORY OF LIABILITY FOR JOB APPLICANTS</b>	There is a split among federal courts as to whether or not job applicants may benefit from a disparate impact theory of discrimination (where a neutral policy disproportionately affects older applicants) under the ADEA <sup>130</sup>	Disparate impact claims may be brought by job applicants <sup>131</sup>	Disparate impact claims may be brought by job applicants <sup>132</sup>
<b>EMPLOYER SIZE</b>	Employers with twenty or more employees <sup>133</sup>	All employers within the state regardless of size <sup>134</sup>	Employers with four or more employees and/or independent contractors <sup>135</sup>

<sup>128</sup>

*Id.*

<sup>130</sup>

See generally *Villareal v. R.J. Reynolds Tobacco Co.*, 839 F.3d 958 (11th Cir. 2016) (ruling that job applicants are not able to bring disparate impact claims against employers); see generally *Kleber v. CareFusion Corp.*, 914 F.3d 480 (7th Cir. 2019) (ruling same), *cert. denied*, 140 S. Ct. 306, 205 L. Ed. 2d 196 (2019) (ruling same); see generally *Rabin v. Pricewaterhouse Coopers LLP*, 236 F. Supp. 3d 1126 (N.D. Cal. 2017) (holding job applicants can bring disparate impact claims against employers).

<sup>131</sup>

See N.Y. EXEC. LAW § 296(1).

<sup>132</sup>

See N.Y.C. Admin. Code § 8-107(17).

<sup>133</sup>

29 U.S.C.A. § 630(b).

<sup>134</sup>

N.Y. EXEC. LAW § 292(5).

<sup>135</sup>

N.Y.C. Admin. Code § 8-102. Except for claims of gender-based harassment where there is no employee minimum. *Id.*