

NYC Commission on Human Rights Legal Enforcement Guidance on Employment Discrimination on the Basis of Age COVID-19 Supplement

The New York City Commission on Human Rights (the “Commission”) is the City agency charged with enforcing the New York City Human Rights Law (“NYCHRL”), which prohibits discrimination in employment, housing, and public accommodations.¹ This document serves as a supplement to the Commission’s Legal Enforcement Guidance on Employment Discrimination on the Basis of Age² and addresses age discrimination specific to the COVID-19 pandemic. Due to the rapidly evolving situation surrounding COVID-19 and its impact on the workplace, the Commission will update this supplement as needed.

Even in the midst of a pandemic, protections against discrimination under the NYCHRL remain in effect. Employers must be sure that their policies and practices, including those implemented in response to COVID-19, do not discriminate against or treat workers less well based on their protected status, including age. Under the NYCHRL, it is unlawful to discriminate against an employee based on their age in the context of hiring, firing, promotions, layoffs, compensation, and negative treatment like harassment.³ Protections against age discrimination under the NYCHRL extend to workers of all age groups.⁴

Based on currently available information, the Centers for Disease Control (“CDC”) has advised that people sixty-five and older are at higher risk for severe illness from COVID-19.⁵ Despite this information, employers cannot adopt policies that treat workers

¹ N.Y.C. Admin. Code §§ 8-101 et seq.

² N.Y.C. Comm’n on Human Rights, *Legal Enforcement Guidance on Employment Discrimination on the Basis of Age* (July 2020), <https://www1.nyc.gov/site/cchr/law/legal-guidances.page> (last accessed July 16, 2020).

³ N.Y.C. Admin. Code § 8-107(1); *see also id.*

⁴ *See* N.Y.C. Admin. Code § 8-107(1).

⁵ Centers for Disease Control and Prevention, *Coronavirus Disease 2019: Older People* (June 25, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html>. The Commission considers actual or perceived infection with COVID-19 to be protected as a disability under the NYCHRL. *See* N.Y.C. Admin. Code § 8-102.

In response to the current public health crisis posed by COVID-19, the Commission has adopted the Equal Employment Opportunity Commission’s guidance, *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act*. U.S. EQUAL EMP’T OPPORTUNITY COMM’N (Mar. 21, 2020), <https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act>. In general, compliance with the EEOC guidance will satisfy employers’ obligations with respect to disability protections under the NYCHRL, as they relate to COVID-19. For more information, please see the Commission’s guidance concerning COVID-19, available at <https://www1.nyc.gov/site/cchr/media/covid19.page>.

differently based on age. Even policies intended to be benevolent, by, for example, prohibiting older workers from returning to the workplace because of their age places them at a higher health risk if they contract COVID-19, are not permissible under the NYCHRL. Employers may, however, take reasonable steps to protect the health and safety of all staff and customers, and should follow local, state, and federal public health orders and recommendations in doing so.⁶

I. Layoffs, Unemployment, and Rehiring

In May 2020, the unemployment rate for workers ages sixteen to twenty-four rose to 25.3%, representing the largest share of workers left unemployed by the pandemic.⁷ Such economic setbacks early in a person's career can have a lasting impact over the course of their lifetime.⁸ And in April 2020, unemployment rates for workers aged fifty-five and older quadrupled, jumping from 3.3% to 13.6%.⁹ While these trends may be attributable to various causes, including the economic impact of the pandemic on particular industries in which workers of certain age groups tend to be employed, employers must ensure that their employment decisions remain free from unlawful age discrimination.

Employers cannot justify discriminatory actions, including layoffs, by relying on stereotypes or assumptions that older workers, for example, are not “tech savvy enough” to successfully telework.¹⁰ Similarly, employers must take steps to ensure that their policies do not have a disparate impact on workers of a particular age group, unless the policy bears a significant relationship to a significant business objective and there is no alternative approach that would avoid the disparate impact on that age group.¹¹

⁶ See N.Y.C. Comm'n on Human Rights, *COVID-19 and Human Rights*, (July 8, 2020), <https://www1.nyc.gov/site/cchr/media/covid19.page>; U.S. EQUAL EMP'T OPPORTUNITY COMM., *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act*, (Mar. 21, 2020), <https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act>.

⁷ Rakesh Kochhar, *Unemployment rose higher in three months of COVID-19 than it did in two years of the Great Recession*, PEW RESEARCH CENTER (June 11, 2020), <https://www.pewresearch.org/fact-tank/2020/06/11/unemployment-rose-higher-in-three-months-of-covid-19-than-it-did-in-two-years-of-the-great-recession/>.

⁸ Eduardo Porter & David Yaffe-Bellany, *Facing Adulthood With an Economic Disaster's Lasting Scars*, N.Y. TIMES, May 19, 2020, <https://www.nytimes.com/2020/05/19/business/economy/coronavirus-young-old.html>.

⁹ AARP Public Policy Institute, *Employment Data Digest, April 2020 1* (May 8, 2020), <https://www.aarp.org/content/dam/aarp/ppi/2020/05/april-data-digest.pdf>.

¹⁰ Eric Bachman, *COVID-19 Layoff Or Pretext For Age Discrimination Against Older Employees*, FORBES (Apr. 30, 2020), <https://www.forbes.com/sites/ericbachman/2020/04/30/covid-19-layoff-or-pretext-for-age-discrimination-against-older-employees/#2d87a50a4c56>.

¹¹ N.Y.C. Admin. Code § 8-107(17).

II. The NYCHRL Does Not Allow for Accommodations Based on Age

Older workers may seek to telework for an extended period of time or may seek leave in lieu of returning to the workplace out of a legitimate fear of contracting COVID-19. Under the NYCHRL, employers are not legally required to provide reasonable accommodations to employees based solely on age and are prohibited from implementing policies in an age-discriminatory manner. Employers do, however, have an ongoing duty to provide employees with accommodations for disabilities¹² unless: doing so poses an undue hardship; or the disability presents a direct threat that cannot be adequately mitigated by a reasonable accommodation.¹³ Workers of all ages may have underlying health conditions that put them at higher risk for a serious illness if they become infected with COVID-19,¹⁴ and thus would have a legal right to an accommodation based on disability. For that reason, when an employee expresses concerns about returning to work based on their age, employers are encouraged to remind workers of the employer's general policy concerning reasonable accommodations and the process for requesting one.¹⁵

If an employer is providing accommodations to its workers beyond those legally required, it must treat workers the same regardless of age. In contrast with federal law, under the NYCHRL, employers cannot give preferential treatment to older workers.¹⁶ For example, it is unlawful under the NYCHRL for employers to have a policy in place that would permit older workers to work remotely while prohibiting younger workers from doing so. Similarly, employers cannot *require* older workers to telecommute because of their age and perceptions about their risk of complication from exposure to COVID-19. Employers cannot make assumptions about older workers' interest, willingness, or capacity to work due to the health risks posed by COVID-19.

Employers should also keep in mind that policies that categorically exclude individuals on account of disability without an individualized assessment are also unlawful.¹⁷ For

¹² N.Y.C. Admin. Code § 8-107(15).

¹³ A "direct threat" is a "significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation." 29 C.F.R. § 1630.2(r).

¹⁴ Centers for Disease Control and Prevention, *People With Certain Medical Conditions*, (July 17, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html> (list of conditions that increase risk of serious illness regardless of age).

¹⁵ See *Employment Questions Related to COVID-19 and Remote Work*, N.Y.C. COMM'N ON HUMAN RIGHTS (May 29, 2020), <https://www1.nyc.gov/assets/cchr/downloads/pdf/materials/COVID-employment-faq.pdf>. Please consult the Commission's *Legal Enforcement Guidance on Discrimination on the Basis of Disability* (June 2018) for more information about the cooperative dialogue process and reasonable accommodations for disabilities, available at https://www1.nyc.gov/assets/cchr/downloads/pdf/NYCCHR_LegalGuide-DisabilityFinal.pdf.

¹⁶ See *Gen. Dynamics v. Cline*, 540 U.S. 581 (2003).

¹⁷ See *Legal Enforcement Guidance on Discrimination on the Basis of Disability*, N.Y.C. COMM'N ON HUMAN RIGHTS 21 (June 2018), https://www1.nyc.gov/assets/cchr/downloads/pdf/NYCCHR_LegalGuide-DisabilityFinal.pdf ("[t]his includes policies that exclude workers with disabilities from specific job categories or positions without an individualized assessment of the candidate and the essential requisites of the job . . . or impose conditions on people on account of their disability.").

example, a blanket policy prohibiting all employees with chronic kidney disease, a risk factor for severe illness from COVID-19, from returning to work would violate the NYCHRL. During the pandemic, consistent with guidance from public health authorities, employers should permit employees to carry out essential job duties through telework whenever possible.

III. Testing and Returning to Work

Consistent with employers' need to take reasonable steps to protect the health and safety of their workforce, employers are permitted to require employees to provide evidence of their ability to safely return to the workplace after recovering from COVID-19 and to confirm that they are not contagious. Employers may require that employees undergo tests such as temperature checks or diagnostic tests to confirm whether employees pose a direct threat to workplace health and safety due to infection, even though such examinations would ordinarily be prohibited in the absence of the COVID-19 pandemic.¹⁸ However, tests must not be administered in a discriminatory manner, by, for example, requiring tests of certain employees based on their age.¹⁹

Hypothetical Scenarios

- An employee has an underlying health condition that puts them at higher risk of complication due to infection with COVID-19 and, as a result, is afraid to go to work for fear of catching COVID-19. The employee would be entitled to a reasonable accommodation based on their disability. If an employer is aware of the employee's underlying health condition that puts them at risk of complication due to COVID-19, or if the employee requests a reasonable accommodation, the employer must engage in a cooperative dialogue with the employee to determine what accommodations, if any, can be made so that an employee can safely perform the essential functions of the job. This might include more personal protective equipment or changing shifts such that they are working when fewer coworkers are present.²⁰
- An older worker wants to return to the office along with their coworkers, but the employer prohibits them from doing so out of concern that older workers will be at greater risk of harm due to infection with COVID-19. This is a violation of the NYCHRL. Employers may not ban older workers from the workplace because of their age, nor can they require them to telework because of their age. Employers

¹⁸ Please see the Commission's COVID-19 website, *COVID-19 and Human Rights* for additional information on testing, <https://www1.nyc.gov/site/cchr/media/covid19.page>.

¹⁹ If an employee requests an alternative method of screening due to a medical condition or due to their religion, employers should treat it accordingly as a request for a reasonable accommodation.

²⁰ Please consult the Commission's *Legal Enforcement Guidance on Discrimination on the Basis of Disability* (June 2018) for more information about the cooperative dialogue process and reasonable accommodations for disabilities, available at https://www1.nyc.gov/assets/cchr/downloads/pdf/NYCCHR_LegalGuide-DisabilityFinal.pdf.

may, however, implement age-neutral telework policies to protect the wellbeing of all workers or, where a worker requests a reasonable accommodation for a disability, allow for telework based on an individualized assessment of the worker's disability-related needs.

- An older worker fears returning to work because of their age and requests permission to continue to telework. The request is refused. The employer is not required to provide an accommodation based solely on concerns that older workers are susceptible to significant health risk. However, if an employer is allowing other workers to telework, for example, those with childcare responsibilities, it should also offer telework as an option to other employees, including older workers.
- A worker fears returning to work because a member of their household has an underlying health condition that may place them at risk of serious complications from COVID-19. Under the NYCHRL, the worker is not entitled to a reasonable accommodation for fear they may infect their family member, though the employer may choose to allow workers to telework pursuant to a non-discriminatory policy.
- An employer chooses to provide greater safety measures for its older employees than its younger employees. This would violate the NYCHRL, as it prohibits employers from extending more favorable treatment to any age group over another.