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NYC Commission on Human Rights

Legal Enforcement Guidance

on Discrimination on the Basis of

Immigration Status and National Origin

I. Introduction

Approximately 3.2 million New York City residents were born outside of the United States, representing 37% of the City’s population.¹ Nearly 1.4 million New York City residents, or 16% of the population, are noncitizens.² More than 50% of children in New York City have a foreign-born parent,³ and approximately 60% of New Yorkers live in a household with at least one immigrant.⁴ New York is also among the most linguistically diverse cities in the world, with hundreds of languages being spoken throughout the five boroughs.⁵

Millions of immigrants have settled in New York City. They have built homes, communities, and businesses; they lead houses of worship, non-profit organizations, corporations, small businesses, City agencies, and educational institutions; and they continuously contribute—in immeasurable ways—to the fabric of this City.

The New York City Human Rights Law (“NYCHRL”) prohibits discrimination on the basis of actual or perceived “alienage and citizenship status,” and “national origin,” among

¹ *State of Our Immigrant City: MOIA Annual Report for Calendar Year 2018*, N.Y.C. Mayor’s Office of Immigrant Affairs (2019), https://www1.nyc.gov/assets/immigrants/downloads/pdf/moia_annual_report%202019_final.pdf.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ Sam Roberts, *Listening to (and Saving) the World’s Languages*, N.Y. TIMES (Apr. 29, 2010), <https://www.nytimes.com/2010/04/29/nyregion/29lost.html>.

other categories, by most employers,⁶ housing providers,⁷ and providers of public accommodations⁸ in New York City. The NYCHRL also prohibits discriminatory

⁶ The NYCHRL prohibits unlawful discriminatory practices in employment and covers entities including employers, labor organizations, employment agencies, joint labor-management committee controlling apprentice training programs, or any employee or agent thereof. N.Y.C. Admin. Code § 8-107(1). Under the NYCHRL:

The term “employer” does not include any employer with fewer than four persons in his or her employ, provided however, that in an action for unlawful discriminatory practice based on a claim of gender-based harassment . . . , the term “employer” shall include any employer, including those with fewer than four persons in their employ. . . . [N]atural persons employed as independent contractors to carry out work in furtherance of an employer’s business enterprise who are not themselves employers shall be counted as persons in the employ of such employer.

Id. § 8-102.

“The term ‘employment agency’ includes any person undertaking to procure employees or opportunities to work.” *Id.* “The term ‘labor organization’ includes any organization which exists and is constituted for the purpose, in whole or in part, of collective bargaining or of dealing with employers concerning grievances, terms and conditions of employment, or of other mutual aid or protection in connection with employment.” *Id.*

⁷ 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). 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 which 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 shall include a publicly-assisted housing accommodation.” *Id.* § 8-102. However, the NYCHRL exempts from coverage:

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) to 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.

Id. § 8-107(5)(4).

⁸ 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). The NYCHRL defines the term “place or provider of public accommodation” to include:

providers, whether licensed or unlicensed, of goods, services, facilities, accommodations, advantages or privileges of any kind, and places, whether licensed or unlicensed, where goods, services, facilities, accommodations, advantages or privileges of any kind are extended, offered, sold, or otherwise made available. Such term shall not include any club which proves that it is in its nature distinctly private . . . [or] a corporation incorporated under the benevolent orders law or described in the benevolent orders law but formed under any other law of this state, or a religious corporation incorporated under the education law or the religious corporation law [which] shall be deemed to be in its nature

harassment⁹ and bias-based profiling by law enforcement.¹⁰ Pursuant to Local Law 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 City’s Human Rights law cannot fall, rather than a ceiling above which the local law cannot rise.”¹¹ In addition, exemptions to the NYCHRL must be construed “narrowly in order to maximize deterrence of discriminatory conduct.”¹²

The New York City Commission on Human Rights (the “Commission”) is the City agency charged with enforcing the NYCHRL. Individuals interested in vindicating their rights under the NYCHRL can choose to file a complaint with the Commission’s Law Enforcement Bureau within one year of the discriminatory act and within three years for claims of gender-based harassment,¹³ or file a complaint in court within three years of the discriminatory act.¹⁴ The Commission has procedures in place to protect the confidentiality of an individual’s immigration status and does not seek out such information.¹⁵ Moreover, the Commission—in compliance with Executive Orders 34 and 41¹⁶ and the City’s Identifying Information Law¹⁷—does not ask for or collect information about immigration status from complainants, respondents, or witnesses, and seeks protective orders as necessary to protect all parties from disclosure about immigration status.¹⁸

distinctly private.

Id. § 8-102.

⁹ N.Y.C. Admin. Code §§ 8-602–603.

¹⁰ *Id.* § 14-151.

¹¹ Local Law 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.”).

¹² Local Law 35 (2016); N.Y.C. Admin. Code § 8-130(b).

¹³ N.Y.C. Admin. Code § 8-109(e).

¹⁴ *Id.* § 8-402.

¹⁵ The Commission also has the ability to receive anonymous complaints and prosecute a Commission-initiated investigation. *Id.* § 8-109(c). Individuals do not need to retain an attorney to file at the Commission.

¹⁶ N.Y.C. Mayoral Executive Orders 34 and 41 of 2003, <https://www1.nyc.gov/site/immigrants/about/local-laws-executive-orders.page>. Executive Order 34, as amended by Executive Order 41, prohibits City officers or employees (other than law enforcement officers, who are subject to separate restrictions) from inquiring about a person’s immigration status unless: “(1) Such person’s immigration status is necessary for the determination of program, service or benefit eligibility or the provision of City services; or (2) Such officer or employee is required by law to inquire about such person’s immigration status.” Executive Order 41 prohibits law enforcement officers from inquiring about a person’s immigration status unless investigating illegal activity other than mere status as an undocumented immigrant. Executive Order 41 also prohibits City officers from disclosing another person’s immigration status unless the disclosure is required by law or permitted by other provisions of the Order.

¹⁷ Local Laws 245, 247 (2017); Charter § 8(h); N.Y.C. Admin. Code § 23-1201 *et seq.*

¹⁸ 47 R.C.N.Y. § 1-65(d) (“Materials related to immigration status are not subject to disclosure or discovery absent an order to compel issued by the Chair. A party seeking production of such materials may move the Administrative Law Judge for a recommendation to the Chair for an order to compel. When deciding a motion for an order to compel the production of such materials, the Chair must consider the following factors: whether the materials are relevant and necessary to a claim or defense, and whether

“Alienage and citizenship status” is defined by the NYCHRL to mean: “(a) the citizenship of any person, or (b) the immigration status of any person who is not a citizen or national of the United States.”¹⁹ This guidance uses the term “immigration status” wherever possible, as the term “alienage,” as a derivative of “alien,” may be offensive.²⁰

“Alien”—used in many laws to refer to a “noncitizen” person—is a term that may carry negative connotations and dehumanize immigrants, marking them as “other.”²¹ As discussed in Section III, the use of certain language, including “illegal alien” and “illegals,” with the intent to demean, humiliate, or offend a person or persons constitutes discrimination under the NYCHRL.²²

production of the materials will subject a party to annoyance, embarrassment, oppression, undue burden, or prejudice (including in *terrorem* effect). Notwithstanding the foregoing, an individual may voluntarily produce or authorize the production of information about the individual's own immigration status.”).

¹⁹ N.Y.C. Admin. Code § 8-102(21).

²⁰ See Stephen Hiltner, *Illegal, Undocumented, Unauthorized: The Terms of Immigration Reporting*, N.Y. TIMES (Mar. 10, 2017), <https://www.nytimes.com/2017/03/10/insider/illegal-undocumented-undocumented-the-terms-of-immigration-reporting.html> (“alien” and “illegal” are “off the table entirely” in the New York Times style guide). The Commission avoids the use of the term “alien” wherever possible to describe an individual or a community despite the fact that the word “alienage” appears in the NYCHRL and in many relevant state and federal laws. See, e.g., 8 U.S.C. § 1324b *et seq.*; N.Y. Const. art. III, § 5; N.Y. Civ. Serv. Law § 53. The Commission recognizes that federal, state, and local laws often contain the word “alien” to describe a “noncitizen” person. Where covered entities are required to complete certain forms that contain a reference to “alien” pursuant to federal, state, or local law, such use does not amount to unlawful discrimination in violation of the NYCHRL.

²¹ Keith Cunningham-Parmeter, *Alien Language: Immigration Metaphors and the Jurisprudence of Otherness*, 79 FORDHAM L. REV. 1545, 1569 (2011). See generally D. Carolina Núñez, *War of the Words: Aliens, Immigrants, Citizens, and the Language of Exclusion*, 2013 B.Y.U. L. REV. 1517 (2013); Gerald L. Neuman, *Aliens as Outlaws: Government Services, Proposition 187, and the Structure of Equal Protection Doctrine*, 42 UCLA L. REV. 1425 (1994); Kevin R. Johnson, *“Aliens” and the US Immigration Laws: The Social and Legal Construction of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 263 (1996).

²² The use of the term “illegal” is problematic for many reasons, including that it purports to assign guilt to a person before a fair trial. In 2009, Supreme Court Justice Sonia Sotomayor became the first justice on the high court to opt for the term “undocumented immigrant” in an opinion. See generally *Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599, 175 L. Ed. 2d 458 (2009). In discussing *Carpenter*, she explained that using the term “illegal alien” creates the perception “that immigrants are all criminals and criminals in a negative sense of drug addicts, thieves, and murderers.” See Derek Hawkins, *The long struggle over what to call ‘undocumented immigrants’ or, as Trump said in his order, ‘illegal aliens’*, Wash. Post (Feb. 9, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/02/09/when-trump-says-illegals-immigrant-advocates-recoil-he-would-have-been-all-right-in-1970/?noredirect=on&utm_term=.dad8d593d0ac. The 2012 Supreme Court decision on immigration omitted the terms “illegal immigrants” and “illegal aliens” all together, except when quoting other sources. See *id.* Advocates highlighted that this reflected a more “humanistic approach” in addressing U.S. immigration policy. *Id.* See also Beth Lyon, *When More “Security” Equals Less Workplace Safety: Reconsidering U.S. Laws that Disadvantage Unauthorized Workers*, 6 U. Pa. J. Lab. & Emp. L. 571, 576, 2004 (referring to such people as “illegal aliens” is equivalent to referring to defendants awaiting trial as “convicted criminals”). International human rights law mandates that States respect immigrants’ human rights and refrain from criminalizing migrants who enter the State irregularly. See International Justice Resource Center, *Ten Human Rights Standards Implicated by U.S. Immigration Policy*, <https://ijrcenter.org/2018/06/27/ten-human-rights-standards-implicated-by-u-s-immigration-policy/>; Inter-American Commission on Human Rights Press Release, *IACHR Expresses Concern over Recent Migration and Asylum Policies and Measures in the United States*, I.A.C.H.R. Press Release 130 (June

Discrimination based on immigration status often overlaps with discrimination based on national origin²³ and/or religion. The “line between discrimination based on ancestry or ethnic characteristics, and discrimination based on place or nation of . . . origin, is not a bright one,”²⁴ and it is often difficult to disentangle the motivation behind discriminatory animus based on immigration status, national origin, and other protected categories. Individuals who feel they have experienced discrimination may file a complaint under any or all of these categories that relate to their claim.²⁵

This document serves as the Commission’s legal enforcement guidance on the NYCHRL’s protections against discrimination based on actual or perceived immigration status and actual or perceived national origin.²⁶ This document is not intended to serve as an exhaustive description of all forms of immigration status-related or national origin-related discrimination claims under the NYCHRL.

II. Legislative History

Local Law 97 of 1965 amended the NYCHRL to add “national origin” as a protected category in employment, public accommodations, and housing.²⁷ Two decades later, the federal government passed the Immigration Reform and Control Act of 1986 (“IRCA”)—a statute that changed the landscape of immigration law by creating sanctions for employers who hire undocumented workers,²⁸ legalizing the presence of certain seasonal agricultural undocumented immigrants, and granting amnesty for all immigrants who entered the United States before January 1, 1982.²⁹

After the passage of IRCA, New York City found that some employers, in an effort to comply with the new federal law, were discriminating against immigrant New Yorkers by asking only “foreign-looking” individuals for work authorization documents or hiring only U.S. citizens.³⁰ The New York State Interagency Task Force on Immigration Affairs similarly found that, due to IRCA, New York employers were engaging in practices that disadvantaged or discriminated against noncitizens by refusing to accept legally valid proof of residency, denying employment to those who experienced minor delays in

18, 2018), http://www.oas.org/en/iachr/media_center/PReleases/2018/130.asp.

²³ The term “national origin” is undefined in the NYCHRL.

²⁴ *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 614 (1987) (“race, religion, and national origin are commonly associated with one another, it is difficult, and unnecessary, to consider whether the various allegedly discriminatory incidents . . . clearly point to either race-, religion-, or national-origin-based discrimination.”).

²⁵ See *Payne v. N.Y.C. Police Dep’t*, 863 F. Supp. 2d 169, 182 n.8 (E.D.N.Y. 2012).

²⁶ While this document is focused on the NYCHRL, the Commission cites federal authority where instructive. This document does not constitute legal guidance on federal law.

²⁷ Marta B. Varela, *The First Forty Years of the Commission on Human Rights*, FORDHAM URBAN L. J., 984–85 (1995) (citing N.Y.C. Local Law 97 (1965)).

²⁸ Bill Jacket, Local Law 52 (1989); 8 U.S.C. §§1160, 1187, 1188, 1255a, 1324a, 1324b, 1364, 1365. IRCA introduced Form I-9 and established financial and other penalties for those employing immigrants without work authorization.

²⁹ 8 U.S.C. §§ 1160, 1255a.

³⁰ Mayor Koch Testimony, Local Law 52 (1989), available upon request from the Commission.

gathering documentation, asking for documents only from individuals who they perceived to be foreign, and refusing to hire individuals not born in the U.S.³¹ The City determined that immigrants “are often victims of discrimination and denied rights conferred upon them by the U.S. Constitution and other federal, state, and City law.”³² As a result, the City enacted Local Law 52 of 1989, adding “alienage and citizenship status” as a protected category to the NYCHRL,³³ providing anti-discrimination legal protections to documented and undocumented immigrants alike.³⁴

III. Violations of the NYCHRL Based on Immigration Status and National Origin

A. Disparate Treatment

Disparate treatment—which occurs when a covered entity treats an individual less well than others because of a protected characteristic³⁵—based on an individual’s actual or perceived immigration status or national origin in employment, housing, and places of public accommodation violates the NYCHRL.³⁶ Disparate treatment may be overt, or it may manifest itself in more subtle ways. Disparate treatment can manifest through policies, treatment, harassment, and actions based on stereotypes or assumptions.

Disparate treatment based on actual or perceived immigration status or national origin may also be expressed by animus based on characteristics closely associated with one’s actual or perceived immigration status or national origin. For example, discriminating against someone because of their accent, English proficiency, or use of another language³⁷ is discrimination based on immigration status and/or national origin.

To establish disparate treatment under the NYCHRL, an individual must show that they were treated less well or subjected to an adverse action at least in part because of their membership in a protected class.³⁸ An individual may demonstrate this through direct evidence of discrimination or indirect evidence that gives rise to an inference of discrimination.³⁹

³¹ *Id.*

³² *Id.*

³³ Codified in N.Y.C. Admin. Code §§ 8-102, 8-107. The protected category was also included with the later additions of bias-based profiling and discriminatory harassment. See N.Y.C. Admin. Code §§ 8-602–603, 14-151.

³⁴ Richard Levine, *Koch Favors Measure to Protect Illegal Aliens*, N.Y. TIMES (Dec. 22, 1988), <https://www.nytimes.com/1988/12/22/nyregion/koch-favors-measure-to-protect-illegal-aliens.html>.

³⁵ *Raytheon Co. v. Hernandez*, 540 U.S. 44, 52 (2003).

³⁶ *Williams v. N.Y.C. Hous. Auth.*, 872 N.Y.S.2d 27, 39 (1st Dep’t 2009). The NYCHRL also protects individuals based on actual or perceived immigration status in several other contexts such as licensing, real estate, credit, discriminatory harassment, and bias-based profiling. See N.Y.C. Admin. Code §§ 8-107(9), 8-107(5), 8-107(24), 8-603, 14-151.

³⁷ In the employment context, proficiency in English may be necessary to requirements of the job. In such instances, an employer must establish that English proficiency is necessary to the job to argue that no discriminatory animus motivated a decision to reject an applicant or to take an adverse action against an employee. See *Mejia v. N.Y. Sheraton Hotel*, 459 F. Supp. 375, 377 (S.D.N.Y. 1978).

³⁸ *Williams*, 872 N.Y.S.2d at 39.

³⁹ 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*

1. Employment

It is unlawful to discriminate in the terms and conditions of employment because of a job applicant's or employee's actual or perceived immigration status or national origin.⁴⁰ Adverse actions and discriminatory policies based on these protected categories violate the NYCHRL because they subject employees to worse treatment based on their actual or perceived immigration status. As discussed further below, the NYCHRL states that compliance with federal, state, or local laws that expressly permit inquiry into immigration status in limited circumstances is not discriminatory conduct;⁴¹ in the employment context, this includes federal legal requirements that employers verify job applicants' work authorization upon hiring. However, if an employer decides to hire someone regardless of work authorization, the employer cannot exploit, harass, or otherwise discriminate against the employee. Such treatment violates the NYCHRL.

a. Hiring practices

The NYCHRL acknowledges that different treatment of individuals based on immigration status may be explicitly required under federal or state law with respect to hiring.⁴² Pursuant to IRCA, employers are not permitted to knowingly hire or employ individuals without work authorization.⁴³ Federal law allows employers to prefer to hire a U.S. citizen or national over a noncitizen where two candidates are "equally qualified" but only after fully considering all other applicants.⁴⁴ Outside of this limited circumstance, it is a violation of the NYCHRL for employers to discriminate among work-authorized individuals—including, but not limited to, citizens, permanent residents, refugees, asylees, and those granted lawful temporary status—unless required or explicitly permitted by law.⁴⁵ For further discussion on the interaction between the NYCHRL and federal and state law with respect to hiring and employment, see *infra* Section IV.

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). A plaintiff may prevail in an action under the NYCHRL if "he or she proves that unlawful discrimination was one of the motivating factors, even if it was not the sole motivating factor, for an adverse employment decision, or that the action was 'more likely than not based in whole or in part on discrimination.'" *Melman v. Montefiore Med. Ctr.*, 98 A.D.3d 107, 127, (1st Dep't 2012) (quoting *Aulicino v. N.Y.C. Dep't of Homeless Servs.*, 580 F.3d 73, 80 (2d Cir. 2009)). If plaintiff makes this *prima facie* showing, 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. 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 the City of New York*, No. 154283/2016, 2019 WL 1580151 (Sup. Ct. N.Y. Cty. Apr. 12, 2019).

⁴⁰ N.Y.C. Admin. Code § 8-107(1).

⁴¹ *Id.* § 8-107(14).

⁴² *Id.*

⁴³ See 8 U.S.C. § 1324a *et seq.*

⁴⁴ *Id.* § 1324b(a)(4).

⁴⁵ See U.S. Citizenship & Immigration Servs., *Preventing Discrimination* (Feb. 24, 2017), <https://www.uscis.gov/i-9-central/employee-rights-resources/preventing-discrimination>.

Employers may not ask applicants questions related to work authorization in an inconsistent manner based on actual or perceived immigration status or national origin. For example, an employer may not ask someone who has an accent whether they have work authorization if the employer does not ask the same question of someone who does not have an accent.⁴⁶

If an employer hires workers who are not work-authorized, those workers cannot be treated less well than any other employee because of their immigration status, including the status of being undocumented.⁴⁷ Such treatment violates the NYCHRL.

b. Document abuse

An employer must not demand specific documents beyond what is required to establish work authorization under federal law.⁴⁸ Federal law requires employers to accept any document an employee presents from the “List of Acceptable Documents” established by statute,⁴⁹ so long as the document “reasonably appears to be genuine and to relate to the employee.”⁵⁰ Employers must not: demand that an employee show specific documents, such as a green card or birth certificate, to establish identity and/or work

⁴⁶ Employers should also be aware of nondiscrimination requirements under federal law. The U.S. Department of Justice has published guidance for employers with respect to the process for having employees complete the mandatory I-9 form to verify their employment authorization. The guidance states that the authorization process does not require an employee to prove their citizenship status to the employer, and that “[a]sking an employee for proof of citizenship or immigration status could violate the law at 8 U.S.C. § 1324b(a)(6).” See U.S. Dep’t of Justice, Immigrant & Employee Rights Section, *How Employers Can Avoid Discrimination in the Form I-9 and E-Verify Process*, <https://www.justice.gov/crt/page/file/1132606/download> (citing 8 U.S.C. § 1324a(b), 8 C.F.R. § Part 274a.2(b)).

⁴⁷ N.Y.C. Admin. Code § 8-107(1).

⁴⁸ Federal law requires that, at the outset of employment, employees, in most circumstances, complete a Form I-9 to verify the employee’s identity and work authorization for employment in the United States. U.S. Citizenship & Immigration Servs., *I-9, Employment Eligibility Verification*, <https://www.uscis.gov/i-9>. An individual does not need to complete an I-9 if: they are an independent contractor; employed for casual domestic work in a private home on an irregular or intermittent basis; not physically working on U.S. soil; or if they are providing labor and are employed by a contractor providing contract services (e.g., employee leasing or temporary agencies). EMPL’T LAW INST., HANDBOOK FOR EMPLOYERS U.S. CITIZENSHIP AND IMMIGRATION SERVICES, 20160311A NYCBAR 264, at 4 (N.Y.C. Bar Ass’n 2016).

⁴⁹ 8 U.S.C. § 1324a. It is an “unfair immigration-related employment practice” under 8 U.S.C. § 1324b(a)(6) for (i) A person or other entity, for purposes of satisfying the requirements of 8 U.S.C. § 1324a(b), either— (A) To request more or different documents than are required under § 1324a(b); or (B) To refuse to honor documents tendered that on their face reasonably appear to be genuine and to relate to the individual; and (ii) To make such request or refusal for the purpose or with the intent of discriminating against any individual....” 28 C.F.R. § 44.200(a)(3).

⁵⁰ See EMPL’T LAW INST., HANDBOOK FOR EMPLOYERS U.S. CITIZENSHIP AND IMMIGRATION SERVICES, 20160311A NYCBAR 264, at 5 (N.Y.C. Bar Ass’n 2016). In the work authorization process, employees are required to provide proof of both their identity and their employment authorization. The instructions for completing I-9 forms have three lists of documents. An employee may provide a document from List A to establish both their identity and their employment authorization. Alternatively, an employee may provide a document from List B to establish their identity and a document from List C to establish their employment authorization. See U.S. Citizenship & Immigration Services, *Acceptable Documents*, <https://www.uscis.gov/i-9-central/acceptable-documents>.

authorization; ask to see work authorization documents before an individual accepts a job offer; “refuse to accept a document, or refuse to hire an individual because a document will expire in the future;”⁵¹ or “demand a specific document when reverifying that an employee is authorized to work.”⁵² Such practices are commonly referred to as “document abuse,”⁵³ and, when motivated at least in part by an employer’s discriminatory animus, are unlawful under the NYCHRL because they subject applicants to discriminatory treatment based on their actual or perceived immigration status or national origin.

Federal law requires or allows employers to reverify an employee’s work authorization in the following limited circumstances: (1) the employee’s work authorization is expiring;⁵⁴ (2) an employer develops “constructive knowledge”⁵⁵ that the employee is not work-authorized;⁵⁶ (3) the employer conducts a neutral, non-discriminatory self-audit of their compliance with work authorization requirements;⁵⁷ or (4) during an I-9 audit by the federal government.⁵⁸ Federal law also requires some employers with federal

⁵¹ See U.S. Citizenship & Immigration Servs., *Preventing Discrimination*, (Feb. 24, 2017) <https://www.uscis.gov/i-9-central/employee-rights-resources/preventing-discrimination>.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ 8 C.F.R. § 274a.2(b)(1); U.S. Citizenship & Immigration Servs., *Completing Section 3, Reverification and Rehires*, <https://www.uscis.gov/i-9-central/complete-correct-form-i-9/completing-section-3-reverification-and-rehires>.

⁵⁵ U.S. Citizenship and Immigration Services defines constructive knowledge as “knowledge which may fairly be inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition.” See 8 C.F.R. § 274a(1)(I)(1). This regulation also offers these examples:

Constructive knowledge may include, but is not limited to, situations where an employer:

- (i) Fails to complete or improperly completes the Employment Eligibility Verification Form I-9;
- (ii) Has information available to it that would indicate that the alien is not authorized to work, such as Labor Certification and/or an Application for Prospective Employer; or
- (iii) Acts with reckless and wanton disregard for the legal consequences of permitting another individual to introduce an unauthorized alien into its work force or to act on its behalf.

⁵⁶ See *Collins Foods Int’l, Inc. v. U.S. I.N.S.*, 948 F.2d 549, 554 (9th Cir. 1991) (noting employment offer before verification of work-authorized status does not constitute constructive knowledge); *Mester Mfg. Co. v. U.S. I.N.S.*, 879 F.2d 561, 566–67 (9th Cir. 1989) (noting knowledge element satisfied where employer failed to investigate after a U.S. Immigration and Naturalization Service (“INS”) agent advised the employer of specific employees that INS suspected of using false alien registration cards); *Trollinger v. Tyson Foods, Inc.*, 543 F. Supp. 2d 842, 848, 853 (E.D. Tenn. 2008) (noting non-English application does not raise reasonable suspicion to constitute knowledge of non-work-authorized status). INS was a federal agency that was eliminated in 2003 and its duties transferred to U.S. Citizenship and Immigration Services, U.S. Immigration and Customs Enforcement, and U.S. Customs and Border Protection. See U.S. Citizenship & Immigration Servs., *Did You Know?: The INS No Longer Exists*, (Apr. 13, 2011), <https://www.uscis.gov/archive/blog/2011/04/did-you-know-ins-no-longer-exists>.

⁵⁷ Employers may conduct self-audits of their compliance with work authorization requirements by selecting records to be audited based on neutral and non-discriminatory criteria. U.S. Immigration and Customs Enforcement has published guidance to help employers structure and implement internal audits in a manner consistent with the employer sanctions and anti-discrimination provisions of the INA. It explicitly states that audits should not be conducted on the “basis of an employee’s citizenship status or national origin, or in retaliation against any employee or employees for any reason.” U.S. Citizenship & Immigration Servs., *Guidance for Employers Conducting Internal Employment Eligibility Verification Form I-9 Audits*, <https://www.justice.gov/crt/file/798276/download>.

⁵⁸ EPLM’T LAW INST., HANDBOOK FOR EMPLOYERS U.S. CITIZENSHIP AND IMMIGRATION SERVICES,

contracts or subcontracts to verify the work authorization of their current employees using the federal government's E-Verify system.⁵⁹ Beyond these circumstances, reverification is not permitted. For example, reinstatement of an employee's position, such as when the employee returns from medical or parental leave, does not trigger federal requirements for checking an employee's eligibility.⁶⁰ Federal rules provide that an employer "is not deemed to have hired an individual for employment if the individual is continuing in his or her employment and has a reasonable expectation of employment at all times," as, for example, when an employee is being promoted, being transferred to a different unit, or on strike. Accordingly, such events do not trigger requirements for reverification.⁶¹ An employer that acquires a new company in a merger and acquisition is permitted to choose how to treat employees who are continuing their employment with the related successor after the merger. If the new employer treats these employees as new hires, the employer must complete a new Form I-9 for work authorization for all employees of the acquired company; if the new employer considers these employees as continuing their employment, the employer is only required to obtain and maintain the previously completed Form I-9.⁶²

Reverification of employment is unlawful under the NYCHRL when it is based on discriminatory animus towards an employee's actual or perceived immigration status or national origin or other protected category under the NYCHRL and takes place outside circumstances permitted under federal law.⁶³ It is also unlawful under the NYCHRL to

20160311A NYCBAR 264, at 5 (N.Y.C. Bar Ass'n 2016); see also Immigration and Nationality Act § 274A, 8 U.S.C. § 1324a(b)(1)(B)–(D); 8 C.F.R. §§ 274a.1(l)(1)(ii), 274a.9(c); U.S. Citizenship & Immigration Servs., E-Verify, 2.1 Form I-9 and E-Verify, <https://www.e-verify.gov/e-verify-user-manual-20-initial-verification/21-form-i-9-and-e-verify>.

⁵⁹ 48 C.F.R. § 22.1802 (E-verify requirements for certain federal contractors and subcontractors). E-Verify, the U.S. Citizenship and Immigration Service's employment eligibility verification program, is an Internet-based system that compares information from an employee's Employment Eligibility Verification Form (I-9) to U.S. Department of Homeland Security and Social Security Administration records to confirm that the employee is authorized to work in the United States. Employers may also conduct self-audits of their compliance with work authorization requirements by selecting records to be audited based on neutral and non-discriminatory criteria. U.S. Immigration and Customs Enforcement has published guidance to help employers structure and implement internal audits in a manner consistent with the employer sanctions and anti-discrimination provisions of the INA. It explicitly states that audits should not be conducted on the "basis of an employee's citizenship status or national origin, or in retaliation against any employee or employees for any reason." U.S. Citizenship & Immigration Servs., *Guidance for Employers Conducting Internal Employment Eligibility Verification Form I-9 Audits*, <https://www.justice.gov/crt/file/798276/download>.

⁶⁰ U.S. Citizenship & Immigration Servs., *Continuing Employment*, <https://www.uscis.gov/i-9-central/complete-correct-form-i-9/complete-section-1-employee-information-and-verification/continuing-employment>.

⁶¹ See 8 C.F.R. § 274a.2 ("An employer will not be deemed to have hired an individual for employment if the individual is continuing in his or her employment and has a reasonable expectation of employment at all times.").

⁶² U.S. Citizenship & Immigration Servs., *Mergers and Acquisitions*, <https://www.uscis.gov/i-9-central/mergers-and-acquisitions>.

⁶³ Guidance from the U.S. Citizenship and Immigration Services states that employers should not reverify U.S. citizens and U.S. noncitizen nationals and should not reverify lawful permanent residents who have presented certain documents. For other individuals, the guidance states that employers should not reverify "List B documents" (documents that are used to establish a person's identity during the work

use reverification as a tool to retaliate against workers who have engaged in protected activity under the NYCHRL.⁶⁴

If an employer receives an “Employee Correction Request Notice,” commonly referred to as a “No-Match Letter” from the Social Security Administration (“SSA”),⁶⁵ the letter by itself does not constitute “constructive knowledge” requiring an employer to take an adverse employment action against the employee.⁶⁶ A No-Match Letter is an educational letter intended to “advise employers that corrections are needed in order for [the SSA] to properly post its employee’s earnings to the correct record” for purposes of Social Security benefits.⁶⁷ The letter advises that the reported information about an employee’s name and/or Social Security number (“SSN”) does not match the name or SSN in the SSA’s records.⁶⁸ As noted in the SSA No-Match Letter itself, as well as in U.S. Department of Justice guidance, employers should not assume that if an employee is listed in a No-Match Letter, the named employee has an issue with their immigration status.⁶⁹ A mismatch could happen for many reasons, including clerical errors and name changes.⁷⁰ Receipt of a No-Match Letter should not be used as a basis for taking adverse action against an employee or for reverifying an employee’s work authorization.⁷¹ Taking an adverse action against an employee due to a mismatch, such

authorization verification process), but should reverify “List A” documents and “List C” documents (documents used to establish work authorization) when the employee’s employment authorization or employment authorization documentation expires. U.S. Citizenship & Immigration Servs., *Completing Section 3, Reverification and Rehires*, <https://www.uscis.gov/i-9-central/complete-correct-form-i-9/completing-section-3-reverification-and-rehires>.

⁶⁴ See 8 U.S.C. § 1324b; N.Y.C. Admin. Code § 8-107(7); see *infra* Section III(E) for discussion on retaliation.

⁶⁵ Soc. Sec. Admin., *Employer Correction Request Notices*, <https://www.ssa.gov/employer/notices.html>. See U.S. Dep’t of Justice, Office of Special Counsel for Immigration-Related Unfair Employment Practices, *SSA No-Match Guidance Page*, <https://www.justice.gov/crt/ssa-no-match-guidance-page>.

⁶⁶ *Aramark Facility Servs. v. Serv. Employees Int’l Union, Local 1877, AFL CIO*, 530 F.3d 817, 825–27 (9th Cir. 2008); see also U.S. Dep’t of Justice, Office of Special Counsel for Immigration-Related Unfair Employment Practices, *Names and Social Security Numbers (SSNs) “No-Matches” Information for Employers*, (employers should not: “[a]ssume the no-match conveys information regarding the employee’s immigration status or actual work authority;” “[u]se the receipt of a no-match notice alone as a basis to terminate, suspend or take other adverse action against the employee;” “[a]ttempt to immediately reverify the employee’s employment eligibility by requesting the completion of a new Form I-9 based solely on the no-match notice;” “[f]ollow different procedures for different classes of employees based on national origin or citizenship status;” “[r]equire the employee to produce specific I-9 documents to address the no-match;” or “[r]equire the employee to provide a written report of SSA verification (as it may not always be obtainable).”

⁶⁷ Soc. Sec. Admin., *Employer Correction Request Notices*, <https://www.ssa.gov/employer/notices.html>.

⁶⁸ N.Y.C. Comm’n on Human Rights and Mayor’s Office of Immigrant Affairs, *Employers: What You Need to Know About Social Security Administration No-Match Letters*, (July 2019), <https://www1.nyc.gov/site/cchr/media/No-Match-Letter-Factsheet.page>.

⁶⁹ U.S. Dep’t of Justice, *Frequently Asked Questions about Name/Social Security Number “No-Matches,”* <https://www.justice.gov/sites/default/files/crt/legacy/2010/12/29/FAQs.pdf>.

⁷⁰ N.Y.C. Comm’n on Human Rights and Mayor’s Office of Immigrant Affairs, *Employers: What You Need to Know About Social Security Administration No-Match Letters*, (July 2019).

⁷¹ U.S. Dep’t of Justice Civil Rights Div. Immigrant and Employee Rights Section, *Name and Social Security Number (SSN) “No-Matches” Information for Employers*, <https://www.justice.gov/crt/case->

as putting an employee on leave or terminating employment, could violate the NYCHRL.⁷²

c. Immigration worksite enforcement

Worksite enforcement is one form of immigration enforcement conducted by the federal government. Immigration worksite enforcement occurs in two ways: (1) in the form of a raid, in which Immigration and Customs Enforcement (“ICE”) physically comes to a worksite unannounced to inspect files and/or detain workers who they determine may be unlawfully present;⁷³ or (2) in the form of an I-9 audit, in which ICE requires employers to submit their employment authorization records, usually within three business days, for verification.⁷⁴

Employers and employees can prepare for immigration worksite enforcement in order to reduce economic and community disruption. Both employers and employees should understand the rights of immigrant workers in the event of an audit or worksite raid.⁷⁵ Employers are encouraged to give notice to their employees when they know or suspect that an audit or raid will occur so that employees have an opportunity to update any necessary documents and make other preparations. Unless explicitly prohibited (such as during an ongoing criminal investigation), it is not against the law for employers to provide notice to their employees of a worksite raid or audit.⁷⁶ In fact, some unions have contract provisions that require the employer to take certain actions in the event a Notice of Inspection is served on an employer.⁷⁷ This may include requiring employers to hold a meeting to notify workers of their rights, notifying the union and workers of discrepancies ICE found during the audit, and allowing workers a reasonable amount of

document/file/1138471/download.

⁷² For additional information on how to appropriately handle SSA No-Match Letters, please refer to the SSA’s website, which contains sample notices and step-by-step instructions. SOC. SEC. ADMIN., *Employer Correction Request Notices (EDCOR)*, <https://www.ssa.gov/employer/notices.html>.

⁷³ ICE may physically visit an employer in a raid of the worksite in which ICE agents question and detain individual workers or groups of workers, or conduct a “silent raid” where ICE agents examine personnel files at an employer’s main office. See Julia Preston, *Illegal Workers Swept from Jobs in Silent Raids*, N.Y. TIMES (July 9, 2010), <https://www.nytimes.com/2010/07/10/us/10enforce.html>.

⁷⁴ In an I-9 audit, ICE will typically serve a “Notice of Inspection” upon an employer, which requires the employer to produce I-9 forms. U.S. Citizenship & Immigration Servs., *Inspections*, <https://www.uscis.gov/i-9-central/retain-store-form-i-9/inspections>; see U.S. Citizenship & Immigration Servs., *Form I-9 Inspection Overview*, (Aug. 9, 2019), <https://www.ice.gov/factsheets/i9-inspection> for more information.

⁷⁵ For additional resources, see N.Y.C. Comptroller, *Immigrant Rights and Services: A Comprehensive Guide to City, State, and Federal Services*, <https://comptroller.nyc.gov/services/for-the-public/immigrant-rights-and-services/>; N.Y.C. Commission on Human Rights, *Important Information for Immigrant Workers*, <https://www1.nyc.gov/site/cchr/media/immigration-workers-rights-factsheet.page>; N.Y.C. Mayor’s Office of Immigrant Affairs, *Research & Evaluations*, <https://www1.nyc.gov/site/immigrants/about/research-evaluations.page>.

⁷⁶ See *United States v. California*, 921 F.3d 865, 879–82 (9th Cir. 2019) (affirming district court’s denial of preliminary injunction in consideration of California law requiring employers to notify employees before federal immigration inspections).

⁷⁷ See, e.g., UNITE HERE, *Workplace Protections For Immigrant Workers*, <https://www.unitehereimmigration.org/about-unite-here/workplace-protections-for-immigrant-workers/> (last accessed Sep. 24, 2019).

time to correct discrepancies in work authorization documents.⁷⁸ Employers can also potentially reduce the immediate disruption of unexpected immigration worksite enforcement by refusing ICE access to non-public facing areas if the agents do not produce a warrant signed by a judge.⁷⁹

Exploiting or threatening ICE involvement to further a discriminatory motive, to harass or intimidate employees, or to retaliate against employees for engaging in protected activity⁸⁰ is a violation of the NYCHRL.⁸¹

d. Employment protections for undocumented immigrant workers

Once an employer has decided to hire an individual, that individual enjoys the same protections under the NYCHRL as any other employee, regardless of their immigration status or work authorization.⁸² Undocumented immigrants can file claims of discrimination at the Commission and in court. Remedies, including, but not limited to,

⁷⁸ See *New Toolkit gives Workers Tools to Fight against Raids and Audits*, MIJENTE (May 11, 2017), <https://mijente.net/2017/05/11/workers-toolkit-fight-against-raids-and-audits/> (discussing AFL-CIO, Toolkit for Organizers and Advocates on Workplace Raids and Audits, May 2017).

⁷⁹ ICE must either have consent of the employer or a judicial warrant, rather than an administrative warrant, to enter non-public facing areas (such as the kitchen of a restaurant or the back office of a store where members of the public are not allowed). An administrative warrant is any document issued by a designated ICE official purporting to document the authority of an ICE agent to arrest a person suspected of violating immigration laws. See 8 U.S.C. § 1357, 8 C.F.R. § 287.5. When exigent circumstances are not present, law enforcement agents must have a warrant signed by a neutral magistrate in order to demand entry to private property. Administrative warrants are not issued by a neutral magistrate, and thus do not provide authority to demand entry. See *generally Camara v. Mun. Ct.*, 387 U.S. 523, 534 (1967) (holding administrative warrant insufficient to permit entry into residence); See *v. City of Seattle*, 387 U.S. 541, 545 (1967) (holding that administrative warrant does not provide authority to enter non-public parts of business without owner's consent); *Coolidge v. New Hampshire*, 403 U.S. 443, 454–55 (1971) (“[s]earches conducted outside judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment.”); *United States v. Abdi*, 463 F. 3d 547, 551 (6th Cir. 2006) (describing the procedure for obtaining an administrative warrant); *United States v. Castellanos*, 518 F.3d 965, 971–72 (8th Cir. 2008).

⁸⁰ For more on retaliation, see *infra* Section III(E).

⁸¹ In addition, New York Labor Law § 215(1)(a)(enacted by Chapter 126 of 2019) provides that “to threaten, penalize, or in any other manner discriminate or retaliate against any employee includes threatening to contact or contacting United States immigration authorities or otherwise reporting or threatening to report an employee's suspected citizenship or immigration status or the suspected citizenship or immigration status of an employee's family or household member.”

⁸² N.Y.C. Admin. Code § 8-107(1); see N.Y. Labor L. §§ 193, 663, 681; Formal Op. No. 2003-F3, Office of the Att’y Gen. of the State of N.Y., 2003 WL 22522840 (Oct. 21, 2003) (federal case law does not preclude the New York State Department of Labor from enforcing state wage payment laws on behalf of undocumented immigrants). There are additional worker protections against retaliation regardless of immigration status in New York City. See, e.g., N.Y.C. Admin. Code § 20-1204 (prohibiting retaliation against employees in relation to their rights under the Fair Work Week Law); 6 R.C.N.Y § 7-104(b) (“Any person who meets the definition of employee in section 7-101 of this subchapter is entitled to the rights and protections provided by this subchapter to employees and any applicable provision of the [Office of Labor Policy and Standards] laws and rules, regardless of immigration status.”); see also N.Y.C. Dep’t of Consumer Affairs, *The Office of Labor Policy & Standards*, <https://www1.nyc.gov/assets/dca/downloads/pdf/workers/OfficeofLaborPolicyandStandards-WhatWeDo.pdf>.

economic and emotional distress damages, are available under the NYCHRL regardless of an employee's immigration status.

e. Harassment

Disparate treatment may manifest as harassment when the incident or behavior creates, reflects, or fosters a work culture or atmosphere that is demeaning, humiliating, or offensive. Harassment related to an individual's actual or perceived immigration status or national origin is a form of discrimination, and may consist of a single or isolated incident or a pattern of repeated acts or behavior. Under the NYCHRL, harassment related to immigration status or national origin in the workplace covers a broad range of conduct and generally occurs when an individual is treated less well on account of their actual or perceived immigration status. The severity or pervasiveness of the harassment is only relevant to damages.⁸³ Even an employer's single comment made in circumstances where that comment would signal discriminatory views about one's immigration status or national origin may be enough to constitute harassment.⁸⁴

The use of the terms "illegal alien" and "illegals," with the intent to demean, humiliate, or offend a person or persons in the workplace, amounts to unlawful discrimination under the NYCHRL. As with other forms of harassment, employers are strictly liable for an unlawful discriminatory practice where the harasser exercises managerial or supervisory responsibility.⁸⁵ Employers may be held liable for a non-managerial employee's harassment if the employer: (1) knew about the employee's conduct and "acquiesced in such conduct or failed to take immediate and appropriate corrective action,"⁸⁶ or (2) should have known about the employee's discriminatory conduct and "failed to exercise reasonable diligence to prevent such discriminatory conduct."⁸⁷

Employer threats to call federal immigration authorities can constitute unlawful harassment under the NYCHRL when motivated, in whole or in part, by animus related to the employee's actual or perceived immigration status and/or national origin. In addition, using the specter of calling immigration authorities or the police to force employees to work in unsafe, unequal, or otherwise unlawful conditions is unlawful harassment under the NYCHRL.⁸⁸ While reporting a violation of the law to the police is

⁸³ *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..."); *Williams*, 872 N.Y.S.2d at 38.

⁸⁴ 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. 2019) (citing *Williams*, 872 N.Y.S.2d at 41 n.30).

⁸⁵ N.Y.C. Admin. Code § 8-107(13)(b)(1).

⁸⁶ *Id.* § 8-107(13)(b)(2).

⁸⁷ *Id.* § 8-107(13)(b)(3).

⁸⁸ See *United States v. Rivera*, 799 F.3d 180, 187 (2d Cir. 2015) ("[v]ictims testified that Appellants threatened that they would report the victims to the immigration authorities and that they were threatened with or subjected to physical violence if they did not comply with Appellants' instructions."). In discussing labor trafficking, "known objective conditions that make the victim especially vulnerable to pressure (such as youth or immigration status) bear on whether the employee's labor was obtained by forbidden means." *Muchira v. Al-Rawaf*, 850 F.3d 605, 618 (4th Cir.), *amended* (Mar. 3, 2017), *cert. denied*, 138 S.Ct. 448,

otherwise permitted, it is a violation of the NYCHRL when such action is taken or threats to take such action are made based solely on a discriminatory or retaliatory motive. If workers have engaged in any protected activity, such reports to authorities may be actionable as retaliation.⁸⁹

Examples of disparate treatment in employment

- A construction company sponsors a temporary worker for the summer with an H-2B visa. The company does not allow the worker to take any breaks for his twelve-hour shift, while the company allows U.S. citizen workers to take two breaks during their twelve-hour shifts. The company threatens to not sponsor the worker again for next season when he complains.
- An employee develops a medical condition and requests an accommodation to attend necessary medical appointments once a week. The employer denies her request. When the employee informs her employer that another employee is permitted to leave work for medical appointments, the employer tells her that she does not have that right because she is an undocumented immigrant. The employer then threatens to call ICE if she misses work for any reason.
- An employer refuses to accept a Social Security card and demands a birth certificate from a job applicant because the applicant speaks English with an accent.
- A hotel prohibits its housekeepers from speaking Spanish while cleaning because it would “offend” hotel guests or make them uncomfortable.
- An employer receives a No-Match Letter that lists an employee who immigrated from the Philippines. The employer has long looked for a reason to discharge the employee because of their accent. With receipt of the No-Match Letter, the employer discharges the employee.
- A construction company provides its Polish workers first priority in scheduling and time off to the disadvantage of its U.S. citizen workers.

2. Housing

It is unlawful to sell, rent, or lease housing with different terms, conditions, or privileges or to misrepresent the availability of housing to someone because of their actual or perceived immigration status or national origin.⁹⁰ It is also unlawful to post an advertisement for housing that discriminates based on membership in a protected category.⁹¹ Under the NYCHRL, practices or policies that single out tenants, home buyers, or housing applicants based on their actual or perceived immigration status or national origin are unlawful disparate treatment unless the covered entity can demonstrate a legitimate non-discriminatory justification for the distinction.

199 L. Ed. 2d 329 (2017) (internal quotation marks and alteration omitted).

⁸⁹ U.S. Dep’t of Labor, *Fact Sheet: Retaliation Based on Exercise of Workplace Rights is Unlawful*, <https://www.dol.gov/dol/fact-sheet/immigration/RetaliationBasedExerciseWorkplaceRightsUnlawful.htm>.

⁹⁰ N.Y.C. Admin. Code § 8-107(5)(a)(1).

⁹¹ *Id.* § 8-107(5).

Adverse treatment may be overt, such as refusing to accept a rental application for an apartment because the applicant is not a U.S. citizen, or may be subtle, such as a landlord telling an applicant that an apartment is no longer available after hearing the applicant speak English with an accent. Landlords may not ignore tenants' requests for repairs, create or allow unsafe conditions, or fail to provide adequate heat because of tenants' actual or perceived immigration status or national origin.

There may be very limited circumstances in which immigration status is relevant and can factor into one's eligibility to access certain housing-related benefits. For example, a public housing provider may be required to ask about a benefit applicant's immigration status to ascertain eligibility for a federal program.⁹² However, information requested should be limited to what is required and may not be used as an excuse for invidious discrimination.

a. Immigration status and national origin cannot be considered in rental and home purchase transactions

Housing providers cannot refuse to rent or sell, or alter the terms and conditions of housing, because of actual or perceived immigration status or national origin. Some personal information may be necessary to complete an application for housing: generally, landlords, sellers, and their agents are permitted to request photo identification and other personal information for purposes of running a credit inquiry. This may include a driver's license, a passport, an SSN, or an individual tax identification number ("ITIN"). However, questions related to immigration status or national origin are discouraged and may be a basis for presuming discriminatory animus. For example, if a landlord tells an applicant they will only accept a passport or an SSN for purposes of a credit check and refuses alternative forms of identification or documentation sufficient to run a credit check, it may be pretext for discrimination.⁹³

Under New York State law, landlords are required to place security deposits in an escrow account separate and apart from the landlord's personal funds.⁹⁴ A landlord does not need a tenant's SSN in order to open an escrow account for the security deposit in the tenant's name.⁹⁵ Accordingly, if a landlord insists that they require an SSN for an escrow account, does not offer an alternative arrangement if no SSN can be provided,⁹⁶ and rejects a prospective tenant on that basis, it may be considered as pretext for discrimination based on immigration status or national origin under the NYCHRL. With respect to home purchases, it is also an unlawful discriminatory practice under the NYCHRL for any individual, bank, trust company, loan association, credit

⁹² See National Immigration Law Center, *Rental Housing Programs* (last updated Oct. 2018), https://www.nilc.org/wp-content/uploads/2016/03/rental_housing_1005.pdf; see also N.Y.C. Admin. Code § 8-107(14).

⁹³ Requesting unnecessary additional documentation, like a driver's license, may also be a proxy for discriminating based on other protected categories such as race, disability, and age.

⁹⁴ See N.Y. Gen. Oblig. L. § 7-107 *et seq.*

⁹⁵ See *id.*

⁹⁶ For example, some online programs partner with landlords to provide deposit-free listings and listings that are explicitly open to international citizens and students.

union, mortgage company, or other financial institution or lender or any agent thereof to discriminate against applicants in the granting, withholding, extending or renewing, or in the fixing of rates, terms, or conditions of any mortgage because of a prospective occupant's actual or perceived immigration status or national origin.⁹⁷

b. Housing protections for undocumented immigrant tenants

Undocumented immigrant tenants and those seeking housing are protected from discrimination by individuals who sell, rent, or lease housing, including owners, other tenants, managing agents, real estate brokers, and real estate agents. Tenants with and without leases are protected from being evicted based on immigration status and national origin, so long as they comply with local housing law. In most circumstances, tenants whose occupancy has lasted thirty days or more, regardless of immigration status, may be evicted only after the landlord has served them with a termination notice and obtained a court order from a judge authorizing eviction.⁹⁸ Only a sheriff, marshal, or constable, not a landlord, can carry out a court-ordered eviction of the tenant.⁹⁹ A landlord's efforts to evict any tenant through intimidation, coercion, or by making the living conditions so unpleasant or uninhabitable, motivated in whole or in part by a tenant's actual or perceived immigration status or national origin, are unlawful under the NYCHRL.

c. Harassment

Under the NYCHRL, harassment related to immigration status or national origin covers a broad range of conduct and occurs generally when an individual is treated less well because of their actual or perceived immigration status or national origin. Such treatment may be demeaning, humiliating, or offensive. Even a single comment by a housing provider or agent made in circumstances where that comment would signal discriminatory views about immigration status or national origin may be enough to constitute harassment.¹⁰⁰

Threats by landlords or their agents to evict tenants or call federal immigration authorities can constitute unlawful harassment under the NYCHRL when motivated, in whole or in part, by animus related to the tenant's actual or perceived immigration status and/or national origin. In addition, using the specter of calling immigration authorities or the police to intimidate tenants from making complaints about unsafe housing conditions or otherwise unlawful conditions is illegal harassment under the NYCHRL. Such harassment includes appearing unannounced at a tenant's apartment with individuals who appear to be law enforcement to intimidate tenants or threatening to make false accusations to law enforcement about unlawful activity. While reporting a violation of the

⁹⁷ See N.Y.C. Admin. Code § 8-107(5)(d).

⁹⁸ *Id.* § 26-521(a). However, if an eviction is motivated in whole or in part by discrimination based on a protected category—such as immigration status or national origin—the landlord would be in violation of the NYCHRL regardless of the length of the tenant's occupancy.

⁹⁹ See State of N.Y. Office of the Attorney General, *Immigrant Tenant Rights*, https://ag.ny.gov/sites/default/files/immigration_tenants_rights_web.pdf; see N.Y. Real Prop. L. § 232-a-b.

¹⁰⁰ See *Cardenas*, 2015 WL 7260567, at *8 (citing *Williams*, 872 N.Y.S.2d at 41 n.30).

law to the police is otherwise permitted, it is a violation of the NYCHRL when such action is taken or threats to take such action are made based solely on a discriminatory or retaliatory motive. If tenants have engaged in any protected activity, such reports to authorities may be actionable as retaliation.

A housing provider's use of the terms "illegal alien" and "illegals," with the intent to demean, humiliate, or offend a person or persons, amounts to unlawful discrimination under the NYCHRL.

Examples of disparate treatment in housing

- A property management company has a policy of asking for a security deposit of six months' rent from applicants whom the company perceives to not have U.S. citizenship compared to one month's rent from applicants the company perceives to be U.S. citizens.
- A landlord fails to make adequate repairs or provide equal services to undocumented tenants because the housing provider believes the tenants will not complain.
- A broker refuses to help an Arabic-speaking individual find an apartment because he believes the individual is a temporary worker and is likely to leave the U.S.
- An Indian immigrant family complains to their landlord about mold and cockroaches in their unit. The landlord tells them to "just deal with it" and threatens to call ICE if they file a complaint in housing court.

3. Public Accommodations

It is unlawful for places or providers of public accommodations,¹⁰¹ their employees, or their agents to directly or indirectly deny any person, or communicate an intent to deny any person, the services, advantages, facilities, or privileges of a public accommodation, or to make their patronage feel unwelcome, because of their actual or perceived immigration status or national origin.¹⁰² Any policy or practice not otherwise required by law that singles out individuals based on their immigration status or national origin is unlawful disparate treatment under the NYCHRL. Policies that categorically exclude or impose different conditions on individuals because of their immigration status, unless specifically required by law, are unlawful.¹⁰³

¹⁰¹ The NYCHRL defines the term "place or provider of public accommodation" to include: providers, whether licensed or unlicensed, of goods, services, facilities, accommodations, advantages or privileges of any kind, and places, whether licensed or unlicensed, where goods, services, facilities, accommodations, advantages or privileges of any kind are extended, offered, sold, or otherwise made available. Such term shall not include any club which proves that it is in its nature distinctly private . . . [or] a corporation incorporated under the benevolent orders law or described in the benevolent orders law but formed under any other law of this state, or a religious corporation incorporated under the education law or the religious corporation law [which] shall be deemed to be in its nature distinctly private.

N.Y.C. Admin. Code § 8-102.

¹⁰² *Id.* § 8-107(4).

¹⁰³ However, it is not a violation for public accommodations to conduct activities and host events

Discriminating against patrons or customers of public accommodations because of their accent, limited English proficiency (“LEP”), or use of another language—such as making a patron or customer feel unwelcome, or turning them away from receiving services—is discrimination based on national origin under the NYCHRL.¹⁰⁴

a. Language access

Depending on the circumstances, a City agency’s failure to seek to provide language interpretation services may be discrimination based on actual or perceived national origin where it amounts to a denial of meaningful access to direct public services or emergency services.¹⁰⁵ City agencies that provide direct public services or emergency services are required to develop and implement plans to provide language services in ten languages other than English and provide telephonic interpretation in at least 100 languages, as well as translate documents most commonly distributed to the public that contain or elicit important and necessary information.¹⁰⁶ Websites maintained by City agencies are also required to include a translation feature.¹⁰⁷ Failure to provide language access services as required by Local Law 30 may constitute a violation of the NYCHRL.¹⁰⁸

which are intended to celebrate and preserve the language and culture associated with a particular national origin. Providers of public accommodations cannot exclude individuals from such activities because they do not, or are perceived to not, belong to a particular protected category.

¹⁰⁴ See N.Y.C. Admin. Code § 8-107(4); *Boureima v. N.Y.C. Human Res. Admin.*, 128 A.D.3d 532 (1st Dep’t 2015) (citing *Colwell v. Dep’t of Health & Human Servs.*, 558 F.3d 1112, 1116–17 (9th Cir. 2009)) (finding that discrimination against limited English proficient individuals was discrimination based on national origin in violation of NYCHRL when provider of public accommodation failed to provide language access services).

¹⁰⁵ See generally *Boureima*, 128 A.D.3d 532; N.Y.C. Admin. Code § 8-107(4)(a)(1)(a) (it is an unlawful discriminatory practice for a provider of public accommodation to “withhold from or deny. . . the full and equal enjoyment, on equal terms and conditions, of any of the accommodations, advantages, services, facilities or privileges of the place or provider of public accommodation.”). Federal agencies similarly interpret Title VI’s prohibition on national origin discrimination to require federal funding recipients to provide translation services to ensure that Limited English Proficient (“LEP”) individuals have meaningful access to federal programs. See, e.g., U.S. Dep’t of Health, Education, and Welfare, Identification of Discrimination and Denial of Services on the Basis of National Origin, 35 Fed. Reg. 11,595 (July 18, 1970); Notice of Proposed Rulemaking, Nondiscrimination on the Basis of Race, Color, or National Origin Under Programs Receiving Federal Financial Assistance Through the Department of Health and Human Services, 45 Fed. Reg. 82,972 (Dec. 17, 1980); Exec. Order No. 13,166, Improving Access for Persons with Limited English Proficiency, 65 Fed. Reg. 50,121 (Aug. 11, 2000); U.S. Dep’t of Justice Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41,455 (June 18, 2002).

¹⁰⁶ N.Y.C. Admin. Code § 28-1101 *et seq.*, added by Local Law 30 (2017). An earlier law, added by Local Law 73 (2003), requires social service agencies to provide language services. N.Y.C. Admin. Code § 21-190. There are also language translation requirements for the City’s emergency notification system. *Id.* § 30-115.

¹⁰⁷ N.Y.C. Admin. Code § 23-810. The translation feature must be indicated by a means, other than or in addition to English, that is comprehensible to speakers of the seven most commonly spoken languages within the City.

¹⁰⁸ See *id.* § 8-107; accord *Boureima*, 128 A.D.3d 532 (basis for the court’s decision was denial of

Additional federal, state, and local requirements also exist to ensure that individuals have language access to services, some mandating certain places of public accommodation to provide translation or interpretation services. For example, the City distributes the Business Owner's Bill of Rights that includes the right to access information in languages other than English and request language interpretation services for inspections.¹⁰⁹ Chain pharmacies must provide free, competent oral interpretation services to counsel individuals about their prescription medications or when soliciting information necessary to maintain a patient medication profile.¹¹⁰ Providers of immigration services must give customers a written contract in a language understood by the customer, either alone or with the assistance of an interpreter, and, if that language is not English, an English language version of the contract must also be provided.¹¹¹ Hospitals must also provide language assistance for patients.¹¹² New York State court rules require interpreters to be provided to LEP litigants in criminal and civil cases.¹¹³ The City's Department of Education also has a language access plan in place for students with LEP parents such that they are "given a meaningful opportunity to participate in their child's education program."¹¹⁴ In addition, government contractors and subcontractors have obligations to provide language services. Under regulations implementing Title VI of the Civil Rights Act of 1964,¹¹⁵ recipients of federal financial

services by HRA).

¹⁰⁹ N.Y.C. Charter § 15(f).

¹¹⁰ N.Y.C. Admin. Code § 20-621.

¹¹¹ *Id.* § 20-777.

¹¹² N.Y. Pub. Health L. § 2807-k(9-a)(c) (requiring financial assistance forms to be printed in any language that is either (i) used to communicate, during at least 5% of patient visits in a year, by patients who cannot speak, read, write or understand the English language at the level of proficiency necessary for effective communication with health care providers, or (ii) spoken by non-English speaking individuals comprising more than 1% of the primary hospital service area population); 10 N.Y.C.R.R. § 405.7 (requiring hospitals to develop a language assistance program to ensure meaningful access to the hospital's services and a reasonable accommodation for all patients who require language assistance).

¹¹³ N.Y. Comp. Codes R. & Regs. tit. 22, §§ 217.1, 217.2.

¹¹⁴ N.Y.C. Dep't of Educ., *Language Access Policy*, <https://www.schools.nyc.gov/school-life/policies-for-all/language-access-policy>; Chancellor Regulation A-663 (June 26, 2007) (requiring that the City's Department of Education ("DOE") provide interpretation services, either at the school/office where the parent is seeking assistance or by telephone, to the maximum extent practicable, during regular business hours to parents whose primary language is a covered language and who request such services in order to communicate with the DOE regarding critical information about their child's education and translation of documents produced by central DOE offices and schools which contain critical information regarding a child's education).

¹¹⁵ 42 U.S.C. § 2000d *et seq.*; 28 C.F.R. § 42.104(b)(2). In August 2000, President Clinton issued Executive Order 13166, which directed each federal agency providing federal financial assistance to issue guidance to recipients of such assistance on their legal obligations to take reasonable steps to ensure meaningful access for LEP persons under the national origin nondiscrimination provisions of Title VI of the Civil Rights Act of 1964, and implementing regulations. The Department of Justice issued guidance pursuant to the Executive Order advising that the requirement to take reasonable steps to ensure meaningful access to programs and activities for LEP persons is "designed to be a flexible and fact-dependent standard," based on an individualized assessment that balances the following four factors: (1) the number or proportion of LEP persons eligible to be served or likely to be encountered by the program or grantee; (2) the frequency with which LEP individuals come in contact with the program; (3) the nature and importance of the program, activity, or service provided by the program to people's

assistance—including government agencies and certain contractors and subcontractors—have a responsibility to ensure meaningful access to their programs and activities by LEP individuals.¹¹⁶

b. Inquiries about immigration status

Unnecessarily asking someone about their immigration status can cause them to feel their “patronage [] is unwelcome, objectionable, [or] not acceptable,”¹¹⁷ and can have a chilling effect on an individual’s access to services. For most covered entities, such as schools, libraries, gyms, stores, restaurants, and cultural institutions, an individual’s immigration status is irrelevant to the provision of services. However, inquiries about immigration status may be relevant to the services offered by some providers, such as attorneys and providers of immigration-related services. In addition, federal law imposes eligibility limits on certain government programs that require providers to inquire about immigration status.¹¹⁸ In such circumstances, it is recommended that providers of public accommodations explain that the inquiry is required by law.

c. Harassment

Harassment by providers of public accommodations because of an individual’s immigration status or national origin, or any other protected category, is unacceptable. Such harassing conduct may include an incident or behavior that makes a patron feel unwelcome, or that fosters an atmosphere that is demeaning, humiliating, or offensive. A single comment made in circumstances where that comment would signal discriminatory views about immigration status or national origin may be enough to constitute harassment.¹¹⁹ Harassment by providers of public accommodations may include comments, or jokes and can occur in public accommodations such as schools, hospitals, or public transportation.

lives; and (4) the resources available to the grantee/recipient and costs. Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41455, 41459 (June 18, 2002).

¹¹⁶ In *Boureima*, a case involving access to the services of a city government agency, plaintiffs alleged violations of the NYCHRL relating to availability of language services. 128 A.D.3d 532. The First Department found that “discrimination against LEP individuals such as plaintiffs constitutes discrimination based on national origin” and that “plaintiffs stated a claim for disparate treatment based on national origin pursuant to the City HRL.” *Id.* at 533. The case was later settled.

¹¹⁷ N.Y.C. Admin. Code § 8-107(4)(b).

¹¹⁸ Some government services may be required to determine the immigration status of an individual to distribute such service. For example, federal government voucher housing programs are permitted to specifically ask for immigration status, as such service is only available to documented individuals. See U.S. Dep’t of Hous. & Urban Dev., *Housing Choice Voucher Program Guidebook, Eligibility and Denial of Assistance*, https://www.hud.gov/sites/documents/DOC_35615.pdf.

¹¹⁹ See *Cardenas*, 2015 WL 7260567, at *8 (citing *Williams*, 872 N.Y.S.2d at 41 n.30). However, the conduct complained of must be more than “petty slights and trivial inconveniences.” *Williams*, 872 N.Y.S.2d at 41.

Threats by providers of public accommodations to call federal immigration authorities can constitute unlawful harassment under the NYCHRL when motivated, in whole or in part, by animus related to the patron's actual or perceived immigration status and/or national origin. In addition, using the specter of calling immigration authorities or the police to intimidate patrons or make them feel unwelcome because of their actual or perceived immigration status and/or national origin is unlawful harassment under the NYCHRL. While reporting a violation of the law to the police is otherwise permitted, it is a violation of the NYCHRL when such action is taken or threats to take such action are made based solely on a discriminatory or retaliatory motive. If patrons have engaged in any protected activity, such reports to authorities may be actionable as retaliation. Furthermore, the use of the terms "illegal alien" and "illegals," with the intent to demean, humiliate, or offend a patron, amounts to unlawful discrimination under the NYCHRL.¹²⁰

Examples of disparate treatment in public accommodations

- A restaurant host tells a man who is speaking Hindi with his family that they must wait to be seated for a table. One hour passes and the family is still not seated, while the host has seated four English-speaking groups that arrived after the family and do not have reservations.
- Classmates repeatedly bully a student who wears a hijab at school, calling her an "illegal" and telling her to "take that off, you're in America now." The student tells her teacher and the school administration that she is being bullied. The teacher and school administration, despite being aware of the conduct, have not taken the usual, mandatory measures to end the behavior.
- At a rest stop, a bus driver of a coach bus company voluntarily identifies to federal immigration authorities passengers whom he perceives to be foreign based on their ethnicity and the language they are speaking. He invites the federal immigration authorities to do a search on the coach bus, telling the agent, "Go ahead, round up the 'illegals.'"
- A store owner tells two friends who are speaking Thai while shopping in his store to "speak English" and "go back to your country."

4. Actions Based on Stereotypes or Assumptions

It is unlawful under the NYCHRL for covered entities in employment, housing, and public accommodations to take an adverse action against an individual or treat an individual less well than another due to stereotypes or assumptions, without regard to individual ability or circumstance, related to immigration status or national origin. Judgments and stereotypes about employees, tenants, or patrons based on their actual or perceived immigration status or national origin, including assumptions about their education, beliefs, or behavior, are pervasive in our society and cannot be used as pretext for unlawful discriminatory treatment or decisions. Such treatment may also contribute to a hostile work environment under the NYCHRL.¹²¹

¹²⁰ See *supra* Section I.

¹²¹ Under the NYCHRL, behavior that constitutes a hostile work environment is much broader than the "severe or pervasive" standard at the federal level; it is simply being treated less well because of

Examples of actions based on stereotypes or assumptions

- An employer interviews a highly qualified applicant for a new position. Upon hearing the applicant's accent, the employer decides not to hire them, assuming that their accent indicates that the applicant is not very smart.
- A landlord is renting an apartment to a prospective tenant who will be arriving from Nigeria with his family. The tenant mentions his children in one of their conversations. The landlord begins to assume that the tenant must have a lot of children and becomes concerned about noise and damage to the apartment. The landlord decides to require a larger security deposit from the family compared to other renters who are not immigrants.
- Hotel staff voluntarily call federal immigration authorities to report the Spanish-sounding names of the guests staying at the hotel because they believe there are too many undocumented immigrants in the U.S.

B. Neutral Policies That Have a Disparate Impact Based on Immigration Status and National Origin

The NYCHRL explicitly creates a disparate impact cause of action, applying to claims of discrimination in employment, housing, public accommodations, and bias-based profiling by law enforcement.¹²² Disparate impact claims involve policies or practices that appear to be neutral, but disproportionately impact one group more than others. Such policies or practices are unlawful under the NYCHRL unless they bear a significant relationship to a significant business objective of the covered entity.¹²³ Therefore, under a disparate impact theory of discrimination, a facially neutral policy or practice may be found to be unlawful discrimination even without evidence of the covered entity's subjective intent to discriminate.¹²⁴ In contrast, if such a policy allows for the possibility of other identifying information to be provided to the landlord, it would likely not run afoul of the NYCHRL.

The standard for establishing a *prima facie* case of disparate impact under the NYCHRL is lower than the standard for analogous claims under federal laws such as Title VII or the New York State Human Rights Law.¹²⁵ Under the NYCHRL, a complainant must show that a facially neutral policy or practice has a disparate impact on a protected

membership to a protected category. *Bermudez v. City of New York*, 783 F. Supp. 2d 560, 579 (S.D.N.Y. 2011) (“[t]he NYCHRL imposes liability for harassing conduct that does not qualify as ‘severe or pervasive’ and questions of ‘severity and pervasiveness’ are applicable to consideration of the scope of permissible damages, but not to the question of underlying liability.”) (citing *Williams*, 872 N.Y.S.2d at 38). The New York State governor signed legislation in August 2019 that eliminates the severe and pervasive standard from the State Human Rights Law (S6594). N.Y. State Bill S6594 (June 17, 2019), <https://legislation.nysenate.gov/pdf/bills/2019/S6594>.

¹²² *Levin v. Yeshiva Univ.*, 96 N.Y.2d 484, 492–93 (2001) (citing N.Y.C. Admin. Code §§ 8-107(17), 14-151(c)(2)).

¹²³ N.Y.C. Admin. Code § 8-107(17)(2).

¹²⁴ *Raytheon*, 540 U.S. at 52–53.

¹²⁵ *Teasdale v. N.Y.C. Fire Dep't*, 574 F. App'x 50, 52 (2d Cir. 2014).

group.¹²⁶ Once such a showing has been made, the covered entity has an opportunity to plead and prove as an affirmative defense that either: (1) the complained-of policy or practice bears a significant relationship to a significant business objective; or (2) the policy or practice does not contribute to the disparate impact.¹²⁷ However, this defense is overcome if the complainant produces substantial evidence of an available alternative policy or practice with less disparate impact, and the covered entity is unable to establish that an alternative policy or practice would not serve its business objective as well as the complained-of policy or practice.¹²⁸ In the employment context, a “significant business objective” includes, but is not limited to, successful performance of the job.¹²⁹

Covered entities should modify policies and practices that may have a disparate impact on individuals due to their immigration status or national origin when there are appropriate alternatives.

Examples of neutral policies with disparate impact

- *Employment.* An employer’s policy states that the only acceptable identification document all employees must provide for purposes of employment is a passport.
- *Housing.* A landlord requires all tenants to show a U.S. passport in order to pick up keys for access to their newly rented apartment.
- *Public Accommodations.* A service provider has a policy requiring all clients to provide their Social Security numbers as the only acceptable identifying information for receipt of services.

C. Discriminatory Harassment

The NYCHRL prohibits discriminatory harassment or violence motivated by an individual’s actual or perceived immigration status or national origin.¹³⁰ Discriminatory harassment occurs when someone uses force or threatens to use force against a victim, or when someone damages or destroys another individual’s property, because of the victim’s actual or perceived immigration status or national origin. This form of discrimination does not require a special relationship, such as employer-employee, landlord-tenant, or between a provider of public accommodation and a customer.

¹²⁶ N.Y.C. Admin. Code § 8-107(17)(1); *see also id.* § 8-107(17)(2)(b) (“The mere existence of a statistical imbalance between a covered entity’s challenged demographic composition and the general population is not alone sufficient to establish a *prima facie* case of disparate impact violation, unless the general population is shown to be the relevant pool for comparison, the imbalance is shown to be statistically significant, and there is an identifiable policy or practice, or group of policies or practices, that allegedly causes the imbalance.”).

¹²⁷ N.Y.C. Admin. Code § 8-107(17)(2)(b).

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* §§ 8-602–604.

Examples of discriminatory harassment

- A family of mixed immigration status lives in an apartment unit. The new tenants next door to them repeatedly bang on their door and wave a baseball bat at them while screaming discriminatory comments about their culture and threatening to call ICE.
- An immigrant shop owner asks a couple of customers to leave his store after they start breaking merchandise. The customers tell the owner he should “go back to where he came from,” and exit the shop. The next morning, the owner discovers that the windows have been smashed and the walls spray-painted with anti-immigrant obscenities.

D. Bias-Based Profiling by Law Enforcement

City law prohibits bias-based profiling by law enforcement.¹³¹ This occurs when a law enforcement agent takes a law enforcement action against someone because of an individual’s actual or perceived immigration status or national origin (or other protected status) rather than a person’s behavior or other information or circumstances that would link an individual to suspicious unlawful activity.¹³² For example, profiling drivers for traffic stops because they appear to be Middle Eastern or from Central America may violate this law. An individual subject to bias-based profiling may file a complaint with the Commission pursuant to the NYCHRL.¹³³

E. Retaliation

The NYCHRL prohibits retaliation for opposing discrimination. The purpose of the retaliation provision is to enable individuals to speak out against discrimination and to freely exercise their rights under the NYCHRL. Retaliating against an individual based on actual or perceived immigration status or national origin because they opposed discrimination is a violation of the NYCHRL.¹³⁴

¹³¹ *Id.* § 14-151. “As used in this section, the following terms have the following meanings: ‘Bias-based profiling’ means an act of a member of the force of the police department or other law enforcement officer that relies on actual or perceived race, national origin, color, creed, age, alienage or citizenship status, gender, sexual orientation, disability, or housing status as the determinative factor in initiating law enforcement action against an individual, rather than an individual’s behavior or other information or circumstances that links a person or persons to suspected unlawful activity.

‘Law enforcement officer’ means (i) a peace officer or police officer as defined in the Criminal Procedure Law who is employed by the city of New York; or (ii) a special patrolman appointed by the police commissioner pursuant to section 14-106 of the administrative code.”

¹³² *Id.* § 14-151(1).

¹³³ The local law also provides for a private cause of action. The remedy in any civil action or administrative proceeding undertaken pursuant to N.Y.C. Admin. Code § 14-151 is limited to injunctive and declaratory relief.

¹³⁴ In addition, New York Labor Law § 215(1)(a) (as amended by Chapter 126 of 2019) provides that “to threaten, penalize, or in any other manner discriminate or retaliate against any employee” includes “contacting or threatening to contact United States immigration authorities or otherwise reporting or threatening to report the suspected citizenship or immigration status of an employee or an employee’s

A covered entity may not retaliate against an individual because they engaged in protected activity, including: (1) opposing a discriminatory practice prohibited by the NYCHRL;¹³⁵ (2) raising an internal complaint regarding a practice prohibited under the NYCHRL; (3) making a charge or filing a complaint with the Commission or any other enforcement agency; (4) testifying, assisting, or participating in an investigation, proceeding, or hearing related to an unlawful practice under NYCHRL; or (5) providing any information to the commission pursuant to the terms of a conciliation agreement.¹³⁶ In order to establish a *prima facie* claim for retaliation, an individual must show that: (1) the individual engaged in a protected activity; (2) the covered entity was aware of the activity; (3) the individual suffered an adverse action; and (4) there was a causal connection between the protected activity and the adverse action.¹³⁷ 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, housing, or participation in a program to be retaliatory under the NYCHRL.¹³⁸ The action could be as severe as termination, demotion, removal of job responsibilities, or eviction, but could also be relocating an employee to a less desirable part of the workspace, shifting an employee's schedule, or failing to make repairs in a resident's unit.

It is a best practice for covered entities to implement internal anti-discrimination policies to educate employees, tenants, and, in the context of public accommodations, patrons, patients, and program participants, of their rights and obligations under the NYCHRL, and regularly train staff on these issues. Covered entities should create procedures for employees, residents, and program participants to internally report violations of the law without fear of adverse action and train those in supervisory roles on how to handle those claims when they witness discrimination or instances are reported to them by subordinates. Covered entities that engage with the public should implement a policy for doing so in a respectful, non-discriminatory manner consistent with the NYCHRL, and ensuring that members of the public do not face discrimination.

family or household member to a federal, state or local agency.”

¹³⁵ 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(DAB), 2007 WL 4563431, at *3 (S.D.N.Y. Dec. 21, 2007).

¹³⁶ N.Y.C. Admin. Code § 8-107(7).

¹³⁷ *Id.*

¹³⁸ *Id.*

Examples of retaliation

- A tenant who lives with several undocumented family members files a complaint with the Commission against his landlord based on a violation of the NYCHRL. The landlord sends a copy of his written response to ICE, identifying the immigration status of the tenant's family members, in an effort to intimidate the complainant.
- An employer has not paid a worker his full wages in two months. When the worker asks for his earned wages, his employer responds that due to slow business, he has to cut costs somewhere, and the employee's wages were cut rather than someone else's because the employee is not a U.S. citizen. When the employee objects, the employer tells the employee, "No one will listen if you complain, since you don't have status, and if you do complain, I'll call ICE."¹³⁹
- A real estate agency fires an employee for reporting that a large landlord with whom the agency closely works refused to rent to the agent's client because the client is a recent immigrant.

F. Associational Discrimination

The NYCHRL's anti-discrimination protections extend to prohibit unlawful discriminatory practices based on an individual's relationship to or association with an individual who actually has or is perceived to have a particular immigration status, or because of their actual or perceived national origin.¹⁴⁰ The law does not require a familial relationship for an individual to be protected by the association provision; the relevant inquiry is whether the covered entity was motivated by the individual's association with an individual who has a particular immigration status or national origin.

To establish a disparate treatment claim of associational discrimination under the NYCHRL, a complainant must show that: (1) the covered entity knew of the individual's relationship or association with someone with an actual or perceived immigration status or national origin; (2) the individual suffered an independent injury, separate from any injury to the person with protected status; and (3) the covered entity treated the associate or relative less well, at least in part because of discriminatory animus.¹⁴¹

A covered entity may not take adverse action based on the immigration status or national origin of a family member or anyone else with whom the applicant, employee, or customer has a relationship or association.

¹³⁹ See *Centeno-Bernuy v. Perry*, No. 03 Civ. 457, 2009 WL 2424380, at *1 (W.D.N.Y. Aug. 5, 2009). Such discrimination and retaliation are actionable under the NYCHRL, but they are also actionable under other statutes, such as the New York Labor Law and Fair Labor Standards Act.

¹⁴⁰ N.Y.C. Admin. Code § 8-107(20).

¹⁴¹ See *In re Comm'n on Human Rights ex rel. Blue v. Jovic*, OATH Index No. 1624/16, Comm'n Dec. & Order, 2017 WL 2491797, at *9 (May 26, 2017) *aff'd sub nom. Jovic*, Index No. 100838/2017 (citing *Jing Zhang v. Jenzabar, Inc.*, No. 12 Civ. 2988, 2015 WL 1475793, at *12 (E.D.N.Y. Mar. 30, 2015)).

Examples of associational disparate treatment claims

- An employer refuses to pay for health benefits for an employee's spouse, where health benefits are typically available to all employees' spouses, because the spouse is not a U.S. citizen.
- A landlord refuses to rent out her apartment to a U.S. citizen who she believes will live with undocumented family members.

IV. Interaction Between the NYCHRL and Federal and State Law

While the NYCHRL protects individuals on the basis of actual or perceived immigration status, the NYCHRL explicitly recognizes that federal and state law may expressly permit discrimination on the grounds of "alienage or citizenship" in certain contexts.¹⁴² The NYCHRL states:

Notwithstanding any other provision of this section, it shall not be an unlawful discriminatory practice for any person to discriminate on the ground of alienage or citizenship status, or to make any inquiry as to a person's alienage or citizenship status, or to give preference to a person who is a citizen or a national of the United States over an equally qualified person who is an alien, *when such discrimination is required or when such preference is expressly permitted by any law or regulation of the United States, the state of New York or the city of New York*, and when such law or regulation does not provide that state or local law may be more protective of aliens; provided, however, that this provision shall not prohibit inquiries or determinations based on alienage or citizenship status when such actions are necessary to obtain the benefits of a federal program. An applicant for a license or permit issued by the city of New York may be required to be authorized to work in the United States whenever by law or regulation there is a limit on the number of such licenses or permits which may be issued.¹⁴³

(Emphasis added.)

Establishing laws regulating immigration is exclusively in the province of the Federal Government.¹⁴⁴ This includes the determination of an individual's immigration status; the issuance of visas, employment authorization documents, and green cards; and employers' restrictions on hiring. IRCA specifically prohibits employers from knowingly hiring immigrants without work authorization and requires that employers attest to their employees' immigration status. Federal law also governs the issuance of employment authorization documents, which are required for noncitizens or non-lawful permanent

¹⁴² See, e.g., N.Y. Pub. Off. Law § 3 (state law imposing citizenship requirements for certain positions, such as police officer).

¹⁴³ N.Y.C. Admin. Code § 8-107(14).

¹⁴⁴ See the Commerce Clause, Art. I, Sec. 8, cl. 3 of the U.S. Constitution; the Naturalization Clause, Art. I, Sec. 8, cl. 4; the Migration and Importation Clause, Art. I, Sec. 9, cl. 1; see also *Chae Chan Ping v. United States*, 130 U.S. 581, 609 (1889); *Fong Yue Ting v. U.S.*, 149 U.S. 698, 711 (1893).

residents.¹⁴⁵ Under the NYCHRL, therefore, it is not unlawful to deny employment to an individual who is not authorized to work in the United States.¹⁴⁶ But if the employer asks whether an applicant has work authorization, the employer must ask all applicants regardless of race, national origin, religion, or another protected category. Once in the workplace, employees have protections and remedies available to them under the NYCHRL regardless of their immigration status, work authorization, or whether they are paid on the books or under the table.

The Commission is dedicated to eradicating discrimination on the basis of immigration status and national origin in New York City. If you believe you have been subjected to unlawful discrimination on the basis of your immigration status, national origin, or membership in another protected class, please contact the Commission at 311 or at (718) 722-3131 to file a complaint of discrimination with the Commission's Law Enforcement Bureau.

¹⁴⁵ IRCA required employers to attest to their employees' immigration status; made it illegal to hire or recruit illegal immigrants knowingly; and legalized certain seasonal agricultural undocumented immigrants. 8 U.S.C. § 1324a *et seq.*

¹⁴⁶ However, it is unlawful to discriminate against someone once they are in the workplace based on their immigration status. See Section III(A)(1).