STATE OF NEW YORK
EXECUTIVE DEPARTMENT

EQUAL EMPLOYMENT OPPORTUNITY
In New York State

RIGHTS AND RESPONSIBILITIES

A Handbook for Employees of New York State Agencies

Andrew M. Cuomo
Governor

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INTRODUCTION

New York State has long been committed to the proposition that every individual in the State have an equal opportunity to enjoy a full and productive life. This commitment to equal opportunity extends to the workplace. Under New York State's Human Rights Law, the first of its kind in the nation, employees are protected from acts of bias, harassment, prejudice or discrimination. Such acts have no place in the workplace, State or otherwise.

All State employees have the right to be free from unlawful discrimination and the responsibility to assure that their actions do not contribute to an atmosphere in which the State's policy of promoting a bias-free work environment is frustrated. To that end, this Handbook is intended to provide employees of the State of New York with information on their rights and responsibilities under state and federal law with respect to equal employment opportunity. Emphasis will be placed on New York State's Human Rights Law since it is generally broader in scope than protections granted under federal law. In addition, this Handbook will cover related state laws and Executive Orders.

This Handbook does not cover agency-specific policies and procedures related to discrimination. That information is provided to employees by their respective agencies.

PROTECTED AREAS

The Human Rights Law ("Law") applies to all State agencies and employees, and provides very broad anti-discrimination coverage. The Law provides, in section 296.1(a), that it is an unlawful discriminatory practice "[f]or an employer or licensing agency, because of the age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, marital status or domestic violence victim status of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment. The Law further provides, in sections 296.15 and 296.16, protections from employment discrimination for persons with prior conviction records, or prior arrests, youthful offender adjudications or sealed records.

Each of these areas will be discussed in order below, as well as other protections provided by Governor's Executive Orders and other state laws and policies.

AGE

No decision affecting hiring, promotion, firing or a term, condition or privilege of employment shall discriminate on the basis of a person's age, nor shall employees be harassed or otherwise discriminated against on such basis, or perceived basis.

While most cases of age discrimination concern allegations that an employee was perceived to be "too old" by an employer, under New York State law it is also discriminatory to base an employment decision on a perception that a person is "too young," as long as the person is at least 18. However, basing a decision on lack of experience or ability is not discriminatory.

Decisions about hiring, job assignments or training must never be based on age-related assumptions about an employee's abilities or willingness to learn or undertake new tasks and responsibilities.

All employees must refrain from conduct or language that directly or indirectly expresses a preference for employees of a certain age group. Ageist remarks must be avoided in the workplace.

Statutory protection.

Age discrimination is made unlawful by Human Rights Law § 296.1 and § 296.3-a, and by the federal Age Discrimination in Employment Act ("ADEA").[1] Under New York law, age discrimination in employment is prohibited against all persons eighteen years of age or older. Under the ADEA, age discrimination is prohibited only against persons forty years of age or older.

Executive Order concerning State workers.

On January 1, 2011, Governor Andrew M. Cuomo issued Executive Order No. 2, reissuing Executive Order No. 96,[2] which prohibits Age Discrimination in the workplace. The Executive Order notes that every State employee is entitled to work in an age-neutral environment with equal opportunity for hiring, promotion and retraining opportunities.

Retirement.

Mandatory retirement of employees at any specific age is generally prohibited, except as noted below.[3] However, retirement plans may contain an age component for eligibility. Thus retirement plans may require that persons attain a certain age, or have some combination of age and years of service, before being eligible for retirement benefits.[4]

Incentive programs intended to induce employees to retire by granting them greater retirement benefits than those to which they would normally be entitled in order to reduce the size of the work force have generally been found to be lawful. Being eligible for "early retirement" is not coercion based on age. Similarly, that an employee may not be eligible for a retirement benefit or incentive because he or she has not attained a certain age (i.e., "too young") is also not considered discriminatory.

Exceptions.

The Civil Service Law[5] mandates minimum and maximum hiring ages for police officers. Correction Officers must be age 21 in order to be appointed.[6] These are lawful exceptions to the provisions of the Human Rights Law.

There are certain limited exceptions to the prohibition on mandatory retirement.[7] For example, officers of the New York State Police are required to retire at age 60,[8] and State park police officers are required to retire at age 62.[9]

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[1] 29 U.S.C. § 621 et seq.
[2] Issued by Gov. Mario M. Cuomo on April 27, 1987.
[3] Human Rights Law § 296.3-a(d), *but see* exceptions below.
[4] Human Rights Law § 296.3-a(g).
[5] N.Y. Civil Service Law § 58; *see also* N.Y. Executive Law § 215.3.
[6] N.Y. Correction Law § 7(4).

In the area of employee benefits, the Human Rights Law does not "preclude the varying of insurance coverage according to an employee's age."[10]

RACE and COLOR

No decision affecting hiring, promotion, firing or a term, condition or privilege of employment shall discriminate on the basis of a person's race or color, nor shall employees be harassed or otherwise discriminated against on such basis, or perceived basis.

Discrimination because of a person's membership in or association with an identifiable class of people based on ancestry or ethnic characteristics can be considered racial discrimination.

There is no objective standard for determining an individual's racial identity. Therefore, the State defers to an employee's self-identification as a member of a particular race.

"Color" can be an independent protected class, based on the color of an individual's skin, irrespective of his or her race.

Statutory protection.

Race and color discrimination is unlawful pursuant to the Human Rights Law § 296.1, and the federal Civil Rights Act of 1964, Title VII.[11]

CREED

No decision affecting hiring, promotion, firing or a term, condition or privilege of employment shall discriminate on the basis of a person's creed, nor shall employees be harassed or otherwise discriminated against on such basis, or perceived basis.

"Creed" encompasses belief in a supreme being or membership in an organized religion or congregation. Atheism and agnosticism are considered creeds as well. A person is also protected from discrimination because of having no

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[7] Human Rights Law § 296.3-a(g).
[8] N.Y. Retirement and Social Security Law § 381-b(e).
[9] N.Y. Park, Recreation and Historic Preservation Law § 13.17(4).
[10] Human Rights Law § 296.3-a(g).
[11] 42 U.S.C. § 2000e et seq.

religion or creed. An individual's self-identification with a particular creed or religious tradition is determinative.

Statutory protection.

Discrimination based on creed is unlawful pursuant to the Human Rights Law § 296.1, and the federal Civil Rights Act of 1964, Title VII.[12]

Sabbath or holy day observance.

An employee is entitled to time off for religious observance of a sabbath or holy day or days, in accordance with the requirements of his or her religion, provided it does not impose an undue hardship to his or her employer, as explained below.[13] Time off shall also be granted to provide a reasonable amount of time for travel before and after the observance.

The Human Rights Law provides that any such absence from work shall, wherever practicable in the reasonable judgment of the employer, be made up by an equivalent amount of time and work at a mutually convenient time, or shall be charged against any available personal, vacation or other paid leave, or shall be taken as leave without pay.[14] Agencies are not required to permit such absence to be made up at another time, but may agree that the employee may do so.

Leave that would ordinarily be granted for other non-medical personal reasons shall not be denied because the leave will be used for religious observance.[15] Under no circumstances may time off for religious observance be charged as sick leave.[16]

The employee is not entitled to premium wages or benefits for work performed during hours to which such premium wages or benefits would ordinarily be applicable, if the employee is working during such hours only to make up time taken for religious observance.[17]

Civil Service Law § 50(9) provides that candidates who are unable to attend a civil service examination because of religious observance can request an

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[12] 42 U.S.C. § 2000e et seq.
[13] Human Rights Law § 296.10(a).
[14] Human Rights Law § 296.10(b).
[15] Human Rights Law § 296.10(c).
[16] Human Rights Law § 296.10(b).
[17] Human Rights Law § 296.10(a). "Premium wages" include "overtime pay and compensatory time off, and additional remuneration for night, weekend or holiday work, or for standby or irregular duty." § 296.10(d)(2). "Premium benefit" means "an employment benefit, such as seniority, group life insurance, health insurance, disability insurance, sick leave, annual leave, or an educational or pension benefit that is greater than the employment benefit due to the employee for an equivalent period of work performed during the regular work schedule of the employee." § 296.10(d)(3).

alternate test date from the Department of Civil Service without additional fee or penalty.

Religious observance or practices.

An employee who, in accordance with his or her religious beliefs, observes a particular manner of dress, hairstyle, beard, or other religious practice, should not be unreasonably required to compromise his or her practice in the workplace. The employer is required by law to make a bona fide effort to accommodate an employee's or prospective employee's religious observance or practice.[18]

Request for accommodation.

The employee needing time off or other accommodation of religious observance or practice should clearly state the religious nature of the request, and should be willing to work with the employer to reach a reasonable accommodation of the need. Supervisors should consult with their human resources and/or legal departments, as necessary, with respect to requests for accommodation of religious observance or practices.

Conflicts with seniority rights.

In making the effort to accommodate sabbath observance or religious practices, the employer is not obliged to initiate adversarial proceedings against a union when the seniority provisions of a collective bargaining agreement limit its ability to accommodate any employee's religious observance or practice, but may satisfy its duty under this section by seeking volunteers willing to waive their seniority rights in order to accommodate their colleague's religious observance or practice. This waiver must be sought from the union that represents the employees covered by such agreement.

Undue hardship.

Before the employer can deny a religious accommodation, the employer must be able to show that accommodating the employee's religious observance or practice would result in undue hardship to the employer. The undue hardship standard applies generally to all accommodation requests, not only those for time off for religious observance. "Undue hardship" means an accommodation requiring significant expense or difficulty, including one that would cause significant interference with the safe or efficient operation of the workplace. Factors that are specifically to be considered are the identifiable costs (such as loss of productivity, or the cost to transfer or hire additional personnel), and the number of individuals who will need time off for a particular sabbath or holy day in relation to available personnel.[19]

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[18] Human Rights Law § 296.10(a).
[19] Human Rights Law § 296.10(d)(1).

Furthermore, in positions that require coverage around the clock or during particular hours, being available even on sabbath or holy days ***may*** be an essential function of the job. Also, certain uniform appearance standards ***may*** be essential to some jobs. A requested accommodation will be considered an undue hardship, and therefore not reasonable, if it will result in the inability of an employee to perform an essential function of the job.[20]

Exceptions.

None with regard to employment decisions. Accommodation is limited by reasonableness, conflicting seniority rights and undue hardship, as set forth above.

NATIONAL ORIGIN

No decision affecting hiring, promotion, firing or a term, condition or privilege of employment shall discriminate on the basis of a person's national origin, nor shall employees be harassed or otherwise discriminated against on such basis, or perceived basis.

National origin is defined as including ancestry, so an individual born in the United States is nonetheless protected against discrimination based on his or her ancestors' nationality.[21] An individual's self-identification with a particular national or ethnic group is determinative.

Statutory protection.

National origin discrimination is unlawful pursuant to the Human Rights Law § 296.1, and the federal Civil Rights Act of 1964, Title VII.[22]

Language issues.

Fluency in English may be a job requirement. However, requiring that a person speaks English as his or her primary language, or be a "native speaker," may be considered national origin discrimination. In some circumstances, where a particular level of fluency in English is not necessary for job performance, requiring such fluency might also constitute national origin discrimination. The only lawful requirement is for a level of English fluency necessary for the job.

Requiring employees to speak only English, at all times in the workplace, may be national origin discrimination. Any specific workplace rule about language use

[20] Human Rights Law § 296.10(d)(1).
[21] Human Rights Law § 292.8.
[22] 42 U.S.C. § 2000e et seq.

must be reasonable and necessary to the efficient conduct of State business. Any such reasonable rule that prohibits or limits the use of a language other than English in the workplace must be clearly communicated to employees before it can be enforced.[23]

Requiring fluency in a language other than English, such as for employment in bilingual positions, is not discriminatory. However, a job qualification of language fluency must be based on an individual's ability, not on national origin. A requirement that an individual be a "native speaker" of a language other than English is discriminatory.

Proof of identity and employment eligibility.

All New York State employees hired after November 6, 1986 must be able to complete a verified federal Form I-9, which establishes the employee's identity and eligibility for employment in the United States. Rescinding an offer of employment or terminating employment based upon lack of current employment authorization is required by federal law and is not unlawful discrimination.[24]

Citizenship requirements.

Employees serving in positions designated as "public offices," as well as peace and police officer positions defined in the New York State Criminal Procedure Law, must be United States citizens.[25]

SEXUAL ORIENTATION

No decision affecting hiring, promotion, firing or a term, condition or privilege of employment shall discriminate on the basis of a person's sexual orientation, nor shall employees be harassed or otherwise discriminated against on such basis, or perceived basis.

The term "sexual orientation" means heterosexuality, homosexuality, bisexuality or asexuality, whether actual or perceived.[26]

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[23] *See* the federal Equal Employment Opportunity Commission's regulation at 29 CFR § 1606.7.
[24] US Immigration and Nationality Act § 274A, as modified by the Immigration Reform and Control Act of 1986, Immigration Act of 1990 and Illegal Immigration Reform and Immigrant Responsibility Act of 1996.
[25] Public Officers Law § 3(1); Criminal Procedure Law § 1.20(34) (police officers); Criminal Procedure Law § 2.10 (peace officers).
[26] Human Rights Law § 292.27.

Statutory protection.

Discrimination on the basis of sexual orientation is unlawful pursuant to the Human Rights Law § 296.1. Sexual orientation is not a protected category under federal law.

Same-sex spouses or partners.

The New York State Marriage Equality Act, signed by Governor Cuomo on June 24, 2011, and effective on July 24, 2011, authorizes marriages between same-sex couples in the State of New York. New York State also recognizes marriages between same-sex couples performed in any jurisdiction where such marriages are valid. Spousal benefits will be provided to same-sex spouses in the same manner as to opposite-sex spouses of State employees. Failure to offer equal benefits, or to discriminate against an employee in a marriage with a same-sex spouse, is considered discrimination on the basis of sexual orientation.

Domestic partners.

Same-sex partners who are not married may also qualify for benefits. The employer and his or her partner can fill out the *Application for Domestic Partner Benefits and Affidavit of Domestic Partnership and Financial Interdependence*, which is available on-line from the Department of Civil Service. Opposite-sex domestic partners can also qualify for benefits on the same basis as same-sex partners.

MILITARY STATUS

No decision affecting hiring, promotion, firing or a term, condition or privilege of employment shall discriminate on the basis of a person's military status, nor shall employees be harassed or otherwise discriminated against on such basis, or perceived basis.

"Military status" is defined in the Human Rights Law as a person's participation in the military service of the United States or the military service of the State, including but not limited to, the armed forces of the United States, the Army National Guard, the Air National Guard, the New York Naval Militia, or the New York Guard.[27]

[27] Human Rights Law § 292.28.

Statutory protection.

Discrimination on the basis of military status is unlawful pursuant to the Human Rights Law § 296.1. The federal Uniformed Services Employment and Reemployment Rights Act (USERRA)[28] provides additional protections.

Military leave provisions for State workers (and all public employees) are contained in N.Y. Military Law § 242 and § 243. Under the 2008 amendments to the federal Family and Medical Leave Act (FMLA), employees with a family member who is on active duty or on call to active duty status may be eligible for qualifying exigency leave or military caregiver leave of up to 26 weeks in a 12-month period, based upon the family member's military service.

Military leave and job retention rights.

N.Y. Military Law entitles State employees to a leave of absence for "ordered military duty"[29] or "military duty."[30] Both provisions entitle State employees to return to their jobs with the same pay, benefits, and status they would have attained had they remained in their position continuously during the period of military duty. State employees on leave for military duty continue to accrue years of service, increment, and any other rights or privileges. Under both Military Law and the Human Rights Law, those called to military duty, or who may be so called, may not be prejudiced in any way with reference to promotion, transfer, or other term, condition or privilege of employment. Military Law § 243(5) provides: "State employees on leave for military duty shall suffer no loss of time, service, increment, or any other right or privilege, or be prejudiced in any way with reference to promotion, transfer, reinstatement or continuance in office. Employees are entitled to contribute to the retirement system in order to have leave time count toward determining length of service."

Similarly, under USERRA, service members who leave their civilian jobs for military service are entitled to return to their jobs with the same pay, benefits, and status they would have attained had they not been away on duty. USERRA also prohibits employers from discriminating against these individuals in employment because of their military service, or for exercising their rights under USERRA.

[28] 38 U.S.C. §§ 4301-35.
[29] N.Y. Military Law § 242; pertains to members of the militia, the reserve forces, or reserve components of any branch of the military.
[30] N.Y. Military Law § 243; pertains to active duty in the armed forces or reservists called to active duty.

SEX

No decision affecting hiring, promotion, firing or a term, condition or privilege of employment shall discriminate on the basis of a person's sex, nor shall employees be harassed or otherwise discriminated against on such basis, or perceived basis.

Statutory protection.

Sex discrimination is unlawful pursuant to the Human Rights Law § 296.1, and the federal Civil Rights Act of 1964, Title VII.[31]

Executive Order concerning State workers.

On January 1, 2011, Governor Andrew M. Cuomo issued Executive Order No. 2 reissuing Executive Order No. 19,[32] which established State policy on sexual harassment in the workplace.

Sexual harassment.

As noted in the Executive Order, sexual harassment is both offensive and unlawful. Every State employee is entitled to a working environment free from sexual harassment and its negative economic, psychological and physical effects. Allowing sexual harassment to go unchecked in State workplaces would create significant costs to the State in both human and financial terms, including the replacement of personnel who leave their jobs, increased use of health benefit plans due to emotional and physical stress, absenteeism, and decline in individual and workgroup productivity.

In accordance with the Executive Order, every State executive branch agency must have in place a policy on sexual harassment prevention, which includes a procedure for the receipt and investigation of complaints of sexual harassment. This policy and procedure should be distributed to new employees, and made available to all staff as needed. Also, each agency must provide appropriate sexual harassment training to its staff.

Hostile environment sexual harassment consists of words, signs, jokes, pranks, intimidation or physical violence which are of a sexual nature, or which are directed at an individual because of that individual's sex. Sexual harassment has also been defined as any unwanted verbal or physical advances, sexually explicit derogatory statements, or sexually discriminatory remarks made by someone in the workplace which are offensive or objectionable to the recipient, which cause the recipient discomfort or humiliation, or which interfere with the recipient's job performance.

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[31] 42 U.S.C. § 2000e et seq.
[32] Issued by Gov. Mario M. Cuomo on May 31, 1983.

Sexual harassment is known as “quid pro quo” harassment when a person in authority tries to trade job benefits for sexual favors. Only supervisors are deemed to engage in this kind of harassment, because co-workers do not have the authority to grant or withhold benefits.

With respect to inappropriate questions during the hiring process or during employment, see, generally, section entitled Unlawful Inquiries, below.

Employees should consult their agency’s sexual harassment policy for further discussion of what constitutes sexual harassment.

As with all discrimination and harassment, if an employee is a victim of sexual harassment, or observes it in the workplace, the employee should complain promptly to a supervisor, managerial employee, personnel administrator, or equal employment officer. The complaint can be verbal or in writing. If the complaint is verbal, a written complaint may be required in order to assist in the investigation. Any complaint, whether verbal or written, must be investigated by the agency. Furthermore, any supervisory or managerial employee who observes or otherwise becomes aware of conduct of a sexually harassing nature, must report such conduct so that it can be investigated.

If an employee is harassed by a co-worker or a supervisor, it is very important that a complaint be made to a higher authority promptly. An agency cannot stop sexual harassment unless it has knowledge of the harassment. Once informed, the agency is required to initiate an investigation and take prompt and effective remedial action where appropriate.

See, generally, section on Harassment, below.

Sex stereotyping.

Sex stereotyping occurs when conduct or personality traits are considered inappropriate simply because they may not conform to general societal norms or other perceptions about how individuals of either sex should act or look. For example, conduct may be considered “too aggressive” only because the individual is female, a person may be considered to be “too sensitive” only because that person is male, or a person might not look or dress in a manner consistent with another person’s views of how a man or woman should look or dress. Making employment decisions based on sex-stereotyped evaluations of conduct, looks or dress can be considered sex discrimination.

Harassment because a person does not conform to gender stereotypes is sexual harassment. Derogatory comments directed at a person who has undergone sex reassignment surgery can be sexual harassment, just as comments about secondary sex characteristics of any person can be sexual harassment.

Non-harassment related sex discrimination can also arise in the context of gender transition issues such as an employer's refusal to recognize an employee's sex after transition. For more information on transgender issues, see sections below on Gender Identity and on Disability.

Pregnancy discrimination and maternity leave.

Discrimination on the basis of pregnancy constitutes sex discrimination. A pregnant individual may not be compelled to take a leave of absence unless pregnancy prevents that individual from performing the duties of the job in a reasonable manner.[33] Disability discrimination may also be implicated where discrimination is based on limitations or perceived limitations due to pregnancy. Any condition related to pregnancy that does prevent the performance of job duties entitles the individual to reasonable accommodation, including time off consistent with the medical leave policies applicable to any disability. (See below in the section on Disability.)

Any parent of a newborn child, a newly adopted child, or a sick child is entitled to available child care leave without regard to the sex of the parent. Only the woman who gives birth, however, is entitled to any medical leave associated with pregnancy, childbirth and recovery.

The federal Family Medical Leave Act[34] is also applicable. In general, the State as an employer cannot take adverse action against employees who take qualifying medical leave for the birth or adoption of a child, for their own serious health condition, or to care for a family member with a serious health condition which qualifies under the Act. The Act entitles eligible employees to take up to a total of 12 weeks of unpaid leave during a 12-month period.

Exceptions.

Both State and federal law permit consideration of sex in employment decisions when it is a bona fide occupational qualification (BFOQ). This is, however, an ***extremely narrow*** exception to the anti-discrimination provisions of the Human Rights Law. Neither customer preference nor stereotyped and generalized views of ability based on sex can form the basis for a BFOQ. However, proof that employing members of a particular sex would impinge on the legitimate personal privacy expectations of an agency's clients, particularly in a custodial environment, may make out a case for a BFOQ.

[33] Human Rights Law § 296.1(g).
[34] 29 U.S.C. § 2601 et seq.

DISABILITY

No decision affecting hiring, promotion, firing or a term, condition or privilege of employment shall discriminate on the basis of a person's disability, nor shall employees be harassed or otherwise discriminated against on such basis, or perceived basis.

All employees must be able to perform the essential functions of their jobs in a reasonable manner, with or without a reasonable accommodation. Consideration of requests for accommodation of applicants or employees with disabilities is required, and should be granted where reasonable.

Statutory protection.

Disability discrimination is unlawful pursuant to Human Rights Law § 296.1. Reasonable accommodation is required of employers pursuant to Human Rights Law § 296.3(a). New York State law has a very broad definition of disability, and generally protects persons with any disabling condition, including temporary disabilities. Disability discrimination is also unlawful under federal law. However, the scope of disability under the provisions of the Americans with Disability Act (ADA) is not as broad.[35] The Federal Rehabilitation Act of 1973 § 503 and § 504[36] also apply to many State workers. Federal law also requires reasonable accommodation.

Guide dog, hearing dog, and service dog provisions are found in Human Rights Law § 296.14. An employee who uses a guide, hearing or service dog is also protected by Civil Rights Law § 47-a and § 47-b.

What is a "disability" under the Human Rights Law?

A "disability" is:

- a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques or
- a record of such an impairment or
- a condition regarded by others as such an impairment.[37]

Because this definition includes any impairment that is demonstrable by clinical or laboratory diagnostic techniques, it includes most disabling conditions.

[35] 42 U.S.C. § 12111 et seq.
[36] 29 U.S.C. § 793 and § 794.
[37] Human Rights Law § 292.21.

Reasonable performance.

An employee with a disability must be able to achieve "reasonable performance" in order to be protected by the Human Rights Law. Reasonable performance is not perfect performance or performance unaffected by the disability, but job performance reasonably meeting the employing agency's needs to achieve its governmental functions. An employee with a disability is entitled to reasonable accommodation if it will permit the employee to achieve reasonable job performance.

Essential functions.

A function is essential if not performing it would fundamentally change the job for which the position exists. If a function is not essential to the job, then it can be reassigned to another employee, and the employee with a disability may not be required to perform that function.

Employers may ask applicants with disabilities about their ability to perform specific job functions and tasks, as long as all applicants are asked in the same way about their abilities. Employers may require applicants/employees to demonstrate capacity to perform the physical demands of a particular job, in the same way as applicants are asked to demonstrate competence and qualifications in other areas. Such tests of capacity, agility, endurance, etc. are non-discriminatory as long as they can be demonstrated to be related to the specific duties of the position applied for, and are uniformly given to all applicants for a particular job category.

Reasonable Accommodation.[38]

A reasonable accommodation is an adjustment or modification made to a job or work environment that enables a person with a disability to perform the essential functions of a job in a reasonable manner. Some examples of reasonable accommodation include:

- A modified work schedule;
- Reassignment of the non-essential functions of the job;
- Acquisition or modification of equipment;
- Provision of an accessible worksite.

All otherwise qualified applicants and employees are entitled to reasonable accommodation of disability. Accommodation is required if it is reasonable and will assist in overcoming an obstacle caused by the disability that prevents the person from applying for the position, from performing the essential functions of

[38] With respect to policy and procedures relative to reasonable accommodation generally, employees should also consult their own agencies' policies, as each State agency is required to have a written plan, policy and procedure for considering reasonable accommodation requests.

the position, or from receiving equal terms, conditions or privileges of the position.

Unless the disability is obvious (e.g. employee's use of a wheelchair) the applicant or employee must inform the employing agency of the need for accommodation. The employee also must provide reasonable medical documentation as requested by the agency, and engage in an interactive process with the agency in order to reach an effective and reasonable accommodation.

Once an accommodation has been requested, the agency has an obligation to verify the need for the accommodation. If the need for accommodation exists, then the employing agency has an obligation to seek an effective solution through an interactive process between the agency and the employee.

While the employee can request a particular accommodation, the obligation to provide a reasonable accommodation is satisfied where the needs of the person with the disability are met. The agency has the right to decide which reasonable accommodation will be granted, so long as it is effective in enabling the employee to perform the job duties in a reasonable manner.

An agency may require a doctor's note to substantiate the request, or a medical examination where appropriate, but must maintain the confidentiality of an employee's medical information. Such information cannot be used by the agency for another purpose such as a basis for referring an employee for a medical examination to determine fitness for duty pursuant to Civil Service Law section 72(1) or placing the employee on an involuntary leave of absence pursuant to Civil Service Law section 72(5) or other personnel actions.

Many common questions about reasonable accommodation are explained in the reasonable accommodation regulations[39] of the New York State Division of Human Rights, which are available on the Division's website. These regulations may be used by applicants, employees, and agency personnel in order to better understand the reasonable accommodation process.

Family Medical Leave Act (29 USC sections 2601 to 2654).

As noted above relative to pregnancy discrimination, the State as an employer cannot take adverse action against employees who exercise their rights to medical leave for the birth, adoption, or foster care placement of a child, for their own serious health condition, or to care for a family member with a serious health condition which qualifies under the Act. The Act entitles eligible employees to take up to a total of 12 weeks of unpaid leave during a 12-month period. (Military caregivers may be entitled to up to 26 weeks of leave. See above, section on Military Status.)

[39] 9 N.Y.C.R.R. § 466.11.

Civil Service Law §§ 71 and 73.

The Civil Service Law allows an agency to terminate an employee after one cumulative year of absence for a disability resulting from an occupational injury or disease as defined in the Workers' Compensation Law.[40] This is extended to two years for an individual injured in an assault that causes such injury or disease. The Civil Service Law also allows an agency to terminate an employee who has been continuously absent for one year for a personal injury or illness.[41]

Drug and Alcohol Free Workplace Policy.

New York State employees are subject to criminal, civil, and disciplinary penalties if they distribute, sell, attempt to sell, possess, or purchase controlled substances while at the workplace or while acting in a work-related capacity. Such illegal acts, even if engaged in while off duty, may result in disciplinary action. In those locations where it is permitted, an employee may possess and use a controlled substance that is properly prescribed for the employee by a physician. Employees are also prohibited from on-the-job use of, or impairment from alcohol. If a supervisor has a reasonable suspicion that an employee is unable to perform job duties due to a disability which may be caused by the use of controlled substances or alcohol, that employee may be required to undergo medical testing.[42] If the cause of the disability is found to be drug- or alcohol-related, the employee may be referred to voluntary and confidential participation in the statewide Employee Assistance Program. Other available options include pursuing disability leave procedures or disciplinary measures. On-line supervisory training regarding a drug and alcohol free workplace is available through the GOER's Online Learning Center at http://www.goer.ny.gov/Training_Development/Online_Learning/index.cfm.

The Federal Drug-Free Workplace Act of 1988, amended in 1994, requires that all agencies that have contracts with the United States Government that exceed $100,000, and all agencies that receive Federal grants, maintain a drug-free workplace. If an employee is involved in work on a contract or grant covered by this law, they are required to notify their employer of any criminal drug statute conviction, for a violation occurring in the workplace, not less than five days after the conviction. Agencies covered by this law must notify the Federal government of the conviction and must take personnel action against an employee convicted of a drug abuse violation.

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[40] Civil Service Law § 71.
[41] Civil Service Law § 73.
[42] For agencies that do not have their own drug/alcohol testing procedures, this test must be done pursuant to Civil Service Law § 72.

Drug Addiction and Alcoholism under the Human Rights Law and Regulations.[43]

An individual who is currently using drugs illegally is not protected under the disability provisions of the Human Rights Law. The law protects individuals who are recovered or recovering drug addicts or alcoholics, and may protect alcoholics if the alcoholism does not interfere with job performance.

Intoxication or use of alcohol on the job is not protected. A test to determine the illegal use of drugs is not considered a medical test that is governed by the Human Rights Law. Agencies have differing requirements and policies with regard to drug testing.

If an individual is protected by the Human Rights Law, adjustment to work schedules, where needed to allow for ongoing treatment, is allowed as an accommodation where reasonable, if the individual is still able to reasonably perform the essential functions of the job, including predictable and regular attendance.

See also, Drug and Alcohol Free Workplace Policy, above.

Guide dogs, hearing dogs, and service dogs.

Users of guide dogs, hearing dogs, or service dogs are given protection by the Human Rights Law.[44] Any dog that meets the definition will be allowed to accompany its owner into the workplace, with only extremely narrow exceptions for health and safety.

The use of such a dog is not considered a reasonable accommodation, but a right protected separately under the Human Rights Law, and the dog owner need not specifically request permission to bring the dog into the workplace. This specific provision is not part of the federal ADA, under which the matter may be analyzed to determine whether a reasonable accommodation is appropriate.

The right to be accompanied by such dogs applies only to dogs that meet the definitions found in the Human Rights Law.

A “guide dog” or “hearing dog” is a dog that is trained to aid a blind or hearing impaired person, is actually used to provide such aid, and was trained by a recognized guide or hearing dog training center or professional guide or hearing dog trainer.[45]

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[43] *See generally* 9 N.Y.C.R.R. § 466.11(h).
[44] Human Rights Law § 296.14.
[45] Human Rights Law §§ 292.31-32.

A “service dog” may perform a variety of assistive services for its owner. However, to meet the definition, the dog must be trained by a recognized service dog training center or professional service dog trainer.[46]

Dogs that are considered therapy, companion or other types of assistance dogs, but who have not been professionally trained as stated in the definitions above, are not covered by this provision.[47] The provision also does not apply to animals other than dogs, regardless of training.

Dogs not meeting one of the definitions, or animals other than dogs, may provide assistance or companionship to a person with a disability. However, they are generally ***not*** permitted into the workplace as a reasonable accommodation, because the workplace and other employees can be adversely impacted by animals that are not professionally trained by recognized guide, hearing or service dog trainers, as provided above.

The New York State Civil Service Law provides qualified employees with special leave benefits for the purposes of obtaining service animals or guide dogs and acquiring necessary training.[48]

Exceptions.

The Human Rights Law does not require accommodation of behaviors that do not meet the employer's workplace behavior standards that are consistently applied to all similarly situated employees, even if these behaviors are caused by a disability.[49]

Reasonable accommodation is not required where the disability or the accommodation itself poses a direct threat, which means a significant risk of substantial harm to the health or safety of the employee or others that cannot be eliminated or reduced by reasonable accommodation.[50]

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[46] Human Rights Law § 292.33.
[47] A dog may be licensed as a “service” dog, and nevertheless not meet the definition of service dog for purposes of the Human Rights Law. N.Y. Agriculture & Markets Law § 110, which requires the licensing of dogs, permits municipalities to exempt from licensing fees various categories of dogs, including “service” and “therapy” dogs, but the section provides no definitions of those categories.
[48] Civil Service Law § 6(1).
[49] 9 N.Y.C.R.R. § 466.11(g)(1).
[50] 9 N.Y.C.R.R. § 466.11(g)(2).

PREDISPOSING GENETIC CHARACTERISTICS

No decision affecting hiring, promotion, firing or a term, condition or privilege of employment shall discriminate on the basis of the applicant or employee having a predisposing genetic characteristic, nor shall employees be harassed or otherwise discriminated against on such basis, or perceived basis.

Testing for such genetic characteristics is prohibited in most circumstances.

Statutory protection.

Discrimination on the basis of a genetic characteristic is unlawful pursuant to Human Rights Law § 296.1 and § 296.19. It is also covered by the federal Genetic Information Nondiscrimination Act (GINA).[51]

What is a predisposing genetic characteristic?

A predisposing genetic characteristic is defined as "any inherited gene or chromosome, or alteration thereof, . . . determined by a genetic test or inferred from information derived from an individual or family member that is scientifically or medically believed to predispose an individual or the offspring of that individual to a disease or disability, or to be associated with a statistically significant increased risk of development of a physical or mental disease or disability."[52]

How is the employee or applicant protected?

It is an unlawful discriminatory practice for any employer to directly or indirectly solicit, require, or administer a genetic test to a person, or solicit or require information from which a predisposing genetic characteristic can be inferred as a condition of employment or pre-employment application.[53] It is also unlawful for an employer to buy or otherwise acquire the results or interpretation of an individual's genetic test results or information from which a predisposing genetic characteristic can be inferred or to make an agreement with an individual to take a genetic test or provide genetic test results or such information.[54]

An employee may give written consent to have a genetic test performed, for purposes of a worker's compensation claim, pursuant to civil litigation, or to determine the employee's susceptibility to potentially carcinogenic, toxic, or otherwise hazardous chemicals or substances found in the workplace

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[51] As with Title VII, the ADA and the ADEA, the Genetic Information Nondiscrimination Act is enforced by the federal Equal Employment Opportunity Commission. When codified, GINA was distributed throughout various sections of Titles 29 and 42 of the United States Code. For more details on GINA, see http://www.eeoc.gov/laws/types/genetic.cfm.
[52] Human Rights Law § 292.21-a.
[53] Human Rights Law § 296.19(a)(1).
[54] Human Rights Law § 296.19(a)(2).

environment. The employer may not take any adverse action against an employee on the basis of such voluntary test.[55]

Exceptions.

An employer may require a specified genetic test as a condition of employment where such a test is shown to be directly related to the occupational environment, such that the employee or applicant with a particular genetic anomaly might be at an increased risk of disease as a result of working in that environment.[56] However, the employer may not take adverse action against the employee as a result of such testing.

MARITAL STATUS

No decision affecting hiring, promotion, firing or a term, condition or privilege of employment shall discriminate on the basis of a person's marital status, nor shall employees be harassed or otherwise discriminated against on such basis, or perceived basis.

"Marital status" is the condition of being single, married, separated, divorced, or widowed.

Statutory protection.

Discrimination on the basis of marital status is unlawful pursuant to Human Rights Law § 296.1. Marital status is not covered by federal law.

Marital status does not include the identity of the spouse.

Discrimination based on the identity of the individual to whom a person is married is not marital status discrimination, as it is only the status of being married, single, divorced, or widowed that is protected. Thus, terminating employment because of the actions of a spouse would not be considered marital status discrimination, because the action was taken not based on the fact that the employee was married but that the employee was married to a particular person.

Nepotism.

Nepotism means hiring, granting employment benefits, or other favoritism based on the identity of a person's spouse or other relative. The Public Officers Law provides that a State employee may not control or influence decisions to hire,

[55] Human Rights Law § 296.19(c) and (d).
[56] Human Rights Law § 296.19(b).

fire, supervise or discipline a spouse or other relative.[57] Moreover, other acts of nepotism not specifically governed by this provision may violate more general conflict of interest provisions in the New York ethics statutes. Such anti-nepotism rules do not implicate marital status discrimination.

What is marital status discrimination?

Some examples of marital status discrimination are:

- expecting an employee to work a disproportionate number of extra shifts or at inconvenient times because he or she is not married, and therefore won't mind.
- selecting a married person for a job based on a belief that married people are more responsible or more stable.
- giving overtime or a promotion to a married person rather than a single person based on a belief that the single person does not have to support anyone else.

DOMESTIC VIOLENCE VICTIM STATUS

No decision affecting hiring, promotion, firing or a term, condition or privilege of employment shall discriminate on the basis of a person's status as a victim of domestic violence, nor shall employees be harassed or otherwise discriminated against on such basis, or perceived basis.

Statutory protection.

Discrimination based on domestic violence victim status is unlawful pursuant to Human Rights Law § 296.1. There is no similar federal protection.

Executive Order concerning State workers.

On January 1, 2011, Governor Andrew M. Cuomo issued Executive Order No. 2, reissuing Executive Order No. 19,[58] which requires adoption of domestic violence and the workplace policies by all executive branch State agencies.

Purpose of domestic violence and the workplace policies.

Domestic violence permeates the lives and compromises the safety of New York State residents with tragic, destructive, and sometimes fatal results. Domestic violence occurs within a wide spectrum of relationships, including married and formerly married couples, couples with children in common, couples who live

[57] Anti-nepotism rules for all State government workplaces are found in N.Y. Public Officers Law § 73.14.
[58] Issued by Gov. Eliot L. Spitzer on October 22, 2007.

together or have lived together, gay, lesbian, bisexual and transgender couples, and couples who are dating or who have dated in the past.

Domestic violence often spills over into the workplace, compromising the safety of both victims and co-workers and resulting in lost productivity, increased health care costs, increased absenteeism, and increased employee turnover. The purpose of the policy is to address the impacts of domestic violence already being felt in the workplace.

The workplace can sometimes be the one place where the victim is not cut off from outside support. The victim's job, financial independence, and the support of the workplace can be part of an effective way out of the abusive situation. Therefore, the domestic violence and the workplace policy aims to support the victim in being able to retain employment, find the resources necessary to resolve the problem, and continue to serve the public as a State employee.

Meeting the needs of domestic violence victims.

A victim of domestic violence can ask the employer for accommodations relating to his or her status, which can include the following:

- Employee's need for time off to go to court, to move, etc., should be granted at least to the extent granted for other personal reasons.
- If an abuser of an employee comes to the workplace and is threatening, the incident should be treated in same manner as any other threat situation. It is not to be treated as just the victim's problem which the victim must handle on her or his own. The victim of domestic violence must not be treated as the "cause" of the problem and supervisory employees must take care that no negative action is taken against the victim because, for example, the abuser comes to the workplace, the victim asks the employer to notify security about the potential for an abuser to come to the workplace, or the victim provides an employer with information about an order of protection against the abuser.
- If a victim needs time off for disability caused by the domestic violence, it should be treated the same as any temporary disability. This includes time off for counseling for psychological conditions caused by the domestic violence. See section on Disability, above: temporary disabilities are covered under the Human Rights Law.

The State's domestic violence and the workplace policy requires this and more. Employees should consult their agency's policy to understand the support it affords to victims of domestic violence, which may include the following:

- Assistance to the employee in determining the best use of his/her attendance and leave benefits when an employee needs to be absent as a result of domestic violence.

- Assistance with enforcement of all known court orders of protection, particularly orders in which the abuser has been ordered to stay away from the work site.
- Refraining from any unnecessary inquiries about domestic violence.
- Maintenance of confidentiality of information about the domestic violence victim to the extent possible.
- Establishment of a violence prevention procedure, such as a policy to call "911" if an abuser comes to the workplace.
- Working with the domestic violence victim to develop a workplace safety plan.

In addition, the policy also sets out standards for the agency to hold employees accountable who utilize State resources or use their position to commit an act of domestic violence.

Time off for legal proceedings.

In addition to the requirement of the domestic violence and the workplace policy that victims be granted reasonable time off to deal with domestic violence, time off for legal proceedings is addressed by the Penal Law. It is illegal for an employer to take any adverse action against an employee who is a victim of a crime for taking time off to appear in court as a witness, to consult with a district attorney, or to obtain an order of protection.[59]

Unemployment insurance benefits.

If a victim must leave a job because of domestic violence, he or she is not necessarily barred from receiving unemployment insurance benefits. Circumstances related to domestic violence may be "good cause" for voluntarily quitting a job. Also, job performance problems related to domestic violence (such as absenteeism or tardiness) will not necessarily bar benefits.[60]

Further information and support.

Dealing with domestic violence requires professional assistance. Domestic violence can be a dangerous or life-threatening situation for the victim and others who may try to become involved. Both victims and employers may contact the NYS Office for the Prevention of Domestic Violence for further information.

[59] N.Y. Penal Law § 215.14.
[60] N.Y. Labor Law § 593.

PRIOR ARREST RECORDS, YOUTHFUL OFFENDER ADJUDICATIONS AND SEALED RECORDS

It is an unlawful discriminatory practice for an employer to make any inquiry about any arrest or criminal accusation of an individual, not then pending against that individual, which has been resolved in favor of the accused or resolved by a youthful offender adjudication or resulted in a sealed conviction. It is unlawful to require any individual to divulge information pertaining to any such arrest or criminal accusation or to take any adverse action based on such an arrest or criminal accusation.

Statutory protection.

This protection is provided by Human Rights Law § 296.16.

What is unlawful?

It is generally unlawful to ask an applicant or employee whether he or she has ever been arrested or had a criminal accusation filed against him or her. It is also generally unlawful to inquire about youthful offender adjudications or sealed records. It is ***not*** unlawful to ask if a person has any currently pending arrests or accusations. (It is also not unlawful to inquire about convictions, see section on Previous Conviction, below.)

It is generally unlawful to require an individual to divulge information about the circumstances of an arrest or accusation no longer pending. In other words, the employer cannot demand information from the individual accused in order to "investigate" the circumstances behind an arrest. It is ***not*** unlawful to require an employee to provide information about the outcome of the arrest, i.e. to demonstrate that it has been terminated in favor of the accused. The agency may be able to take action against an employee for the conduct that led to the arrest but Human Rights Law §296.16 provides that no person "shall be required to divulge information" pertaining to the arrests resolved as set out below.

Pending arrest or accusation.

As long as an arrest or criminal accusation remains pending, the individual is not protected. The agency may refuse to hire or may terminate or discipline the employee in accordance with applicable law or collective bargaining agreement provisions. The agency may also question the employee about the pending arrest or accusation, the underlying circumstances, and the progress of the matter through the criminal justice system.

However, if the employee is arrested while employed, is not terminated by the employer, and the arrest is subsequently terminated in favor of the employee, the

employee then becomes protected. After a favorable termination, the employer cannot initiate an adverse action against the employee based on the arrest and cannot question the employee about the matter. The employer can require that the employee provide proof of the favorable disposition in a timely manner.

What specific circumstances are protected?

The arrest or criminal accusation must have been:

- dismissed, pursuant to Criminal Procedure Law § 160.50;
- disposed of as a youthful offender adjudication, pursuant to Criminal Procedure Law § 720.35;
- resulted in a conviction for a violation, which was sealed pursuant to Criminal Procedure Law § 160.55; or
- resulted in a conviction, which was sealed pursuant to Criminal Procedure Law § 160.58.

Sealed records.

Whether or not a record is sealed is a factual question. Many records that could be sealed are not in fact sealed. Sealing a record requires that the court specifically order that the record be sealed. The applicant or employee is responsible to know the status of a sealable conviction. If it is not in fact sealed, then it is a conviction record that can be required to be disclosed. (See the section below on Previous Conviction.)

Exceptions.

The Human Rights Law explicitly states that arrest inquiries, requests for information, or adverse actions may be lawful where such actions are "specifically required or permitted by statute."[61]

These provisions do not apply to an application for employment as a police officer or peace officer.[62]

The provisions do not fully apply to an application for employment or membership in any law enforcement agency. For those positions, arrests or criminal accusations that are dismissed pursuant to Criminal Procedure Law § 160.50 may not be subject to inquiry, demands for information, or be the basis of adverse action. However, the other types of terminations (youthful offender adjudication or sealed convictions) may be inquired into and taken into consideration for jobs with law enforcement agencies.

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[61] Human Rights Law § 296.16; see e.g. Civil Service Law § 50(4).
[62] Police and peace officer as defined in Criminal Procedure Law §§ 1.20 and 2.10, respectively.

PREVIOUS CONVICTION RECORDS

It is unlawful to deny any license or employment, to refuse to hire, or terminate, or take an adverse employment action against an applicant or employee, by reason of his or her having been convicted of one or more criminal offenses, if such refusal is in violation of the provisions of Article 23-A of the Correction Law. The Correction Law provides the standards to be applied and factors to be considered before an employment decision may be based on a previous conviction, including the factor that it is the public policy of the State of New York to encourage the licensure and employment of those with previous criminal convictions

Statutory protection.

This protection is provided by Human Rights Law § 296.15, in conjunction with Article 23-A of the N.Y. Correction Law.

Factors from the Correction Law.

The Correction Law provides that an employer may not refuse to hire, or terminate an employee, or take an adverse employment action against an individual, because that individual has been previously convicted of one or more criminal offenses, or because of a belief that a conviction record indicates a lack of "good moral character," ***unless*** either there is a direct relationship between one or more of the previous criminal offenses and the specific employment sought or held, or employment of the individual would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.[63]

In order to determine whether there is either a direct relationship or unreasonable risk (as mentioned above), the employer must apply the factors set forth in the Correction Law, as follows:

(a) The public policy of this State, as expressed in this act, to encourage the licensure and employment of persons previously convicted of one or more criminal offenses.

(b) The specific duties and responsibilities necessarily related to the license or employment sought or held by the person.

(c) The bearing, if any, the criminal offense or offenses for which the person was previously convicted will have on his fitness or ability to perform one or more such duties or responsibilities.

(d) The time which has elapsed since the occurrence of the criminal offense or offenses.

[63] N.Y. Correction Law § 752.

(e) The age of the person at the time of occurrence of the criminal offense or offenses.

(f) The seriousness of the offense or offenses.

(g) Any information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct.

(h) The legitimate interest of the public agency or private employer in protecting property, and the safety and welfare of specific individuals or the general public.[64]

Also, in making the determination, the employer must give consideration to a certificate of relief from disabilities or a certificate of good conduct issued to the individual, which creates a presumption of rehabilitation in regard to any offense specified in the certificate.[65]

The factors must be applied on a case-by-case basis and each of the factors must be considered. The employing agency must take into account the individual's situation by analyzing factors (d) through (g) and must also analyze the specific duties and responsibilities of the job pursuant to factors (b), (c) and (h). If any additional documentation is needed, it must be requested of the applicant or employee before any adverse determination is made. A justification memorandum that merely tracks the statute but without rational application of the factors to the facts of the case may lead to a finding that an adverse determination was arbitrary and capricious.

Conviction must be "previous."

Individuals are protected for ***previous*** convictions. A conviction that occurs during employment does not entitle the individual to these protections.

Inquiries and misrepresentation.

Unlike many other areas covered by the Human Rights Law, an employer is not prevented from asking an individual to disclose prior convictions as part of the employment application process or at any time during employment.

If the employer learns at any time that that an applicant or employee has made a misrepresentation with regard to any previous conviction, it may be grounds for denial or termination of employment.[66]

Interaction with the arrest provisions.

The arrest provisions[67] of the Human Rights Law interact with the conviction provisions. Although it is ***lawful to ask*** about previous convictions, it is ***unlawful***

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[64] N.Y. Correction Law § 753.1.
[65] N.Y. Correction Law § 753.2.
[66] N.Y. Correction Law § 751; see also Civil Service Law section 50(4).

to ask about previous arrests resolved in an individual's favor, or about youthful offender adjudications, or about convictions that have been sealed pursuant to Criminal Procedure Law § 160.55 or § 160.58. If any individual with a youthful offender record or a sealed conviction states that he or she has no previous convictions, this is not a misrepresentation. The employer is not entitled to any information about youthful offender records or sealed convictions. (See section on Prior Arrest, above.)

Enforcement only by court action.

A State employee or an applicant for State employment cannot file a complaint with the Division of Human Rights regarding previous conviction. An individual can pursue enforcement under the Human Rights Law only by filing an Article 78 proceeding in State Supreme Court.[68] (However, State employees may file complaints with respect to the Prior Arrest provisions of the Human Rights Law (see section on Prior Arrest, above) with the Division of Human Rights.)

Exceptions.

It is not unlawful to discriminate if, upon weighing the factors set out above, the previous criminal offense bears a direct relationship to the job duties, or if employment of the individual would involve an unreasonable risk to safety or welfare, as explained in more detail above.

An individual may be required to disclose previous convictions, unless they are sealed, as explained in more detail above.

These protections do not apply to "membership in any law enforcement agency."[69]

GENDER IDENTITY

No decision affecting hiring, promotion, firing or a term, condition or privilege of employment shall discriminate on the basis of a person's gender identity, nor shall employees be harassed or otherwise discriminated against on such basis, or perceived basis.

"Gender identity" means and individual's gender identity, self-image, appearance, behavior or expression, whether or not that gender identity, self-image, appearance, behavior or expression is different from that traditionally associated with the legal sex or gender assigned to an individual at birth.

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[67] Human Rights Law § 296.16.
[68] N.Y. Correction Law § 755.1.
[69] N.Y. Correction Law § 750.5.

Statutory protection.

There is no specific protection for gender identity in federal or New York State law, but gender identity may form the basis of a sex discrimination claim, under certain circumstances, or a disability discrimination claim if the employee alleges that he or she has "gender identity disorder" or "gender dysphoria," which are considered disabilities under the Human Rights Law. (See sections on Sex and on Disability, above.)

Executive Order concerning State workers.

On January 1, 2011, Governor Andrew M. Cuomo issued Executive Order No. 2, reissuing Executive Order No. 33,[70] which prohibits discrimination in employment by executive branch agencies on the basis of gender identity.

What protection against discrimination is provided?

The Executive Order seeks to root out employment discrimination on the basis of gender identity in order to help attract and retain competent and effective employees.

No State agency, employee or agent thereof, shall discriminate on the basis of gender identity against any individual in any matter pertaining to employment by the State including, but not limited to, hiring, termination, retention, job appointment, promotion, tenure, recruitment, compensation and benefits, and other terms and conditions of employment. Under the Executive Order, harassment and retaliation based on gender identity are also prohibited. (See sections, generally, on Harassment and on Retaliation, below.) Claims of retaliation or harassment based on gender identity can only be processed under the Human Rights Law if the basis for such claim is otherwise covered under that law. All complaints alleging harassment and retaliation under Executive Order 33 can be made under an agency's internal discrimination complaint procedure.

The prohibition on gender identity discrimination extends to actions based upon an individual's actual or perceived gender identity. While gender identity discrimination can take many forms, it includes, but is not limited to, unwelcome verbal or physical conduct, such as derogatory comments, jokes, graffiti, drawings or photographs, touching, gestures, or creating or failing to remedy a hostile work environment.

[70] Issued by Gov. David A Paterson on December 16, 2009.

GENERAL PROHIBITIONS

Harassment

Harassment that creates a hostile work environment, based on the protected categories discussed in this Handbook, is unlawful pursuant to the Human Rights Law. (See also subsection on Sexual Harassment, above.) State employees are entitled to a work environment which promotes respect for all, and actions that demonstrate bias, harassment, or prejudice will not be tolerated.

Harassment consists of words, signs, jokes, pranks, intimidation or physical violence that is directed at an employee because of his or her membership in any protected class, or perceived class. It also includes workplace behavior that is offensive and based on stereotypes about a particular protected group, or which is intended to cause discomfort or humiliation on the basis of protected class membership.

Harassment is unlawful when it becomes severe or frequent enough to alter the terms or conditions of an individual's employment.

Appropriate supervision is not harassment.

Normal workplace supervision, such as enforcing productivity requirements, requiring competent job performance, or issuing disciplinary warnings or notices, is ***not*** harassment. If these actions are imposed on the basis of protected class membership, then this may be discrimination in the terms, condition or privileges of employment.

Harassment must be reported.

The employing agency is not responsible for harassment by co-workers, unless the agency knows about the harassment and fails to take appropriate steps to correct the situation. Harassment should be reported to a supervisor, manager, human resources officer, or EEO officer. The individual who reports harassment, or who is experiencing the harassment, needs to cooperate with any investigation into the harassment so that a full and fair investigation can be conducted and any necessary remedial action can be promptly undertaken.

An employee with supervisory responsibility has a duty to report harassment that he or she observes or otherwise knows about. A supervisor who has received a report of harassment from an employee has a duty to report it to management, even if the employee who complained has asked that it not be reported. Any harassment or potential harassment that is observed must be reported, even if no one is complaining about it.

Harassment must be investigated and appropriate corrective action taken.

The employing agency has the duty to investigate any report of harassment. If it is determined that the harassing behavior is occurring, the employing agency has a duty to take prompt and effective corrective action to stop the harassment and take such other steps as are appropriate.

Unlawful Inquiries

It is an unlawful discriminatory practice for an employer to print, circulate, or use any form of application, or to make any inquiry which expresses directly or indirectly, any limitation, specification or discrimination as to any protected category, unless based upon a bona fide occupational qualification.[71]

Even if an inquiry is not asked with the apparent intent to express a limitation, it can become evidence of discriminatory intent in a subsequent action, by creating an appearance of discriminatory motivation. Those interviewing candidates for State positions or promotions should exercise extreme caution so as not to ask any unnecessary question or make any comment that could be interpreted as expressing a discriminatory motivation. This is simply a good employment practice.

Information gathered in furtherance of an affirmative action plan may be lawful, so long as the affirmative action is pursued in a lawful manner (which is beyond the scope of this booklet). Information on protected category membership which is collected for statistical purposes should be retained separately from a candidate's other information.

Retaliation

Retaliation by an employer is unlawful pursuant to the Human Rights Law and the Civil Service Law.[72] The federal statutes mentioned in this handbook also prohibit retaliation.

The Human Rights Law protects any individual who has filed a complaint, testified or assisted in any proceeding under the Law, as well as one who has opposed any practices forbidden by the Law. Even if the practices the individual has opposed are not in fact a violation of the Human Rights Law, the individual is protected if he or she had a good faith belief that the practices were unlawful.

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[71] Human Rights Law § 296.1(d).
[72] Human Rights Law § 296.7; see also Civil Service Law § 75.(b), which gives protection to "whistleblowers."

Division or court proceedings.

A complainant or witness is absolutely protected against retaliation for any oral or written statements made to the Division or a court in the course of proceedings, regardless of the merits or disposition of the underlying complaint.

Opposing discriminatory practices.

Opposing discriminatory practices includes filing an internal complaint of discrimination with the employing agency, or reporting discriminatory actions to a supervisor or other appropriate person, either verbally or in writing. It also includes complaining that another person's rights under the Law were violated or encouraging a fellow employee to report unlawful discriminatory practices.

However, behaving inappropriately towards a person deemed to be engaged in discrimination or harassment does not constitute protected opposition to unlawful practices. Employees should instead complain to a supervisor, manager, human resources officer, or EEO officer.

There is no protection for a person who opposes practices the person finds merely distasteful or wrong, despite having no reasonable basis to believe those practices were in violation of the Law or State policy Furthermore, the retaliation provision is not intended to protect persons making false charges of discrimination.

Adverse employment action.

Retaliation consists of an adverse action or actions taken against the employee by the employer. The action need not be job-related or occur in the workplace. Unlawful retaliation can be any action, more than trivial, that would have the effect of dissuading a reasonable worker from making or supporting a charge of discrimination.

Actionable retaliation by an employer can occur after the individual is no longer employed by that employer. This can include giving an unwarranted negative reference for a former employee.

A negative employment action is not retaliatory merely because it occurs after the employee engaged in protected activity. Employees continue to be subject to all job requirements and disciplinary rules after having engaged in such activity. In order to make a claim of retaliation, the individual must be able to substantiate the claim that the adverse action was retaliatory.

Political Activities

The Civil Service Law provides that no appointment or selection or removal from employment shall relate to the political opinions or affiliations of any person. No

person in the civil service of the State is under any obligation to contribute to any political fund or render any political service and no person shall be removed or otherwise prejudiced for refusing to do so. No person in the civil service shall discharge or promote or reduce or in any manner change the rank or compensation of another for failing to contribute money or any other valuable thing for any political purpose. No person in the civil service shall use his or her official authority or influence to coerce the political action of any person or body or to interfere with any election.[73] This provision has been enforced by the New York State Commission on Public Integrity, which will be replaced on or before December 12, 2011, by the Joint Commission on Public Ethics. Complaints regarding this provision should not be filed with the Division of Human Rights.

Diversity

New York State is committed to a nondiscriminatory employment program designed to meet all the legal and ethical obligations of equal opportunity employment. Each department develops affirmative action policies and plans to ensure compliance with equal opportunity laws. To assist in building cooperative work environments, which welcome an increasingly diverse workforce, the Department of Civil Service Staffing Services Division, and courses on diversity in the workplace, are available to agencies through the Governor's Office of Employee Relations (GOER). Contact your personnel office for more information about specific agency affirmative action policies and plans. Diversity training information is available under Training & Development on the GOER website at www.goer.ny.gov.

Reporting Discrimination Complaints Internally

As noted throughout this Handbook, any employee who has been subjected to any discrimination, bias, prejudice, harassment or retaliation, based on any of the areas covered by the handbook, should promptly report the matter to his or her supervisor or manager, to the agency's human resources department, or to the agency's Equal Opportunity Officer.

Each agency has policies and procedures in place to respond to such complaints, and can advise employees as to appropriate steps to take pursuant to the agency's procedures. All agency procedures are designed to ensure that the State's anti-discrimination policies are followed, including the State's policies forbidding retaliation, as set out above. All agency procedures provide for a prompt and complete investigation as to the complaint of discrimination, and for prompt and effective remedial action where appropriate.

[73] Civil Service Law § 107.

Pursuing Discrimination Complaints Externally

Agency policies and procedures are intended to address all complaints of discrimination within the agency. They are not intended to satisfy, replace or circumvent options available to employees through negotiated union contracts; federal, state or other civil rights enforcement agencies; and/or the judicial system. Thus the use of these internal complaint procedures will not suspend any time limitations for filing complaints set by law or rule, and will not fulfill any other requirements set by law or rule.

Employees are not required to pursue their agency's internal complaint procedure before filing a complaint with any agency or with a court, based on federal or state or local law (though as mentioned previously, an agency may not be held responsible for harassment by coworkers if it was not made aware of the harassment).

Listed throughout the Handbook are citations to the various laws that pertain to discrimination. Employees may be able to file complaints pursuant to these laws with administrative agencies and/or in court. There may also be additional remedies available to employees, and employees may wish to seek an attorney's advice prior to determining appropriate steps to take.

The following agencies can provide information to employees, and receive and investigate complaints of employment discrimination pursuant to the New York State Human Rights Law (State Division of Human Rights) or Title VII, ADEA, ADA or GINA (U.S. Equal Employment Opportunity Commission).

- New York State Division of Human Rights ("SDHR")
  - Website: www.dhr.ny.gov
  - Telephone: (888)392-3644
  - TTY number: (718)741-8300
- United State Equal Employment Opportunity Commission ("EEOC")
  - Website: www.eeoc.gov
  - Telephone: (800)669-4000
  - TTY number: (800)669-6820

NOTE

This Handbook has been prepared for the general information of State employees as a summary of the various laws, executive orders, and policies that provide protection from discrimination for State employees. The Handbook is not exhaustive and does not summarize all legal protections that may apply to State employees. Employees should also refer to the employee manual and anti-discrimination policies of their employing agency.

This handbook does not grant any legal rights to any employee, nor is it intended to bind the State in any way. Where there is a conflict between any law, regulation, order, policy or collective bargaining agreement and the text of this Handbook, such law, regulation, order, policy or agreement shall be controlling.

The State reserves the right to revise, add to, or delete any portion of this Handbook at anytime, in its sole discretion, without prior notice to employees. Moreover, this Handbook is not intended to, and does not create any right, contractual or otherwise, for any employee, not otherwise contained in the particular law or executive order the Handbook summarizes.

This Handbook has been written so as to not conflict with any collective bargaining agreement that the State has entered into with any union representing its unionized employees. If there is any conflict between this Handbook and any collective bargaining agreement, the provisions of the collective bargaining agreement will control. This Handbook shall not constitute a change in any existing term and condition of employment.