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5:30 PM CLE (Included in Ticket Price), 6:30 PM COCKTAIL HOUR, 7:30 PM BANQUET DINNER

**TOPIC:** "Taming the Elephant in the Courtroom- Strategies for female lawyers and their supporters to identify, defuse and combat bias in the courtroom and in the boardroom"

**MODERATOR:** Claire F. Rush Esq. – Rush & Sabbatino, PLLC

**SPEAKERS:** Suzanne M. Halbardier, Esq. – Barry McTiernan & Moore LLC  
Andrea Alonso, Esq. – Morris, Duffy Alonso & Faley  
Margaret G. Klein, Esq. - Law Offices of Margaret G. Klein & Associates – Attorney of Record for GNY  
Karen Campbell, Esq. – Lewis Brisbois Bisgaard & Smith LLP  
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Defense Association of New York --  
Continuing Legal Education - May 10, 2018

# Taming the Elephant in the Courtroom- Strategies for female lawyers and their supporters to identify, defuse and combat bias in the courtroom and in the boardroom

CLE PowerPoint Slides and other materials,  
and CVs of the moderator and presenters,  
now follow

# **Taming the Elephant in the Courtroom**

**Strategies for Female Litigators to Defuse,  
Confront and Combat Bias**

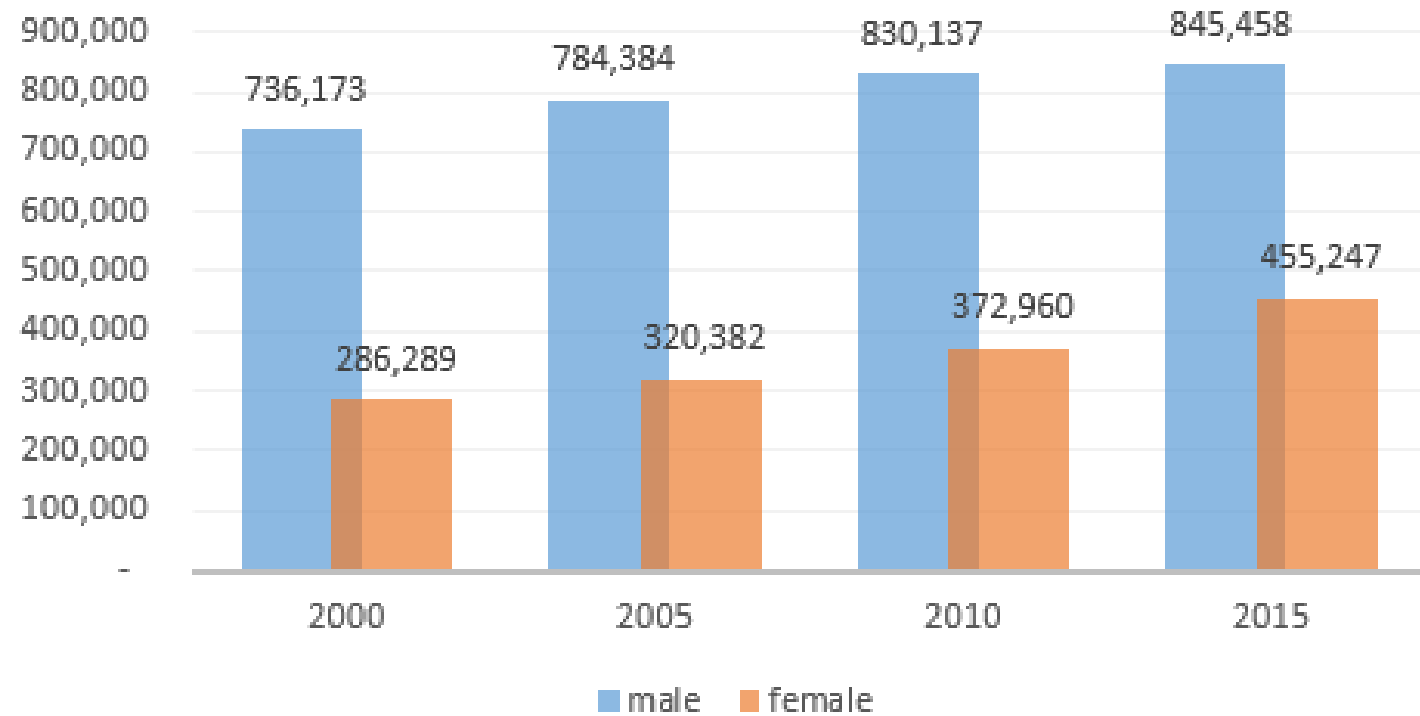
# A 2005 ABA STUDY FINDS WOMEN ARE UNDERREPRESENTED AMONG LAW FIRM PARTNERS

## Qualified women are even less likely to make partner

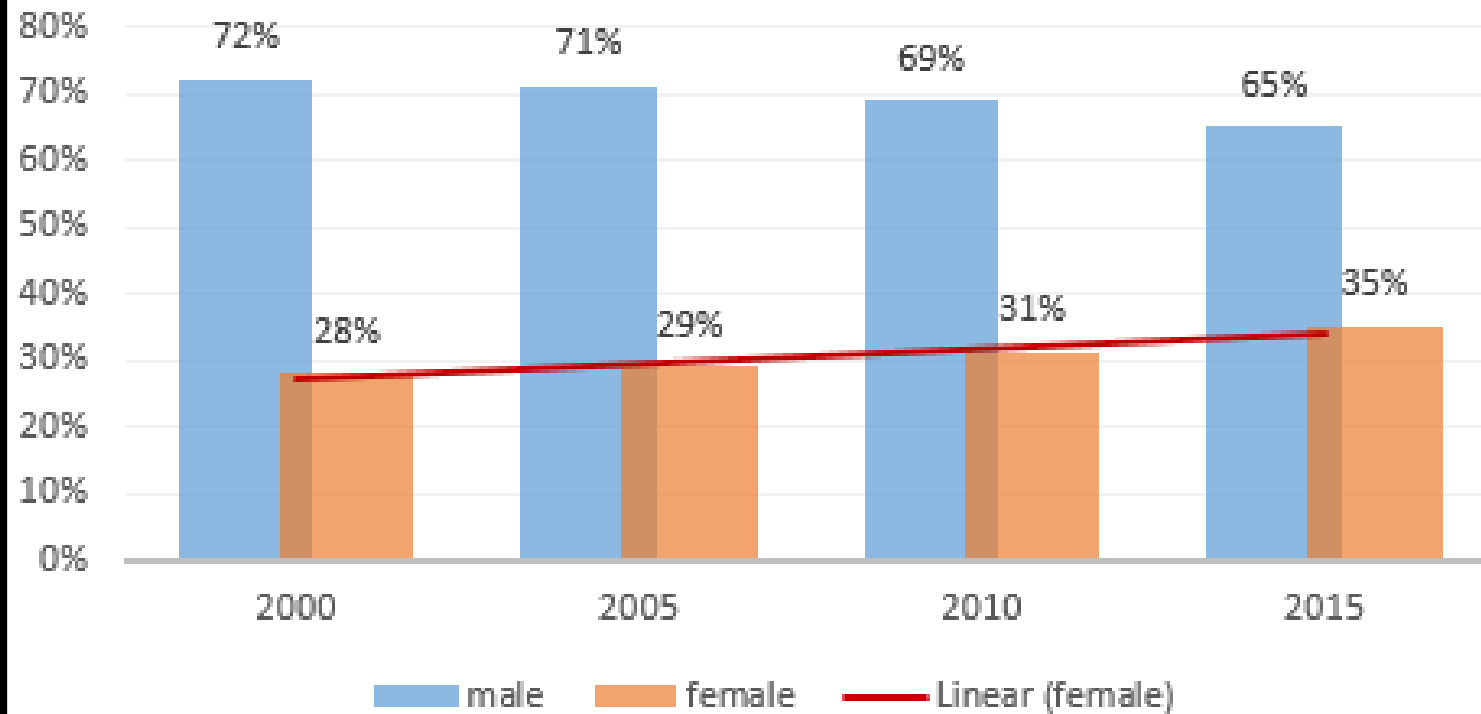
- The average female lawyer makes \$20,000 a year less than the average male lawyer.
- Given the same qualifications, men are still twice as likely to be offered partnership in law firms.
- Women make up about 29% of the profession, **yet**
  - Only 15.6% of law firm partners are women
  - Only 13.7% of general counsel at Fortune 500 corporations are women.
  - For women of color, the under-representation is even greater



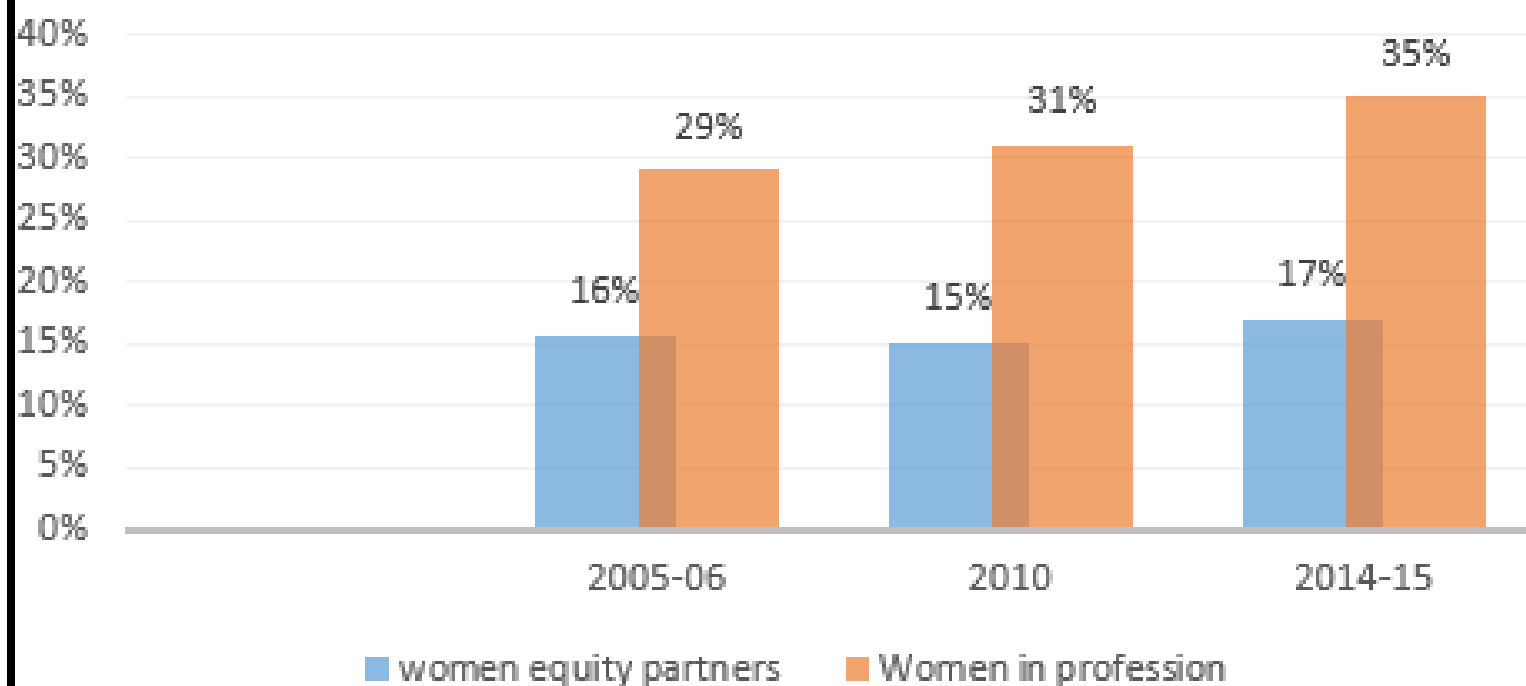
## Gender Breakdown Among U.S. Lawyers



## Gender Breakdown by Percentage



## Women Equity Partners vs. Overall Women Lawyers



# Bullying In The Workplace





# Dealing with Sexual Harassment



# The Child Bearing - Caregiving Trap



# Microaggressions and Marginality

Manifestation, Dynamics, and Impact



Edited by  
Derald Wing Sue



Implicit Bias

It's All Around US



STRONG FEAR  
WOMAN  
GIRL RELIGION SCARY SMART  
BLACK  
LOVE INTELLIGENT  
HEALTH PREJUDICE  
DUMB  
TOLERANCE  
BIAS

RELIGION MAN WHITE FRIENDSHIP  
SEX BOY HATE SUBCONSCIOUS  
OLD CAREFUL  
GAY JOB  
WEAR



OVERCOMING  
UNCONSCIOUS BIAS

# THE FLIP TEST : TAKE-CHARGE V. TAKE-CARE

 <p>leader provider assertive strong driven</p>	 <p>leader provider assertive strong driven</p>
 <p>supportive emotional helpful sensitive fragile</p>	 <p>supportive emotional helpful sensitive fragile</p>
Image 1	Image 2

# Creating Opportunities For Women Attorneys





# Mentorship and Sponsorship



# CORPORATE COUNSEL AS A CHANGE DRIVER



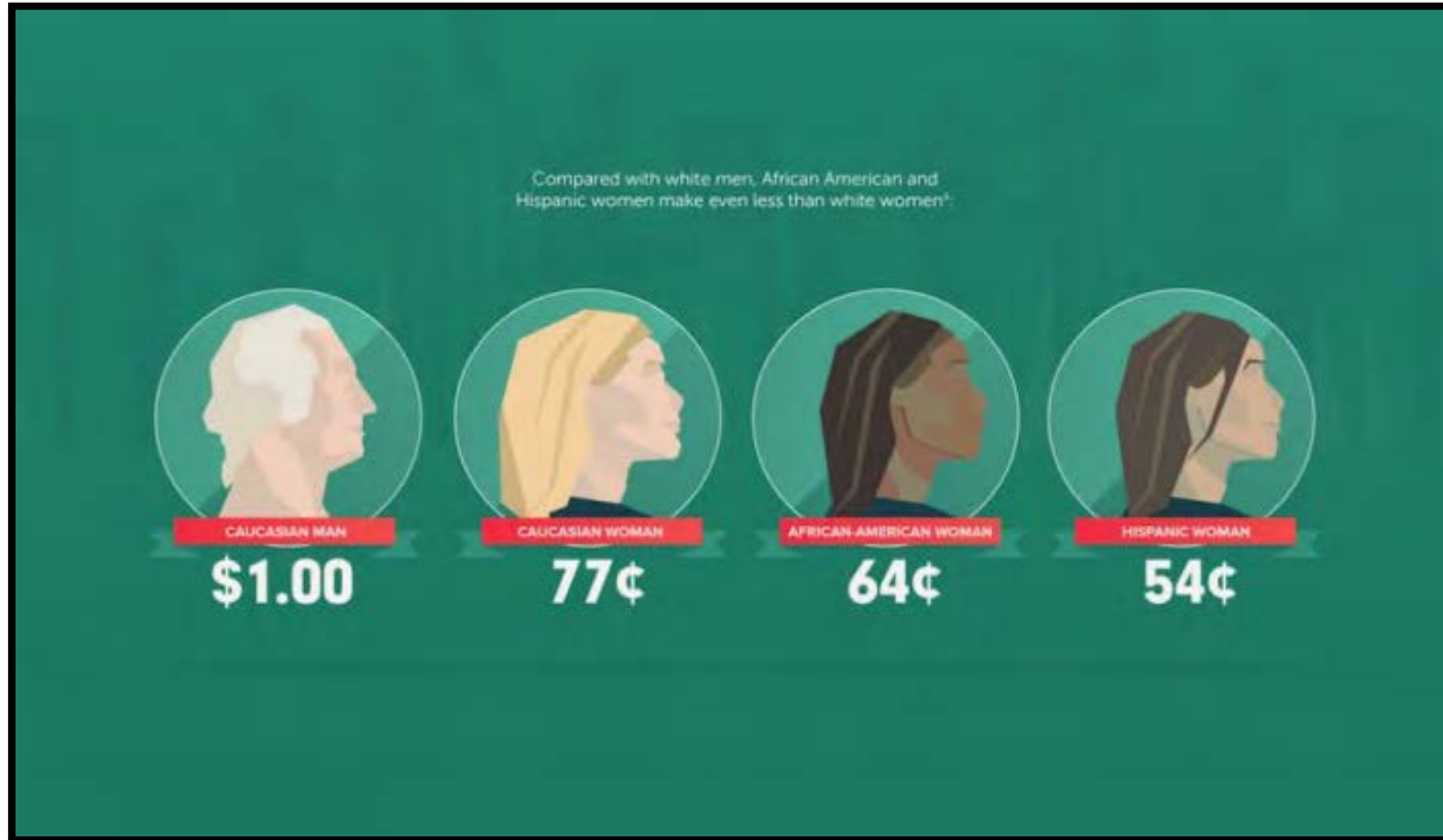
**MCCA**

**Inclusive leadership in the legal field is critical**

U.S. Law Firms	Fortune 500 *in 2017
84% of partners are white	92% of partners are white
86% of new general counsels were white	

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# The Pay Gap is Real and Persistent



# There is a 27% Gender Pay Gap Among Equity Partners



bamboohr

PayScale

# Creating Pay Transparency in the Workplace



# CONFRONTING ORIGINATION DISPUTES



# STRATEGIES FOR BRIDGING THE GAP



# LEVERAGE TECHNOLOGY TO FACILITATE REMOTE WORK





# FLEX TIME AND PART TIME EMPLOYMENT



# EQUALIZE TRAINING AND ADVANCEMENT OPPORTUNITIES



# BUSINESS DEVELOPMENT TRAINING



Please proceed  
to the next page

*You Hit Like a Girl: Overcoming the Challenge of Subconscious Gender Bias*  
Janelle L. Davis  
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A recent report from the American Bar Association analyzed a number of statistics related to women in the legal profession. These statistics included the percentage of female summer associates versus male summer associates, the number of female equity partners, the number of women general counsels in Fortune 1000 companies, and compensation for women attorneys as compared to their male counterparts. *See* American Bar Association, *A Current Glance at Women in the Law* (2014), available at [http://www.americanbar.org/content/dam/aba/marketing/women/current\\_glance\\_statistics\\_july2014.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/marketing/women/current_glance_statistics_july2014.authcheckdam.pdf). The results of this report were similar to numbers in prior years, and therefore, not entirely surprising. For example, although nearly half of summer associates are women, just 34% of practicing lawyers are women. The numbers of those women who eventually rise to the equity partner ranks in private practice are even lower – just 17%. *Id.* In Fortune 500 companies only 21% of general counsels are women. *Id.* General counsels, of course, are typically the ones with the power to hire outside lawyers and to demand that their outside counsel consist of diverse teams that include women in key roles.

The ABA's report also addresses compensation, noting that “[a]t the median, women equity partners in the 200 largest firms earn 89% of the compensation earned by their male peers.” *Id.* It's no secret that law firms and corporations have diversity initiatives and have made efforts to attract and retain women. So why are the numbers still so low? What accounts for this continued, staggering disparity between male and female lawyers in positions of power? Women are attending college and law school in at least the same numbers as men. They often

outperform men academically, yet the parity between men and women in the legal profession is lacking. The answer is undoubtedly a complicated one involving many issues beyond the scope of this paper. However, there is no question that subconscious gender bias plays a role in the advancement (or lack thereof) of women lawyers. This paper will briefly explore the issue of subconscious gender bias — what it is, how to recognize it and address it, and why this should matter to all of us.

### **What is Subconscious Gender Bias?**

Subconscious gender bias is “an implicit association or attitude (about race or gender, for example) that operates beyond our control and awareness, informs our perception of a person or social group, and can influence our decision-making and behavior toward the target of the bias.” J. Bruning, *#WomenExcel: Are you aware of your unconscious bias?* (Sept. 8, 2015), available at <http://blogs.aecom.com/womenexcel-are-you-aware-of-your-unconscious-bias/>. There is nothing inherently bad about this type of bias. It’s a normal part of filtering information. *Id.* But subconscious gender bias is particularly concerning for the advancement of women in the legal profession because by its very nature people are generally unaware of it. It’s not something we intend to do. However, when those in power in law firms, courtrooms, and corporate America unknowingly allow subconscious gender bias to influence their decisions, the development and advancement of women in the legal profession suffers.

This type of implicit bias stems from gender-based stereotypes that begin when we are children. We are socialized to view women as soft spoken, kind, and compassionate. Men, on the other hand, are viewed as ambitious and strong. *See Levinson & Young, Implicit Gender Bias in the Legal Profession: An Empirical Study*, 18 DUKE J. GENDER L. & POL’Y 1, 6 (Fall

2010) (“In the context of gender stereotypes, children are likely to learn at an early age that men are ‘competent, rational, assertive, independent, objective, and self confident,’ and women are ‘emotional, submissive, dependent, tactful, and gentle.’”). Over time these seemingly innocent stereotypes grow into social expectations for men and women — expectations that do not lend themselves to seeing women in positions of authority or leadership. For instance, men are ranked higher than women in most qualities associated with leadership simply because they are men. Deborah L. Rhode, *The Subtle Side of Sexism*, 16 COLUM. J. GENDER & L. 613, 619 (2007). This creates problems as women try to rise to the leadership ranks in their organizations because there is a perceived “mismatch between the qualities traditionally associated with women and those associated with professional success.” *Id.* at 621. As one author put it, because women are seen as soft and feminine, they are often perceived as “too ‘soft’—unable or unwilling to make the tough calls required of those in positions of power. On the other hand, they may appear too tough—strident and overly aggressive or ambitious.” *Id.* The same problem arises in the area of self-promotion. A woman who promotes herself too much is viewed negatively when the same behavior is expected and deemed appropriate for men. *Id.* See also McKinsey & Company, *Women in the Workplace* (2015), available at [http://womenintheworkplace.com/ui/pdfs/Women\\_in\\_the\\_Workplace\\_2015.pdf?v=5](http://womenintheworkplace.com/ui/pdfs/Women_in_the_Workplace_2015.pdf?v=5) (“Success and likeability are positively correlated for men and negatively correlated for women . . . . This bias often surfaces in the way women are described, both in passing and in performance reviews.”). This likeability bias was addressed in the McKinsey & Company’s 2015 Women in the Workplace study. The study noted that “[w]hen a woman asserts herself, she is often called ‘aggressive,’ ‘ambitious,’ or ‘out for herself.’ When a man does the same, he is seen as ‘confident’ and ‘strong.’ As a result of this double standard, women can face penalties in the

workplace like missing out on hiring or advancement opportunities and salary increases.” *Id.* at 23.

Other instances of subconscious gender bias are equally subtle. For example, a woman speaking up during a meeting to offer an unpopular, but necessary opinion may be viewed as a troublemaker. Law firms have issued memos to women regarding appropriate attire, while leaving the issue of attire for men alone. Marilyn Stowe, *Patronising, sexist and wrong. Law firm issues note on how to dress* (Nov. 11, 2013), available at <http://www.theguardian.com/women-in-leadership/2013/nov/11/clifford-chance-memo-how-to-dress>. Women are routinely told to smile more or to be more cheerful or enthusiastic, yet women who do smile a lot are often viewed as less professional and there is some evidence that being too cheerful can hold women back from leadership positions. See Vanessa Ko, *Cheerfulness may hold back female leaders* (June 13, 2013), available at <http://www.cnn.com/2013/06/13/business/pride-vs-happiness-among-leaders/>.

Research also shows that when men achieve career success, their success is attributed to their intelligence, drive or commitment. Martha Foschi, *Double Standards for Competence: Theory & Research*, 26 ANN. REV. SOC. 21 (2000). But for women, their success is attributed to luck or special treatment. *Id.* These are only a few examples of subconscious gender bias. Studies are replete with others. Rhode, *supra* at 618-19 (summarizing findings of subconscious gender bias from studies).

Subconscious gender bias also reveals itself in how the appearances of men and women are judged. Older women are marginalized as unattractive, but men with wrinkles and gray hair are “distinguished.” Rhode, *supra* at 629. In addition, ask just about any woman in the legal profession and chances are she has experienced some form of subconscious gender bias



firsthand. She may have been mistaken as the court reporter at a deposition. She may have been called “honey” or “dear” by an older, male judge. Or she may have received a negative performance evaluation and told to be more enthusiastic about her workplace because she spoke up about unfair policies in an effort to prompt positive change. She has probably been in a meeting where she made a suggestion that was ignored, only to hear that same suggestion accepted later in the meeting when offered by a man.

Working women with children face subconscious gender bias regularly. For instance, if a working mother leaves the office early, her colleagues may infer that the reason involves family obligations while a working father faces no such assumptions. Rhode, *supra* at 618. Similarly, “[h]aving children makes women, but not men, appear less competent and less available to meet workplace responsibilities than their childless counterparts.” *Id.*

Another situation that can occur all too often involves the provision of opportunities in the workplace. For instance, some senior lawyers may hesitate to ask a woman with small children to travel for a key client meeting, deposition, or a trial. The senior lawyer may want the woman to handle the matter, but may incorrectly assume that the woman does not want to be away from her children in favor of a job opportunity. Therefore, this leads to the opportunity being provided to a childless woman or, most likely, a man without even giving the woman with children a chance to say yes or no to the opportunity. Relatedly, when a woman becomes pregnant it is sometimes assumed that she will not return to work after her maternity leave, and therefore, she is no longer assigned to challenging cases. Repeated lack of opportunity then leads to the failure to develop the skills necessary to advance in the legal profession. This lack of skills eventually leads to failure to advance, whether voluntary or not, and ultimately, to women leaving the profession.

The hardest part about dealing with subconscious gender bias is that most of the time we do not even realize we are doing it. Most people are not deliberately trying to keep women from advancing in the workplace. In the example of a senior lawyer not asking a woman with small children to travel for work, the senior lawyer was most likely trying to be helpful by not putting a mother in the position of being away from her children. There was no ill will or deliberate attempt to keep a woman from an important opportunity. Yet that was the end result — the loss of an opportunity because of the assumption that a woman would not want a work opportunity to require travel away from her family. Would the same assumption be made about a man?

Subconscious gender bias is also particularly problematic because diversity and inclusion policies instituted to help retain and advance women will not change it. The best example of this is flexible working arrangements in law firms. Most law firms have policies in place that allow for part-time hours, flex-time, or some form of flexible work arrangements designed to allow both male and female attorneys better balance their work and family demands. However, participation in these programs is almost always by female attorneys who are then viewed as lacking commitment or as lazy for using the programs available to them. In some law firms, advancement to equity partner is not even allowed for attorneys who are on a reduced schedule.

Parental leave policies are another example. Women are afforded maternity leave when they birth or adopt a child and while many employers offer leave to fathers, few use it. The 2015 *Women in the Workplace* performed by McKinsey & Company addressed this issue. In the study — which involved 118 companies and nearly 30,000 employees — found that “[m]ore than 90 percent of both women and men believe taking extended family leave will hurt their position at work—and more than half believe it will hurt them a great deal.” McKinsey & Company, *supra* at 16. It stands to reason then that because women disproportionately use leave

programs, they are disproportionately viewed negatively for it. Thus, while these programs are important and necessary in order for women to continue to advance in the legal professions, they are not all that's required. Subconscious gender bias will only change when we begin to recognize it, discuss it, and change it ourselves. In other words, it requires individual changes within each of us.

### **Why is it important to address subconscious gender bias?**

Although it is hard to determine exactly how much and how often subconscious gender bias influences decisions in the workplace, it is undoubtedly part of the explanation for the huge disparity between men and women in influential positions in the legal profession for several reasons. The 2015 Women in the Workplace study found that women believe the workplace is biased against them and that they are disadvantaged by it. McKinsey & Company, *supra* at 13. Women “are almost three times more likely than men to say they have personally missed out on an assignment, promotion, or raise because of their gender. Compared with men, women also report that they are consulted less often on important decisions.” *Id.* In addition to this perceived disadvantage, there are several concrete ways in which subconscious gender bias negatively affects women in the workplace.

First, subconscious gender bias impacts the opportunities provided to women, particularly women with children. Challenging and key opportunities are critical for anyone to develop their skills as an attorney. If these opportunities are not provided, the attorney will not develop and ultimately will not progress to the senior levels within their organizations.

Second, subconscious gender bias influences performance evaluations and decision-making regarding advancement. This is perfectly illustrated by the *Hopkins* case discussed below. Women who are assertive in their careers and who self-promote to develop business

cannot be viewed as “bossy” or “pushy” or “too aggressive.” Instead, these qualities within women must be given the same respect that they are given when exhibited by a man. If they are not, the performance evaluations, and ultimately, the advancement of women in the profession will suffer.

Third, women will begin to adapt their behaviors to avoid the negative consequences that come from subconscious gender bias. Specifically, women may stop exhibiting certain behaviors once those behaviors are viewed negatively. A woman told that she is too negative for providing constructive criticisms of firm policies will eventually stop offering that feedback for fear of being penalized. A woman who speaks up in client meetings will remain quiet when she is ignored in favor of a man’s opinion. More concerning is when women stop self-promoting because of negative feedback. Self-promotion is a key part of success in the legal profession and is already a difficult area for women. Discouraging women from doing it by providing negative feedback makes it even harder for them to advance.

Fourth, in extreme cases, subconscious gender bias could result in discrimination claims by female employees. Therefore, law firms and corporations must work to eradicate it for this reason as well. Perhaps one of the most famous examples of such a case is the Supreme Court’s decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Ann Hopkins was an accountant at Price Waterhouse who was denied partnership despite her excellent qualifications. She billed more hours and brought in more business than other candidates. She had also received excellent ratings from her firm’s clients. But she was denied partnership based on subjective criteria. She was told she lacked interpersonal skills and “social grace.” She was viewed as overly aggressive and unduly harsh and one partner even suggested that she take a course in charm school. Although some male accountants had received feedback for being too overbearing, they were not

similar penalized or viewed negatively like Hopkins. Hopkins eventually won her case after *seven years* of legal wrangling, but her legal wrangling should not have been necessary in the first place. Eradicating subconscious gender bias through the areas addressed below would have helped Hopkins and her employer. And more broadly, eradicating subconscious gender bias will help women stay in, and advance within, the legal profession.

### **How should subconscious gender bias be handled?**

Addressing subconscious gender bias begins with training to identify subconscious gender bias. As a profession we cannot change what we do not acknowledge and, as discussed, most people do not even realize that they are exhibiting subconscious gender bias when they do it. Thus, law firms, courthouses, corporations, and even law schools should provide information regarding subconscious gender bias, how it happens, what it looks like, and how it impacts women in the legal profession. This is particularly critical for managers, section leaders in law firms, and those with decision-making power when it comes to the advancement of attorneys. These individuals shape the opportunities provided to young lawyers and they influence the advancement of young lawyers. By providing this training, we will all become more aware of the issue and also more knowledgeable about how to identify and stop it.

Training of course is not enough. We must use the knowledge provided to point out subconscious gender bias when it happens. And once we recognize it we must take the next step of talking about it. Women and men in authority positions should stand up for women who are characterized as “too aggressive” for speaking up in meetings or for self-promotion. They should speak out when a woman is told that she should be more enthusiastic about her job or that she should smile more around the office.

In addition, when it comes to performance evaluations and criteria for advancement, we should ensure that the evaluation criteria are clear, measurable, understood, and set in advance. This will minimize the chance that subjective criteria is subconsciously used against women preventing them from advancement to leadership ranks in their organizations.

There is no simple solution to closing the gap between men and women in leadership positions in the legal profession. But working to eliminate subconscious gender bias will go a long way.

Please proceed  
to the next page



# **IF NOT NOW, WHEN?**

**Achieving Equality for Women Attorneys in  
the Courtroom and in ADR**

**Report of the New York State Bar Association**

**Prepared by the Commercial and Federal Litigation Section's  
Task Force on Women's Initiatives: Hon. Shira A. Scheindlin  
(ret.); Carrie H. Cohen; Tracee E. Davis; Bernice K. Leber;  
Sharon M. Porcellio; Lesley F. Rosenthal; Lauren J. Wachtler**

**Approved by the House  
of Delegates  
November 2017**



## TABLE OF CONTENTS

<b>I. Introduction</b> .....	1
<b>II. Literature Review: Women in Litigation; Women in ADR</b> .....	2
<b>A. Women in Litigation: Nationwide</b> .....	2
<b>B. Women in ADR</b> .....	10
<b>III. Survey: Methodology and Findings</b> .....	14
<b>A. Women Litigators in New York State Courts</b> .....	15
<b>B. Women Litigators in Federal Courts</b> .....	16
<b>C. Women Litigators: Criminal &amp; Civil; Private &amp; Public</b> .....	17
<b>D. Women in Alternative Dispute Resolution</b> .....	18
<b>IV. Going Forward: Suggested Solutions</b> .....	18
<b>A. Women’s Initiatives</b> .....	18
<b>B. Formal Programs Focused on Lead Roles in Court and Discovery</b> .....	20
<b>C. Efforts to Provide Other Speaking Opportunities for Women</b> .....	21
<b>D. Sponsorship</b> .....	21
<b>E. Efforts by the Judiciary</b> .....	23
<b>F. Efforts by Clients</b> .....	24
<b>G. ADR Context</b> .....	26
<b>V. Conclusion</b> .....	27
<b>Appendix</b> .....	29

**IF NOT NOW, WHEN? ACHIEVING EQUALITY FOR WOMEN ATTORNEYS  
IN THE COURTROOM AND IN ADR  
REPORT OF THE COMMERCIAL AND FEDERAL LITIGATION SECTION  
2017 WOMEN’S INITIATIVE STUDY**

**I. Introduction**

During the last two decades, much has been written and discussed about whether women attorneys appear in court with the frequency expected given their numbers in the legal profession. The Commercial and Federal Litigation Section of the New York State Bar Association is a preeminent bar group focused on complex commercial state and federal litigation. The Section counts among its former chairs a substantial number of prominent women litigators from both upstate and downstate, including a former United States District Judge who previously served as a federal prosecutor and an attorney in private practice, a former President of the New York State Bar Association who is recognized as one of New York’s top female commercial litigators and also serves as a mediator and arbitrator of commercial disputes, a former federal and state prosecutor who now is a partner in a large global law firm, an in-house counsel at a large non-profit corporation, and senior partners in large and mid-size private law firms located both upstate and downstate. With the full support and commitment of the Section’s leadership, these female alumnae Section chairs met and formed an ad hoc task force devoted to the issue of women litigators in the courtroom. The task force also examined the related issue of the apparent dearth of women who serve as arbitrators and mediators in complex commercial and international arbitrations and mediations (collectively referred to herein as Alternative Dispute Resolution (“ADR”)).

As an initial matter, the task force sought to ascertain whether there was, in fact, a disparity in the number of female attorneys versus male attorneys who appear in speaking roles in federal and state courts throughout New York. Toward that end, the task force devised and distributed a survey to state and federal judges throughout the State and then compiled the survey results. As fully discussed below, based on the survey results, the task force found continued disparity and gender imbalance in the courtroom. This report first details recent studies and research on the issue of gender disparity in the legal profession, then discusses how the court survey was conducted, including methodology and findings, and concludes with recommendations for addressing the disparity and ensuring that women attorneys obtain their rightful equal place in the courtroom. This report further details the task force’s findings with respect to the gender gap in the ADR context.

## **II. Literature Review: Women in Litigation; Women in ADR**

There is no shortage of literature discussing the gender gap in the courtroom, which sadly continues to persist at all levels—from law firm associates, to equity partnerships at law firms, to lead counsel at trial. To orient the discussion, the task force sets forth below a brief summary of some of the relevant articles it reviewed.

### **A. Women in Litigation: Nationwide**

#### *ABA Commission on Women in the Profession*

The ABA Commission on Women in the Profession (the “ABA Commission”) was founded in 1987 “to assess the status of women in the legal profession and to identify barriers to their achievement.”<sup>1</sup> The following year, with Hillary Rodham Clinton serving as its inaugural chair, the ABA Commission published a groundbreaking report documenting the lack of adequate advancement opportunities for women lawyers.<sup>2</sup> Thirty years later, the ABA Commission is perhaps the nation’s preeminent body for researching and addressing issues faced by women lawyers.<sup>3</sup>

In 2015, the ABA Commission published *First Chairs at Trial: More Women Need Seats at the Table* (the “ABA Report”), “a first-of-its-kind empirical study of the participation of women and men as lead counsel and trial attorneys in civil and criminal litigation.”<sup>4</sup> The study was based on a random sample of 600 civil and criminal cases filed in the United States District Court for the Northern District of Illinois in 2013—a sample that offered a limited but important snapshot into the composition of trial courtrooms at that time.<sup>5</sup> As summarized by its authors, Stephanie A. Scharf and Roberta D. Liebenberg, the ABA Report showed at a high level the following:

[W]omen are consistently underrepresented in lead counsel positions and in the role of trial attorney . . . . In civil cases, [for example], men are three times more likely than women to appear as lead counsel . . . . That substantial gender gap is a marked departure from what we expected based on the distribution of

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<sup>1</sup> Stephanie A. Scharf & Roberta D. Liebenberg, ABA Commission on Women in the Profession, *First Chairs at Trial: More Women Need Seats at the Table—A Research Report on the Participation of Women Lawyers as Lead Counsel and Trial Counsel in Litigation* at 25 (2015).

<sup>2</sup> *See id.*

<sup>3</sup> *See id.*

<sup>4</sup> *Id.* At 4.

<sup>5</sup> *See id.*

men and women appearing generally in the federal cases we examined (a roughly 2 to 1 ratio) and the distribution of men and women in the legal profession generally (again, a roughly 2 to 1 ratio).<sup>6</sup>

The ABA Report also provided more granular statistics about the sample population, including that out of the 558 civil cases surveyed, 68% of all lawyers and 76% of the lead counsel were male.<sup>7</sup> The disparity was even more exaggerated in the class action context, in which 87% of lead class counsel were men.<sup>8</sup> The 50 criminal cases studied fared no better: among all attorneys appearing, 67% were men and just 33% were women.<sup>9</sup>

Contextualizing these statistics, the ABA Report also outlined factors that might help to explain the gender disparities evidenced by the data. In particular, the ABA Report posited that:

The underrepresentation of women among lead lawyers may. . . stem from certain client preferences, as some clients prefer a male lawyer to represent them in court. . . . In addition, women may too often be relegated by their law firms to second-chair positions, even though they have the talent and experience to serve as first chairs. The denial of these significant opportunities adversely affects the ability of women to advance at their firms. All of these issues apply with even greater force to women trial attorneys of color, who face the double bind of gender and race.

*Id.* at 15 (footnote omitted). The ABA Report concluded by offering some “best practices” for law schools, law firms, clients, judges, and women lawyers, many of which focus on cultivating opportunities for women to gain substantive trial experience.<sup>10</sup>

Other research corroborates the extent to which gender disparities continue to persist within the legal profession, particularly within law firm culture. This research shows that the presence of women in the legal profession—now in substantial numbers—has not translated into equal opportunities for women lawyers at all levels. For example, a recent law firm survey, conducted by the New York City Bar Association, found that just 35% of all lawyers at surveyed firms in 2015 were women—“despite [the fact that

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<sup>6</sup> *Id.*

<sup>7</sup> *See id.* at 8-10.

<sup>8</sup> *See id.* at 12.

<sup>9</sup> *See id.* at 12-13.

<sup>10</sup> *Id.* *See also id.* at 14-17.

women have] represent[ed] almost half of graduating law school classes for nearly two decades.”<sup>11</sup> That same survey found a disparity in lawyer attrition rates based on gender and ethnicity, with 18.4% of women and 20.8% of minorities leaving the surveyed firms in 2015 compared to just 12.9% of white men.<sup>12</sup> Serious disparities also have been identified at the most senior levels of the law firm structure. Indeed, a 2015 survey by the National Association of Women Lawyers found that women held only 18% of all equity partner positions—just 2% higher than they did approximately a decade earlier.<sup>13</sup> Based on one study by legal recruiting firm, Major, Lindsey & Africa, it is estimated that the compensation of male partners is, on average, 44% higher than that of female partners.<sup>14</sup>

In April 2017, ALM Intelligence focused on Big Law and asked, “Where Do We Go From Here?: Big Law’s Struggle With Recruiting and Retaining Female Talent.”<sup>15</sup> The author found that certain niche practices such as education, family law, health care, immigration, and labor and employment had the greatest proportion of women; other areas such as banking, corporate, and litigation had the lowest number of female attorneys.<sup>16</sup>

Promisingly, however, there also have been significant calls to action—across the bar and bench—to increase advancement opportunities for women lawyers. In interviews conducted after the ABA Report was published, top female trial attorneys cited factors such as competing familial demands, law firm culture (including a desire to have “tried and true” lawyers serve as lead counsel), and too few training opportunities for young lawyers as reasons why so few women were present at the highest ranks of the profession.<sup>17</sup> Those interviewed suggested ways in which law firms can foster the development of women lawyers at firms, including by affording female associates more

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<sup>11</sup> Liane Jackson, *How can barriers to advancement be removed for women at large law firms?*, ABA Journal (Jan. 1, 2017), [http://www.abajournal.com/magazine/article/visible\\_difference\\_women\\_law](http://www.abajournal.com/magazine/article/visible_difference_women_law).

<sup>12</sup> *See id.*

<sup>13</sup> Andrew Strickler, *Female Attorneys Should Grab High-Profile Work: Bar Panel*, Law360 (Jan. 27, 2016), <https://www.law360.com/articles/750952/female-attorneys-should-grab-high-profile-work-bar-panel>.

<sup>14</sup> *See id.*

<sup>15</sup> Daniella Isaacson, ALM Intelligence, *Where Do We Go From Here?: Big Law’s Struggle With Recruiting and Retaining Female Talent* (Apr. 2017).

<sup>16</sup> Meghan Tribe, *Study Shows Gender Diversity Varies Widely Across Practice Areas*, The Am Law Daily (Apr. 17, 2017) <http://www.americanlawyer.com/id=1202783889472/Study-Shows-Gender-Diversity-Varies-Widely-Across-Practice-Areas> (citing Daniella Isaacson, ALM Intelligence, *Where Do We Go From Here?: Big Law’s Struggle With Recruiting and Retaining Female Talent* (Apr. 2017)).

<sup>17</sup> Mary Ellen Egan, *Too Few Women in Court*, The American Lawyer (Apr. 25, 2016), <http://www.americanlawyer.com/id=1202755433078/Too-Few-Women-in-Court>.

courtroom opportunities and moving away from using business generation as the basis for determining who is selected to try a case.<sup>18</sup> Among those interviewed was Ms. Liebenberg, one of the co-authors of the ABA Report. She stressed that clients can play an important role by using their economic clout to insist that women play a significant role in their trial teams.<sup>19</sup>

In another follow-up to the ABA Report, Law360 published an article focusing on the ABA Report's recommendation that judges help to close the gender gap by encouraging law firms to give young lawyers (including female and minority associates) visible roles in the courtroom and at trial.<sup>20</sup> The article highlighted the practice of some judges around the country in doing this, such as Judge Barbara Lynn of the Northern District of Texas. As explained in the article, Judge Lynn employs a "standard order"—adapted from one used by Judge William Alsup of the Northern District of California—that encouraged parties to offer courtroom opportunities to less experienced members of their teams.<sup>21</sup> One such order provides: "In those instances where the court is inclined to rule on the papers, a representation that the argument would be handled by a young lawyer will weigh in favor of holding a hearing."<sup>22</sup> As explained in the article, Judge Lynn said that, while her order does not mention gender, younger lawyers in her courtroom tend to include more women.

Indeed, a recent survey revealed that nineteen federal judges have issued standing orders that encourage law firms to provide junior attorneys with opportunities to gain courtroom experience.<sup>23</sup> Here are some examples of such orders:

- Judge Indira Talwani (D. Mass): "Recognizing the importance of the development of future generations of practitioners through courtroom opportunities, the undersigned judge, as a matter of policy, strongly encourages the participation of relatively inexperienced attorneys in all courtroom proceedings including but not limited to initial scheduling conferences, status conferences, hearings on discovery motions, and examination of witnesses at

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<sup>18</sup> *See id.*

<sup>19</sup> *See id.*

<sup>20</sup> Andrew Strickler, *Judges Key to Closing Trial Counsel Gender Gap*, Law360 (July 20, 2015) <https://www.law360.com/articles/680493/judges-key-to-closing-trial-counsel-gender-gap>.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> Michael Rader, *Rising to the Challenge: Junior Attorneys in the Courtroom*, 257 N.Y.L.J. 4 (Apr. 28, 2017).

trial.”

- Judge William Alsup (N.D. Cal.): “The Court strongly encourages lead counsel to permit young lawyers to examine witnesses at trial and to have an important role. It is the way one generation will teach the next to try cases and to maintain our district’s reputation for excellence in trial practice.”

- Magistrate Judge Christopher Burke (D. Del.) “indicates that the court will make extra effort to grant argument—and will strongly consider allotting additional time for oral argument—when junior lawyers argue.”

- Judge Allison Burroughs (D. Mass) offers law firm associates the chance to argue a motion after the lead attorneys have argued the identical motion.<sup>24</sup>

As explained in the article cited below, there are benefits to both the lawyer and the client in having junior attorneys play a more significant role in the litigation:

When it comes to examining a witness at trial, junior lawyers frequently have a distinct advantage over their more senior colleagues. It is very often the junior lawyer who spent significant time with the witness during the discovery process . . . . In the case of an expert witness, the junior lawyer probably played a key role in drafting the expert report. In the case of a fact witness, the junior lawyer probably worked with the witness to prepare a detailed outline of the direct examination. . . . [C]lients should appreciate that the individual best positioned to present a witness’s direct testimony at trial may be the junior attorney who worked with that witness . . . . The investment of time required to prepare a junior attorney to examine a witness or conduct an important argument can be substantial, but this type of hands-on mentoring is one of the most rewarding aspects of legal practice.<sup>25</sup>

At the same time, practitioners also have urged junior female attorneys to seek out advancement opportunities for themselves—a sentiment that was shared by panelists at a conference hosted by the New York State Bar Association in January 2016. Panel members—who spoke from a variety of experiences, ranging from that of a federal District Court Judge to a former Assistant U.S. Attorney to private practice—“uniformly called for rising female attorneys to seek out client matters, pro bono cases, bar roles, and other responsibilities that would give them experience as well as profile beyond their

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

home office.”<sup>26</sup>

### *ABA Presidential Task Force on Gender Equity*

In 2012, American Bar Association President Laurel G. Bellows appointed a blue-ribbon Task Force on Gender Equity (“Task Force”) to recommend solutions for eliminating gender bias in the legal profession.<sup>27</sup> In 2013, the Task Force in conjunction with the ABA Commission published a report that discussed, among other things, specific steps clients can take to ensure that law firms they hire provide, promote, and achieve diverse and inclusive workplaces.<sup>28</sup> Working together, the Task Force concluded, “general counsel and law firms can help reduce and ultimately eliminate the compensation gap that women continue to experience in the legal profession.”<sup>29</sup>

The Task Force recommended several “best practices” that in-house counsel can undertake to promote the success of women in the legal profession. As a “baseline effort,” corporations that hire outside counsel, including litigators, should inform their law firms that the corporation is interested in seeing female partners serving as “lead lawyers, receiving appropriate origination credit, and being in line for succession to handle their representation on behalf of the firm.”<sup>30</sup> Corporate clients can also expand their list of “go-to” lawyers by obtaining referrals to women lawyers from local bar associations; contacting women lawyers in trial court opinions issued in areas of expertise needed; and inviting diverse lawyers to present CLE programs.<sup>31</sup> This allows the corporate clients to use their “purchasing power” to ensure that their hired firms are creating diverse legal teams.<sup>32</sup>

The Task Force also reported that clients can utilize requests for proposal and pitch

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<sup>26</sup> Andrew Strickler, *Female Attorneys Should Grab High-Profile Work: Bar Panel*, Law360 (Jan. 27, 2016) <https://www.law360.com/articles/750952/female-attorneys-should-grab-high-profile-work-bar-panel> (emphasis added).

<sup>27</sup> *ABA Presidential Task Force on Gender Equity and the Commission on Women in the Profession, Power of the Purse: How General Counsel Can Impact Pay Equity for Women Lawyers* (2013).

<sup>28</sup> *Publications from the ABA Presidential Task Force on Gender Equity*, AMERICAN BAR ASSOCIATION (2012), [https://www.americanbar.org/groups/women/gender\\_equity\\_task\\_force/task\\_force\\_publications.html](https://www.americanbar.org/groups/women/gender_equity_task_force/task_force_publications.html).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 6. For an in-depth discussion of recommendations for steps clients can take to combat the gender disparity in courtrooms, *see infra* Part F.

<sup>31</sup> *Id.* at 9.

<sup>32</sup> *Id.* at 8.



meetings to convey their diversity policies to outside firms and “specify metrics by which they can better evaluate a firm’s commitment to women lawyers.”<sup>33</sup> When in-house counsel ask their outside firms to provide data, they demonstrate to the firms their consciousness of metrics, and the data allows them to benchmark the information against other firms.<sup>34</sup>

Perhaps the most impactful practice corporate clients can undertake is a “deepened level of inquiry,” which involves investigating how work is credited within law firms.<sup>35</sup> For example, a general counsel may tell a firm that she wants “the woman lawyer on whom she continually relied to be the relationship partner and to receive fee credit for the client’s matters” even if that means “transferring that role from a senior partner” that might cause “tension in the firm.”<sup>36</sup>

Finally, clients can “lead by example, both formally and informally” by partnering with law firms committed to bringing about pay equity.<sup>37</sup> The Task force professed that by doing so, corporate clients have the power to shatter the “last vestiges of the glass ceiling in the legal profession.”<sup>38</sup>

### *Call for Diversity by Corporate Counsel*

The ABA was not the first and only organization to recognize the growing importance of gender equity in the legal profession. In 1999, Charles R. Morgan, then Chief Legal Officer for BellSouth Corporation, developed a pledge titled Diversity in the Workplace: A Statement of Principle (“Statement of Principle”) as a reaction to the lack of diversity at law firms providing legal services to Fortune 500 companies.<sup>39</sup> Mr. Morgan intended the Statement of Principle to function as a mandate requiring law firms to make immediate and sustained improvements in diversity initiatives.<sup>40</sup> More than four hundred Chief Legal Officers of major corporations signed the Statement of Principle,<sup>41</sup>

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<sup>33</sup> *Id.* at 10.

<sup>34</sup> *See id.* at 11.

<sup>35</sup> *See id.* at 13.

<sup>36</sup> *Id.* at 10.

<sup>37</sup> *Id.* at 15.

<sup>38</sup> *Id.*

<sup>39</sup> Donald O. Johnson, *The Business Case for Diversity at the CPCU Society* at 5 (2007), <https://www.cpcusociety.org/sites/dev.aicpcu.org/files/imported/BusinessDiversity.pdf>.

<sup>40</sup> Rick Palmore, *A Call to Action: Diversity in the Legal Profession*, 8 ENGAGE 21, 21 (2004).

<sup>41</sup> Donald O. Johnson, *The Business Case for Diversity at the CPCU Society* at 5 (2007),

which served as evidence of commitment by signatory corporations to a diverse legal profession.<sup>42</sup>

By 2004, however, Rick Palmore, a “nationally recognized advocate for diversity in the legal industry,”<sup>43</sup> then serving as an executive and counsel at Sara Lee Corporation, observed that efforts for law firm diversity had reached a “disappointing plateau.”<sup>44</sup> Mr. Palmore authored *A Call to Action: Diversity in the Legal Profession*, (“Call to Action”), which built upon the Statement of Principle.<sup>45</sup> The Call to Action focused on three major elements: (1) the general principle of having a principal’s interest in diversity; (2) diversity performance by law firms, especially in hiring and retention; and (3) commitment to no longer hiring law firms that do not promote diversity initiatives.<sup>46</sup>

Mr. Palmore pledged to “make decisions regarding which law firms represent our companies based in significant part on the diversity performance of the firms.” To that end, he called upon corporate legal departments and law firms to increase the numbers of women and minority attorneys hired and retained.<sup>47</sup> Mr. Palmore stated that he intended to terminate relationships with firms whose performances “consistently evidence[] a lack of meaningful interest in being diverse.”<sup>48</sup> By December 4, 2004, the Call to Action received signatory responses from seventy-two companies, including corporate giants such as American Airlines, UPS, and Wal-Mart.<sup>49</sup> Both the Statement of Principle and *A Call to Action* reflect the belief of many leading corporations that diversity is important and has the potential to profoundly impact business performance.<sup>50</sup>

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<https://www.cpcusociety.org/sites/dev.aicpcu.org/files/imported/BusinessDiversity.pdf>.

<sup>42</sup> Rick Palmore, *A Call to Action: Diversity in the Legal Profession*, 8 ENGAGE 21, 21 (2004).

<sup>43</sup> Rick Palmore, Senior Counsel, Dentons US LLP; LCLD Founding Chair Emeritus [http://www.lclldnet.org/media/mce\\_filebrowser/2017/02/22/Palmore.Rick-Fellows-branded-bio.2.13.17.pdf](http://www.lclldnet.org/media/mce_filebrowser/2017/02/22/Palmore.Rick-Fellows-branded-bio.2.13.17.pdf) (last visited May 30, 2017).

<sup>44</sup> Rick Palmore, *A Call to Action: Diversity in the Legal Profession*, 8 ENGAGE 21, 21 (2004).

<sup>45</sup> Melanie Lasoff Levs, *Call to Action: Sara Lee's General Counsel: Making Diversity a Priority*, DIVERSITY & THE BAR (Jan./Feb. 2005), <http://archive.mcca.com/index.cfm?fuseaction=page.viewpage&pageid=803>.

<sup>46</sup> *See id.*

<sup>47</sup> *Id.*

<sup>48</sup> Rick Palmore, *A Call to Action: Diversity in the Legal Profession*, 8 ENGAGE 21, 21 (2004).

<sup>49</sup> Melanie Lasoff Levs, *Call to Action: Sara Lee's General Counsel: Making Diversity a Priority*, DIVERSITY & THE BAR (Jan./Feb. 2005), <http://archive.mcca.com/index.cfm?fuseaction=page.viewpage&pageid=803>.

<sup>50</sup> Donald O. Johnson, *The Business Case for Diversity at the CPCU Society* at 7 (2007),

## B. Women in ADR

Turning to the ADR context, the governing principle should be that panels of “[n]eutrals should reflect the diverse communities of attorneys and parties whom they serve.”<sup>51</sup> This statement strikes us as the best way to begin our survey of the literature concerning the status of women in the world of ADR.

It should come as no surprise that much has been written about the lack of diversity among ADR neutrals, especially those selected for high-value cases. As a 2017 article examining gender differences in dispute resolution practice put it, “the more high-stakes the case, the lower the odds that a woman would be involved.”<sup>52</sup> Data from a 2014 ABA Dispute Resolution Section survey indicated that for cases with between one and ten million dollars at issue, 82% of neutrals and 89% of arbitrators were men.<sup>53</sup> Another survey estimated that women arbitrators were involved in just 4% of cases involving one billion dollars or more.<sup>54</sup>

One part of the problem may be that relatively few women and minorities are present within the field. For example, one ADR provider estimated that in 2016 only 25% of its neutrals were women, 7% were minorities, and 95% were over fifty.<sup>55</sup> Similarly, in 2016, the International Centre for Settlement of Investment Disputes (an arm of the World Bank) reported that only 12% of those selected as arbitrators in ICSID cases were women.<sup>56</sup> Similarly, the International Institute for Conflict Prevention and Resolution (CPR)

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<https://www.cpcusociety.org/sites/dev.aicpcu.org/files/imported/BusinessDiversity.pdf>.

<sup>51</sup> Theodore K. Cheng, *A Celebration of Diversity in Alternative Dispute Resolution*, Diversity and the Bar Spring 2017 MCCA.com at 14.

<sup>52</sup> Noah Hanft, *Making Diversity Happen in ADR: No More Lip Service*, 257 N.Y.L.J. S6 (Mar. 20, 2017).

<sup>53</sup> See *id.* (citing *Gender Differences in Dispute Resolution Practice: Report on the ABA Section of Dispute Resolution Practice Snapshot Survey* (Jan. 2014)).

<sup>54</sup> See Christine Simmons, *Where Are the Women and Minorities in Global Dispute Resolution?*, *The American Lawyer* (Oct. 10, 2016) <http://www.americanlawyer.com/id=1202769481566/Where-Are-the-Women-and-Minorities-in-Global-Dispute-Resolution?mcode=0&curindex=0&curpage=ALL>.

<sup>55</sup> See Noah Hanft, *Making Diversity Happen in ADR: No More Lip Service*, 257 N.Y.L.J. S6 (Mar. 20, 2017) (citing Ben Hancock, *ADR Business Wakes Up to Glaring Deficit of Diversity*, <http://www.law.com/sites/almstaff/2016/10/05/adr-business-wakes-up-to-glaring-deficit-of-diversity/> (Oct. 5, 2016)).

<sup>56</sup> See Christine Simmons, *Where Are the Women and Minorities in Global Dispute Resolution?*, *The American Lawyer* (Oct. 10, 2016) <http://www.americanlawyer.com/id=1202769481566/Where-Are-the-Women-and-Minorities-in-Global-Dispute-Resolution?mcode=0&curindex=0&curpage=ALL>.

reported that of more than 550 neutrals who serve on its worldwide panels, about 15% are women and 14% are minorities.<sup>57</sup>

One of the concerns raised by this lack of diversity among neutrals is that it diminishes the legitimacy of the process.<sup>58</sup> But as one recent article in the *New York Law Journal* suggests, it may be even harder to take steps to improve diversity within ADR than it is to do so in law firms given the incentives of key stakeholders in the ADR context.<sup>59</sup> In particular, the article argues that law firms may be more inclined to recommend familiar, well-established (likely male) neutrals with the intent of trying to achieve a favorable outcome, and their clients may be more willing to accept their lawyers' recommendations for that same reason.<sup>60</sup>

Comparing ADR statistics with those of the judiciary is revealing. Approximately 33% of federal judges are women and 20% are minorities—which is far ahead of the numbers in the world of ADR.<sup>61</sup> Despite ADR's "quasi-public" nature, it remains a private and confidential enterprise for which gender and racial statistics for ADR providers are not fully available.<sup>62</sup> Nonetheless, the information that is available reveals a stark underrepresentation of women and minority arbitrators and mediators.<sup>63</sup> In short, the overwhelming percentage of neutrals are white men and the lowest represented group is minority women. It is no wonder that one attorney reported that, in her twenty-three years of practice, she had just three cases with non-white male neutrals.<sup>64</sup>

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<sup>57</sup> Ben Hancock, *ADR Business Wakes Up to Glaring Deficit of Diversity*, Law.com (Oct. 5, 2016).

<sup>58</sup> See Christine Simmons, *Where Are the Women and Minorities in Global Dispute Resolution?*, *The American Lawyer* (Oct. 10, 2016) <http://www.americanlawyer.com/id=1202769481566/Where-Are-the-Women-and-Minorities-in-Global-Dispute-Resolution?mcode=0&curindex=0&curpage=ALL>.

<sup>59</sup> See Noah Hanft, *Making Diversity Happen in ADR: No More Lip Service*, 257 N.Y.L.J. S6 (Mar. 20, 2017) (citing Ben Hancock, *ADR Business Wakes Up to Glaring Deficit of Diversity*, <http://www.law.com/sites/almstaff/2016/10/05/adr-business-wakes-up-to-glaring-deficit-of-diversity/> (Oct. 5, 2016)).

<sup>60</sup> See *id.*

<sup>61</sup> Laura A. Kaster, et al., *The Lack of Diversity in ADR—and the Current Beneath*, *American Inns of Court* (Mar./Apr. 2017) at 14.

<sup>62</sup> Ben Hancock, *ADR Business Wakes Up to Glaring Deficit of Diversity*, Law.com (Oct. 5, 2016); see also Laura A. Kaster, *Choose Diverse Neutral to Resolve Disputes—A Diverse Panel Will Improve Decision Making* ("Because alternative dispute resolution is a privatization of otherwise public court systems, it is . . . valid to compare the public judiciary to private neutrals in commercial arbitration.").

<sup>63</sup> *ABA Presidential Task Force on Gender Equity and the Commission on Women in the Profession, Power of the Purse: How General Counsel Can Impact Pay Equity for Women Lawyers* (2013).

<sup>64</sup> Ben Hancock, *ADR Business Wakes Up to Glaring Deficit of Diversity*, Law.com (Oct. 5, 2016).

The homogeneity within the ADR field is even worse at the case-specific level. A 2014 survey published by the American Bar Association indicated a clear disparity in the types of cases for which women neutrals were selected: whereas 57% of neutrals in family, elder, and probate cases were women, this figure was just 37% for labor and employment actions, 18% for corporate and commercial cases, and 7% for intellectual property cases.<sup>65</sup>

Some have theorized that the reason for the lack of diversity within ADR—both in the neutrals available for selection and the types of cases for which diverse neutrals are selected—is a “chronological lag”: most neutrals who are actually selected are retired judges or lawyers with long careers behind them, who comprise a pool of predominantly white males.<sup>66</sup> But, women have been attending law school at equal rates as men for more than ten years and there is no dearth of qualified female practitioners.<sup>67</sup> Accordingly, other important but difficult to overcome factors may include implicit bias by lawyers or their related fear of engaging neutrals who may not share their same background (and therefore, who they believe may arrive at an unfavorable decision).<sup>68</sup> This cannot be an excuse: “the privatization of dispute resolution through ADR . . . cannot alter the legitimacy of requiring that society’s dispute resolution professionals, who perform a quasi-public function, reflect the population at large.”<sup>69</sup>

This disparity continues to exist despite the well-documented benefits for all stakeholders of diversity in decision-making processes. Indeed, studies indicate that “when arbitration involves a panel of three, the parties are likely to have harder working panelists and a more focused judgment from the neutrals if the panel is diverse.”<sup>70</sup> This is because “when members of a group notice that they are socially different from one another, . . . they assume they will need to work harder to come to a consensus. . . . [T]he hard work can lead to better outcomes.”<sup>71</sup> In order to move the needle on diversity in the ADR field, especially with respect to lawyers’ selection of neutrals which is arguably the

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<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> David H. Burt, *et al.*, *Why Bringing Diversity to ADR Is a Necessity*, ACC Docket at 44 (Oct. 2013).

<sup>68</sup> *Id.*; see also Ben Hancock, *ADR Business Wakes Up to Glaring Deficit of Diversity*, Law.com (Oct. 5, 2016).

<sup>69</sup> Laura A. Kaster, *Why and How Corporations Must Act Now to Improve ADR Diversity*, Corporate Disputes (Jan.-Mar. 2015).

<sup>70</sup> Laura A. Kaster, *Choose Diverse Neutral to Resolve Disputes—A Diverse Panel Will Improve Decision Making*.

<sup>71</sup> *Id.*

largest driver of the composition of ADR panels, “[w]hat may be missing is the firm belief that diversity matters not just for basic fairness and social equity but also for better judgment.”<sup>72</sup>

In a recent article, Theodore Cheng, an ADR specialist, described what he sees as the failure of the legal community to accept the fact that diversity in the selection of neutrals is both necessary and beneficial. He begins by noting that “the decision-making process is generally improved, resulting in normatively better and more correct outcomes, when there exist different points of view.”<sup>73</sup> Cheng then notes the gap between the commitment to diversity by companies in their own legal departments versus their commitment to diversity in the ADR process.

The efforts on the part of corporate legal departments to ensure diverse legal teams does not appear to extend to the selection of neutrals – a task routinely delegated to outside counsel. Mr. Cheng’s article explains that outside counsel may be afraid of taking a chance on an unknown quantity for fear that they might be held responsible for an unsatisfactory result. Accordingly, they tend to select known quantities, relying on recommendations from within their firms or from friends, which tends to produce the usual suspects – overwhelmingly lawyers like themselves – i.e., older white males. There is also “a failure to acknowledge and address unconscious, implicit biases that permeate any decision-making process.”<sup>74</sup> The author concludes that there are many qualified women and minorities available to be selected as neutrals but those doing the selections have somehow failed to recognize that this service – like any other service provided to corporate entities – must consider the need for diversity.

Mr. Cheng also stresses why diversity in ADR is important. His article notes that ADR is the privatization of a public function and it is therefore important that the neutrals be diverse and reflect the communities of attorneys and litigants they serve. Secondly, the author notes (as have many others) that better decisions are made when different points of view are considered. The addition of new perspectives is always a benefit. Some ADR providers are taking steps to document and address the problem. For example, the International Institute for Conflict Prevention and Resolution has developed the following Diversity Commitment which any company can sign: “We ask that our outside law firms and counterparties include qualified diverse neutrals among any list of neutrals or arbitrators they propose. We will do the same with the lists we provide.”<sup>75</sup> Similarly, the American Arbitration Association has committed to ensuring that 20% of the arbitrators on the lists it provides to the parties are

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<sup>72</sup> *Id.*

<sup>73</sup> *Id.* (citing Scott Page, *The Difference: How the Power of Diversity Creates Better Groups, Firms, Schools and Societies* (Princeton Univ. Press 2017) and James Surowiecki, *The Wisdom of Crowds* (Anchor Books 2004)).

<sup>74</sup> *Id.* at 19.

<sup>75</sup> Laura A. Kaster, *Why and How Corporations Must Act Now to Improve ADR Diversity*, Corporate Disputes (Jan.-Mar. 2015).

diverse candidates.<sup>76</sup> Although such initiatives are promising, the role of the parties is just as important: it is incumbent upon law firms, lawyers, and clients to select diverse neutrals.

### III. Survey: Methodology and Findings

The task force's survey began with the creation of two questionnaires both drafted by the task force.<sup>77</sup> The first questionnaire was directed to federal and state judges sitting throughout New York. This questionnaire was designed to be an observational study that asked judges to record the presence of speaking counsel by gender in all matters in their courtrooms occurring between approximately September 1, 2016 and December 31, 2016. The second questionnaire was directed to various ADR providers asking them to record by gender both the appearance of counsel in each proceeding and the gender of the neutral conducting the proceeding.

The focus of the first survey was to track the participation of women as lead counsel and trial attorneys in civil and criminal litigation. While there have been many anecdotal studies about women attorneys' presence in the courtroom, the task force believes its survey to be the first study based on actual courtroom observations by the bench. The study surveyed proceedings in New York State at each level of court—trial, intermediate, and court of last resort—in both state and federal courts. Approximately 2,800 questionnaires were completed and returned. The cooperation of the judges and courthouse staff was unprecedented and remarkable: New York's Court of Appeals, all four Appellate Divisions, and Commercial Divisions in Supreme Courts in counties from Suffolk to Onondaga to Erie participated. The United States Court of Appeals for the Second Circuit provided assistance compiling publicly available statistics and survey responses were provided by nine Southern District of New York Judges (including the Chief Judge) and Magistrate Judges and District and Magistrate Judges from the Western District of New York.

The results of the survey are striking:<sup>78</sup>

- Female attorneys represented just 25.2% of the attorneys appearing in commercial and criminal cases in courtrooms across New York.
- Female attorneys accounted for 24.9% of lead counsel roles and 27.6% of additional counsel roles.
- The most striking disparity in women's participation appeared in

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<sup>76</sup> Ben Hancock, *ADR Business Wakes Up to Glaring Deficit of Diversity*, Law.com (Oct. 5, 2016).

<sup>77</sup> Each questionnaire is attached hereto as [Appendix A](#).

<sup>78</sup> Survey results in chart format broken down by Court are attached hereto as [Appendix B](#).

complex commercial cases: women's representation as lead counsel shrank from 31.6% in one-party cases to 26.4% in two-party cases to 24.8% in three-to-four-party cases and to 19.5% in cases involving five or more parties. In short, the more complex the case, the less likely that a woman appeared as lead counsel.

The percentage of female attorneys appearing in court was nearly identical at the trial level (24.7%) to at the appellate level (25.2%). The problem is slightly worse downstate (24.8%) than upstate (26.2%).<sup>79</sup>

In New York federal courts, female attorneys made up 24.4% of all attorneys who appeared in court, with 23.1% holding the position of lead counsel. In New York State courts, women made up 26.9% of attorneys appearing in court and 26.8% of attorneys in the position of lead counsel.

One bright spot is public interest law (mainly criminal matters), where female lawyers accounted for 38.2% of lead counsel and 30.9% of attorneys overall. However, in private practice (including both civil and criminal matters), female lawyers only accounted for 19.4% of lead counsel. In sum, the low percentage of women attorneys appearing in a speaking role in courts was found at every level and in every type of court: upstate and downstate, federal and state, trial and appellate, criminal and civil, ex parte applications and multi-party matters. Set forth below is the breakout in all courtrooms—state, federal, regional, and civil/criminal.

### **A. Women Litigators in New York State Courts**

The view from the New York Court of Appeals is particularly interesting. The statistics collected from that Court showed real progress—perhaps as a result of female leadership of that court, now headed by Chief Judge Janet DiFiore and past Chief Judge Judith S. Kaye, as well as the fact that the Court has had a majority of women judges for more than ten years. Of a total of 137 attorneys appearing in that Court, female attorneys made up 39.4%. This percentage held whether the females were lead or second chair counsels. In cases in which at least one party was represented by a public sector office, women attorneys were in the majority at 51.3%. Of the appearances in civil cases, 30% were by female attorneys. The figure in criminal cases was even higher—female attorneys made up 46.8% of all attorneys appearing in those cases.

Similarly, female attorneys in the public sector were well represented in the Appellate Divisions, approaching the 50% mark in the Second Department. The picture

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<sup>79</sup> The task force recognizes that the statistics reported herein may have been affected by which Judges agreed to participate in the survey and other selection bias inherent in any such type of survey. It thus is possible that there is a wider gap between the numbers of women versus men who have speaking roles in courtrooms throughout New York State than the gap demonstrated by the task force's study.



was not as strong in the upstate Appellate Divisions, where, even in cases involving a public entity, women were less well represented (32.6% in the Third Department and 35.3% in the Fourth Department). Women in the private sector in Third Department cases fared worst of all, where they represented 18% of attorneys in the lead and only 12.5% of attorneys in any capacity versus 36.18% of private sector attorneys in the First Department (for civil cases).

Set forth below are some standout figures by county:

- Female public sector attorneys in Erie County represented a whopping 88.9% of all appearances, although the number (n=9) was small.
- Female attorneys in Suffolk County were in the lead position just 13.5% of the time.
- Although the one public sector attorney in Onondaga County during the study period was female, in private sector cases, women represented just 22.2% of all attorneys appearing in state court in that county.

While not studied in every court, the First Department further broke down its statistics for commercial cases and the results are not encouraging. Of the 148 civil cases heard by the First Department during the survey period for which a woman argued or was lead counsel, only 22 of those cases were commercial disputes, which means that women attorneys argued or were lead counsel in only 5.37% of commercial appeals compared to 36.18% for all civil appeals. Such disparity suggests that women are not appearing as lead counsel for commercial cases, which often involve high stakes business-related issues and large dollar amounts.

## **B. Women Litigators in Federal Courts**

Women are not as well represented in the United States Court of Appeals for the Second Circuit as they are in the New York Court of Appeals. Of the 568 attorneys appearing before the Second Circuit during the survey period, 20.6% were female—again, this number held regardless of whether the women were in the lead or in supporting roles. Women made up 35.8% of public sector attorneys but just 13.8% of the private attorneys in that court. Women represented a higher percentage of the attorneys in criminal cases (28.1%) than in civil cases (17.5%).

The Southern District of New York's percentages largely mirrored the sample overall, with women representing 26.1% of the 1627 attorneys appearing in the courtrooms of judges who participated in the survey—24.7% in the role of lead counsel. One anomaly in the Southern District of New York was in the courtroom of the Honorable Deborah A. Batts, where women represented 46.2% of the attorneys and 45.8% of the lead attorneys.

The figures from the Western District of New York fell somewhat below those from the Southern District of New York, again mirroring the slightly lower percentages of female attorneys' participation upstate in state courts as well: 22.9% of the attorneys appearing in the participating Western District of New York cases were women, and 20.8% of the lead attorneys were women.

Overall, women did slightly better in state courts (26.9% of appearances and 25.3% of lead appearances), than in federal courts (24.4% of appearances and 23.1% in the lead).

### **C. Women Litigators: Criminal & Civil; Private & Public**

As has been noted in other areas, female attorneys are better represented among lawyers in criminal cases (30.9%) than in civil cases (23.2%), regardless of trial or appellate court or state or federal court. The difference is explained almost entirely by the difference between female attorneys in the private sector (22.5%) compared to female attorneys in the public sector, particularly with respect to prosecutors and state or federal legal aid offices, which provide services to indigent defendants (totaling 37.0%).

Similarly, women made up 39.6% of the attorneys representing public entities—such as the state or federal government but just 18.5% of lawyers representing private parties in civil litigation.

Overall, female attorneys were almost twice as likely to represent parties in the public sector (38.2% of the attorneys in the sample) than private litigants (19.4%).

Across the full sample, women made up 24.9% of lead counsel and 27.6% of additional counsel.

All these survey findings point to the same conclusion: female attorneys in speaking roles in court account for just about a quarter of counsel who appear in state and federal courts in New York. The lack of women attorneys with speaking roles in court is widespread across different types of cases, varying locations, and at all levels of courts.<sup>80</sup>

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<sup>80</sup> The survey did not include family or housing courts. Accordingly, the percentage of women in speaking roles who appear in those courts may be higher, especially in family court as that area of the law tends to have a greater percentage of women practitioners. See Vivian Chen, *Do Women Really Choose the Pink Ghetto?; Are women opting for those lower-paying practices or is there an invisible hand that steers them there?*, *The American Lawyer* (Apr. 26, 2017), <http://www.americanlawyer.com/id=1202784558726>.

## **D. Women in Alternative Dispute Resolution**

The view from the world of ADR is slightly more positive for women, although more progress is needed. Two leading ADR providers gathered statistics on the proceedings conducted by their neutrals. In a sample size of 589 cases, women were selected as arbitrators 26.8% of the time and selected as mediators about half the time (50.2%). In a small sample size of two cases, women provided 50% of the neutral analyses but they were not chosen as court referees in either of those two cases.

Data from another major ADR provider revealed that women arbitrators comprised between 15-25% of all appointments for both domestic and foreign arbitrations.

## **IV. Going Forward: Suggested Solutions**

The first step in correcting a problem is to identify it. To do so, as noted by this report and the ALM Intelligence study referenced above in its “Gender Diversity Best Practices Checklist”—the metrics component—firms need data.<sup>81</sup> Regular collection and review of data keeps the “problem” front and center and ideally acts as a reminder of what needs to be done. Suggesting solutions, such as insisting within law firms that women have significant roles on trial teams or empowering female attorneys to seek out advancement opportunities for themselves, is easy to do. Implementing these solutions is more challenging.<sup>82</sup>

### **Litigation Context**

#### **A. Women’s Initiatives**

Many law firms have started Women’s Initiatives designed to provide female attorneys with the tools they need to cultivate and obtain opportunities for themselves and to place themselves in a position within their firms to gain trial and courtroom experience. The success of these initiatives depends on “buy in” not only from all female attorneys, but also from all partners. Data supports the fact that the most successful

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<sup>81</sup> Daniella Isaacson, ALM Intelligence, *Where Do We Go From Here?: Big Law’s Struggle With Recruiting and Retaining Female Talent* (Apr. 2017) at 12; see also Meghan Tribe, *Study Shows Gender Diversity Varies Widely Across Practice Areas*, The Am Law Daily (Apr. 17, 2017) <http://www.americanlawyer.com/id=1202783889472/Study-Shows-Gender-Diversity-Varies-Widely-Across-Practice-Areas>.

<sup>82</sup> A summary of the suggestions contained in the report are attached hereto as [Appendix C](#). Many of the suggestions for law firms contained in this report may be more applicable to large firms than small or mid-size firms but hopefully are sufficiently broad based to provide guidance for all law firms.

Women’s Initiative programs depend on the support from all partners and associates.<sup>83</sup>

One suggestion is that leaders in law firms—whether male or female—take on two different roles. The first is to mentor female attorneys with an emphasis on the mentor discussing various ways in which the female attorney can gain courtroom experience and eventually become a leader in the firm. The second is to provide “hands on” experience to the female attorneys at the firm by assigning them to work with a partner who will not only see that they go to court, but that they also participate in the courtroom proceedings. It is not enough simply to bring an associate to court and have her sit at counsel table while the partner argues the matter. Female associates need opportunities to argue the motion under the supervision of the partner.<sup>84</sup>

Similarly, instead of only preparing an outline for a direct examination of a witness or preparing exhibits to be used during a direct examination, the associate also should conduct the direct examination under the supervision of the partner. While motions and examinations of witnesses at hearings and trials take place in the courtroom, the same technique also can be applied to preparing the case for trial.

Female attorneys should have the opportunity early in their careers to conduct a deposition—not just prepare the outline for a partner. The same is true of defending a deposition. In public sector offices—such as the Corporation Counsel of the City of New York, the Attorney General of the State of New York, District Attorney’s Offices and U.S. Attorney’s Offices—junior female attorneys have such opportunities early in their careers and on a regular basis. They thus are able to learn hands-on courtroom skills, which they then can take into the private sector after government service.

Firm management, and in particular litigation department heads, also should be educated on how to mentor and guide female attorneys. They should also be encouraged to proactively ensure that women are part of the litigation team and that women on the litigation team are given responsibilities that allow them to appear and speak in court. Formal training and education in courtroom skills should be encouraged and made a part of the law firm initiative. Educational sessions should include mock depositions, oral arguments, and trial skills. These sessions should be available to all junior attorneys, but the firm’s Women’s Initiative should make a special effort to encourage female attorneys to participate in these sessions.

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<sup>83</sup> See Victoria Pynchon, *5 Ways to Ensure Your Women’s Initiative Succeeds*, <http://www.forbes.com/sites/shenegotiates/2012/05/14/5-ways-to-ensure-your-womens-initiative-succeeds/#20a31614ff92> (May 14, 2012) (citing Lauren Stiller Rikleen, *Ending the Gauntlet, Removing Barriers to Women’s Success in the Law* (2006)).

<sup>84</sup> Understandably, all partners, especially women partners, are under tremendous pressures themselves on any given matter. As a result, delegating substantive work to junior attorneys may not always be feasible.

Data also has shown that female attorneys in the private sector may not be effective in seeking out or obtaining courtroom opportunities for themselves within their firm culture. It is important that more experienced attorneys help female attorneys learn how to put themselves in a position to obtain courtroom opportunities. This can be accomplished, at least in part, in two ways. First, female attorneys from within and outside the firm should be recruited to speak to female attorneys and explain how the female attorney should put herself in a position to obtain opportunities to appear in court. Second, women from the business world should also be invited to speak at Women's Initiative meetings and explain how they have achieved success in their worlds and how they obtained opportunities. These are skills that cross various professions and should not be ignored.

Partners in the firms need to understand that increasing the number of women in leadership roles in their firms is a benefit, not only to the younger women in the firm but to them as well. Education and training of all firm partners is the key to the success of any Women's Initiative.

A firm's Women's Initiative also should provide a forum to address other concerns of the firm's female attorneys. This should not be considered a forum for "carping," but for making and taking concrete and constructive steps to show and assist female attorneys in learning how to do what is needed to obtain opportunities in the courtroom and take a leadership role in the litigation of their cases.

## **B. Formal Programs Focused on Lead Roles in Court and Discovery**

Another suggestion is that law firms establish a formal program through which management or heads of litigation departments seek out junior female associates on a quarterly or semi-annual basis and provide them with the opportunity to participate in a program that enables them to obtain the courtroom and pre-trial experiences outlined above. The establishment of a formal program sends an important signal within a firm that management is committed to providing women with substantive courtroom experience early in their careers.

Firm and department management, of course, would need to monitor the success of such a program to determine whether it is achieving the goals of training women and retaining them at the firm. One possible monitoring mechanism would be to track on a monthly or quarterly basis the gender of those attorneys who have taken or defended a deposition, argued a motion, conducted a hearing or a trial during that period. The resulting numbers then would be helpful to the firm in assessing whether its program was effective. The firm also should consider ways in which the program could be improved and expanded. Management and firm leaders should be encouraged to identify, hire, and retain female attorneys within their firms. Needless to say, promoting women to department heads and firm management is one way to achieve these goals. Women are

now significantly underrepresented in both capacities.<sup>85</sup>

### C. Efforts to Provide Other Speaking Opportunities for Women

In addition to law firms assigning female litigators to internal and external speaking opportunities, such as educational programs in the litigation department or speaking at a client continuing legal education program, firms should encourage involvement with bar associations and other civic or industry groups that regularly provide speaking opportunities.<sup>86</sup> These opportunities allow junior lawyers to practice their public speaking when a client's fate and money are not at risk. Such speaking opportunities also help junior attorneys gain confidence, credentials, and contacts. In addition, bar associations at all levels present the prospect for leadership roles from tasks as basic as running a committee meeting to becoming a section or overall bar association leader. These opportunities can be instrumental to the lawyer's growth, development, and reputation.

### D. Sponsorship

In addition to having an internal or external mentor, an ABA publication has noted that, although law firms talk a lot about the importance of mentoring and how to make busy partners better at it, they spend very little time discussing the importance of, and need for, sponsors:

Mentors are counselors who give career advice and provide suggestions on how to navigate certain situations. Sponsors can do everything that mentors do but also have the stature and gravitas to affect whether associates make partner. They wield their influence to further junior lawyers' careers by calling in favors, bring attention to the associates' successes and help them cultivate important relationships with other influential lawyers and clients—all of which are absolutely essential in law firms. **Every sponsor can be a mentor, but not every mentor can be a sponsor.**

Sponsorship is inherent in the legal profession's origins as a craft learned by apprenticeship. For generations, junior lawyers learned the practice of law from senior attorneys who, over time, gave them

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<sup>85</sup> Lauren Stiller Rikleen, *Women Lawyers Continue to Lag Behind Male Colleagues*, Report of the Ninth Annual National Association of Women Lawyers National Survey on Retention and Promotion of Women in Law Firms (2015).

<sup>86</sup> It is noteworthy that, as of January 1, 2017, women comprise nearly 36% of the New York State Bar Association's membership but comprise only 24% of the Commercial and Federal Litigation Section's membership.

more responsibility and eventually direct access and exposure to clients. These senior lawyers also sponsored their protégés during the partnership election process. Certain aspects of traditional legal practice are no longer feasible today, so firms have created formal training and mentoring programs to fill the void. While these programs may be effective, there is no substitute for learning at the heels of an experienced, influential lawyer. This was true during the apprenticeship days and remains so today.

Because the partnership election process is opaque and potentially highly political, having a sponsor is essential. Viable candidates need someone to vouch for their legal acumen while simultaneously articulating the business case for promotion . . .<sup>87</sup>

As Sylvia Ann Hewlett, founding president of the Center for Talent Innovation (formerly Center for Work-Life Policy), explained in a 2011 Harvard Business Review article “sponsors may advise or steer [their sponsorees] but their chief role is to develop [them] as leader[s]”<sup>88</sup> and “use[] chips on behalf of protégés’ and ‘advocates for promotions.”<sup>89</sup> “Sponsors advocate on their protégés’ behalf, connecting them to important players and assignments. In doing so, they make themselves look good. And precisely because sponsors go out on a limb, they expect stellar performance and loyalty.”<sup>90</sup>

Recommendations for successful sponsorship programs include the following activities by a sponsor for his or her sponsoree:

- Expand the sponsoree’s perception of what she can do.
- Connect the sponsoree with the firm’s senior leaders.

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<sup>87</sup> Kenneth O.C. Imo, *Mentors Are Good, Sponsors Are Better*, American Bar Association Law Practice Magazine (Jan./Feb. 2013) ([http://www.americanbar.org/publications/law\\_practice\\_magazine/2013/january-february/mentors-are-good-sponsors-are-better.html](http://www.americanbar.org/publications/law_practice_magazine/2013/january-february/mentors-are-good-sponsors-are-better.html)) (emphasis added).

<sup>88</sup> Sylvia Ann Hewlett, *The Right Way to Find a Career Sponsor*, Harv. Bus. Rev. (Sept. 11, 2013) <https://hbr.org/2013/09/the-right-way-to-find-a-career-sponsor>.

<sup>89</sup> Kenneth O.C. Imo, *Mentors Are Good, Sponsors Are Better*, American Bar Association Law Practice Magazine (Jan./Feb. 2013), ([http://www.americanbar.org/publications/law\\_practice\\_magazine/2013/january-february/mentors-are-good-sponsors-are-better.html](http://www.americanbar.org/publications/law_practice_magazine/2013/january-february/mentors-are-good-sponsors-are-better.html)).

<sup>90</sup> Sylvia Ann Hewlett, *Mentors are Good. Sponsors Are Better*, N.Y. Times, Apr. 13, 2013, <http://www.nytimes.com/2013/04/14/jobs/sponsors-seen-as-crucial-for-womens-career-advancement.html>.

- Promote the sponsoree’s visibility within the firm.
- Connect the sponsoree to career advancement opportunities.
- Advise the sponsoree on how to look and act the part.
- Facilitate external contacts.
- Provide career advice.<sup>91</sup>

Of course, given attorneys’ and firms’ varying sizes and limited time and resources, firms should consider what works best for that firm and that one size does not fit all.

### **E. Efforts by the Judiciary**

Members of the judiciary also must be committed to ensuring that female attorneys have equal opportunities to participate in the courtroom. When a judge notices that a female associate who has prepared the papers and is most familiar with the case is not arguing the motion, that judge should consider addressing questions to the associate. If this type of exchange were to happen repeatedly—i.e., that the judge expects the person who is most familiar with the issue take a lead or, at least, some speaking role—then partners might be encouraged to provide this opportunity to the female associate before the judge does it for them.

All judges, regardless of gender, also should be encouraged to appoint more women as lead counsel in class actions, and as special masters, referees, receivers, or mediators. Some judges have insisted that they will not appoint a firm to a plaintiffs’ management committee unless there is at least one woman on the team. Other judges have issued orders, referred to earlier in this report, that if a female, minority, or junior associate is likely to argue a motion, the court may be more likely to grant a request for oral argument of that motion. Many judges are willing to permit two lawyers to argue for one party – perhaps splitting the issues to be argued. In that way, a senior attorney might argue one aspect of the motion, and a more junior attorney another aspect. Judges have suggested that it might be wise to alert the court in advance if two attorneys plan to argue the motion to ensure that this practice is acceptable to the judge. Judges should be encouraged to amend their individual rules to encourage attorneys to take advantage of these courtroom opportunities. All judges should be encouraged to promote and support women in obtaining speaking and leadership roles in the courtroom. All judges and lawyers should consider participating in panels and roundtable discussions to address these issues and both male and female attorneys should be invited and encouraged to attend such events.

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<sup>91</sup> Kenneth O.C. Imo, *Mentors Are Good, Sponsors Are Better*, American Bar Association Law Practice Magazine, (Jan./Feb. 2013), ([http://www.americanbar.org/publications/law\\_practice\\_magazine/2013/january-february/mentors-are-good-sponsors-are-better.html](http://www.americanbar.org/publications/law_practice_magazine/2013/january-february/mentors-are-good-sponsors-are-better.html)) (emphasis added).



## F. Efforts by Clients

Clients also can combat the gender disparity in courtrooms. Insistence on diverse litigation teams is a growing trend across corporate America. Why should corporate clients push for diverse trial teams? Because it is to their advantage to do so. According to Michael Dillon, general counsel for Adobe Systems, Inc., “it makes sense to have a diverse organization that can meet the needs of diverse customers and business partners in several countries” and diversity makes an organization “resilient.”<sup>92</sup>

A diverse litigation team also can favorably impact the outcome of a trial. A team rich in various life experiences and perspectives may be more likely to produce a comprehensive and balanced assessment of information and strategy.<sup>93</sup> A diverse team is also better equipped to collectively pick up verbal and nonverbal cues at trial as well as “read” witnesses, jurors and judges with greater insight and precision.<sup>94</sup>

Additionally, the context surrounding a trial—including the venue, case type, and courtroom environment—can affect how jurors perceive attorneys and ultimately influence the jury’s verdict.<sup>95</sup> Consciously or not, jurors assess attorney “[p]ersonality, attractiveness, emotionality, and presentation style” when deciding whether they like the attorney, will take him or her seriously, or can relate to his or her persona and arguments.<sup>96</sup> Because women stereotypically convey different attributes than men, a female attorney actively involved in a trial may win over a juror who was unable to connect with male attorneys on the same litigation team.<sup>97</sup> Accordingly, a team with diverse voices may be more capable of communicating in terms that resonate with a broader spectrum of courtroom decision-makers.<sup>98</sup>

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<sup>92</sup> David Ruiz, *HP, Legal Depts. Ask Firms for Diversity, Make Efforts In-House*, Corporate Counsel (Apr. 5, 2017) <http://www.corpcounsel.com/id=1202783051167/Legal-Depts-Ask-Firms-for-Diversity-Make-Efforts-InHouse>.

<sup>93</sup> Craig C. Martin & David J. Bradford, *Litigation: Why You Want a Diverse Trial Team*, INSIDE COUNSEL, Oct. 14, 2010, <http://www.insidecounsel.com/2010/10/14/litigation-why-you-want-a-diverse-trial-team?slreturn=1495741834>.

<sup>94</sup> *Id.*

<sup>95</sup> Ann T. Greeley & Karen L. Hirschman, “*Trial Teams and the Power of Diversity*,” at 3 (2012).

<sup>96</sup> *Id.* at 5.

<sup>97</sup> *Id.*

<sup>98</sup> Craig C. Martin & David J. Bradford, *Litigation: Why You Want a Diverse Trial Team*, Inside Counsel (Oct. 14, 2010) <http://www.insidecounsel.com/2010/10/14/litigation-why-you-want-a-diverse-trial-team?slreturn=1495741834>.

Further, a diverse trial team can increase the power of the team's message. A diverse composition indirectly suggests that the truth of the facts and the principles on which the case is based have been "fairly presented and are universal in their message."<sup>99</sup> This creates a cohesive account of events and theory of the case, which would be difficult for an opposing party to dismiss as representing only a narrow slice of society.<sup>100</sup>

The clear advantages of diverse trial teams are leading corporate clients to take direct and specific measures to ensure that their legal matters are handled by diverse teams of attorneys. General Counsels are beginning to press their outside firms to diversify litigation teams in terms of gender at all levels of seniority.<sup>101</sup> Many corporate clients often directly state that they expect their matters will be handled by both men and women.<sup>102</sup>

For example, in 2017, General Counsel for HP, Inc. implemented a policy requiring "at least one diverse firm relationship partner, regularly engaged with HP on billing and staffing issues" or "at least one woman and one racially/ethnically diverse attorney, each performing or managing at least 10% of the billable hours worked on HP matters."<sup>103</sup> The policy reserves for HP the right to withhold up to ten percent of all amounts invoiced to firms failing to meet these diverse staffing requirements.<sup>104</sup> Oracle Corporation has also implemented an outside retention policy "designed to eliminate law firm excuses for not assigning women and minority attorneys to legal matters."<sup>105</sup> Oracle asks its outside firms to actively promote and recruit women; ensure that the first person with appropriate experience considered for assignment to a case is a woman or a minority; and annually report to Oracle the number and percentage of women and

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<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> Ellen Rosen, *Facebook Pushes Outside Law Firms to Become More Diverse*, New York Times (Apr. 2, 2017) [https://www.nytimes.com/2017/04/02/business/dealbook/facebook-pushes-outside-law-firms-to-become-more-diverse.html?\\_r=1](https://www.nytimes.com/2017/04/02/business/dealbook/facebook-pushes-outside-law-firms-to-become-more-diverse.html?_r=1).

<sup>102</sup> Ann T. Greeley & Karen L. Hirschman, "Trial Teams and the Power of Diversity," at 2 (2012).

<sup>103</sup> Jennifer Williams-Alvarez, *HP, Mandating Diversity, Will Withhold Fees From Some Firm*, Corporate Counsel (Feb. 13, 2017), <http://www.corpcounsel.com/id=1202779113475/HP-Mandating-Diversity-Will-Withhold-Fees-From-Some-Firms>.

<sup>104</sup> *Id.*

<sup>105</sup> *Hiring Women and Minority Attorneys – One General Counsel's Perspective*, <http://corporate.findlaw.com/human-resources/hiring-women-and-minority-attorneys-a-general-counsel-s-perspec.html#sthash.HNE30g5o.dpuf> (last visited June 1, 2017).

minority partners in the firm.<sup>106</sup> Similarly, Facebook, Inc. now requires that women and ethnic minorities account for at least thirty-three percent of law firm teams working on its matters.<sup>107</sup> Under Facebook’s policy, the firms also must show that they “actively identify and create clear and measurable leadership opportunities for women and minorities” when they represent Facebook in legal matters.<sup>108</sup>

Corporate clients can follow the examples set by their peers to aid the effort to ensure that female attorneys have equal opportunities to participate in all aspects of litigation, including speaking roles in the courtroom.

## G. ADR Context

The first step in addressing any issue is to recognize the issue and start a dialogue.

Accordingly, the dialogue that has begun amongst ADR providers and professionals involved in the ADR process is encouraging. One important step that has been undertaken is the Equal Representation in Arbitration pledge—agreed to by a broad group of ADR stakeholders, including counsel, arbitrators, corporate representatives, academics, and others—to encourage the development and selection of qualified female arbitrators.<sup>109</sup> This pledge outlines simple measures including having a fair representation of women on lists of potential arbitrators and tribunal chairs.<sup>110</sup> Other important steps to encourage diverse neutrals have been taken by leading ADR providers, including such diversity commitments as described above.

Another example of a step is the establishment by the ABA’s Dispute Resolution Section of “Women in Dispute Resolution.” This initiative provides networking opportunities for women neutrals to be exposed to decision makers selecting mediators and arbitrators; develops a list of women neutrals and their areas of expertise; provides professional

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<sup>106</sup> *Id.*

<sup>107</sup> Ellen Rosen, *Facebook Pushes Outside Law Firms to Become More Diverse*, New York Times (Apr. 2, 2017) [https://www.nytimes.com/2017/04/02/business/dealbook/facebook-pushes-outside-law-firms-to-become-more-diverse.html?\\_r=1](https://www.nytimes.com/2017/04/02/business/dealbook/facebook-pushes-outside-law-firms-to-become-more-diverse.html?_r=1).

<sup>108</sup> *Id.* Some corporations have gone further, even firing law firms because they are run by “old white men.” Laura Colby, *Law Firms Risk Losing Corporate Work Unless they Promote Women*, Bloomberg (Dec. 9, 2016), <https://www.bloomberg.com/news/articles/2016-12-09/corporate-america-pressures-law-firms-to-promote-minorities>.

<sup>109</sup> *See Take the Pledge*, Equal Representation in Arbitration, <http://www.arbitrationpledge.com/pledge> (last visited Mar. 31, 2017).

<sup>110</sup> *Id.*

development opportunities for women neutrals; and provides skills education for its members.<sup>111</sup> Those who select neutrals must make every effort to eliminate unconscious biases that affect such selection. They also must continually remember to recognize the benefit of diversity in the composition of panels neutrals that leads to better and more accurate results. If corporate counsel, together with outside counsel, make the same efforts to diversify the selection of neutrals, as they do when hiring outside counsel, then there may be a real change in the percentage of women selected as neutrals in all types of cases – particularly including complex large commercial disputes.

## **V. Conclusion**

Unfortunately, the gender gap in the courtroom and in ADR has persisted even decades after women have comprised half of all law school graduates. The federal and state courts in New York are not exempt from this phenomenon. There is much more that law firms, corporate counsel, and judges can do to help close the gap. Similarly, the limited number of women serving as neutrals in ADR and appearing as counsel in complex commercial arbitrations is startling. While one size does not fit all, and the solutions will vary within firms and practice areas, the legal profession must take a more proactive role to assure that female attorneys achieve their equal day in court and in ADR.

The active dialogue that continues today is a promising step in the right direction. It is the task force's hope that this dialogue—and the efforts of all stakeholders in the legal process—will help change the quantitative and qualitative role of female lawyers.

<sup>111</sup> See <http://apps.americanbar.org/dch/committee.cfm?com=DR589300> for more information.

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## APPENDIX A

### JUDICIAL FORM FOR TRACKING COURT APPEARANCES

Identify your court (e.g. SDNY, 1st Dep't; 2d Cir; Commercial Div. N.Y. Co) \_\_\_\_\_

#### I. *Type of Case*

- A. Trial Court Criminal \_\_\_ (for federal court) Civil \_\_\_  
(please specify subject matter e.g. contract, negligence, employment, securities)  
B. Appeal Criminal \_\_\_ (for federal court) Civil \_\_\_

#### II. *Type of Proceeding*

- A. Arraignment \_\_\_ B. Bail Hearing \_\_\_ C. Sentencing \_\_\_ (for federal court)  
D. Initial Conference \_\_\_ E. Status/Compliance Conference  
F. Oral Argument on Motion \_\_\_ (please specify type of motion e.g. discovery, motion to dismiss, summary judgment, TRO/preliminary injunction, class certification, in limine)  
G. Evidentiary Hearing \_\_\_ H. Trial \_\_\_ I. Post-Trial \_\_\_ J. Appellate Argument \_\_\_

#### III. *Number of Parties (total for all sides)*

- A. Two \_\_\_ B. Two to Five \_\_\_ C. More than Five \_\_\_

#### IV. *Lead Counsel for Plaintiff(s)* (the lawyer who primarily spoke in court)

- |                 |                 |                 |
|-----------------|-----------------|-----------------|
| Plaintiff No. 1 | Plaintiff No. 2 | Plaintiff No. 3 |
| Male ___        | Male ___        | Male ___        |
| Female ___      | Female ___      | Female ___      |
| Public ___      | Public ___      | Public ___      |
| Private ___     | Private ___     | Private ___     |

#### V. *Lead Counsel for Defendant(s)* (the lawyer who primarily spoke in court)

- |                 |                 |                 |
|-----------------|-----------------|-----------------|
| Defendant No. 1 | Defendant No. 2 | Defendant No. 3 |
| Male ___        | Male ___        | Male ___        |
| Female ___      | Female ___      | Female ___      |
| Public ___      | Public ___      | Public ___      |
| Private ___     | Private ___     | Private ___     |

#### VI. *Additional Counsel for Plaintiff(s)* (other lawyers at counsel table who did not speak)

- |                 |                 |                 |
|-----------------|-----------------|-----------------|
| Plaintiff No. 1 | Plaintiff No. 2 | Plaintiff No. 3 |
| Male ___        | Male ___        | Male ___        |
| Female ___      | Female ___      | Female ___      |
| Public ___      | Public ___      | Public ___      |
| Private ___     | Private ___     | Private ___     |

#### VII. *Additional Counsel for Defendant(s)* (other lawyers at counsel table who did not speak)

- |                 |                 |                 |
|-----------------|-----------------|-----------------|
| Defendant No. 1 | Defendant No. 2 | Defendant No. 3 |
| Male ___        | Male ___        | Male ___        |
| Female ___      | Female ___      | Female ___      |
| Public ___      | Public ___      | Public ___      |
| Private ___     | Private ___     | Private ___     |

**ADR FORM FOR TRACKING APPEARANCES IN ADR PROCEEDINGS**

- I. Is this an arbitration or mediation? \_\_\_\_\_ If it is a mediation, is it court ordered? \_\_\_\_\_
- II. Type of Case (please specify) (e.g., commercial, personal injury, real estate, family law)  
\_\_\_\_\_
- III. If there is one neutral, is that person a female? \_\_\_\_\_
- IV. If there is a panel, (a) how many are party arbitrators and, if so, how many are females? \_\_\_\_\_  
(b) how many are neutrals and, if so, how many are females? \_\_\_\_\_  
(c) is the Chair a female? \_\_\_\_\_
- V. Assuming the panel members are neutrals, how was the neutral(s) chosen?
1. From a list provided by a neutral organization? \_\_\_\_\_
2. By the court? \_\_\_\_\_
3. Agreed upon by parties? \_\_\_\_\_
4. Two arbitrators selected the third? \_\_\_\_\_
- VI. Number of Parties (total for all sides) \_\_\_\_\_
- VII. Amount at issue (apx.) on affirmative case \$ \_\_\_\_\_ Counterclaims, if any \$ \_\_\_\_\_
- VIII. Lead Counsel for Plaintiff(s):  
(lawyer who primarily spoke) (other lawyers who did not speak, including local counsel)  
Male \_\_\_\_\_ Male \_\_\_\_\_  
Female \_\_\_\_\_ Female \_\_\_\_\_  
Government \_\_\_\_\_ Government \_\_\_\_\_  
Non-Government \_\_\_\_\_ Non-Government \_\_\_\_\_
- IX. Lead Counsel for Defendant(s):  
(lawyer who primarily spoke) (other lawyers who did not speak, including local counsel)  
Male \_\_\_\_\_ Male \_\_\_\_\_  
Female \_\_\_\_\_ Female \_\_\_\_\_  
Government \_\_\_\_\_ Government \_\_\_\_\_  
Non-Government \_\_\_\_\_ Non-Government \_\_\_\_\_
- X. Was the Plaintiff a female or, if a corporation, was the GC/CEO/CFO a female? \_\_\_\_\_
- XI. Was the Defendant a female or, if a corporation, was the GC/CEO/CFO female? \_\_\_\_\_
- XII. Was this your first or a repeat ADR matter for these parties or their counsel? If repeat, please describe the prior proceeding(s) in which you served and at whose behest and whether the proceeding involved the same or a different area of the law.

## APPENDIX B

TABLE 1  
SUMMARY OF FINDINGS

Category	# Men	# Women	% Women
Total - Sample-wide	3886	1309	25.2%
Trial level -all	1805	592	24.7%
Appeal level - all	1007	340	25.2%
Upstate Courts - all	1154	409	26.2%
Downstate Courts - all	2103	694	24.8%
Federal Courts - all	1890	611	24.4%
State Courts - all	1725	635	26.9%
All Courts - Parties of 1	561	259	31.6%
Parties of 2	2532	910	26.4%
Parties of 3-4	681	224	24.8%
Parties of 5+	587	142	19.5%
All Courts - Lead Counsel	3430	1 135	24.9%
All Courts - Additional Counsel	456	174	27.6%
All Courts - Private Civil Lawyers	1688	384	18.5%



TABLE 2  
DETAIL DATA CITED IN REPORT

Category	# Men	# Women	% Women
Total - Sample-wide	3886	1309	25.2%
New York Court of Appeals	83	54	39.4%
Court of Appeals - Public Attorneys	39	41	51.3%
Court of Appeals - Civil Cases	42	18	30.0%
Court of Appeals - Criminal Cases	41	36	46.8%
New York Appellate Divisions			
First Department - Civil Cases		148	5.37% (commercial cases)
Second Department - Public Attorneys	64	63	49.6%
Third Department - Lead Counsel	200	44	18.0%
Third Department - Public Attorneys	31	15	32.6%
Third Department - Private Attorneys	168	24	12.5%
Fourth Department - Public Attorneys	209	114	35.3%
Erie County	190	70	26.9%
Erie County - Public Attorneys	1	8	88.9%
Suffolk County	176	28	13.7%
Onondaga County	95	35	26.9%
Onondaga County - Private Attorneys	14	4	22.2%
United States Court of Appeals for the Second Circuit	451	117	20.6%
Second Circuit - Public Attorneys	102	57	35.8%
Second Circuit - Private Attorneys	338	54	13.8%
Second Circuit - Civil Cases	331	70	17.5%
Second Circuit - Criminal Cases	120	47	28.1%
Southern District of New York	1203	424	26.1%
SDNY - Lead Counsel	931	306	24.7%
Western District of New York	236	70	22.9%
WDNY - Lead Counsel	221	58	20.8%
Trial level - all	1805	592	24.7%
Appeal level - all	1007	340	25.2%
Upstate Courts - all	1154	409	26.2%
Downstate Courts - all	2103	694	24.8%

Category	# Men	# Women	% Women
Federal Courts -all	1 890	611	24.4%
Lead Counsel	1595	478	23.1%
State Courts - all	1725	635	26.9%
State Courts - Lead Counsel	1672	613	26.8%
State Courts - Civil Cases	2896	874	23.2%
State Courts - Criminal Cases	628	281	30.9%
State Courts - Public Cases	692	428	38.2%
State Courts - Private Cases	2172	524	19.4%
All Courts - Parties of 1	561	259	31.6%
Parties of 2	2532	910	26.4%
Parties of 3-4	681	224	24.8%
Parties of 5+	587	142	19.5%
All Courts - Lead Counsel	3430	1135	24.9%
All Courts - Additional Counsel	456	174	27.6%
All Courts - Private Civil Lawyers	1688	384	18.5%

## APPENDIX C

### SUMMARY OF RECOMMENDATIONS

#### 1. The Law Firms

- Women's Initiatives
  - Establish and support strong institutionalized Women's Initiatives with emphasis on the following:
    - Convincing partners to provide speaking opportunities in court and at depositions for junior attorneys
    - Training and education on courtroom skills
    - Leadership training
    - Guest speakers
    - Mentorship programs
- Formal Programs to Ensure Lead Roles in Court and Discovery
  - Establish a formal program through which management or heads of litigation departments ensure that junior associates are provided with speaking opportunities in court and at depositions.
  - Track speaking opportunities in court and at depositions on a quarterly basis
- Promote Outside Speaking Opportunities
  - Provide junior attorneys with internal and external speaking opportunities.
- Sponsorship
  - Establish and support an institutionalized Sponsorship Program.

#### 2. The Judiciary

- Ask junior attorneys to address particular issues before the Court.
- Favor granting oral argument when a junior attorney is scheduled to argue the matter.
- Encourage attorneys who primarily authored the briefs to argue the motions or certain parts of the motions in court.
- Appoint qualified women as lead counsel in class actions and as members of steering committees as well as special masters, referees, receivers, and mediators.
- Include as a court rule that more than one attorney can argue a motion.

### 3. The Client

- Insist on diverse litigation teams.
- Monitor actual work of diverse team members.
- Impose penalties for failure to have diverse teams or teams where diverse members do not perform significant work on the matter.

### 4. ADR Context

- **Fair representation of women on lists of potential arbitrators and mediators.**
- Corporate counsel should demand diverse neutrals on matters.
- Stress the benefits of having a diverse panel of decisionmakers for arbitrations.
- Instruct outside counsel to consider diversity when selecting neutrals and monitor such selections.

Please proceed  
to the next page



U.S. Equal Employment Opportunity Commission

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## Title VII of the Civil Rights Act of 1964

*EDITOR'S NOTE: The following is the text of Title VII of the Civil Rights Act of 1964 (Pub. L. 88-352) (Title VII), as amended, as it appears in volume 42 of the United States Code, beginning at section 2000e. Title VII prohibits employment discrimination based on race, color, religion, sex and national origin. The Civil Rights Act of 1991 (Pub. L. 102-166) (CRA) and the Lily Ledbetter Fair Pay Act of 2009 (Pub. L. 111-2) amend several sections of Title VII. In addition, section 102 of the CRA (which is printed elsewhere in this publication) amends the Revised Statutes by adding a new section following section 1977 (42 U.S.C. 1981), to provide for the recovery of compensatory and punitive damages in cases of intentional violations of Title VII, the Americans with Disabilities Act of 1990, and section 501 of the Rehabilitation Act of 1973. Cross references to Title VII as enacted appear in italics following each section heading. Editor's notes also appear in italics.*

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### An Act

To enforce the constitutional right to vote, to confer jurisdiction upon the district courts of the United States to provide injunctive relief against discrimination in public accommodations, to authorize the attorney General to institute suits to protect constitutional rights in public facilities and public education, to extend the Commission on Civil Rights, to prevent discrimination in federally assisted programs, to establish a Commission on Equal Employment Opportunity, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Civil Rights Act of 1964".

\*\*\*

## DEFINITIONS

SEC. 2000e. [Section 701]

For the purposes of this subchapter-

- (a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11 [originally, bankruptcy], or receivers.
- (b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5 [United States Code]), or
- (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26 [the Internal Revenue Code of 1986], except that during the first year after March 24, 1972 [the date of enactment of the Equal Employment Opportunity Act of 1972], persons having fewer than twenty-five employees (and their agents) shall not be considered employers.
- (c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person.
- (d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee,

joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is (A) twenty-five or more during the first year after March 24, 1972 [*the date of enactment of the Equal Employment Opportunity Act of 1972*], or (B) fifteen or more thereafter, and such labor organization-

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended [*29 U.S.C. 151 et seq.*], or the Railway Labor Act, as amended [*45 U.S.C. 151 et seq.*];

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 [*29 U.S.C. 401 et seq.*], and further includes any governmental industry, business, or activity.

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act [*43 U.S.C. 1331 et seq.*].

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

(k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title [*section 703(h)*] shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: Provided, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

(l) The term "complaining party" means the Commission, the Attorney General, or a person who may bring an action or proceeding under this subchapter.

(m) The term "demonstrates" means meets the burdens of production and persuasion.

(n) The term "respondent" means an employer, employment agency, labor organization, joint labor management committee controlling apprenticeship or other training or retraining program, including an on-the-job training program, or Federal entity subject to section 2000e-16 of this title.

## APPLICABILITY TO FOREIGN AND RELIGIOUS EMPLOYMENT

### SEC. 2000e-1. [Section 702]

#### (a) Inapplicability of subchapter to certain aliens and employees of religious entities

This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

#### (b) Compliance with statute as violative of foreign law

It shall not be unlawful under section 2000e-2 or 2000e-3 of this title [section 703 or 704] for an employer (or a corporation controlled by an employer), labor organization, employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining (including on-the-job training programs) to take any action otherwise prohibited by such section, with respect to an employee in a workplace in a foreign country if compliance with such section would cause such employer (or such corporation), such organization, such agency, or such committee to violate the law of the foreign country in which such workplace is located.

#### (c) Control of corporation incorporated in foreign country

(1) If an employer controls a corporation whose place of incorporation is a foreign country, any practice prohibited by section 2000e-2 or 2000e-3 of this title [section 703 or 704] engaged in by such corporation shall be presumed to be engaged in by such employer.

(2) Sections 2000e-2 and 2000e-3 of this title [sections 703 and 704] shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.

(3) For purposes of this subsection, the determination of whether an employer controls a corporation shall be based on-

- (A) the interrelation of operations;
- (B) the common management;
- (C) the centralized control of labor relations; and
- (D) the common ownership or financial control, of the employer and the corporation.

## UNLAWFUL EMPLOYMENT PRACTICES

### SEC. 2000e-2. [Section 703]

#### (a) Employer practices

It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

#### (b) Employment agency practices

It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.



## (c) Labor organization practices

It shall be an unlawful employment practice for a labor organization-

- (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;
- (2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or
- (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

## (d) Training programs

It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion

Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

## (f) Members of Communist Party or Communist-action or Communist-front organizations

As used in this subchapter, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950 [50 U.S.C. 781 *et seq.*].

## (g) National security

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if-

- (1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and
- (2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29 [section 6(d) of the Labor Standards Act of 1938, as amended].

(i) Businesses or enterprises extending preferential treatment to Indians

Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Preferential treatment not to be granted on account of existing number or percentage imbalance

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

(k) Burden of proof in disparate impact cases

(1) (A) An unlawful employment practice based on disparate impact is established under this subchapter only if-

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

(B) (i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of "alternative employment practice".

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter.

(3) Notwithstanding any other provision of this subchapter, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act [21 U.S.C. 801 et seq.] or any other provision of Federal law, shall be considered an unlawful employment practice under this subchapter only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.

## (l) Prohibition of discriminatory use of test scores

It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.

## (m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

## (n) Resolution of challenges to employment practices implementing litigated or consent judgments or orders

(1) (A) Notwithstanding any other provision of law, and except as provided in paragraph (2), an employment practice that implements and is within the scope of a litigated or consent judgment or order that resolves a claim of employment discrimination under the Constitution or Federal civil rights laws may not be challenged under the circumstances described in subparagraph (B).

(B) A practice described in subparagraph (A) may not be challenged in a claim under the Constitution or Federal civil rights laws-

(i) by a person who, prior to the entry of the judgment or order described in subparagraph (A), had-

(I) actual notice of the proposed judgment or order sufficient to apprise such person that such judgment or order might adversely affect the interests and legal rights of such person and that an opportunity was available to present objections to such judgment or order by a future date certain; and

(II) a reasonable opportunity to present objections to such judgment or order; or

(ii) by a person whose interests were adequately represented by another person who had previously challenged the judgment or order on the same legal grounds and with a similar factual situation, unless there has been an intervening change in law or fact.

## (2) Nothing in this subsection shall be construed to-

(A) alter the standards for intervention under rule 24 of the Federal Rules of Civil Procedure or apply to the rights of parties who have successfully intervened pursuant to such rule in the proceeding in which the parties intervened;

(B) apply to the rights of parties to the action in which a litigated or consent judgment or order was entered, or of members of a class represented or sought to be represented in such action, or of members of a group on whose behalf relief was sought in such action by the Federal Government;

(C) prevent challenges to a litigated or consent judgment or order on the ground that such judgment or order was obtained through collusion or fraud, or is transparently invalid or was entered by a court lacking subject matter jurisdiction; or

(D) authorize or permit the denial to any person of the due process of law required by the Constitution.

(3) Any action not precluded under this subsection that challenges an employment consent judgment or order described in paragraph (1) shall be brought in the court, and if possible before the judge, that entered such judgment or order. Nothing in this subsection shall preclude a transfer of such action pursuant to section 1404 of Title 28 [United States Code].

## OTHER UNLAWFUL EMPLOYMENT PRACTICES

SEC. 2000e-3. [Section 704]

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

(b) Printing or publication of notices or advertisements indicating prohibited preference, limitation, specification, or discrimination; occupational qualification exception

It shall be an unlawful employment practice for an employer, labor organization, employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to print or publish or cause to be printed or published any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, or relating to admission to, or employment in, any program established to provide apprenticeship or other training by such a joint labor-management committee, indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin, except that such a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion, sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment.

## EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

SEC. 2000e-4. [Section 705]

(a) Creation; composition; political representation; appointment; term; vacancies; Chairman and Vice Chairman; duties of Chairman; appointment of personnel; compensation of personnel

There is hereby created a Commission to be known as the Equal Employment Opportunity Commission, which shall be composed of five members, not more than three of whom shall be members of the same political party. Members of the Commission shall be appointed by the President by and with the advice and consent of the Senate for a term of five years. Any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed, and all members of the Commission shall continue to serve until their successors are appointed and qualified, except that no such member of the Commission shall continue to serve (1) for more than sixty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment sine die of the session of the Senate in which such nomination was submitted. The President shall designate one member to serve as Chairman of the Commission, and one member to serve as Vice Chairman. The Chairman shall be responsible on behalf of the Commission for the administrative operations of the Commission, and, except as provided in subsection (b) of this section, shall appoint, in accordance with the provisions of Title 5 [United States Code] governing appointments in the competitive service, such officers, agents, attorneys, administrative law judges [originally, hearing examiners], and employees as he deems necessary to assist it in the performance of its functions and to fix their compensation in accordance with the provisions of chapter 51 and subchapter III of chapter 53 of Title 5 [United States Code], relating to classification and General Schedule pay rates: Provided, That assignment, removal, and compensation of administrative law judges [originally, hearing examiners] shall be in accordance with sections 3105, 3344, 5372, and 7521 of Title 5 [United States Code].

(b) General Counsel; appointment; term; duties; representation by attorneys and Attorney General

(1) There shall be a General Counsel of the Commission appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel shall have responsibility for the conduct of litigation as provided in sections 2000e-5 and 2000e-6 of this title [sections 706 and 707]. The General Counsel shall have such other duties as the Commission may prescribe or as may be provided by law and shall concur with the Chairman of the Commission on the appointment and supervision of regional attorneys. The General Counsel of the Commission on the effective date of this Act shall continue in such position and perform the functions specified in this subsection until a successor is appointed and qualified.

(2) Attorneys appointed under this section may, at the direction of the Commission, appear for and represent the Commission in any case in court, provided that the Attorney General shall conduct all litigation to which the Commission is a party in the Supreme Court pursuant to this subchapter.

(c) Exercise of powers during vacancy; quorum

A vacancy in the Commission shall not impair the right of the remaining members to exercise all the powers of the Commission and three members thereof shall constitute a quorum.

## (d) Seal; judicial notice

The Commission shall have an official seal which shall be judicially noticed.

## (e) Reports to Congress and the President

The Commission shall at the close of each fiscal year report to the Congress and to the President concerning the action it has taken *originally, the names, salaries, and duties of all individuals in its employ* and the moneys it has disbursed. It shall make such further reports on the cause of and means of eliminating discrimination and such recommendations for further legislation as may appear desirable.

## (f) Principal and other offices

The principal office of the Commission shall be in or near the District of Columbia, but it may meet or exercise any or all its powers at any other place. The Commission may establish such regional or State offices as it deems necessary to accomplish the purpose of this subchapter.

## (g) Powers of Commission

The Commission shall have power-

- (1) to cooperate with and, with their consent, utilize regional, State, local, and other agencies, both public and private, and individuals;
- (2) to pay to witnesses whose depositions are taken or who are summoned before the Commission or any of its agents the same witness and mileage fees as are paid to witnesses in the courts of the United States;
- (3) to furnish to persons subject to this subchapter such technical assistance as they may request to further their compliance with this subchapter or an order issued thereunder;
- (4) upon the request of (i) any employer, whose employees or some of them, or (ii) any labor organization, whose members or some of them, refuse or threaten to refuse to cooperate in effectuating the provisions of this subchapter, to assist in such effectuation by conciliation or such other remedial action as is provided by this subchapter;
- (5) to make such technical studies as are appropriate to effectuate the purposes and policies of this subchapter and to make the results of such studies available to the public;
- (6) to intervene in a civil action brought under section 2000e-5 of this title *[section 706]* by an aggrieved party against a respondent other than a government, governmental agency or political subdivision.

## (h) Cooperation with other departments and agencies in performance of educational or promotional activities; outreach activities

- (1) The Commission shall, in any of its educational or promotional activities, cooperate with other departments and agencies in the performance of such educational and promotional activities.
- (2) In exercising its powers under this subchapter, the Commission shall carry out educational and outreach activities (including dissemination of information in languages other than English) targeted to-
  - (A) individuals who historically have been victims of employment discrimination and have not been equitably served by the Commission; and
  - (B) individuals on whose behalf the Commission has authority to enforce any other law prohibiting employment discrimination, concerning rights and obligations under this subchapter or such law, as the case may be.

## (i) Personnel subject to political activity restrictions

All officers, agents, attorneys, and employees of the Commission shall be subject to the provisions of section 7324 of Title 5 *originally, section 9 of the Act of August 2, 1939, as amended (the Hatch Act)*, notwithstanding any exemption contained in such section.

## (j) Technical Assistance Training Institute

- (1) The Commission shall establish a Technical Assistance Training Institute, through which the Commission shall provide technical assistance and training regarding the laws and regulations enforced by the Commission.

(2) An employer or other entity covered under this subchapter shall not be excused from compliance with the requirements of this subchapter because of any failure to receive technical assistance under this subsection.

(3) There are authorized to be appropriated to carry out this subsection such sums as may be necessary for fiscal year 1992.

(k) EEOC Education, Technical Assistance, and Training Revolving Fund

(1) There is hereby established in the Treasury of the United States a revolving fund to be known as the "EEOC Education, Technical Assistance, and Training Revolving Fund" (hereinafter in this subsection referred to as the "Fund") and to pay the cost (including administrative and personnel expenses) of providing education, technical assistance, and training relating to laws administered by the Commission. Monies in the Fund shall be available without fiscal year limitation to the Commission for such purposes.

(2)(A) The Commission shall charge fees in accordance with the provisions of this paragraph to offset the costs of education, technical assistance, and training provided with monies in the Fund. Such fees for any education, technical assistance, or training--

(i) shall be imposed on a uniform basis on persons and entities receiving such education, assistance, or training,

(ii) shall not exceed the cost of providing such education, assistance, and training, and

(iii) with respect to each person or entity receiving such education, assistance, or training, shall bear a reasonable relationship to the cost of providing such education, assistance, or training to such person or entity.

(B) Fees received under subparagraph (A) shall be deposited in the Fund by the Commission.

(C) The Commission shall include in each report made under subsection (e) of this section information with respect to the operation of the Fund, including information, presented in the aggregate, relating to--

(i) the number of persons and entities to which the Commission provided education, technical assistance, or training with monies in the Fund, in the fiscal year for which such report is prepared,

(ii) the cost to the Commission to provide such education, technical assistance, or training to such persons and entities, and

(iii) the amount of any fees received by the Commission from such persons and entities for such education, technical assistance, or training.

(3) The Secretary of the Treasury shall invest the portion of the Fund not required to satisfy current expenditures from the Fund, as determined by the Commission, in obligations of the United States or obligations guaranteed as to principal by the United States. Investment proceeds shall be deposited in the Fund.

(4) There is hereby transferred to the Fund \$1,000,000 from the Salaries and Expenses appropriation of the Commission.

## ENFORCEMENT PROVISIONS

### SEC. 2000e-5. [Section 706]

#### (a) Power of Commission to prevent unlawful employment practices

The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title [section 703 or 704].

(b) Charges by persons aggrieved or member of Commission of unlawful employment practices by employers, etc.; filing; allegations; notice to respondent; contents of notice; investigation by Commission; contents of charges; prohibition on disclosure of charges; determination of reasonable cause; conference, conciliation, and persuasion for elimination of unlawful practices; prohibition on disclosure of informal endeavors to end unlawful practices; use of evidence in subsequent proceedings; penalties for disclosure of information; time for determination of reasonable cause

Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the

date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than \$1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge.

(c) State or local enforcement proceedings; notification of State or local authority; time for filing charges with Commission; commencement of proceedings

In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(d) State or local enforcement proceedings; notification of State or local authority; time for action on charges by Commission

In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(e) Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency; seniority system

(1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(2) For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this subchapter (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to

the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.

(3)(A) For purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this title, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.

(B) In addition to any relief authorized by section 1977A of the Revised Statutes (42 U.S.C. 1981a), liability may accrue and an aggrieved person may obtain relief as provided in subsection (g)(1), including recovery of back pay for up to two years preceding the filing of the charge, where the unlawful employment practices that have occurred during the charge filing period are similar or related to unlawful employment practices with regard to discrimination in compensation that occurred outside the time for filing a charge.

(f) Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master

(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.



(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28 [*United States Code*], the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

(g) Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders

(1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

(2) (A) No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this Title [*section 704(a)*].

(B) On a claim in which an individual proves a violation under section 2000e-2(m) of this title [*section 703(m)*] and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court-

(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title [*section 703(m)*]; and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

(h) Provisions of chapter 6 of Title 29 not applicable to civil actions for prevention of unlawful practices

The provisions of chapter 6 of title 29 [*the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (29 U.S.C. 105-115)*] shall not apply with respect to civil actions brought under this section.

(i) Proceedings by Commission to compel compliance with judicial orders In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under this section, the Commission may commence proceedings to compel compliance with such order.

(j) Appeals

Any civil action brought under this section and any proceedings brought under subsection (i) of this section shall be subject to appeal as provided in sections 1291 and 1292, Title 28 [United States Code].

(k) Attorney's fee; liability of Commission and United States for costs

In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

## CIVIL ACTIONS BY THE ATTORNEY GENERAL

SEC. 2000e-6. [Section 707]

(a) Complaint

Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

(b) Jurisdiction; three-judge district court for cases of general public importance: hearing, determination, expedition of action, review by Supreme Court; single judge district court: hearing, determination, expedition of action

The district courts of the United States shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, and in any such proceeding the Attorney General may file with the clerk of such court a request that a court of three judges be convened to hear and determine the case. Such request by the Attorney General shall be accompanied by a certificate that, in his opinion, the case is of general public importance. A copy of the certificate and request for a three-judge court shall be immediately furnished by such clerk to the chief judge of the circuit (or in his absence, the presiding circuit judge of the circuit) in which the case is pending. Upon receipt of such request it shall be the duty of the chief judge of the circuit or the presiding circuit judge, as the case may be, to designate immediately three judges in such circuit, of whom at least one shall be a circuit judge and another of whom shall be a district judge of the court in which the proceeding was instituted, to hear and determine such case, and it shall be the duty of the judges so designated to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited. An appeal from the final judgment of such court will lie to the Supreme Court.

In the event the Attorney General fails to file such a request in any such proceeding, it shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

It shall be the duty of the judge designated pursuant to this section to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited.

(c) Transfer of functions, etc., to Commission; effective date; prerequisite to transfer; execution of functions by Commission

Effective two years after March 24, 1972 [the date of enactment of the Equal Employment Opportunity Act of 1972], the functions of the Attorney General under this section shall be transferred to the Commission, together with such personnel, property, records, and unexpended balances of appropriations, allocations, and other funds employed, used, held, available, or to be made available in connection with such functions unless the President submits, and neither House of Congress vetoes, a reorganization plan pursuant to chapter 9 of Title 5 [United States Code], inconsistent with the provisions of this subsection. The Commission shall carry out such functions in accordance with subsections (d) and (e) of this section.

(d) Transfer of functions, etc., not to affect suits commenced pursuant to this section prior to date of transfer

Upon the transfer of functions provided for in subsection (c) of this section, in all suits commenced pursuant to this section prior to the date of such transfer, proceedings shall continue without abatement, all court orders and decrees shall remain in effect, and the Commission shall be substituted as a party for the United States of America, the Attorney General, or the Acting Attorney General, as appropriate.

(e) Investigation and action by Commission pursuant to filing of charge of discrimination; procedure

Subsequent to March 24, 1972 [the date of enactment of the Equal Employment Opportunity Act of 1972], the Commission shall have authority to investigate and act on a charge of a pattern or practice of discrimination, whether filed by or on behalf of a person claiming to be aggrieved or by a member of the Commission. All such actions shall be conducted in accordance with the procedures set forth in section 2000e-5 of this title [section 706].

## EFFECT ON STATE LAWS

SEC. 2000e-7. [Section 708]

Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.

## INVESTIGATIONS

SEC. 2000e-8. [Section 709]

(a) Examination and copying of evidence related to unlawful employment practices

In connection with any investigation of a charge filed under section 2000e-5 of this title [section 706], the Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this subchapter and is relevant to the charge under investigation.

(b) Cooperation with State and local agencies administering State fair employment practices laws; participation in and contribution to research and other projects; utilization of services; payment in advance or reimbursement; agreements and rescission of agreements

The Commission may cooperate with State and local agencies charged with the administration of State fair employment practices laws and, with the consent of such agencies, may, for the purpose of carrying out its functions and duties under this subchapter and within the limitation of funds appropriated specifically for such purpose, engage in and contribute to the cost of research and other projects of mutual interest undertaken by such agencies, and utilize the services of such agencies and their employees, and, notwithstanding any other provision of law, pay by advance or reimbursement such agencies and their employees for services rendered to assist the Commission in carrying out this subchapter. In furtherance of such cooperative efforts, the Commission may enter into written agreements with such State or local agencies and such agreements may include provisions under which the Commission shall refrain from processing a charge in any cases or class of cases specified in such agreements or under which the Commission shall relieve any person or class of persons in such State or locality from requirements imposed under this section. The Commission shall rescind any such agreement whenever it determines that the agreement no longer serves the interest of effective enforcement of this subchapter.

(c) Execution, retention, and preservation of records; reports to Commission; training program records; appropriate relief from regulation or order for undue hardship; procedure for exemption; judicial action to compel compliance

Every employer, employment agency, and labor organization subject to this subchapter shall (1) make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed, (2) preserve such records for such periods, and (3) make such reports therefrom as the Commission shall prescribe by regulation or order, after public hearing, as reasonable, necessary, or appropriate for the enforcement of this subchapter or the regulations or orders thereunder. The Commission shall, by regulation, require each employer, labor organization, and joint labor-management committee subject to this subchapter which controls an apprenticeship or other training program to maintain such records as are reasonably necessary to carry out the purposes of this subchapter, including, but not limited to, a list of applicants who wish to participate in such program, including the chronological order in which applications were received, and to furnish to the Commission upon request, a detailed description of the manner in which persons are selected to participate in the apprenticeship or other training program. Any employer, employment agency, labor organization, or joint labor-management committee which believes that the application to it of any regulation or order issued under this section would result in undue hardship may apply to the Commission for an exemption from the application of such regulation or order, and, if such application for an exemption is denied, bring a civil action in the United States district court for the district where such records are kept. If the Commission or the court, as the case may be, finds that the application of the regulation or order to the employer, employment agency, or labor organization in question would impose an undue hardship, the Commission or the court, as the

case may be, may grant appropriate relief. If any person required to comply with the provisions of this subsection fails or refuses to do so, the United States district court for the district in which such person is found, resides, or transacts business, shall, upon application of the Commission, or the Attorney General in a case involving a government, governmental agency or political subdivision, have jurisdiction to issue to such person an order requiring him to comply.

(d) Consultation and coordination between Commission and interested State and Federal agencies in prescribing recordkeeping and reporting requirements; availability of information furnished pursuant to recordkeeping and reporting requirements; conditions on availability

In prescribing requirements pursuant to subsection (c) of this section, the Commission shall consult with other interested State and Federal agencies and shall endeavor to coordinate its requirements with those adopted by such agencies. The Commission shall furnish upon request and without cost to any State or local agency charged with the administration of a fair employment practice law information obtained pursuant to subsection (c) of this section from any employer, employment agency, labor organization, or joint labor-management committee subject to the jurisdiction of such agency. Such information shall be furnished on condition that it not be made public by the recipient agency prior to the institution of a proceeding under State or local law involving such information. If this condition is violated by a recipient agency, the Commission may decline to honor subsequent requests pursuant to this subsection.

(e) Prohibited disclosures; penalties

It shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding under this subchapter involving such information. Any officer or employee of the Commission who shall make public in any manner whatever any information in violation of this subsection shall be guilty of a misdemeanor and upon conviction thereof, shall be fined not more than \$1,000, or imprisoned not more than one year.

## CONDUCT OF HEARINGS AND INVESTIGATIONS PURSUANT TO SECTION 161 OF Title 29

SEC. 2000e-9. *[Section 710]*

For the purpose of all hearings and investigations conducted by the Commission or its duly authorized agents or agencies, section 161 of Title 29 *[section 11 of the National Labor Relations Act]* shall apply.

## POSTING OF NOTICES; PENALTIES

SEC. 2000e-10. *[Section 711]*

(a) Every employer, employment agency, and labor organization, as the case may be, shall post and keep posted in conspicuous places upon its premises where notices to employees, applicants for employment, and members are customarily posted a notice to be prepared or approved by the Commission setting forth excerpts from or, summaries of, the pertinent provisions of this subchapter and information pertinent to the filing of a complaint.

(b) A willful violation of this section shall be punishable by a fine of not more than \$100 for each separate offense.

## VETERANS' SPECIAL RIGHTS OR PREFERENCE

SEC. 2000e-11. *[Section 712]*

Nothing contained in this subchapter shall be construed to repeal or modify any Federal, State, territorial, or local law creating special rights or preference for veterans.

## REGULATIONS; CONFORMITY OF REGULATIONS WITH ADMINISTRATIVE PROCEDURE PROVISIONS; RELIANCE ON INTERPRETATIONS AND INSTRUCTIONS OF COMMISSION

SEC. 2000e-12. *[Section 713]*

(a) The Commission shall have authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this subchapter. Regulations issued under this section shall be in conformity with the standards and limitations of subchapter II of chapter 5 of Title 5 *[originally, the Administrative Procedure Act]*.

(b) In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission, or (2) the failure of such person to publish and file any information required by any provision of this subchapter if he pleads and proves that he failed to publish and file such information in good faith, in conformity with the instructions of the Commission issued under this subchapter regarding the filing of such information. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that (A) after such act or omission, such interpretation or opinion is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect, or (B) after publishing or filing the description and annual reports, such publication or filing is determined by judicial authority not to be in conformity with the requirements of this subchapter.

## APPLICATION TO PERSONNEL OF COMMISSION OF SECTIONS 111 AND 1114 OF TITLE 18; PUNISHMENT FOR VIOLATION OF SECTION 1114 OF TITLE 18

SEC. 2000e-13. *[Section 714]*

The provisions of sections 111 and 1114, Title 18 *[United States Code]*, shall apply to officers, agents, and employees of the Commission in the performance of their official duties. Notwithstanding the provisions of sections 111 and 1114 of Title 18 *[United States Code]*, whoever in violation of the provisions of section 1114 of such title kills a person while engaged in or on account of the performance of his official functions under this Act shall be punished by imprisonment for any term of years or for life.

## TRANSFER OF AUTHORITY

*[Administration of the duties of the Equal Employment Opportunity Coordinating Council was transferred to the Equal Employment Opportunity Commission effective July 1, 1978, under the President's Reorganization Plan of 1978.]*

## EQUAL EMPLOYMENT OPPORTUNITY COORDINATING COUNCIL; ESTABLISHMENT; COMPOSITION; DUTIES; REPORT TO PRESIDENT AND CONGRESS

SEC. 2000e-14. *[Section 715]*

*[Original introductory text: There shall be established an Equal Employment Opportunity Coordinating Council (hereinafter referred to in this section as the Council) composed of the Secretary of Labor, the Chairman of the Equal Employment Opportunity Commission, the Attorney General, the Chairman of the United States Civil Service Commission, and the Chairman of the United States Civil Rights Commission, or their respective delegates.]*

The Equal Employment Opportunity Commission *[originally, Council]* shall have the responsibility for developing and implementing agreements, policies and practices designed to maximize effort, promote efficiency, and eliminate conflict, competition, duplication and inconsistency among the operations, functions and jurisdictions of the various departments, agencies and branches of the Federal Government responsible for the implementation and enforcement of equal employment opportunity legislation, orders, and policies. On or before October 1 *[originally, July 1]* of each year, the Equal Employment Opportunity Commission *[originally, Council]* shall transmit to the President and to the Congress a report of its activities, together with such recommendations for legislative or administrative changes as it concludes are desirable to further promote the purposes of this section.

## PRESIDENTIAL CONFERENCES; ACQUAINTANCE OF LEADERSHIP WITH PROVISIONS FOR EMPLOYMENT RIGHTS AND OBLIGATIONS; PLANS FOR FAIR ADMINISTRATION; MEMBERSHIP

SEC. 2000e-15. *[Section 716]*

*[Original text: (a) This title shall become effective one year after the date of its enactment.*

*(b) Notwithstanding subsection (a), sections of this title other than sections 703, 704, 706, and 707 shall become effective immediately.*

*(c) The President shall, as soon as feasible after July 2, 1964 [the date of enactment of this title], convene one or more conferences for the purpose of enabling the leaders of groups whose members will be affected by this*

subchapter to become familiar with the rights afforded and obligations imposed by its provisions, and for the purpose of making plans which will result in the fair and effective administration of this subchapter when all of its provisions become effective. The President shall invite the participation in such conference or conferences of (1) the members of the President's Committee on Equal Employment Opportunity, (2) the members of the Commission on Civil Rights, (3) representatives of State and local agencies engaged in furthering equal employment opportunity, (4) representatives of private agencies engaged in furthering equal employment opportunity, and (5) representatives of employers, labor organizations, and employment agencies who will be subject to this subchapter.

### TRANSFER OF AUTHORITY

*[Enforcement of Section 717 was transferred to the Equal Employment Opportunity Commission from the Civil Service Commission (Office of Personnel Management) effective January 1, 1979 under the President's Reorganization Plan No. 1 of 1978.]*

## EMPLOYMENT BY FEDERAL GOVERNMENT

SEC. 2000e-16. *[Section 717]*

(a) Discriminatory practices prohibited; employees or applicants for employment subject to coverage

All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5 *[United States Code]*, in executive agencies *[originally, other than the General Accounting Office]* as defined in section 105 of Title 5 *[United States Code]* (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Regulatory Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Printing Office, the Government Accountability Office, and the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

(b) Equal Employment Opportunity Commission; enforcement powers; issuance of rules, regulations, etc.; annual review and approval of national and regional equal employment opportunity plans; review and evaluation of equal employment opportunity programs and publication of progress reports; consultations with interested parties; compliance with rules, regulations, etc.; contents of national and regional equal employment opportunity plans; authority of Librarian of Congress

Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission *[originally, Civil Service Commission]* shall have authority to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Equal Employment Opportunity Commission *[originally, Civil Service Commission]* shall-

- (1) be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of this section shall submit in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment;
- (2) be responsible for the review and evaluation of the operation of all agency equal employment opportunity programs, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each such department, agency, or unit; and
- (3) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to equal employment opportunity.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. The plan submitted by each department, agency, and unit shall include, but not be limited to-

- (1) provision for the establishment of training and education programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential; and
- (2) a description of the qualifications in terms of training and experience relating to equal employment opportunity for the principal and operating officials of each such department, agency, or unit responsible for carrying out the equal employment opportunity program and of the

allocation of personnel and resources proposed by such department, agency, or unit to carry out its equal employment opportunity program.

With respect to employment in the Library of Congress, authorities granted in this subsection to the Equal Employment Opportunity Commission [*originally, Civil Service Commission*] shall be exercised by the Librarian of Congress.

(c) Civil action by employee or applicant for employment for redress of grievances; time for bringing of action; head of department, agency, or unit as defendant

Within 90 days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission [*originally, Civil Service Commission*] upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Equal Employment Opportunity Commission [*originally, Civil Service Commission*] on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title [*section 706*], in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

(d) Section 2000e-5(f) through (k) of this title applicable to civil actions

The provisions of section 2000e-5(f) through (k) of this title [*section 706(f) through (k)*], as applicable, shall govern civil actions brought hereunder, and the same interest to compensate for delay in payment shall be available as in cases involving nonpublic parties.

(e) Government agency or official not relieved of responsibility to assure nondiscrimination in employment or equal employment opportunity

Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.

(f) Section 2000e-5(e)(3) [*Section 706(e)(3)*] shall apply to complaints of discrimination in compensation under this section.

## PROCEDURE FOR DENIAL, WITHHOLDING, TERMINATION, OR SUSPENSION OF GOVERNMENT CONTRACT SUBSEQUENT TO ACCEPTANCE BY GOVERNMENT OF AFFIRMATIVE ACTION PLAN OF EMPLOYER; TIME OF ACCEPTANCE OF PLAN

SEC. 2000e-17. [*Section 718*]

No Government contract, or portion thereof, with any employer, shall be denied, withheld, terminated, or suspended, by any agency or officer of the United States under any equal employment opportunity law or order, where such employer has an affirmative action plan which has previously been accepted by the Government for the same facility within the past twelve months without first according such employer full hearing and adjudication under the provisions of section 554 of Title 5 [*United States Code*], and the following pertinent sections: Provided, That if such employer has deviated substantially from such previously agreed to affirmative action plan, this section shall not apply: Provided further, That for the purposes of this section an affirmative action plan shall be deemed to have been accepted by the Government at the time the appropriate compliance agency has accepted such plan unless within forty-five days thereafter the Office of Federal Contract Compliance has disapproved such plan.

Please proceed  
to the next page



# Code of Federal Regulations

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## Title 29 - Labor

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Title: PART 1604 - GUIDELINES ON DISCRIMINATION BECAUSE OF SEX

Context: Title 29 - Labor. Subtitle B - Regulations Relating to Labor (Continued). CHAPTER XIV - EQUAL EMPLOYMENT OPPORTUNITY COMMISSION.

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### Pt. 1604

#### PART 1604—GUIDELINES ON DISCRIMINATION BECAUSE OF SEX

##### Sec.

- 1604.1 General principles.
- 1604.2 Sex as a bona fide occupational qualification.
- 1604.3 Separate lines of progression and seniority systems.
- 1604.4 Discrimination against married women.
- 1604.5 Job opportunities advertising.
- 1604.6 Employment agencies.
- 1604.7 Pre-employment inquiries as to sex.
- 1604.8 Relationship of title VII to the Equal Pay Act.
- 1604.9 Fringe benefits.
- 1604.10 Employment policies relating to pregnancy and childbirth.
- 1604.11 Sexual harassment.

#### Appendix to Part 1604—Questions and Answers on the Pregnancy Discrimination Act, Public Law 95-555, 92 Stat. 2076 (1978)

Authority Sec. 713(b), 78 Stat. 265, 42 U.S.C. 2000e-12.

Source: 37 FR 6836, April 5, 1972, unless otherwise noted.

##### § 1604.1 General principles.

(a) References to "employer" or "employers" in this part 1604 state principles that are applicable not only to employers but also to labor organizations and to employment agencies insofar as their action or inaction may adversely affect employment opportunities.

(b) To the extent that the views expressed in prior Commission pronouncements are inconsistent with the views expressed herein, such prior views are hereby overruled.

(c) The Commission will continue to consider particular problems relating to sex discrimination on a case-by-case basis.

##### § 1604.2 Sex as a bona fide occupational qualification.

(a) The commission believes that the bona fide occupational qualification exception as to sex should be interpreted narrowly. Label—"Men's jobs" and "Women's jobs"—tend to deny employment opportunities unnecessarily to one sex or the other.

(1) The Commission will find that the following situations do not warrant the application of the bona fide occupational qualification exception:

(i) The refusal to hire a woman because of her sex based on assumptions of the comparative employment characteristics of women in general. For example, the assumption that the turnover rate among women is higher than among men.

(ii) The refusal to hire an individual based on stereotyped characterizations of the sexes. Such stereotypes include, for example, that men are less capable of assembling intricate equipment; that women are less capable of aggressive salesmanship. The principle of nondiscrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group.

(iii) The refusal to hire an individual because of the preferences of coworkers, the employer, clients or customers except as covered specifically in paragraph (a)(2) of this section.

(2) Where it is necessary for the purpose of authenticity or genuineness, the Commission will consider sex to be a bona fide occupational qualification, e.g., an actor or actress.

(b) Effect of sex-oriented State employment legislation.

(1) Many States have enacted laws or promulgated administrative regulations with respect to the employment of females. Among these laws are those which prohibit or limit the employment of females, e.g., the employment of females in certain occupations, in jobs requiring the lifting or carrying of weights exceeding certain prescribed limits, during certain hours of the night, for more than a specified number of hours per day or per week, and for certain periods of time before and after childbirth. The Commission has found that such laws and regulations do not take into account the capacities, preferences, and abilities of individual females and, therefore, discriminate on the basis of sex. The Commission has concluded that such laws and regulations conflict with and are superseded by title VII of the Civil Rights Act of 1964. Accordingly, such laws will not be considered a defense to an otherwise established unlawful employment practice or as a basis for the application of the bona fide occupational qualification exception.

(2) The Commission has concluded that State laws and regulations which discriminate on the basis of sex with regard to the employment of minors are in conflict with and are superseded by title VII to the extent that such laws are more restrictive for one sex. Accordingly, restrictions on the employment of minors of one sex over and above those imposed on minors of the other sex will not be considered a defense to an otherwise established unlawful employment practice or as a basis for the application of the bona fide occupational qualification exception.

(3) A number of States require that minimum wage and premium pay for overtime be provided for female employees. An employer will be deemed to have engaged in an unlawful employment practice if:

(i) It refuses to hire or otherwise adversely affects the employment opportunities of female applicants or employees in order to avoid the payment of minimum wages or overtime pay required by State law; or

(ii) It does not provide the same benefits for male employees.

(4) As to other kinds of sex-oriented State employment laws, such as those requiring special rest and meal periods or physical facilities for women, provision of these benefits to one sex only will be a violation of title VII. An employer will be deemed to have engaged in an unlawful employment practice if:

(i) It refuses to hire or otherwise adversely affects the employment opportunities of female applicants or employees in order to avoid the provision of such benefits; or

(ii) It does not provide the same benefits for male employees. If the employer can prove that business necessity precludes providing these benefits to both men and women, then the State law is in conflict with and superseded by title VII as to this employer. In this situation, the employer shall not provide such benefits to members of either sex.

(5) Some States require that separate restrooms be provided for employees of each sex. An employer will be deemed to have engaged in an unlawful employment practice if it refuses to hire or otherwise adversely affects the employment opportunities of applicants or employees in order to avoid the provision of such restrooms for persons of that sex.

**§ 1604.3 Separate lines of progression and seniority systems.**

(a) It is an unlawful employment practice to classify a job as "male" or "female" or to maintain separate lines of progression or separate seniority lists based on sex where this would adversely affect any employee unless sex is a bona fide occupational qualification for that job. Accordingly, employment practices are unlawful which arbitrarily classify jobs so that:

(1) A female is prohibited from applying for a job labeled "male," or for a job in a "male" line of progression; and vice versa.

(2) A male scheduled for layoff is prohibited from displacing a less senior female on a "female" seniority list; and vice versa.

(b) A Seniority system or line of progression which distinguishes between "light" and "heavy" jobs constitutes an unlawful employment practice if it operates as a disguised form of classification by sex, or creates unreasonable obstacles to the advancement by members of either sex into jobs which members of that sex would reasonably be expected to perform.

**§ 1604.4 Discrimination against married women.**

(a) The Commission has determined that an employer's rule which forbids or restricts the employment of married women and which is not applicable to married men is a discrimination based on sex prohibited by title VII of the Civil Rights Act. It does not seem to us relevant that the rule is not directed against all females, but only against married females, for so long as sex is a factor in the application of the rule, such application involves a discrimination based on sex.

(b) It may be that under certain circumstances, such a rule could be justified within the meaning of section 703(e)(1) of title VII. We express no opinion on this question at this time except to point out that sex as a bona fide occupational qualification must be justified in terms of the peculiar requirements of the particular job and not on the basis of a general principle such as the desirability of spreading work.

**§ 1604.5 Job opportunities advertising.**

It is a violation of title VII for a help-wanted advertisement to indicate a preference, limitation, specification, or discrimination based on sex unless sex is a bona fide occupational qualification for the particular job involved. The placement of an advertisement in columns classified by publishers on the basis of sex, such as columns headed "Male" or "Female," will be considered an expression of a preference, limitation, specification, or discrimination based on sex.

**§ 1604.6 Employment agencies.**

(a) Section 703(b) of the Civil Rights Act specifically states that it shall be unlawful for an employment agency to discriminate against any individual because of sex. The Commission has determined that private employment agencies which deal exclusively with one sex are engaged in an unlawful employment practice, except to the extent that such agencies limit their services to furnishing employees for particular jobs for which sex is a bona fide occupational qualification.

(b) An employment agency that receives a job order containing an unlawful sex specification will share responsibility with the employer placing the job order if the agency fills the order knowing that the sex specification is not based upon a bona fide occupational qualification. However, an employment agency will not be deemed to be in violation of the law, regardless of the determination as to the employer, if the agency does not have reason to believe that the employer's claim of bona fide occupational qualification is without substance and the agency makes and maintains a written record available to the Commission of each such job order. Such record shall include the name of the employer, the description of the job and the basis for the employer's claim of bona fide occupational qualification.

(c) It is the responsibility of employment agencies to keep informed of opinions and decisions of the Commission on sex discrimination.

**§ 1604.7 Pre-employment inquiries as to sex.**

A pre-employment inquiry may ask "Male....., Female....."; or "Mr. Mrs. Miss," provided that the inquiry is made in good faith for a nondiscriminatory purpose. Any pre-employment inquiry in connection with prospective employment which expresses directly or indirectly any limitation, specification, or discrimination as to sex shall be unlawful unless based upon a bona fide occupational qualification.

**§ 1604.8 Relationship of title VII to the Equal Pay Act.**

(a) The employee coverage of the prohibitions against discrimination based on sex contained in title VII is coextensive with that of the other prohibitions contained in title VII and is not limited by section 703(h) to those employees covered by the Fair Labor Standards Act.

(b) By virtue of section 703(h), a defense based on the Equal Pay Act may be raised in a proceeding under title VII.

(c) Where such a defense is raised the Commission will give appropriate consideration to the interpretations of the Administrator, Wage and Hour Division, Department of Labor, but will not be bound thereby.

**§ 1604.9 Fringe benefits.**

(a) "Fringe benefits," as used herein, includes medical, hospital, accident, life insurance and retirement benefits; profit-sharing and bonus plans; leave; and other terms, conditions, and privileges of employment.

(b) It shall be an unlawful employment practice for an employer to discriminate between men and women with regard to fringe benefits.

(c) Where an employer conditions benefits available to employees and their spouses and families on whether the employee is the "head of the household" or "principal wage earner" in the family unit, the benefits tend to be available only to male employees and their families. Due to the fact that such conditioning discriminatorily affects the rights of women employees, and that "head of household" or "principal wage earner" status bears no relationship to job performance, benefits which are so conditioned will be found a prima facie violation of the prohibitions against sex discrimination contained in the act.

(d) It shall be an unlawful employment practice for an employer to make available benefits for the wives and families of male employees where the same benefits are not made available for the husbands and families of female employees; or to make available benefits for the wives of male employees which are not made available for female employees; or to make available benefits to the husbands of female employees which are not made available for male employees. An example of such an unlawful employment practice is a situation in which wives of male employees receive maternity benefits while female employees receive no such benefits.

(e) It shall not be a defense under title VIII to a charge of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than the other.

(f) It shall be an unlawful employment practice for an employer to have a pension or retirement plan which establishes different optional or compulsory retirement ages based on sex, or which differentiates in benefits on the basis of sex. A statement of the General Counsel of September 13, 1968, providing for a phasing out of differentials with regard to optional retirement age for certain incumbent employees is hereby withdrawn.

**§ 1604.10 Employment policies relating to pregnancy and childbirth.**

(a) A written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy, childbirth or related medical conditions is in prima facie violation of title VII.

(b) Disabilities caused or contributed to by pregnancy, childbirth, or related medical conditions, for all job-related purposes, shall be treated the same as disabilities caused or contributed to by other medical conditions, under any health or disability insurance or sick leave plan available in connection with employment. Written or unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the

accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy, childbirth or related medical conditions on the same terms and conditions as they are applied to other disabilities. Health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term or where medical complications have arisen from an abortion, are not required to be paid by an employer; nothing herein, however, precludes an employer from providing abortion benefits or otherwise affects bargaining agreements in regard to abortion.

(c) Where the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or no leave is available, such a termination violates the Act if it has a disparate impact on employees of one sex and is not justified by business necessity.

(d)(1) Any fringe benefit program, or fund, or insurance program which is in effect on October 31, 1978, which does not treat women affected by pregnancy, childbirth, or related medical conditions the same as other persons not so affected but similar in their ability or inability to work, must be in compliance with the provisions of § 1604.10(b) by April 29, 1979. In order to come into compliance with the provisions of 1604.10(b), there can be no reduction of benefits or compensation which were in effect on October 31, 1978, before October 31, 1979 or the expiration of a collective bargaining agreement in effect on October 31, 1978, whichever is later.

(2) Any fringe benefit program implemented after October 31, 1978, must comply with the provisions of § 1604.10(b) upon implementation.

[44 FR 23805, Apr. 20, 1979]

#### **§ 1604.11 Sexual harassment.**

(a) Harassment on the basis of sex is a violation of section 703 of title VII. <sup>1</sup> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

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**Footnote(s):**

<sup>1</sup> The principles involved here continue to apply to race, color, religion or national origin.

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(b) In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis.

(c) [Reserved]

(d) With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.

(e) An employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.

(f) Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under title VII, and developing methods to sensitize all concerned.

(g) Other related practices: Where employment opportunities or benefits are granted because of an individual's submission to the employer's sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but denied that employment opportunity or benefit.

#### APPENDIX A TO § 1604.11—BACKGROUND INFORMATION

THE COMMISSION HAS RESCINDED § 1604.11(C) OF THE GUIDELINES ON SEXUAL HARASSMENT, WHICH SET FORTH THE STANDARD OF EMPLOYER LIABILITY FOR HARASSMENT BY SUPERVISORS. THAT SECTION IS NO LONGER VALID, IN LIGHT OF THE SUPREME COURT DECISIONS IN *BURLINGTON INDUSTRIES, INC. V. ELLERTH*, 524 U.S. 742 (1998), AND *FARAGHER V. CITY OF BOCA RATON*, 524 U.S. 775 (1998). THE COMMISSION HAS ISSUED A POLICY DOCUMENT THAT EXAMINES THE FARAGHER AND ELLERTH DECISIONS AND PROVIDES DETAILED GUIDANCE ON THE ISSUE OF VICARIOUS LIABILITY FOR HARASSMENT BY SUPERVISORS. EEOC ENFORCEMENT GUIDANCE: VICARIOUS EMPLOYER LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS (6/18/99), EEOC COMPLIANCE MANUAL (BNA), N:4075 [BINDER 3]; ALSO AVAILABLE THROUGH EEOC'S WEB SITE, AT [WWW.EEOC.GOV](http://WWW.EEOC.GOV), OR BY CALLING THE EEOC PUBLICATIONS DISTRIBUTION CENTER, AT 1-800-669-3362 (VOICE), 1-800-800-3302 (TTY).

(Title VII, Pub. L. 88-352, 78 Stat. 253 (42 U.S.C. 2000e *et seq.*) [45 FR 74677, Nov. 10, 1980, as amended at 64 FR 58334, Oct. 29, 1999])

#### Pt. 1604, App.

#### Appendix to Part 1604—Questions and Answers on the Pregnancy Discrimination Act, Public Law 95-555, 92 Stat. 2076 (1978)

##### Introduction

On October 31, 1978, President Carter signed into law the *Pregnancy Discrimination Act* (Pub. L. 95-955). The Act is an amendment to title VII of the Civil Rights Act of 1964 which prohibits, among other things, discrimination in employment on the basis of sex. The *Pregnancy Discrimination Act* makes it clear that "because of sex" or "on the basis of sex", as used in title VII, includes "because of or on the basis of pregnancy, childbirth or related medical conditions." Therefore, title VII prohibits discrimination in employment against women affected by pregnancy or related conditions.

The basic principle of the Act is that women affected by pregnancy and related conditions must be treated the same as other applicants and employees on the basis of their ability or inability to work. A woman is therefore protected against such practices as being fired, or refused a job or promotion, merely because she is pregnant or has had an abortion. She usually cannot be forced to go on leave as long as she can still work. If other employees who take disability leave are entitled to get their jobs back when they are able to work again, so are women who have been unable to work because of pregnancy.

In the area of fringe benefits, such as disability benefits, sick leave and health insurance, the same principle applies. A woman unable to work for pregnancy-related reasons is entitled to disability benefits or sick leave on the same basis as employees unable to work for other medical reasons. Also, any health insurance provided must cover expenses for pregnancy-related conditions on the same basis as expenses for other medical conditions. However, health insurance for expenses arising from abortion is not required except where the life of the mother would be endangered if the fetus were carried to term, or where medical complications have arisen from an abortion.

Some questions and answers about the *Pregnancy Discrimination Act* follow. Although the questions and answers often use only the term "employer," the Act—and these questions and answers—apply also to unions and other entities covered by title VII.

1. Q. What is the effective date of the Pregnancy Discrimination Act?

A. The Act became effective on October 31, 1978, except that with respect to fringe benefit programs in effect on that date, the Act will take effect 180 days thereafter, that is, April 29, 1979.

To the extent that title VII already required employers to treat persons affected by pregnancy-related conditions the same as persons affected by other medical conditions, the Act does not change employee rights arising prior to October 31, 1978, or April 29, 1979. Most employment practices relating to pregnancy, childbirth and related conditions—whether concerning fringe benefits or other practices—were already controlled by title VII prior to this Act. For example, title VII has always prohibited an employer from firing, or refusing to hire or promote, a woman because of pregnancy or related conditions, and from failing to accord a woman on pregnancy-related leave the same seniority retention and accrual accorded those on other disability leaves.

2. Q. If an employer had a sick leave policy in effect on October 31, 1978, by what date must the employer bring its policy into compliance with the Act?

A. With respect to payment of benefits, an employer has until April 29, 1979, to bring into compliance any fringe benefit or insurance program, including a sick leave policy, which was in effect on October 31, 1978. However, any such policy or program created after October 31, 1978, must be in compliance when created.

With respect to all aspects of sick leave policy other than payment of benefits, such as the terms governing retention and accrual of seniority, credit for vacation, and resumption of former job on return from sick leave, equality of treatment was required by title VII without the Amendment.

3. Q. Must an employer provide benefits for pregnancy-related conditions to an employee whose pregnancy begins prior to April 29, 1979, and continues beyond that date?

A. As of April 29, 1979, the effective date of the Act's requirements, an employer must provide the same benefits for pregnancy-related conditions as it provides for other conditions, regardless of when the pregnancy began. Thus, disability benefits must be paid for all absences on or after April 29, 1979, resulting from pregnancy-related temporary disabilities to the same extent as they are paid for absences resulting from other temporary disabilities. For example, if an employee gives birth before April 29, 1979, but is still unable to work on or after that date, she is entitled to the same disability benefits available to other employees. Similarly, medical insurance benefits must be paid for pregnancy-related expenses incurred on or after April 29, 1979.

If an employer requires an employee to be employed for a predetermined period prior to being eligible for insurance coverage, the period prior to April 29, 1979, during which a pregnant employee has been employed must be credited toward the eligibility waiting period on the same basis as for any other employee.

As to any programs instituted for the first time after October 31, 1978, coverage for pregnancy-related conditions must be provided in the same manner as for other medical conditions.

4. Q. Would the answer to the preceding question be the same if the employee became pregnant prior to October 31, 1978?

A. Yes.

5. Q. If, for pregnancy-related reasons, an employee is unable to perform the functions of her job, does the employer have to provide her an alternative job?

A. An employer is required to treat an employee temporarily unable to perform the functions of her job because of her pregnancy-related condition in the same manner as it treats other temporarily disabled employees, whether by providing modified tasks, alternative assignments, disability leaves, leaves without pay, etc. For example, a woman's primary job function may be the operation of a machine, and, incidental to that function, she may carry materials to and from the machine. If other employees temporarily unable to lift are relieved of these functions, pregnant employees also unable to lift must be temporarily relieved of the function.

6. Q. What procedures may an employer use to determine whether to place on leave as unable to work a pregnant employee who claims she is able to work or deny leave to a pregnant employee who claims that she is disabled from work?

A. An employer may not single out pregnancy-related conditions for special procedures for determining an employee's ability to work. However, an employer may use any procedure used to determine the ability of all employees to work. For example, if an employer requires its employees to submit a doctor's statement concerning their inability to work before granting leave or paying sick benefits, the employer may require employees affected by pregnancy-related conditions to submit such statement. Similarly, if an employer allows its employees to obtain doctor's statements from their personal physicians for absences due to other disabilities or return dates from other disabilities, it must accept doctor's statements from personal physicians for absences and return dates connected with pregnancy-related disabilities.

7. Q. Can an employer have a rule which prohibits an employee from returning to work for a predetermined length of time after childbirth?

A. No.

8. Q. If an employee has been absent from work as a result of a pregnancy-related condition and recovers, may her employer require her to remain on leave until after her baby is born?

A. No. An employee must be permitted to work at all times during pregnancy when she is able to perform her job.

9. Q. Must an employer hold open the job of an employee who is absent on leave because she is temporarily disabled by pregnancy-related conditions?

A. Unless the employee on leave has informed the employer that she does not intend to return to work, her job must be held open for her return on the same basis as jobs are held open for employees on sick or disability leave for other reasons.

10. Q. May an employer's policy concerning the accrual and crediting of seniority during absences for medical conditions be different for employees affected by pregnancy-related conditions than for other employees?

A. No. An employer's seniority policy must be the same for employees absent for pregnancy-related reasons as for those absent for other medical reasons.

11. Q. For purposes of calculating such matters as vacations and pay increases, may an employer credit time spent on leave for pregnancy-related reasons differently than time spent on leave for other reasons?

A. No. An employer's policy with respect to crediting time for the purpose of calculating such matters as vacations and pay increases cannot treat employees on leave for pregnancy-related reasons less favorably than employees on leave for other reasons. For example, if employees on leave for medical reasons are credited with the time spent on leave when computing entitlement to vacation or pay raises, an employee on leave for pregnancy-related disability is entitled to the same kind of time credit.

12. Q. Must an employer hire a woman who is medically unable, because of a pregnancy-related condition, to perform a necessary function of a job?

A. An employer cannot refuse to hire a woman because of her pregnancy-related condition so long as she is able to perform the major functions necessary to the job. Nor can an employer refuse to hire her because of its preferences against pregnant workers or the preferences of co-workers, clients, or customers.

13. Q. May an employer limit disability benefits for pregnancy-related conditions to married employees?

A. No.

14. Q. If an employer has an all female workforce or job classification, must benefits be provided for pregnancy-related conditions?



A. Yes. If benefits are provided for other conditions, they must also be provided for pregnancy-related conditions.

15. Q. For what length of time must an employer who provides income maintenance benefits for temporary disabilities provide such benefits for pregnancy-related disabilities?

A. Benefits should be provided for as long as the employee is unable to work for medical reasons unless some other limitation is set for all other temporary disabilities, in which case pregnancy-related disabilities should be treated the same as other temporary disabilities.

16. Q. Must an employer who provides benefits for long-term or permanent disabilities provide such benefits for pregnancy-related conditions?

A. Yes. Benefits for long-term or permanent disabilities resulting from pregnancy-related conditions must be provided to the same extent that such benefits are provided for other conditions which result in long-term or permanent disability.

17. Q. If an employer provides benefits to employees on leave, such as installment purchase disability insurance, payment of premiums for health, life or other insurance, continued payments into pension, saving or profit sharing plans, must the same benefits be provided for those on leave for pregnancy-related conditions?

A. Yes, the employer must provide the same benefits for those on leave for pregnancy-related conditions as for those on leave for other reasons.

18. Q. Can an employee who is absent due to a pregnancy-related disability be required to exhaust vacation benefits before receiving sick leave pay or disability benefits?

A. No. If employees who are absent because of other disabling causes receive sick leave pay or disability benefits without any requirement that they first exhaust vacation benefits, the employer cannot impose this requirement on an employee absent for a pregnancy-related cause.

18 (A). Q. Must an employer grant leave to a female employee for childcare purposes after she is medically able to return to work following leave necessitated by pregnancy, childbirth or related medical conditions?

A. While leave for childcare purposes is not covered by the Pregnancy Discrimination Act, ordinary title VII principles would require that leave for childcare purposes be granted on the same basis as leave which is granted to employees for other non-medical reasons. For example, if an employer allows its employees to take leave without pay or accrued annual leave for travel or education which is not job related, the same type of leave must be granted to those who wish to remain on leave for infant care, even though they are medically able to return to work.

19. Q. If State law requires an employer to provide disability insurance for a specified period before and after childbirth, does compliance with the State law fulfill the employer's obligation under the Pregnancy Discrimination Act?

A. Not necessarily. It is an employer's obligation to treat employees temporarily disabled by pregnancy in the same manner as employees affected by other temporary disabilities. Therefore, any restrictions imposed by State law on benefits for pregnancy-related disabilities, but not for other disabilities, do not excuse the employer from treating the individuals in both groups of employees the same. If, for example, a State law requires an employer to pay a maximum of 26 weeks benefits for disabilities other than pregnancy-related ones but only six weeks for pregnancy-related disabilities, the employer must provide benefits for the additional weeks to an employee disabled by pregnancy-related conditions, up to the maximum provided other disabled employees.

20. Q. If a State or local government provides its own employees income maintenance benefits for disabilities, may it provide different benefits for disabilities arising from pregnancy-related conditions than for disabilities arising from other conditions?

A. No. State and local governments, as employers, are subject to the Pregnancy Discrimination Act in the same way as private employers and must bring their employment practices and programs into compliance with the Act, including disability and health insurance programs.

21. Q. Must an employer provide health insurance coverage for the medical expenses of pregnancy-related conditions of the spouses of male employees? Of the dependents of all employees?

A. Where an employer provides no coverage for dependents, the employer is not required to institute such coverage. However, if an employer's insurance program covers the medical expenses of spouses of female employees, then it must equally cover the medical expenses of spouses of male employees, including those arising from pregnancy-related conditions.

But the insurance does not have to cover the pregnancy-related conditions of other dependents as long as it excludes the pregnancy-related conditions of the dependents of male and female employees equally.

22. Q. Must an employer provide the same level of health insurance coverage for the pregnancy-related medical conditions of the spouses of male employees as it provides for its female employees?

A. No. It is not necessary to provide the same level of coverage for the pregnancy-related medical conditions of spouses of male employees as for female employees. However, where the employer provides coverage for the medical conditions of the spouses of its employees, then the level of coverage for pregnancy-related medical conditions of the spouses of male employees must be the same as the level of coverage for all other medical conditions of the spouses of female employees. For example, if the employer covers employees for 100 percent of reasonable and customary expenses sustained for a medical condition, but only covers dependent spouses for 50 percent of reasonable and customary expenses for their medical conditions, the pregnancy-related expenses of the male employee's spouse must be covered at the 50 percent level.

23. Q. May an employer offer optional dependent coverage which excludes pregnancy-related medical conditions or offers less coverage for pregnancy-related medical conditions where the total premium for the optional coverage is paid by the employee?

A. No. Pregnancy-related medical conditions must be treated the same as other medical conditions under any health or disability insurance or sick leave plan *available in connection with employment*, regardless of who pays the premiums.

24. Q. Where an employer provides its employees a choice among several health insurance plans, must coverage for pregnancy-related conditions be offered in all of the plans?

A. Yes. Each of the plans must cover pregnancy-related conditions. For example, an employee with a single coverage policy cannot be forced to purchase a more expensive family coverage policy in order to receive coverage for her own pregnancy-related condition.

25. Q. On what basis should an employee be reimbursed for medical expenses arising from pregnancy, childbirth or related conditions?

A. Pregnancy-related expenses should be reimbursed in the same manner as are expenses incurred for other medical conditions. Therefore, whether a plan reimburses the employees on a fixed basis, or a percentage of reasonable and customary charge basis, the same basis should be used for reimbursement of expenses incurred for pregnancy-related conditions. Furthermore, if medical costs for pregnancy-related conditions increase, reevaluation of the reimbursement level should be conducted in the same manner as are cost reevaluations of increases for other medical conditions.

Coverage provided by a health insurance program for other conditions must be provided for pregnancy-related conditions. For example, if a plan provides major medical coverage, pregnancy-related conditions must be so covered. Similarly, if a plan covers the cost of a private room for other conditions, the plan must cover the cost of a private room for pregnancy-related conditions. Finally, where a health insurance plan covers office visits to physicians, pre-natal and post-natal visits must be included in such coverage.

26. Q. May an employer limit payment of costs for pregnancy-related medical conditions to a specified dollar amount set forth in an insurance policy, collective bargaining agreement or other statement of benefits to which an employee is entitled?

A. The amounts payable for the costs incurred for pregnancy-related conditions can be limited only to the same extent as are costs for other conditions. Maximum recoverable dollar amounts may be specified for pregnancy-related conditions if such amounts are similarly specified for other conditions, and so long as the specified amounts in all instances cover the same proportion of actual costs. If, in addition to the scheduled amount for other procedures, additional costs are paid for, either directly or indirectly, by the employer, such additional payments must also be paid for pregnancy-related procedures.

27. Q. May an employer impose a different deductible for payment of costs for pregnancy-related medical conditions than for costs of other medical conditions?

A. No. Neither an additional deductible, an increase in the usual deductible, nor a larger deductible can be imposed for coverage for pregnancy-related medical costs, whether as a condition for inclusion of pregnancy-related costs in the policy or for payment of the costs when incurred. Thus, if pregnancy-related costs are the first incurred under the policy, the employee is required to pay only the same deductible as would otherwise be required had other medical costs been the first incurred. Once this deductible has been paid, no additional deductible can be required for other medical procedures. If the usual deductible has already been paid for other medical procedures, no additional deductible can be required when pregnancy-related costs are later incurred.

28. Q. If a health insurance plan excludes the payment of benefits for any conditions existing at the time the insured's coverage becomes effective (pre-existing condition clause), can benefits be denied for medical costs arising from a pregnancy existing at the time the coverage became effective?

A. Yes. However, such benefits cannot be denied unless the pre-existing condition clause also excludes benefits for other pre-existing conditions in the same way.

29. Q. If an employer's insurance plan provides benefits after the insured's employment has ended (i.e. extended benefits) for costs connected with pregnancy and delivery where conception occurred while the insured was working for the employer, but not for the costs of any other medical condition which began prior to termination of employment, may an employer (a) continue to pay these extended benefits for pregnancy-related medical conditions but not for other medical conditions, or (b) terminate these benefits for pregnancy-related conditions?

A. Where a health insurance plan currently provides extended benefits for other medical conditions on a less favorable basis than for pregnancy-related medical conditions, extended benefits must be provided for other medical conditions on the same basis as for pregnancy-related medical conditions. Therefore, an employer can neither continue to provide less benefits for other medical conditions nor reduce benefits currently paid for pregnancy-related medical conditions.

30. Q. Where an employer's health insurance plan currently requires total disability as a prerequisite for payment of extended benefits for other medical conditions but not for pregnancy-related costs, may the employer now require total disability for payment of benefits for pregnancy-related medical conditions as well?

A. Since extended benefits cannot be reduced in order to come into compliance with the Act, a more stringent prerequisite for payment of extended benefits for pregnancy-related medical conditions, such as a requirement for total disability, cannot be imposed. Thus, in this instance, in order to comply with the Act, the employer must treat other medical conditions as pregnancy-related conditions are treated.

31. Q. Can the added cost of bringing benefit plans into compliance with the Act be apportioned between the employer and employee?

A. The added cost, if any, can be apportioned between the employer and employee in the same proportion that the cost of the fringe benefit plan was apportioned on October 31, 1978, if that

apportionment was nondiscriminatory. If the costs were not apportioned on October 31, 1978, they may not be apportioned in order to come into compliance with the Act. However, in no circumstance may male or female employees be required to pay unequal apportionments on the basis of sex or pregnancy.

32. Q. In order to come into compliance with the Act, may an employer reduce benefits or compensation?

A. In order to come into compliance with the Act, benefits or compensation which an employer was paying on October 31, 1978 cannot be reduced before October 31, 1979 or before the expiration of a collective bargaining agreement in effect on October 31, 1978, whichever is later.

Where an employer has not been in compliance with the Act by the times specified in the Act, and attempts to reduce benefits, or compensation, the employer may be required to remedy its practices in accord with ordinary title VII remedial principles.

33. Q. Can an employer self-insure benefits for pregnancy-related conditions if it does not self-insure benefits for other medical conditions?

A. Yes, so long as the benefits are the same. In measuring whether benefits are the same, factors other than the dollar coverage paid should be considered. Such factors include the range of choice of physicians and hospitals, and the processing and promptness of payment of claims.

34. Q. Can an employer discharge, refuse to hire or otherwise discriminate against a woman because she has had an abortion?

A. No. An employer cannot discriminate in its employment practices against a woman who has had an abortion.

35. Q. Is an employer required to provide fringe benefits for abortions if fringe benefits are provided for other medical conditions?

A. All fringe benefits other than health insurance, such as sick leave, which are provided for other medical conditions, must be provided for abortions. Health insurance, however, need be provided for abortions only where the life of the woman would be endangered if the fetus were carried to term or where medical complications arise from an abortion.

36. Q. If complications arise during the course of an abortion, as for instance excessive hemorrhaging, must an employer's health insurance plan cover the additional cost due to the complications of the abortion?

A. Yes. The plan is required to pay those additional costs attributable to the complications of the abortion. However, the employer is not required to pay for the abortion itself, except where the life of the mother would be endangered if the fetus were carried to term.

37. Q. May an employer elect to provide insurance coverage for abortions?

A. Yes. The Act specifically provides that an employer is not precluded from providing benefits for abortions whether directly or through a collective bargaining agreement, but if an employer decides to cover the costs of abortion, the employer must do so in the same manner and to the same degree as it covers other medical conditions.

[44 FR 23805, Apr. 20, 1979]

Please proceed  
to the next page

**New York State  
Executive Law  
Article 15  
HUMAN RIGHTS LAW**

§ 290. Purposes of article

§ 291. Equality of opportunity a civil right

§ 292. Definitions

1. person
2. employment agency
3. labor organization
4. unlawful discriminatory practice
5. employer
6. employee
7. commissioner
8. national origin
9. place of public accommodation, resort or amusement
10. housing accommodation
11. publicly-assisted housing accommodations
12. multiple dwelling
13. commercial space
14. real estate broker
15. real estate salesperson
16. necessary party
17. parties to the proceeding
18. hearing examiner
19. discrimination
20. credit
21. disability
- 21-a. predisposing genetic characteristic
- 21-b. genetic test
- 21-e. reasonable accommodation
- 21-f. pregnancy-related condition
22. creditor
23. credit reporting bureau
24. regulated creditor
25. superintendent
26. familial status
27. sexual orientation
28. military status
29. reserve armed forces
30. organized militia of the state

31. repealed
32. repealed
33. repealed
34. domestic violence victim

§ 293. Division of human rights

§ 294. General policies of division

§ 295. General powers and duties of division

§ 296. Unlawful discriminatory practices

1. [employment, licensing]
- 1-a. [apprentice training program]
2. [public accommodations]
- 2-a. [publicly-assisted housing]
3. [reasonable accommodation of disability in employment]
- 3-a. [age discrimination]
- 3-b. [real estate professionals]
4. [education corporations]
5. [private housing]
6. [aid, abet, incite, compel]
7. [retaliation]
8. [violation conciliation agreement]
9. [volunteer fire companies]
10. [accommodation of religious practices]
11. [religious institution exemption]
12. [affirmative action plans]
13. [boycott or blacklist]
14. [service dogs]
15. [conviction record]
16. [arrest record]
17. [senior discount in housing]
18. [reasonable accommodation of disability in housing]
19. [predisposing genetic characteristic]
20. [repealed]
21. [disability discount in housing]

§ 296-a. Unlawful discriminatory practices in relation to credit

§ 296-b. Unlawful discriminatory practices relating to domestic workers

§ 296-c. Unlawful discriminatory practices relating to interns

§ 297. Procedure

1. [filing the complaint]

N.Y. Executive Law, Article 15  
Human Rights Law

2. [service and investigation]
3. [conciliation]
4. [hearing and order]
5. [statute of limitations]
6. [injunctive relief]
7. [compliance]
8. [confidentiality of records]
9. [court action; annulment; untimeliness; court election in housing]
10. [attorney's fees]

§ 298. Judicial review and enforcement

§ 298-a. Application of article to certain acts committed outside the state of New York

§ 299. Penal provision

§ 300. Construction

§ 301. Separability



**§ 290. Purposes of article.**

1. This article shall be known as the "Human Rights Law".
2. It shall be deemed an exercise of the police power of the state for the protection of the public welfare, health and peace of the people of this state, and in fulfillment of the provisions of the constitution of this state concerning civil rights.
3. The legislature hereby finds and declares that the state has the responsibility to act to assure that every individual within this state is afforded an equal opportunity to enjoy a full and productive life and that the failure to provide such equal opportunity, whether because of discrimination, prejudice, intolerance or inadequate education, training, housing or health care not only threatens the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state and threatens the peace, order, health, safety and general welfare of the state and its inhabitants. A division in the executive department is hereby created to encourage programs designed to insure that every individual shall have an equal opportunity to participate fully in the economic, cultural and intellectual life of the state; to encourage and promote the development and execution by all persons within the state of such state programs; to eliminate and prevent discrimination in employment, in places of public accommodation, resort or amusement, in educational institutions, in public services, in housing accommodations, in commercial space and in credit transactions and to take other actions against discrimination as herein provided; and the division established hereunder is hereby given general jurisdiction and power for such purposes.

**§ 291. Equality of opportunity a civil right.**

1. The opportunity to obtain employment without discrimination because of age, race, creed, color, national origin, sexual orientation, military status, sex, marital status, or disability, is hereby recognized as and declared to be a civil right.
2. The opportunity to obtain education, the use of places of public accommodation and the ownership, use and occupancy of housing accommodations and commercial space without discrimination because of age, race, creed, color, national origin, sexual orientation, military status, sex, marital status, or disability, as specified in section two hundred ninety six of this article, is hereby recognized as and declared to be a civil right.
3. The opportunity to obtain medical treatment of an infant prematurely born alive in the course of an abortion shall be the same as the rights of an infant born spontaneously.

**§ 292. Definitions.**

When used in this article:

**1.** The term "person" includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

**2.** The term "employment agency" includes any person undertaking to procure employees or opportunities to work.

**3.** 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 or conditions of employment, or of other mutual aid or protection in connection with employment.

**4.** The term "unlawful discriminatory practice" includes only those practices specified in sections two hundred ninety-six and two hundred ninety-six-a of this article.

**5. [Effective January 19, 2016:]** The term "employer" does not include any employer with fewer than four persons in his or her employ except as set forth in section two hundred ninety-six-b of this article, provided, however, that in the case of an action for discrimination based on sex pursuant to subdivision one of section two hundred ninety-six of this article, with respect to sexual harassment only, the term "employer" shall include all employers within the state.

**5. [Effective until January 19, 2016:]** The term "employer" does not include any employer with fewer than four persons in his or her employ except as set forth in section two hundred ninety-six-b of this title.

**6.** The term "employee" in this article does not include any individual employed by his or her parents, spouse or child, or in the domestic service of any person except as set forth in section two hundred ninety-six-b of this title.

**7.** The term "commissioner", unless a different meaning clearly appears from the context, means the state commissioner of human rights; and the term "division" means the state division of human rights created by this article.

**8.** The term "national origin" shall, for the purposes of this article, include "ancestry."

**9. [Effective November 22, 2015:]** The term "place of public accommodation, resort or amusement" shall include, regardless of whether the owner or operator of such place is a state or local government entity or a private individual or entity, except as hereinafter specified, all places included in the meaning of such terms as: inns, taverns, road houses, hotels, motels, whether conducted for the entertainment of transient guests or for the accommodation of those seeking health, recreation or rest, or restaurants, or eating houses, or any place where food is sold for consumption on the premises; buffets, saloons, barrooms, or any store, park or enclosure

where spirituous or malt liquors are sold; ice cream parlors, confectionaries, soda fountains, and all stores where ice cream, ice and fruit preparations or their derivatives, or where beverages of any kind are retailed for consumption on the premises; wholesale and retail stores and establishments dealing with goods or services of any kind, dispensaries, clinics, hospitals, bath-houses, swimming pools, laundries and all other cleaning establishments, barber shops, beauty parlors, theatres, motion picture houses, airdromes, roof gardens, music halls, race courses, skating rinks, amusement and recreation parks, trailer camps, resort camps, fairs, bowling alleys, golf courses, gymnasiums, shooting galleries, billiard and pool parlors; garages, all public conveyances operated on land or water or in the air, as well as the stations and terminals thereof; travel or tour advisory services, agencies or bureaus; public halls, public rooms, public elevators, and any public areas of any building or structure. Such term shall not include kindergartens, primary and secondary schools, high schools, academies, colleges and universities, extension courses, and all educational institutions under the supervision of the regents of the state of New York; any such kindergarten, primary and secondary school, academy, college, university, professional school, extension course or other education facility, supported in whole or in part by public funds or by contributions solicited from the general public; or any institution, club or place of accommodation which proves that it is in its nature distinctly private. In no event shall an institution, club or place of accommodation be considered in its nature distinctly private if it has more than one hundred members, provides regular meal service and regularly receives payment for dues, fees, use of space, facilities, services, meals or beverages directly or indirectly from or on behalf of a nonmember for the furtherance of trade or business. An institution, club, or place of accommodation which is not deemed distinctly private pursuant to this subdivision may nevertheless apply such selective criteria as it chooses in the use of its facilities, in evaluating applicants for membership and in the conduct of its activities, so long as such selective criteria do not constitute discriminatory practices under this article or any other provision of law. For the purposes of this section, 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 corporations law shall be deemed to be in its nature distinctly private.

No institution, club, organization or place of accommodation which sponsors or conducts any amateur athletic contest or sparring exhibition and advertises or bills such contest or exhibition as a New York state championship contest or uses the words "New York state" in its announcements shall be deemed a private exhibition within the meaning of this section.

**9. [Effective until November 22, 2015:]** The term "place of public accommodation, resort or amusement" shall include, except as hereinafter specified, all places included in the meaning of such terms as: inns, taverns, road houses, hotels, motels, whether conducted for the entertainment of transient guests or for the accommodation of those seeking health, recreation or rest, or restaurants, or eating houses, or any place where food is sold for consumption on the premises; buffets, saloons, barrooms, or any store, park or enclosure where spirituous or malt liquors are sold; ice cream parlors, confectionaries, soda fountains, and all stores where ice cream, ice and fruit preparations or their derivatives, or where beverages of any kind are retailed for consumption on the premises; wholesale and retail stores and establishments dealing with goods or services of any kind, dispensaries, clinics, hospitals, bath-houses, swimming pools, laundries and all other cleaning establishments, barber shops, beauty parlors, theatres, motion picture

houses, airdromes, roof gardens, music halls, race courses, skating rinks, amusement and recreation parks, trailer camps, resort camps, fairs, bowling alleys, golf courses, gymnasiums, shooting galleries, billiard and pool parlors; garages, all public conveyances operated on land or water or in the air, as well as the stations and terminals thereof; travel or tour advisory services, agencies or bureaus; public halls and public elevators of buildings and structures occupied by two or more tenants, or by the owner and one or more tenants. Such term shall not include public libraries, kindergartens, primary and secondary schools, high schools, academies, colleges and universities, extension courses, and all educational institutions under the supervision of the regents of the state of New York; any such public library, kindergarten, primary and secondary school, academy, college, university, professional school, extension course or other education facility, supported in whole or in part by public funds or by contributions solicited from the general public; or any institution, club or place of accommodation which proves that it is in its nature distinctly private. In no event shall an institution, club or place of accommodation be considered in its nature distinctly private if it has more than one hundred members, provides regular meal service and regularly receives payment for dues, fees, use of space, facilities, services, meals or beverages directly or indirectly from or on behalf of a nonmember for the furtherance of trade or business. An institution, club, or place of accommodation which is not deemed distinctly private pursuant to this subdivision may nevertheless apply such selective criteria as it chooses in the use of its facilities, in evaluating applicants for membership and in the conduct of its activities, so long as such selective criteria do not constitute discriminatory practices under this article or any other provision of law. For the purposes of this section, 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 corporations law shall be deemed to be in its nature distinctly private. No institution, club, organization or place of accommodation which sponsors or conducts any amateur athletic contest or sparring exhibition and advertises or bills such contest or exhibition as a New York state championship contest or uses the words "New York state" in its announcements shall be deemed a private exhibition within the meaning of this section.

**10.** The term "housing accommodation" includes 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.

**11.** The term "publicly-assisted housing accommodations" shall include all housing accommodations within the state of New York in

- (a) public housing,
- (b) housing operated by housing companies under the supervision of the commissioner of housing,
- (c) housing constructed after July first, nineteen hundred fifty, within the state of New York

(1) which is exempt in whole or in part from taxes levied by the state or any of its political subdivisions,

(2) which is constructed on land sold below cost by the state or any of its political subdivisions or any agency thereof, pursuant to the federal housing act of nineteen hundred forty-nine,

(3) which is constructed in whole or in part on property acquired or assembled by the state or any of its political subdivisions or any agency thereof through the power of condemnation or otherwise for the purpose of such construction, or

(4) for the acquisition, construction, repair or maintenance of which the state or any of its political subdivisions or any agency thereof supplies funds or other financial assistance,

(d) housing which is located in a multiple dwelling, the acquisition, construction, rehabilitation, repair or maintenance of which is, after July first, nineteen hundred fifty-five, financed in whole or in part by a loan, whether or not secured by a mortgage, the repayment of which is guaranteed or insured by the federal government or any agency thereof, or the state or any of its political subdivisions or any agency thereof, provided that such a housing accommodation shall be deemed to be publicly assisted only during the life of such loan and such guaranty or insurance; and

(e) housing which is offered for sale by a person who owns or otherwise controls the sale of ten or more housing accommodations located on land that is contiguous (exclusive of public streets), if (1) the acquisition, construction, rehabilitation, repair or maintenance of such housing accommodations is, after July first, nineteen hundred fifty-five, financed in whole or in part by a loan, whether or not secured by a mortgage, the repayment of which is guaranteed or insured by the federal government or any agency thereof, or the state or any of its political subdivisions or any agency thereof, provided that such a housing accommodation shall be deemed to be publicly assisted only during the life of such loan and guaranty or insurance, or (2) a commitment, issued by a government agency after July first, nineteen hundred fifty-five, is outstanding that acquisition of such housing accommodations may be financed in whole or in part by a loan, whether or not secured by a mortgage, the repayment of which is guaranteed or insured by the federal government or any agency thereof, or the state or any of its political subdivisions or any agency thereof.

**12.** The term "multiple dwelling", as herein used, means a dwelling which is occupied, as a rule, for permanent residence purposes and which is either sold, rented, leased, let or hired out, to be occupied as the residence or home of three or more families living independently of each other. A "multiple dwelling" shall not be deemed to include a hospital, convent, monastery, asylum or public institution, or a fireproof building used wholly for commercial purposes except for not more than one janitor's apartment and not more than one penthouse occupied by not more than two families. The term "family," as used herein, means either a person occupying a dwelling and maintaining a household, with not more than four boarders, roomers or lodgers, or two or more persons occupying a dwelling, living together and maintaining a common household, with not more than four boarders, roomers or lodgers. A "boarder," "roomer" or "lodger" residing with a family means a person living within the household who pays a consideration for such residence and does not occupy such space within the household as an incident of employment therein. Within the context of this definition, the terms "multiple dwelling" and "multi-family dwelling" are interchangeable.

**13.** The term "commercial space" means any space in a building, structure, or portion thereof which is used or occupied or is intended, arranged or designed to be used or occupied for the manufacture, sale, resale, processing, reprocessing, displaying, storing, handling, garaging or distribution of personal property; and any space which is used or occupied, or is intended, arranged or designed to be used or occupied as a separate business or professional unit or office in any building, structure or portion thereof.

**14.** The term "real estate broker" means any person, firm or corporation who, for another and for a fee, commission or other valuable consideration, lists for sale, sells, at auction or otherwise, exchanges, buys or rents, or offers or attempts to negotiate a sale, at auction or otherwise, exchange, purchase or rental of an estate or interest in real estate, or collects or offers or attempts to collect rent for the use of real estate, or negotiates, or offers or attempts to negotiate, a loan secured or to be secured by a mortgage or other incumbrance upon or transfer of real estate. In the sale of lots pursuant to the provisions of article nine-a of the real property law, the term "real estate broker" shall also include any person, partnership, association or corporation employed by or on behalf of the owner or owners of lots or other parcels of real estate, at a stated salary, or upon a commission, or upon a salary and commission, or otherwise, to sell such real estate, or any parts thereof, in lots or other parcels, and who shall sell or exchange, or offer or attempt or agree to negotiate the sale or exchange, of any such lot or parcel of real estate.

**15.** The term "real estate salesperson" means a person employed by a licensed real estate broker to list for sale, sell or offer for sale, at auction or otherwise, to buy or offer to buy or to negotiate the purchase or sale or exchange of real estate, or to negotiate a loan on real estate, or to lease or rent or offer to lease, rent or place for rent any real estate, or who collects or offers or attempts to collect rent for the use of real estate for or in behalf of such real estate broker.

**16.** The term "necessary party" means any person who has such an interest in the subject matter of a proceeding under this article, or whose rights are so involved, that no complete and effective disposition can be made without his or her participation in the proceeding.

**17.** The term "parties to the proceeding" means the complainant, respondent, necessary parties and persons permitted to intervene as parties in a proceeding with respect to a complaint filed under this article.

**18.** The term "hearing examiner" means an employee of the division who shall be assigned for stated periods to no other work than the conduct of hearings under this article;

**19.** The term "discrimination" shall include segregation and separation.

**20.** The term "credit", when used in this article means the right conferred upon a person by a creditor to incur debt and defer its payment, whether or not any interest or finance charge is made for the exercise of this right.

**21.** The term "disability" means (a) 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 (b) a record of such an impairment or (c) a condition regarded by others as such an impairment, provided, however, that in all provisions of this article dealing with employment, the term shall be limited to disabilities which, upon the provision of reasonable accommodations, do not prevent the complainant from performing in a reasonable manner the activities involved in the job or occupation sought or held.

**21-a.** "Predisposing genetic characteristic" shall mean any inherited gene or chromosome, or alteration thereof, and 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.

**21-b.** "Genetic test" shall mean a test for determining the presence or absence of an inherited genetic characteristic in an individual, including tests of nucleic acids such as DNA, RNA and mitochondrial DNA, chromosomes or proteins in order to identify a predisposing genetic characteristic.

[21-c. Blank]

[21-d. Blank]

**21-e.** The term "reasonable accommodation" means actions taken which permit an employee, prospective employee or member with a disability, [Effective January 19, 2016: or pregnancy-related condition,] to perform in a reasonable manner the activities involved in the job or occupation sought or held and include, but are not limited to, provision of an accessible worksite, acquisition or modification of equipment, support services for persons with impaired hearing or vision, job restructuring and modified work schedules; provided, however, that such actions do not impose an undue hardship on the business, program or enterprise of the entity from which action is requested.

**21-f. [Effective January 19, 2016:]** The term "pregnancy-related condition" means a medical condition related to pregnancy or childbirth that inhibits the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques; provided, however, that in all provisions of this article dealing with employment, the term shall be limited to conditions which, upon the provision of reasonable accommodations, do not prevent the complainant from performing in a reasonable manner the activities involved in the job or occupation sought or held; and provided further, however, that pregnancy-related conditions shall be treated as temporary disabilities for the purposes of this article.

**22.** The term "creditor", when used in this article, means any person or financial institution which does business in this state and which extends credit or arranges for the extension of credit by others. The term creditor includes, but is not limited to, banks and trust companies, private bankers, foreign banking corporations and national banks, savings banks, licensed lenders, savings and loan associations, credit unions, sales finance companies, insurance premium finance

agencies, insurers, credit card issuers, mortgage brokers, mortgage companies, mortgage insurance corporations, wholesale and retail merchants and factors.

**23.** The term "credit reporting bureau", when used in this article, means any person doing business in this state who regularly makes credit reports, as such term is defined by subdivision e of section three hundred seventy-one of the general business law.

**24.** The term "regulated creditor", when used in this article, means any creditor, as herein defined, which has received its charter, license, or organization certificate, as the case may be, from the banking department or which is otherwise subject to the supervision of the banking department.

**25.** The term "superintendent", when used in this article, means the head of the banking department appointed pursuant to section twelve of the banking law.

**26.** The term "familial status", when used in this article, means:

(a) any person who is pregnant or has a child or is in the process of securing legal custody of any individual who has not attained the age of eighteen years, or

(b) one or more individuals (who have not attained the age of eighteen years) being domiciled with:

- (1) a parent or another person having legal custody of such individual or individuals, or
- (2) the designee of such parent.

**27.** The term "sexual orientation" means heterosexuality, homosexuality, bisexuality or asexuality, whether actual or perceived. However, nothing contained herein shall be construed to protect conduct otherwise proscribed by law.

**28.** The term "military status" when used in this article means 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, the New York guard, and such additional forces as may be created by the federal or state government as authorized by law.

**29.** The term "reserve armed forces", when used in this article, means service other than permanent, full-time service in the military forces of the United States including but not limited to service in the United States Army Reserve, the United States Naval Reserve, the United States Marine Corps Reserve, the United States Air Force Reserve, or the United States Coast Guard Reserve.

**30.** The term "organized militia of the state", when used in this article, means service other than permanent, full-time service in the military forces of the state of New York including but not limited to the New York army national guard, the New York air national guard, the New York naval militia and the New York guard.



31. [repealed]
32. [repealed]
33. [repealed]

34. The term "domestic violence victim", when used in this article, means an individual who is a victim of an act which would constitute a family offense pursuant to subdivision one of section eight hundred twelve of the family court act.

### **§ 293. Division of human rights.**

1. There is hereby created in the executive department a division of human rights hereinafter in this article called the division. The head of such division shall be a commissioner hereinafter in this article called the commissioner, who shall be appointed by the governor, by and with the advice and consent of the senate and shall hold office at the pleasure of the governor. The commissioner shall be entitled to his or her expenses actually and necessarily incurred by him or her in the performance of his or her duties.

2. The commissioner may establish, consolidate, reorganize or abolish such bureaus and other organizational units within the division as he or she determines to be necessary for efficient operation.

### **§ 294. General policies of division.**

The division shall formulate policies to effectuate the purposes of this article and may make recommendations to agencies and officers of the state or local subdivisions of government in aid of such policies and purposes.

### **§ 295. General powers and duties of division.**

The division, by and through the commissioner or his or her duly authorized officer or employee, shall have the following functions, powers and duties:

1. To establish and maintain its principal office, and such other offices within the state as it may deem necessary.

2. To function at any place within the state.

3. To appoint such officers, attorneys, clerks and other employees and agents, consultants and special committees as it may deem necessary, fix their compensation within the limitations provided by law, and prescribe their duties.

**4.** To obtain upon request and utilize the services of all governmental departments and agencies.

**5.** To adopt, promulgate, amend and rescind suitable rules and regulations to carry out the provisions of this article, and the policies and practices of the division in connection therewith.

**6. (a)** To receive, investigate and pass upon complaints alleging violations of this article.

**(b)** Upon its own motion, to test and investigate and to make, sign and file complaints alleging violations of this article and to initiate investigations and studies to carry out the purposes of this article.

**7.** To hold hearings, to provide where appropriate for cross interrogatories, subpoena witnesses, impel their attendance, administer oaths, take the testimony of any person under oath, and in connection therewith, to require the production for examination of any books or papers relating to any matter under investigation or in question before the division. The division may make rules as to the issuance of subpoenas which may be issued by the division at any stage of any investigation or proceeding before it. In any such investigation or hearing, the commissioner, or an officer duly designated by the commissioner to conduct such investigation or hearing, may confer immunity in accordance with the provisions of section 50.20 of the criminal procedure law.

**8.** To create such advisory councils, local, regional or state wide, as in its judgment will aid in effectuating the purposes of this article and of section eleven of article one of the constitution of this state, and the division may empower them to study the problems of discrimination in all or specific fields of human relationships or in specific instances of discrimination because of age, race, creed, color, national origin, sexual orientation, military status, sex, disability or marital status and make recommendations to the division for the development of policies and procedures in general and in specific instances. The advisory councils also shall disseminate information about the division's activities to organizations and individuals in their localities. Such advisory councils shall be composed of representative citizens, serving without pay, but with reimbursement for actual and necessary traveling expenses; and the division may make provision for technical and clerical assistance to such councils and for the expenses of such assistance.

**9.** To develop human rights plans and policies for the state and assist in their execution and to make investigations and studies appropriate to effectuate this article and to issue such publications and such results of investigations and research as in its judgment will tend to inform persons of the rights assured and remedies provided under this article, to promote good will and minimize or eliminate discrimination because of age, race, creed, color, national origin, sexual orientation, military status, sex, disability or marital status.

**10.** To render each year to the governor and to the legislature a full written report of all its activities and of its recommendations.

**11.** To inquire into incidents of and conditions which may lead to tension and conflict among racial, religious and nationality groups and to take such action within the authority granted by law to the division, as may be designed to alleviate such conditions, tension and conflict.

**12.** To furnish any person with such technical assistance as the division deems appropriate to further compliance with the purposes or provisions of this article.

**13.** To promote the creation of human rights agencies by counties, cities, villages or towns in circumstances the division deems appropriate.

**14.** To accept, with the approval of the governor, as agent of the state, any grant, including federal grants, or any gift for any of the purposes of this article. Any moneys so received may be expended by the division to effectuate any purpose of this article, subject to the same limitations as to approval of expenditures and audit as are prescribed for state moneys appropriated for the purposes of this article.

**15.** To adopt an official seal.

**16.** To have concurrent jurisdiction with the New York city commission on human rights over the administration and enforcement of title C of chapter one of the administrative code of the city of New York.

## **§ 296. Unlawful discriminatory practices.**

**1.** It shall be an unlawful discriminatory practice:

(a) For an employer or licensing agency, because of an individual's age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, **[Effective January 19, 2016: familial status,]** marital status, or domestic violence victim status, 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.

(b) For an employment agency to discriminate against any individual because of age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, **[Effective January 19, 2016: familial status,]** or marital status, in receiving, classifying, disposing or otherwise acting upon applications for its services or in referring an applicant or applicants to an employer or employers.

(c) For a labor organization, because of the age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, **[Effective January 19, 2016: familial status,]** or marital status of any individual, to exclude or to expel from its membership such individual or to discriminate in any way against any of its members or against any employer or any individual employed by an employer.

(d) For any employer or employment agency to print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for employment or to make any inquiry in connection with prospective employment, which expresses directly or indirectly, any limitation, specification or discrimination as to age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, **[Effective January 19, 2016: familial status,]** or marital status, or any intent to make any such limitation, specification or discrimination, unless based upon a bona fide occupational qualification; provided, however, that neither this paragraph nor any provision of this chapter or other law shall be construed to prohibit the department of civil service or the department of personnel of any city containing more than one county from requesting information from applicants for civil service examinations concerning any of the aforementioned characteristics, other than sexual orientation, for the purpose of conducting studies to identify and resolve possible problems in recruitment and testing of members of minority groups to insure the fairest possible and equal opportunities for employment in the civil service for all persons, regardless of age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, **[Effective January 19, 2016: familial status,]** or marital status.

(e) For any employer, labor organization or employment agency to discharge, expel or otherwise discriminate against any person because he or she has opposed any practices forbidden under this article or because he or she has filed a complaint, testified or assisted in any proceeding under this article.

(f) Nothing in this subdivision shall affect any restrictions upon the activities of persons licensed by the state liquor authority with respect to persons under twenty-one years of age.

(g) For an employer to compel an employee who is pregnant to take a leave of absence, unless the employee is prevented by such pregnancy from performing the activities involved in the job or occupation in a reasonable manner.

**1-a.** It shall be an unlawful discriminatory practice for an employer, labor organization, employment agency or any joint labor-management committee controlling apprentice training programs:

(a) To select persons for an apprentice training program registered with the state of New York on any basis other than their qualifications, as determined by objective criteria which permit review;

(b) To deny to or withhold from any person because of race, creed, color, national origin, sexual orientation, military status, sex, age, disability, **[Effective January 19, 2016: familial status,]** or marital status, the right to be admitted to or participate in a guidance program, an apprenticeship training program, on-the-job training program, executive training program, or other occupational training or retraining program;

(c) To discriminate against any person in his or her pursuit of such programs or to discriminate against such a person in the terms, conditions or privileges of such programs because of race, creed, color, national origin, sexual orientation, military status, sex, age, disability, **[Effective January 19, 2016: familial status,]** or marital status;

(d) To print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for such programs or to make any inquiry in connection with such program which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color, national origin, sexual orientation, military status, sex, age, disability **[Effective January 19, 2016: familial status,]** or marital status, or any intention to make any such limitation, specification or discrimination, unless based on a bona fide occupational qualification.

2. (a) It shall be an unlawful discriminatory practice for any person, being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation, resort or amusement, because of the race, creed, color, national origin, sexual orientation, military status, sex, or disability or marital status of any person, directly or indirectly, to refuse, withhold from or deny to such person any of the accommodations, advantages, facilities or privileges thereof, including the extension of credit, or, directly or indirectly, to publish, circulate, issue, display, post or mail any written or printed communication, notice or advertisement, to the effect that any of the accommodations, advantages, facilities and privileges of any such place shall be refused, withheld from or denied to any person on account of race, creed, color, national origin, sexual orientation, military status, sex, or disability or marital status, or that the patronage or custom thereof of any person of or purporting to be of any particular race, creed, color, national origin, sexual orientation, military status, sex or marital status, or having a disability is unwelcome, objectionable or not acceptable, desired or solicited.

(b) Nothing in this subdivision shall be construed to prevent the barring of any person, because of the sex of such person, from places of public accommodation, resort or amusement if the division grants an exemption based on bona fide considerations of public policy; nor shall this subdivision apply to the rental of rooms in a housing accommodation which restricts such rental to individuals of one sex.

(c) For the purposes of paragraph (a) of this subdivision, "discriminatory practice" includes:

(i) a refusal to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford facilities, privileges, advantages or accommodations to individuals with disabilities, unless such person can demonstrate that making such modifications would fundamentally alter the nature of such facilities, privileges, advantages or accommodations;

(ii) a refusal to take such steps as may be necessary to ensure that no individual with a disability is excluded or denied services because of the absence of auxiliary aids and services, unless such person can demonstrate that taking such steps would fundamentally alter the nature of the facility, privilege, advantage or accommodation being offered or would result in an undue burden;

(iii) a refusal to remove architectural barriers, and communication barriers that are structural in nature, in existing facilities, and transportation barriers in existing vehicles and rail passenger cars used by an establishment for transporting individuals (not including barriers that can only be removed through the retrofitting of vehicles or rail passenger cars by the installation of a hydraulic or other lift), where such removal is readily achievable;

(iv) **[Effective November 22, 2015:]** where such person is a local or state government entity, a refusal to remove architectural barriers, and communication barriers that are structural in nature, in existing facilities, and transportation barriers in existing vehicles and rail passenger cars used by an establishment for transporting individuals (not including barriers that can only be removed through the retrofitting of vehicles or rail passenger cars by the installation of a hydraulic or other lift), where such removal does not constitute an undue burden; except as set forth in paragraph (e) of this subdivision; nothing in this section would require a public entity to: necessarily make each of its existing facilities accessible to and usable by individuals with disabilities; take any action that would threaten or destroy the historical significance of an historic property; or to make structural changes in existing facilities where other methods are effective in achieving compliance with this section; and

(v) **[Effective November 22, 2015:]** where such person can demonstrate that the removal of a barrier under subparagraph (iii) of this paragraph is not readily achievable, a failure to make such facilities, privileges, advantages or accommodations available through alternative methods if such methods are readily achievable.

**[Effective until November 22, 2015:]** (iii) a refusal to remove architectural barriers, and communication barriers that are structural in nature, in existing facilities, and transportation barriers in existing vehicles and rail passenger cars used by an establishment for transporting individuals (not including barriers that can only be removed through the retrofitting of vehicles or rail passenger cars by the installation of a hydraulic or other lift), where such removal is readily achievable; and

(iv) where such person can demonstrate that the removal of a barrier under subparagraph (iii) of this paragraph is not readily achievable, a failure to make such facilities, privileges, advantages or accommodations available through alternative methods if such methods are readily achievable.

(d) For the purposes of this subdivision:

(i) "Readily achievable" means easily accomplishable and able to be carried out without much difficulty or expense. In determining whether an action is readily achievable, factors to be considered include:

- (A) the nature and cost of the action needed under this subdivision;
- (B) the overall financial resources of the facility or facilities involved in the action; the number of persons employed at such facility; the effect on expenses and resources or the impact otherwise of such action upon the operation of the facility;
- (C) the overall financial resources of the place of public accommodation, resort or amusement; the overall size of the business of such a place with respect to the number of its employees; the number, type and location of its facilities; and
- (D) the type of operation or operations of the place of public accommodation, resort or amusement, including the composition, structure and functions of the workforce of such

place; the geographic separateness, administrative or fiscal relationship of the facility or facilities in question to such place.

- (ii) "Auxiliary aids and services" include:
  - (A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;
  - (B) qualified readers, taped texts or other effective methods of making visually delivered materials available to individuals with visual impairments;
  - (C) acquisition or modification of equipment or devices; and
  - (D) other similar services and actions.
- (iii) "Undue burden" means significant difficulty or expense. In determining whether an action would result in an undue burden, factors to be considered shall include:
  - (A) The nature and cost of the action needed under this article;
  - (B) The overall financial resources of the site or sites involved in the action; the number of persons employed at the site; the effect on expenses and resources; legitimate safety requirements that are necessary for safe operation, including crime prevention measures; or the impact otherwise of the action upon the operation of the site;
  - (C) The geographic separateness, and the administrative or fiscal relationship of the site or sites in question to any parent corporation or entity;
  - (D) If applicable, the overall financial resources of any parent corporation or entity; the overall size of the parent corporation or entity with respect to the number of its employees; the number, type, and location of its facilities; and
  - (E) If applicable, the type of operation or operations of any parent corporation or entity, including the composition, structure, and functions of the workforce of the parent corporation or entity.
- (iv) "Reasonable modifications in policies, practices, procedures" includes modification to permit the use of a service animal by a person with a disability, consistent with federal regulations implementing the Americans with Disabilities Act, Title III, at 28 CFR 36.302(c).

(e) Paragraphs (c) and (d) of this subdivision do not apply to any air carrier, the National Railroad Passenger Corporation, or public transportation facilities, vehicles or services owned, leased or operated by the state, a county, city, town or village, or any agency thereof, or by any public benefit corporation or authority.

**2-a.** It shall be an unlawful discriminatory practice for the owner, lessee, sub-lessee, assignee, or managing agent of publicly-assisted housing accommodations or other person having the right of ownership or possession of or the right to rent or lease such accommodations:

(a) To refuse to sell, rent or lease or otherwise to deny to or withhold from any person or group of persons such housing accommodations because of the race, creed, color, disability, national origin, sexual orientation, military status, age, sex, marital status, or familial status of such person or persons, or to represent that any housing accommodation or land is not available for inspection, sale, rental or lease when in fact it is so available.

(b) To discriminate against any person because of his or her race, creed, color, disability, national origin, sexual orientation, military status, age, sex, marital status, or familial status in the

terms, conditions or privileges of any publicly-assisted housing accommodations or in the furnishing of facilities or services in connection therewith.

(c) To cause to be made any written or oral inquiry or record concerning the race, creed, color, disability, national origin, sexual orientation, membership in the reserve armed forces of the United States or in the organized militia of the state, age, sex, marital status, or familial status of a person seeking to rent or lease any publicly-assisted housing accommodation; provided, however, that nothing in this subdivision shall prohibit a member of the reserve armed forces of the United States or in the organized militia of the state from voluntarily disclosing such membership.

(c-1) To print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for the purchase, rental or lease of such housing accommodation or to make any record or inquiry in connection with the prospective purchase, rental or lease of such a housing accommodation which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color, national origin, sexual orientation, military status, sex, age, disability, marital status, or familial status, or any intent to make any such limitation, specification or discrimination.

(d)(1) To refuse to permit, at the expense of the person with a disability, reasonable modifications of existing premises occupied or to be occupied by the said person, if the modifications may be necessary to afford the said person full enjoyment of the premises, in conformity with the provisions of the New York state uniform fire prevention and building code, except that, in the case of a rental, the landlord may, where it is reasonable to do so, condition permission for a modification on the renter's agreeing to restore the interior of the premises to the condition that existed before the modification, reasonable wear and tear excepted.

(2) To refuse to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford a person with a disability equal opportunity to use and enjoy a dwelling, including reasonable modification to common use portions of the dwelling, or

(3) In connection with the design and construction of covered multi-family dwellings for first occupancy after March thirteenth, nineteen hundred ninety-one, a failure to design and construct dwellings in accordance with the accessibility requirements of the New York state uniform fire prevention and building code, to provide that:

- (i) The public use and common use portions of the dwellings are readily accessible to and usable by disabled persons with disabilities;
- (ii) All the doors are designed in accordance with the New York state uniform fire prevention and building code to allow passage into and within all premises and are sufficiently wide to allow passage by persons in wheelchairs; and
- (iii) All premises within covered multi-family dwelling units contain an accessible route into and through the dwelling; light switches, electrical outlets, thermostats, and other environmental controls are in accessible locations; there are reinforcements in the bathroom walls to allow later installation of grab bars; and there are usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space, in conformity with the New York state uniform fire prevention and building code.



(e) Nothing in this subdivision shall restrict the consideration of age in the rental of publicly-assisted housing accommodations if the division grants an exemption based on bona fide considerations of public policy for the purpose of providing for the special needs of a particular age group without the intent of prejudicing other age groups.

(f) Nothing in this subdivision shall be deemed to restrict the rental of rooms in school or college dormitories to individuals of the same sex.

**3.** (a) It shall be an unlawful discriminatory practice for an employer, licensing agency, employment agency or labor organization to refuse to provide reasonable accommodations to the known disabilities, **[Effective January 19, 2016:** or pregnancy-related conditions,] of an employee, prospective employee or member in connection with a job or occupation sought or held or participation in a training program.

(b) Nothing contained in this subdivision shall be construed to require provision of accommodations which can be demonstrated to impose an undue hardship on the operation of an employer's, licensing agency's, employment agency's or labor organization's business, program or enterprise. In making such a demonstration with regard to undue hardship the factors to be considered include:

- (i) The overall size of the business, program or enterprise with respect to the number of employees, number and type of facilities, and size of budget;
- (ii) The type of operation which the business, program or enterprise is engaged in, including the composition and structure of the workforce; and
- (iii) The nature and cost of the accommodation needed.

**[There are two paragraphs designated (c).]**

(c) **[Effective January 19, 2016:]** Nothing in this subdivision regarding "reasonable accommodation" or in the chapter of the laws of two thousand fifteen which added this paragraph shall alter, diminish, increase, or create new or additional requirements to accommodate protected classes pursuant to this article other than the additional requirements as explicitly set forth in such chapter of the laws of two thousand fifteen.

**[There are two paragraphs designated (c).]**

(c) **[Effective January 19, 2016:]** The employee must cooperate in providing medical or other information that is necessary to verify the existence of the disability or pregnancy-related condition, or that is necessary for consideration of the accommodation. The employee has a right to have such medical information kept confidential.

**3-a.** It shall be an unlawful discriminatory practice: (a) For an employer or licensing agency to refuse to hire or employ or license or to bar or to terminate from employment an individual eighteen years of age or older, or to discriminate against such individual in promotion, compensation or in terms, conditions, or privileges of employment, because of such individual's age.

(b) For any employer, licensing agency or employment agency to print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for employment or to make any inquiry in connection with prospective employment, which expresses, directly or indirectly, any limitation, specification or discrimination on account of age respecting individuals eighteen years of age or older, or any intent to make any such limitation, specification, or discrimination.

(c) For any employer, licensing agency or employment agency to discharge or otherwise discriminate against any person because he or she has opposed any practices forbidden under this article or because he or she has filed a complaint, testified or assisted in any proceeding under this article.

(d) Notwithstanding any other provision of law, no employee shall be subject to termination or retirement from employment on the basis of age, except where age is a bona fide occupational qualification reasonably necessary to the normal operation of a particular business, where the differentiation is based on reasonable factors other than age, or as otherwise specified in paragraphs (e) and (f) of this subdivision or in article fourteen-A of the retirement and social security law.

(e) Nothing contained in this subdivision or in subdivision one of this section shall be construed to prevent the compulsory retirement of any employee who has attained sixty-five years of age, and who, for a two-year period immediately before retirement, is employed in a bona fide executive or a high policymaking position, if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of such plans, of the employer of such employee, which equals, in the aggregate, at least forty-four thousand dollars; provided that for the purposes of this paragraph only, the term "employer" includes any employer as otherwise defined in this article but does not include (i) the state of New York, (ii) a county, city, town, village or any other political subdivision or civil division of the state, (iii) a school district or any other governmental entity operating a public school, college or university, (iv) a public improvement or special district, (v) a public authority, commission or public benefit corporation, or (vi) any other public corporation, agency, instrumentality or unit of government which exercises governmental power under the laws of the state. In applying the retirement benefit test of this paragraph, if any such retirement benefit is in a form other than a straight life annuity with no ancillary benefits, or if employees contribute to any such plan or make rollover contributions, such benefit shall be adjusted in accordance with rules and regulations promulgated by the division, after an opportunity for public hearing, so that the benefit is the equivalent of a straight life annuity with no ancillary benefits under a plan to which employees do not contribute and under which no rollover contributions are made.

(f) Nothing contained in this subdivision, in subdivision one of this section or in article fourteen-A of the retirement and social security law shall be construed to prevent the compulsory retirement of any employee who has attained seventy years of age and is serving under a contract for unlimited tenure, or a similar arrangement providing for unlimited tenure, at a nonpublic institution of higher education. For purposes of such subdivisions or article, the term "institution of higher education" means an educational institution which

- (i) admits as regular students only persons having a certificate of graduation from a school providing secondary education, or the recognized equivalent of such a certificate,
- (ii) is lawfully authorized to provide a program of education beyond secondary education, and
- (iii) provides an educational program for which it awards a bachelor's degree or provides not less than a two-year program which is acceptable for full credit toward such a degree.

(g) In the event of a conflict between the provisions of this subdivision and the provisions of article fourteen-A of the retirement and social security law, the provisions of article fourteen-A of such law shall be controlling. But nothing contained in this subdivision, in subdivision one of this section or in article fourteen-A of the retirement and social security law shall be construed to prevent the termination of the employment of any person who, even upon the provision of reasonable accommodations, is physically unable to perform his or her duties or to affect the retirement policy or system of any employer where such policy or system is not merely a subterfuge to evade the purposes of said subdivisions or said article; nor shall anything in such subdivisions or such article be deemed to preclude the varying of insurance coverages according to an employee's age. The provisions of this subdivision shall not affect any restriction upon the activities of persons licensed by the state liquor authority with respect to persons under twenty-one years of age.

**3-b.** It shall be an unlawful discriminatory practice for any real estate broker, real estate salesperson or employee or agent thereof or any other individual, corporation, partnership or organization for the purpose of inducing a real estate transaction from which any such person or any of its stockholders or members may benefit financially, to represent that a change has occurred or will or may occur in the composition with respect to race, creed, color, national origin, sexual orientation, military status, sex, disability, marital status, or familial status of the owners or occupants in the block, neighborhood or area in which the real property is located, and to represent, directly or indirectly, that this change will or may result in undesirable consequences in the block, neighborhood or area in which the real property is located, including but not limited to the lowering of property values, an increase in criminal or anti-social behavior, or a decline in the quality of schools or other facilities.

**4.** It shall be an unlawful discriminatory practice for an education corporation or association which holds itself out to the public to be non-sectarian and exempt from taxation pursuant to the provisions of article four of the real property tax law to deny the use of its facilities to any person otherwise qualified, or to permit the harassment of any student or applicant, by reason of his race, color, religion, disability, national origin, sexual orientation, military status, sex, age or marital status, except that any such institution which establishes or maintains a policy of educating persons of one sex exclusively may admit students of only one sex.

**5. (a)** It shall be an unlawful discriminatory practice for the owner, lessee, sub-lessee, assignee, or managing agent of, or other person having the right to sell, rent or lease a housing accommodation, constructed or to be constructed, or any agent or employee thereof:

N.Y. Executive Law, Article 15  
Human Rights Law

(1) To refuse to sell, rent, lease or otherwise to deny to or withhold from any person or group of persons such a housing accommodation because of the race, creed, color, national origin, sexual orientation, military status, sex, age, disability, marital status, or familial status of such person or persons, or to represent that any housing accommodation or land is not available for inspection, sale, rental or lease when in fact it is so available.

(2) To discriminate against any person because of race, creed, color, national origin, sexual orientation, military status, sex, age, disability, marital status, or familial status in the terms, conditions or privileges of the sale, rental or lease of any such housing accommodation or in the furnishing of facilities or services in connection therewith.

(3) To print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for the purchase, rental or lease of such housing accommodation or to make any record or inquiry in connection with the prospective purchase, rental or lease of such a housing accommodation which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color, national origin, sexual orientation, military status, sex, age, disability, marital status, or familial status, or any intent to make any such limitation, specification or discrimination.

The provisions of this paragraph (a) shall not apply (1) to the rental of a housing accommodation in a building which contains housing accommodations for not more than two families living independently of each other, if the owner resides in one of such housing accommodations, (2) to the restriction of the rental of all rooms in a housing accommodation to individuals of the same sex or (3) to the rental of a room or rooms in a housing accommodation, if such rental is by the occupant of the housing accommodation or by the owner of the housing accommodation and the owner resides in such housing accommodation or (4) solely with respect to age and familial status to the restriction of the sale, rental or lease of housing accommodations exclusively to persons sixty-two years of age or older and the spouse of any such person, or for housing intended and operated for occupancy by at least one person fifty-five years of age or older per unit. In determining whether housing is intended and operated for occupancy by persons fifty-five years of age or older, Sec. 807(b) (2) (c) (42 U.S.C. 3607 (b) (2) (c)) of the federal Fair Housing Act of 1988, as amended, shall apply.

(b) It shall be an unlawful discriminatory practice for the owner, lessee, sub-lessee, or managing agent of, or other person having the right of ownership or possession of or the right to sell, rent or lease, land or commercial space:

(1) To refuse to sell, rent, lease or otherwise deny to or withhold from any person or group of persons land or commercial space because of the race, creed, color, national origin, sexual orientation, military status, sex, age, disability, marital status, or familial status of such person or persons, or to represent that any housing accommodation or land is not available for inspection, sale, rental or lease when in fact it is so available;

(2) To discriminate against any person because of race, creed, color, national origin, sexual orientation, military status, sex, age, disability, marital status, or familial status in the terms,

conditions or privileges of the sale, rental or lease of any such land or commercial space; or in the furnishing of facilities or services in connection therewith;

(3) To print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for the purchase, rental or lease of such land or commercial space or to make any record or inquiry in connection with the prospective purchase, rental or lease of such land or commercial space which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color, national origin, sexual orientation, military status, sex, age, disability, marital status, or familial status; or any intent to make any such limitation, specification or discrimination.

(4) With respect to age and familial status, the provisions of this paragraph shall not apply to the restriction of the sale, rental or lease of land or commercial space exclusively to persons fifty-five years of age or older and the spouse of any such person, or to the restriction of the sale, rental or lease of land to be used for the construction, or location of housing accommodations exclusively for persons sixty-two years of age or older, or intended and operated for occupancy by at least one person fifty-five years of age or older per unit. In determining whether housing is intended and operated for occupancy by persons fifty-five years of age or older, Sec. 807(b)(2)(c) (42 U.S.C. 3607(b)(2)(c)) of the federal Fair Housing Act of 1988, as amended, shall apply.

(c) It shall be an unlawful discriminatory practice for any real estate broker, real estate salesperson or employee or agent thereof:

(1) To refuse to sell, rent or lease any housing accommodation, land or commercial space to any person or group of persons or to refuse to negotiate for the sale, rental or lease, of any housing accommodation, land or commercial space to any person or group of persons because of the race, creed, color, national origin, sexual orientation, military status, sex, age, disability, marital status, or familial status of such person or persons, or to represent that any housing accommodation, land or commercial space is not available for inspection, sale, rental or lease when in fact it is so available, or otherwise to deny or withhold any housing accommodation, land or commercial space or any facilities of any housing accommodation, land or commercial space from any person or group of persons because of the race, creed, color, national origin, sexual orientation, military status, sex, age, disability, marital status, or familial status of such person or persons.

(2) To print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for the purchase, rental or lease of any housing accommodation, land or commercial space or to make any record or inquiry in connection with the prospective purchase, rental or lease of any housing accommodation, land or commercial space which expresses, directly or indirectly, any limitation, specification, or discrimination as to race, creed, color, national origin, sexual orientation, military status, sex, age, disability, marital status, or familial status; or any intent to make any such limitation, specification or discrimination.

(3) With respect to age and familial status, the provisions of this paragraph shall not apply to the restriction of the sale, rental or lease of any land or commercial space exclusively to persons fifty-five years of age or older and the spouse of any such person, or to the restriction of the sale, rental or lease of any housing accommodation or land to be used for the construction or location of housing accommodations for persons sixty-two years of age or older, or intended and operated for occupancy by at least one person fifty-five years of age or older per unit. In determining whether housing is intended and operated for occupancy by persons fifty-five years of age or older, Sec. 807 (b)(2)(c) (42 U.S.C. 3607(b)(2)(c)) of the federal Fair Housing Act of 1988, as amended, shall apply.

(d) It shall be an unlawful discriminatory practice for any real estate board, because of the race, creed, color, national origin, sexual orientation, military status, age, sex, disability, marital status, or familial status of any individual who is otherwise qualified for membership, to exclude or expel such individual from membership, or to discriminate against such individual in the terms, conditions and privileges of membership in such board.

(e) It shall be an unlawful discriminatory practice for the owner, proprietor or managing agent of, or other person having the right to provide care and services in, a private proprietary nursing home, convalescent home, or home for adults, or an intermediate care facility, as defined in section two of the social services law, heretofore constructed, or to be constructed, or any agent or employee thereof, to refuse to provide services and care in such home or facility to any individual or to discriminate against any individual in the terms, conditions, and privileges of such services and care solely because such individual is a blind person. For purposes of this paragraph, a "blind person" shall mean a person who is registered as a blind person with the commission for the visually handicapped and who meets the definition of a "blind person" pursuant to section three of chapter four hundred fifteen of the laws of nineteen hundred thirteen entitled "An act to establish a state commission for improving the condition of the blind of the state of New York, and making an appropriation therefor".

(f) The provisions of this subdivision, as they relate to age, shall not apply to persons under the age of eighteen years.

(g) It shall be an unlawful discriminatory practice for any person offering or providing housing accommodations, land or commercial space as described in paragraphs (a), (b), and (c) of this subdivision to make or cause to be made any written or oral inquiry or record concerning membership of any person in the state organized militia in relation to the purchase, rental or lease of such housing accommodation, land, or commercial space, provided, however, that nothing in this subdivision shall prohibit a member of the state organized militia from voluntarily disclosing such membership.

6. It shall be an unlawful discriminatory practice for any person to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this article, or to attempt to do so.

7. It shall be an unlawful discriminatory practice for any person engaged in any activity to which this section applies to retaliate or discriminate against any person because he or she has

opposed any practices forbidden under this article or because he or she has filed a complaint, testified or assisted in any proceeding under this article.

**8.** It shall be an unlawful discriminatory practice for any party to a conciliation agreement made pursuant to section two hundred ninety-seven of this article to violate the terms of such agreement.

**9. (a)** It shall be an unlawful discriminatory practice for any fire department or fire company therein, through any member or members thereof, officers, board of fire commissioners or other body or office having power of appointment of volunteer firefighters, directly or indirectly, by ritualistic practice, constitutional or by-law prescription, by tacit agreement among its members, or otherwise, to deny to any individual membership in any volunteer fire department or fire company therein, or to expel or discriminate against any volunteer member of a fire department or fire company therein, because of the race, creed, color, national origin, sexual orientation, military status, sex, marital status, [**Effective January 19, 2016:** or familial status,] of such individual.

**(b)** Upon a complaint to the division, as provided for under subdivision one of section two hundred ninety-seven of this article, and in the event the commissioner finds that an unlawful discriminatory practice has been engaged in, the board of fire commissioners or other body or office having power of appointment of volunteer firefighters shall be served with any order required, under subdivision four of section two hundred ninety-seven of this article, to be served on any or all respondents requiring such respondent or respondents to cease and desist from such unlawful discriminatory practice and to take affirmative action. Such board shall have the duty and power to appoint as a volunteer firefighter, notwithstanding any other statute or provision of law or by-law of any volunteer fire company, any individual whom the commissioner has determined to be the subject of an unlawful discriminatory practice under this subdivision. Unless such board has been found to have engaged in an unlawful discriminatory practice, service upon such board of such order shall not constitute such board or its members as a respondent nor constitute a finding of an unlawful discriminatory practice against such board or its members.

**10. (a)** It shall be an unlawful discriminatory practice for any employer, or an employee or agent thereof, to impose upon a person as a condition of obtaining or retaining employment, including opportunities for promotion, advancement or transfers, any terms or conditions that would require such person to violate or forego a sincerely held practice of his or her religion, including but not limited to the observance of any particular day or days or any portion thereof as a sabbath or other holy day in accordance with the requirements of his or her religion, unless, after engaging in a bona fide effort, the employer demonstrates that it is unable to reasonably accommodate the employee's or prospective employee's sincerely held religious observance or practice without undue hardship on the conduct of the employer's business. Notwithstanding any other provision of law to the contrary, an employee shall not be entitled to premium wages or premium benefits for work performed during hours to which such premium wages or premium benefits would ordinarily be applicable, if the employee is working during such hours only as an accommodation to his or her sincerely held religious requirements. Nothing in this paragraph or paragraph (b) of this subdivision shall alter or abridge the rights granted to an employee concerning the payment of wages or privileges of seniority accruing to that employee.

(b) Except where it would cause an employer to incur an undue hardship, no person shall be required to remain at his or her place of employment during any day or days or portion thereof that, as a requirement of his or her religion, he or she observes as his or her sabbath or other holy day, including a reasonable time prior and subsequent thereto for travel between his or her place of employment and his or her home, provided however, 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 some other mutually convenient time, or shall be charged against any leave with pay ordinarily granted, other than sick leave, provided further, however, that any such absence not so made up or charged, may be treated by the employer of such person as leave taken without pay.

(c) It shall be an unlawful discriminatory practice for an employer to refuse to permit an employee to utilize leave, as provided in paragraph (b) of this subdivision, solely because the leave will be used for absence from work to accommodate the employee's sincerely held religious observance or practice.

(d) As used in this subdivision:

(1) "undue hardship" shall mean an accommodation requiring significant expense or difficulty (including a significant interference with the safe or efficient operation of the workplace or a violation of a bona fide seniority system). Factors to be considered in determining whether the accommodation constitutes an undue economic hardship shall include, but not be limited to:

- (i) the identifiable cost of the accommodation, including the costs of loss of productivity and of retaining or hiring employees or transferring employees from one facility to another, in relation to the size and operating cost of the employer;
- (ii) the number of individuals who will need the particular accommodation to a sincerely held religious observance or practice; and



(iii) for an employer with multiple facilities, the degree to which the geographic separateness or administrative or fiscal relationship of the facilities will make the accommodation more difficult or expensive.

Provided, however, an accommodation shall be considered to constitute an undue hardship if it will result in the inability of an employee to perform the essential functions of the position in which he or she is employed.

(2) "premium wages" shall include overtime pay and compensatory time off, and additional remuneration for night, weekend or holiday work, or for standby or irregular duty.

(3) "premium benefit" shall mean 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 the employee for an equivalent period of work performed during the regular work schedule of the employee.

In the case of any employer other than the state, any of its political subdivisions or any school district, this subdivision shall not apply where the uniform application of terms and conditions of attendance to employees is essential to prevent undue economic hardship to the employer. In any proceeding in which the applicability of this subdivision is in issue, the burden of proof shall be upon the employer. If any question shall arise whether a particular position or class of positions is excepted from this subdivision by this paragraph, such question may be referred in writing by any party claimed to be aggrieved, in the case of any position of employment by the state or any of its political subdivisions, except by any school district, to the civil service commission, in the case of any position of employment by any school district, to the commissioner of education, who shall determine such question and in the case of any other employer, a party claiming to be aggrieved may file a complaint with the division pursuant to this article. Any such determination by the civil service commission shall be reviewable in the manner provided by article seventy-eight of the civil practice law and rules and any such determination by the commissioner of education shall be reviewable in the manner and to the same extent as other determinations of the commissioner under section three hundred ten of the education law.

**11.** Nothing contained in this section shall be construed to bar any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization, from limiting employment or sales or rental of housing accommodations or admission to or giving preference to persons of the same religion or denomination or from taking such action as is calculated by such organization to promote the religious principles for which it is established or maintained.

**12.** Notwithstanding the provisions of subdivisions one, one-a and three-a of this section, it shall not be an unlawful discriminatory practice for an employer, employment agency, labor organization or joint labor-management committee to carry out a plan, approved by the division, to increase the employment of members of a minority group (as may be defined pursuant to the regulations of the division) which has a state-wide unemployment rate that is disproportionately high in comparison with the state-wide unemployment rate of the general population. Any plan approved under this subdivision shall be in writing and the division's approval thereof shall be for a limited period and may be rescinded at any time by the division.

**13.** It shall be an unlawful discriminatory practice (i) for any person to boycott or blacklist, or to refuse to buy from, sell to or trade with, or otherwise discriminate against any person, because of the race, creed, color, national origin, sexual orientation, military status, sex, disability, **[Effective January 19, 2016:** or familial status,] of such person, or of such person's partners, members, stockholders, directors, officers, managers, superintendents, agents, employees, business associates, suppliers or customers, or (ii) for any person willfully to do any act or refrain from doing any act which enables any such person to take such action. This subdivision shall not apply to:

- (a) Boycotts connected with labor disputes; or
- (b) Boycotts to protest unlawful discriminatory practices.

**14.** In addition to reasonable modifications in policies, practices, or procedures, including those defined in subparagraph (iv) of paragraph (d) of subdivision two of this section or reasonable accommodations for persons with disabilities as otherwise provided in this section, including the use of an animal as a reasonable accommodation, it shall be an unlawful discriminatory practice for any person engaged in any activity covered by this section to deny access or otherwise to discriminate against a blind person, a hearing impaired person or a person with another disability because he or she is accompanied by a dog that has been trained to work or perform specific tasks for the benefit of such person by a professional guide dog, hearing dog or service dog training center or professional guide dog, hearing dog or service dog trainer, or to discriminate against such professional guide dog, hearing dog or service dog trainer engaged in such training of a dog for use by a person with a disability, whether or not accompanied by the person for whom the dog is being trained.

**15.** It shall be an unlawful discriminatory practice for any person, agency, bureau, corporation or association, including the state and any political subdivision thereof, to deny any license or employment to any individual by reason of his or her having been convicted of one or more criminal offenses, or by reason of a finding of a lack of "good moral character" which is based upon his or her having been convicted of one or more criminal offenses, when such denial is in violation of the provisions of article twenty-three-A of the correction law. Further, there shall be a rebuttable presumption in favor of excluding from evidence the prior incarceration or conviction of any person, in a case alleging that the employer has been negligent in hiring or retaining an applicant or employee, or supervising a hiring manager, if after learning about an applicant or employee's past criminal conviction history, such employer has evaluated the factors set forth in section seven hundred fifty-two of the correction law, and made a reasonable, good

faith determination that such factors militate in favor of hire or retention of that applicant or employee.

**16.** It shall be an unlawful discriminatory practice, unless specifically required or permitted by statute, for any person, agency, bureau, corporation or association, including the state and any political subdivision thereof, to make any inquiry about, whether in any form of application or otherwise, or to act upon adversely to the individual involved, any arrest or criminal accusation of such individual not then pending against that individual which was followed by a termination of that criminal action or proceeding in favor of such individual, as defined in subdivision two of section 160.50 of the criminal procedure law, or by a youthful offender adjudication, as defined in subdivision one of section 720.35 of the criminal procedure law, or by a conviction for a violation sealed pursuant to section 160.55 of the criminal procedure law or by a conviction which is sealed pursuant to section 160.58 of the criminal procedure law, in connection with the licensing, employment or providing of credit or insurance to such individual; provided, further, that no person shall be required to divulge information pertaining to any arrest or criminal accusation of such individual not then pending against that individual which was followed by a termination of that criminal action or proceeding in favor of such individual, as defined in subdivision two of section 160.50 of the criminal procedure law, or by a youthful offender adjudication, as defined in subdivision one of section 720.35 of the criminal procedure law, or by a conviction for a violation sealed pursuant to section 160.55 of the criminal procedure law, or by a conviction which is sealed pursuant to section 160.58 of the criminal procedure law. The provisions of this subdivision shall not apply to the licensing activities of governmental bodies in relation to the regulation of guns, firearms and other deadly weapons or in relation to an application for employment as a police officer or peace officer as those terms are defined in subdivisions thirty-three and thirty-four of section 1.20 of the criminal procedure law; provided further that the provisions of this subdivision shall not apply to an application for employment or membership in any law enforcement agency with respect to any arrest or criminal accusation which was followed by a youthful offender adjudication, as defined in subdivision one of section 720.35 of the criminal procedure law, or by a conviction for a violation sealed pursuant to section 160.55 of the criminal procedure law, or by a conviction which is sealed pursuant to section 160.58 of the criminal procedure law.

**17.** Nothing in this section shall prohibit the offer and acceptance of a discount to a person sixty-five years of age or older for housing accommodations.

**18.** It shall be an unlawful discriminatory practice for the owner, lessee, sub-lessee, assignee, or managing agent of, or other person having the right of ownership of or possession of or the right to rent or lease housing accommodations:

(1) To refuse to permit, at the expense of a person with a disability, reasonable modifications of existing premises occupied or to be occupied by the said person, if the modifications may be necessary to afford the said person full enjoyment of the premises, in conformity with the provisions of the New York state uniform fire prevention and building code except that, in the case of a rental, the landlord may, where it is reasonable to do so, condition permission for a modification on the renter's agreeing to restore the interior of the premises to the condition that existed before the modification, reasonable wear and tear excepted.

(2) To refuse to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford said person with a disability equal opportunity to use and enjoy a dwelling, including reasonable modification to common use portions of the dwelling, or

(3) In connection with the design and construction of covered multi-family dwellings for first occupancy after March thirteenth, nineteen hundred ninety-one, a failure to design and construct dwellings in accordance with the accessibility requirements for multi-family dwellings found in the New York state uniform fire prevention and building code to provide that:

- (i) The public use and common use portions of the dwellings are readily accessible to and usable by persons with disabilities;
- (ii) All the doors are designed in accordance with the New York state uniform fire prevention and building code to allow passage into and within all premises and are sufficiently wide to allow passage by persons in wheelchairs; and
- (iii) All premises within covered multi-family dwelling units contain an accessible route into and through the dwelling; light switches, electrical outlets, thermostats, and other environmental controls are in accessible locations; there are reinforcements in the bathroom walls to allow later installation of grab bars; and there are usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space, in conformity with the New York state uniform fire prevention and building code.

**19.** (a) Except as provided in paragraph (b) of this subdivision, it shall be an unlawful discriminatory practice of any employer, labor organization, employment agency, licensing agency, or its employees, agents, or members:

(1) 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, pre-employment application, labor organization membership, or licensure; or

(2) 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.

(b) 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 said environment.

(c) Nothing in this section shall prohibit the genetic testing of an employee who requests a genetic test and who provides written and informed consent to taking a genetic test for any of the following purposes:

(1) pursuant to a workers' compensation claim;

(2) pursuant to civil litigation; or

(3) to determine the employee's susceptibility to potentially carcinogenic, toxic, or otherwise hazardous chemicals or substances found in the workplace environment only if the employer does not terminate the employee or take any other action that adversely affects any term, condition or privilege of employment pursuant to the genetic test results.

(d) If an employee consents to genetic testing for any of the aforementioned allowable reasons, he or she must be given and sign an authorization of consent form which explicitly states the specific purpose, uses and limitations of the genetic tests and the specific traits or characteristics to be tested.

**20.** [repealed]

**21.** Nothing in this section shall prohibit the offer and acceptance of a discount for housing accommodations to a person with a disability, as defined in subdivision twenty-one of section two hundred ninety-two of this article.

**§ 296-a. Unlawful discriminatory practices in relation to credit.**

**1.** It shall be an unlawful discriminatory practice for any creditor or any officer, agent or employee thereof:

a. In the case of applications for credit with respect to the purchase, acquisition, construction, rehabilitation, repair or maintenance of any housing accommodation, land or commercial space to discriminate against any such applicant because of the race, creed, color, national origin, sexual orientation, military status, age, sex, marital status, disability, or familial status of such applicant or applicants or any member, stockholder, director, officer or employee of such applicant or applicants, or of the prospective occupants or tenants of such housing accommodation, land or commercial space, in the granting, withholding, extending or renewing, or in the fixing of the rates, terms or conditions of, any such credit;

b. To discriminate in the granting, withholding, extending or renewing, or in the fixing of the rates, terms or conditions of, any form of credit, on the basis of race, creed, color, national origin, sexual orientation, military status, age, sex, marital status, disability, or familial status;

c. To use any form of application for credit or use or make any record or inquiry which expresses, directly or indirectly, any limitation, specification, or discrimination as to race, creed,

color, national origin, sexual orientation, military status, age, sex, marital status, disability, or familial status;

d. To make any inquiry of an applicant concerning his or her capacity to reproduce, or his or her use or advocacy of any form of birth control or family planning;

e. To refuse to consider sources of an applicant's income or to subject an applicant's income to discounting, in whole or in part, because of an applicant's race, creed, color, national origin, sexual orientation, military status, age, sex, marital status, childbearing potential, disability, or familial status;

f. To discriminate against a married person because such person neither uses nor is known by the surname of his or her spouse. This paragraph shall not apply to any situation where the use of a surname would constitute or result in a criminal act.

**2.** Without limiting the generality of subdivision one of this section, it shall be considered discriminatory if, because of an applicant's or class of applicants' race, creed, color, national origin, sexual orientation, military status, age, sex, marital status or disability, or familial status, (i) an applicant or class of applicants is denied credit in circumstances where other applicants of like overall credit worthiness are granted credit, or (ii) special requirements or conditions, such as requiring co-obligors or reapplication upon marriage, are imposed upon an applicant or class of applicants in circumstances where similar requirements or conditions are not imposed upon other applicants of like overall credit worthiness.

**3.** It shall not be considered discriminatory if credit differentiations or decisions are based upon factually supportable, objective differences in applicants' overall credit worthiness, which may include reference to such factors as current income, assets and prior credit history of such applicants, as well as reference to any other relevant factually supportable data; provided, however, that no creditor shall consider, in evaluating the credit worthiness of an applicant, aggregate statistics or assumptions relating to race, creed, color, national origin, sexual orientation, military status, sex, marital status or disability, or to the likelihood of any group of persons bearing or rearing children, or for that reason receiving diminished or interrupted income in the future.

**3-a.** It shall not be an unlawful discriminatory practice to consider age in determining credit worthiness when age has a demonstrable and statistically sound relationship to a determination of credit worthiness.

**4. a.** If so requested by an applicant for credit, a creditor shall furnish such applicant with a statement of the specific reasons for rejection of the applicant's application for credit.

b. If so requested in writing by an individual who is or was married, a creditor or credit reporting bureau shall maintain in its records a separate credit history for any such individual. Such separate history shall include all obligations as to which such bureau has notice with respect to which any such person is or was individually or jointly liable.

5. No provision of this section providing spouses the right to separately apply for credit, borrow money, or have separate credit histories maintained shall limit or foreclose the right of creditors, under any other provision of law, to hold one spouse legally liable for debts incurred by the other.

6. Any person claiming to be aggrieved by an unlawful discriminatory practice engaged in by a regulated creditor, in lieu of the procedure set forth in section two hundred ninety-seven of this article, may file a verified complaint with the superintendent, as provided hereinafter; provided, however, that the filing of a complaint with either the superintendent or the division shall bar subsequent recourse to the other agency, as well as to any local commission on human rights, with respect to the grievance complained of.

7. In the case of a verified complaint filed with the superintendent the following procedures shall be followed:

a. After receipt of the complaint, the superintendent shall make a determination within thirty days of whether there is probable cause to believe that the person named in the complaint has engaged in or is engaging in an unlawful discriminatory practice. If the superintendent determines there is no such probable cause, the complaint shall be dismissed. If the superintendent determines that there is such probable cause, he or she shall attempt to resolve such complaint by conference and conciliation. If conciliation is achieved, the terms shall be recorded in a written agreement signed by the creditor and complainant, a copy of which shall be forwarded to the commissioner.

b. If conciliation is not achieved, the superintendent or his or her designated representative shall conduct a hearing with respect to the alleged violation of this section. All interested parties shall be entitled to adequate and timely notice of the hearing. Such parties shall have the right to be represented by counsel or by other representatives of their own choosing; to offer evidence and witnesses in their own behalf and to cross-examine other parties and witnesses; to have the power of subpoena exercised in their behalf; and to have access to a written record of such hearing. The superintendent or his or her representative shall not be bound by the strict rules of evidence prevailing in courts of law or equity. The testimony taken shall be under oath and a record shall be made of the proceedings. A written decision shall be made by the superintendent or his or her designated representative separately setting forth findings of fact and conclusions of law. A copy of such decision shall be forwarded to the commissioner.

c. **[Effective for actions commenced on or after January 19, 2016:]** If the superintendent finds that a violation of this section has occurred, the superintendent shall issue an order which shall do one or more of the following:

(1) impose a fine in an amount not to exceed ten thousand dollars for each violation, to be paid to the people of the state of New York;

(2) award compensatory damages to the person aggrieved by such violation;

(3) for a claim of sex discrimination only, award reasonable attorney's fees attributable to such claim to any prevailing party; provided, however, that a prevailing respondent or defendant in order to recover such reasonable attorney's fees must make a motion requesting such fees and show that the action or proceeding brought was frivolous. In no case shall attorney's fees be awarded to the department, nor shall the department be liable to a prevailing party for attorney's fees. In order to find the action or proceeding to be frivolous, the superintendent must find in writing one or more of the following:

(a) the action or proceeding was commenced, used or continued in bad faith, solely to delay or prolong the resolution of the litigation or to harass or maliciously injure another; or

(b) the action or proceeding was commenced or continued in bad faith without any reasonable basis and could not be supported by a good faith argument for an extension, modification or reversal of existing law. If the action or proceeding was promptly discontinued when the party or attorney learned or should have learned that the action or proceeding lacked such a reasonable basis, the court may find that the party or the attorney did not act in bad faith.

(4) require the regulated creditor to cease and desist from such unlawful discriminatory practices;

(5) require the regulated creditor to take such further affirmative action as will effectuate the purposes of this section, including, but not limited to, granting the credit which was the subject of the complaint.

c. **[Effective until January 19, 2016:]** If the superintendent finds that a violation of this section has occurred, the superintendent shall issue an order which shall do one or more of the following:

(1) impose a fine in an amount not to exceed ten thousand dollars for each violation, to be paid to the people of the state of New York;

(2) award compensatory damages to the person aggrieved by such violation;

(3) require the regulated creditor to cease and desist from such unlawful discriminatory practices;



(4) require the regulated creditor to take such further affirmative action as will effectuate the purposes of this section, including, but not limited to, granting the credit which was the subject of the complaint.

d. Any complainant, respondent or other person aggrieved by any order or final determination of the superintendent may obtain judicial review thereof.

8. Where the superintendent makes a determination that a regulated creditor has engaged in or is engaging in discriminatory practices, the superintendent is empowered to issue appropriate orders to such creditor pursuant to the banking law. Such orders may be issued without the necessity of a complaint being filed by an aggrieved person.

9. Whenever any creditor makes application to the superintendent or the banking board to take any action requiring consideration by the superintendent or such board of the public interest and the needs and convenience thereof, or requiring a finding that the financial responsibility, experience, charter, and general fitness of the applicant, and of the members thereof if the applicant be a co-partnership or association, and of the officers and directors thereof if the applicant be a corporation, are such as to command the confidence of the community and to warrant belief that the business will be operated honestly, fairly, and efficiently, such creditor shall certify to the superintendent compliance with the provisions of this section. In the event that the records of the banking department show that such creditor has been found to be in violation of this section, such creditor shall describe what action has been taken with respect to its credit policies and procedures to remedy such violation or violations. The superintendent shall, in approving the foregoing applications and making the foregoing findings, give appropriate weight to compliance with this section.

10. Any complaint filed with the superintendent pursuant to this section shall be so filed within one year after the occurrence of the alleged unlawful discriminatory practice.

11. The superintendent is hereby empowered to promulgate rules and regulations hereunder to effectuate the purposes of this section.

12. The provisions of this section, as they relate to age, shall not apply to persons under the age of eighteen years.

**§ 296-b. Unlawful discriminatory practices relating to domestic workers.**

1. For the purposes of this section: "Domestic workers" shall have the meaning set forth in section two of the labor law.

2. It shall be an unlawful discriminatory practice for an employer to:

(a) Engage in unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature to a domestic worker when: (i) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment; (ii) submission to or rejection of such conduct by an individual is used as the basis for employment

decisions affecting such individual; or (iii) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance by creating an intimidating, hostile, or offensive working environment.

(b) Subject a domestic worker to unwelcome harassment based on gender, race, religion or national origin, where such harassment has the purpose or effect of unreasonably interfering with an individual's work performance by creating an intimidating, hostile, or offensive working environment.

**§ 296-c. Unlawful discriminatory practices relating to interns.**

1. As used in this section, "Intern" means a person who performs work for an employer for the purpose of training under the following circumstances:

a. the employer is not committed to hire the person performing the work at the conclusion of the training period;

b. the employer and the person performing the work agree that the person performing the work is not entitled to wages for the work performed; and

c. the work performed:

- (1) provides or supplements training that may enhance the employability of the intern;
- (2) provides experience for the benefit of the person performing the work;
- (3) does not displace regular employees; and
- (4) is performed under the close supervision of existing staff.

2. It shall be an unlawful discriminatory practice for an employer to:

a. refuse to hire or employ or to bar or to discharge from internship an intern or to discriminate against such intern in terms, conditions or privileges of employment as an intern because of the intern's age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, marital status, or domestic violence victim status;

b. discriminate against an intern in receiving, classifying, disposing or otherwise acting upon applications for internships because of the intern's age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, marital status, or domestic violence victim status;

c. print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for employment as an intern or to make any inquiry in connection with prospective employment, which expresses directly or indirectly, any limitation, specification or discrimination as to age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, marital status or domestic violence victim status, or any intent to make any such limitation, specification or discrimination, unless based upon a bona fide occupational qualification; provided, however, that

neither this paragraph nor any provision of this chapter or other law shall be construed to prohibit the department of civil service or the department of personnel of any city containing more than one county from requesting information from applicants for civil service internships or examinations concerning any of the aforementioned characteristics, other than sexual orientation, for the purpose of conducting studies to identify and resolve possible problems in recruitment and testing of members of minority groups to insure the fairest possible and equal opportunities for employment in the civil service for all persons, regardless of age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, marital status or domestic violence victim status;

d. to discharge, expel or otherwise discriminate against any person because he or she has opposed any practices forbidden under this article or because he or she has filed a complaint, testified or assisted in any proceeding under this article; or

e. to compel an intern who is pregnant to take a leave of absence, unless the intern is prevented by such pregnancy from performing the activities involved in the job or occupation in a reasonable manner.

**3.** It shall be an unlawful discriminatory practice for an employer to:

a. engage in unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature to an intern when:

(1) submission to such conduct is made either explicitly or implicitly a term or condition of the intern's employment;

(2) submission to or rejection of such conduct by the intern is used as the basis for employment decisions affecting such intern; or

(3) such conduct has the purpose or effect of unreasonably interfering with the intern's work performance by creating an intimidating, hostile, or offensive working environment; or

b. subject an intern to unwelcome harassment based on age, sex, race, creed, color, sexual orientation, military status, disability, predisposing genetic characteristics, marital status, domestic violence victim status, or national origin, where such harassment has the purpose or effect of unreasonably interfering with the intern's work performance by creating an intimidating, hostile, or offensive working environment.

**4.** Nothing in this section shall affect any restrictions upon the activities of persons licensed by the state liquor authority with respect to persons under twenty-one years of age.

**5.** Nothing in this section shall create an employment relationship between an employer and an intern for the purposes of articles six, seven, eighteen or nineteen of the labor law.

**§ 297. Procedure.**

1. Any person claiming to be aggrieved by an unlawful discriminatory practice may, by himself or herself or his her attorney at law, make, sign and file with the division a verified complaint in writing which shall state the name and address of the person alleged to have committed the unlawful discriminatory practice complained of and which shall set forth the particulars thereof and contain such other information as may be required by the division. The commissioner of labor or the attorney general, or the chair of the commission on quality of care for the mentally disabled, or the division on its own motion may, in like manner, make, sign and file such complaint. In connection with the filing of such complaint, the attorney general is authorized to take proof, issue subpoenas and administer oaths in the manner provided in the civil practice law and rules. Any employer whose employees, or some of them, refuse or threaten to refuse to cooperate with the provisions of this article, may file with the division a verified complaint asking for assistance by conciliation or other remedial action.

2. a. After the filing of any complaint, the division shall promptly serve a copy thereof upon the respondent and all persons it deems to be necessary parties, and make prompt investigation in connection therewith. Within one hundred eighty days after a complaint is filed, the division shall determine whether it has jurisdiction and, if so, whether there is probable cause to believe that the person named in the complaint, hereinafter referred to as the respondent, has engaged or is engaging in an unlawful discriminatory practice. If it finds with respect to any respondent that it lacks jurisdiction or that probable cause does not exist, the commissioner shall issue and cause to be served on the complainant an order dismissing such allegations of the said complaint as to such respondent.

b. Notwithstanding the provisions of paragraph a of this subdivision, with respect to housing discrimination only, after the filing of any complaint, the division shall, within thirty days after receipt, serve a copy thereof upon the respondent and all persons it deems to be necessary parties, and make prompt investigation in connection therewith. Within one hundred days after a complaint is filed, the division shall determine whether it has jurisdiction and, if so, whether there is probable cause to believe that the person named in the complaint, hereinafter referred to as the respondent, has engaged or is engaging in an unlawful discriminatory practice. If it finds with respect to any respondent that it lacks jurisdiction or that probable cause does not exist, the commissioner shall issue and cause to be served on the complainant an order dismissing such allegations of the said complaint as to such respondent.

3. a. If in the judgment of the division the circumstances so warrant, it may, at any time after the filing of the complaint, endeavor to eliminate such unlawful discriminatory practice by conference, conciliation and persuasion. Each conciliation agreement shall include provisions requiring the respondent to refrain from the commission of unlawful discriminatory practices in the future and may contain such further provisions as may be agreed upon by the division, the complainant, and the respondent, including a provision for the entry in the supreme court in any county in the judicial district where the alleged unlawful discriminatory practice was committed, or where any respondent resides or maintains an office for the transaction of business, or where the housing accommodation, land or commercial space specified in the complaint is located, of a

consent decree embodying the terms of the conciliation agreement. The division shall not disclose what has transpired in the course of such endeavors.

b. If a conciliation agreement is entered into, the division shall issue an order embodying such agreement and serve a copy of such order upon all parties to the proceeding, and if a party to any such proceeding is a regulated creditor, the division shall forward a copy of the order embodying such agreement to the superintendent.

c. If the division finds that noticing the complaint for hearing would be undesirable, the division may, in its unreviewable discretion, at any time prior to a hearing before a hearing examiner, dismiss the complaint on the grounds of administrative convenience. However, in cases of housing discrimination only, an administrative convenience dismissal will not be rendered without the consent of the complainant. The division may, subject to judicial review, dismiss the complaint on the grounds of untimeliness if the complaint is untimely or on the grounds that the election of remedies is annulled.

4. a. Within two hundred seventy days after a complaint is filed, or within one hundred twenty days after the court has reversed and remanded an order of the division dismissing a complaint for lack of jurisdiction or for want of probable cause, unless the division has dismissed the complaint or issued an order stating the terms of a conciliation agreement not objected to by the complainant, the division shall cause to be issued and served a written notice, together with a copy of such complaint, as the same may have been amended, requiring the respondent or respondents to answer the charges of such complaint and appear at a public hearing before a hearing examiner at a time not less than five nor more than fifteen days after such service and at a place to be fixed by the division and specified in such notice. The place of any such hearing shall be the office of the division or such other place as may be designated by the division. The case in support of the complaint shall be presented by one of the attorneys or agents of the division and, at the option of the complainant, by his or her attorney. With the consent of the division, the case in support of the complainant may be presented solely by his or her attorney. No person who shall have previously made the investigation, engaged in a conciliation proceeding or caused the notice to be issued shall act as a hearing examiner in such case. Attempts at conciliation shall not be received in evidence. At least two business days prior to the hearing the respondent shall, and any necessary party may, file a written answer to the complaint, sworn to subject to the penalties of perjury, with the division and serve a copy upon all other parties to the proceeding. A respondent who has filed an answer, or whose default in answering has been set aside for good cause shown may appear at such hearing in person or otherwise, with or without counsel, cross examine witnesses and the complainant and submit testimony. The complainant and all parties shall be allowed to present testimony in person or by counsel and cross examine witnesses. The hearing examiner may in his or her discretion permit any person who has a substantial personal interest to intervene as a party, and may require that necessary parties not already parties be joined. The division or the complainant shall have the power reasonably and fairly to amend any complaint, and the respondent and any other party shall have like power to amend his or her answer. The hearing examiner shall not be bound by the strict rules of evidence prevailing in courts of law or equity. The testimony taken at the hearing shall be under oath and a record made.

b. If the respondent fails to answer the complaint, the hearing examiner designated to conduct the hearing may enter the default and the hearing shall proceed on the evidence in support of the complaint. Such default may be set aside only for good cause shown upon equitable terms and conditions.

c. Within one hundred eighty days after the commencement of such hearing, a determination shall be made and an order served as hereinafter provided. If, upon all the evidence at the hearing, the commissioner shall find that a respondent has engaged in any unlawful discriminatory practice as defined in this article, the commissioner shall state findings of fact and shall issue and cause to be served on such respondent an order, based on such findings and setting them forth, and including such of the following provisions as in the judgment of the division will effectuate the purposes of this article: (i) requiring such respondent to cease and desist from such unlawful discriminatory practice; (ii) requiring such respondent to take such affirmative action, including (but not limited to) hiring, reinstatement or upgrading of employees, with or without back pay, restoration to membership in any respondent labor organization, admission to or participation in a guidance program, apprenticeship training program, on the job training program or other occupational training or retraining program, the extension of full, equal and unsegregated accommodations, advantages, facilities and privileges to all persons, granting the credit which was the subject of any complaint, evaluating applicants for membership in a place of accommodation without discrimination based on race, creed, color, national origin, sex, disability or marital status, and without retaliation or discrimination based on opposition to practices forbidden by this article or filing a complaint, testifying or assisting in any proceeding under this article; (iii) awarding of compensatory damages to the person aggrieved by such practice; (iv) awarding of punitive damages, in cases of housing discrimination only, in an amount not to exceed ten thousand dollars, to the person aggrieved by such practice; (v) requiring payment to the state of profits obtained by a respondent through the commission of unlawful discriminatory acts described in subdivision three b of section two hundred ninety six of this article; and (vi) assessing civil fines and penalties in an amount not to exceed fifty thousand dollars, to be paid to the state by a respondent found to have committed an unlawful discriminatory act, or not to exceed one hundred thousand dollars to be paid to the state by a respondent found to have committed an unlawful discriminatory act which is found to be willful, wanton or malicious; (vii) requiring a report of the manner of compliance. If, upon all the evidence, the commissioner shall find that a respondent has not engaged in any such unlawful discriminatory practice, he or she shall state findings of fact and shall issue and cause to be served on the complainant an order based on such findings and setting them forth dismissing the said complaint as to such respondent. A copy of each order issued by the commissioner shall be delivered in all cases to the attorney general, the secretary of state, if he or she has issued a license to the respondent, and such other public officers as the division deems proper, and if any such order issued by the commissioner concerns a regulated creditor, the commissioner shall forward a copy of any such order to the superintendent. A copy of any complaint filed against any respondent who has previously entered into a conciliation agreement pursuant to paragraph a of subdivision three of this section or as to whom an order of the division has previously been entered pursuant to this paragraph shall be delivered to the attorney general, to the secretary of state if he or she has issued a license to the respondent and to such other public officers as the division deems proper, and if any such respondent is a regulated creditor, the commissioner shall forward a copy of any such complaint to the superintendent.

d. The division shall establish rules of practice to govern, expedite and effectuate the foregoing procedure and its own actions thereunder.

e. Any civil penalty imposed pursuant to this subdivision shall be separately stated, and shall be in addition to and not reduce or offset any other damages or payment imposed upon a respondent pursuant to this article. In cases of employment discrimination where the employer has fewer than fifty employees, such civil fine or penalty may be paid in reasonable installments, in accordance with regulations promulgated by the division. Such regulations shall require the payment of reasonable interest resulting from the delay, and in no case permit installments to be made over a period longer than three years.

**5.** Any complaint filed pursuant to this section must be so filed within one year after the alleged unlawful discriminatory practice.

**6.** At any time after the filing of a complaint with the division alleging an unlawful discriminatory practice under this article, if the division determines that the respondent is doing or procuring to be done any act tending to render ineffectual any order the commissioner may enter in such proceeding, the commissioner may apply to the supreme court in any county where the alleged unlawful discriminatory practice was committed, or where any respondent resides or maintains an office for the transaction of business, or if the complaint alleges an unlawful discriminatory practice under subdivision two a or paragraph (a), (b) or (c) of subdivision five of section two hundred ninety six of this article, where the housing accommodation, land or commercial space specified in the complaint is located, or, if no supreme court justice is available in such county, in any other county within the judicial district, for an order requiring the respondents or any of them to show cause why they should not be enjoined from doing or procuring to be done such act. The order to show cause may contain a temporary restraining order and shall be served in the manner provided therein. On the return date of the order to show cause, and after affording all parties an opportunity to be heard, if the court deems it necessary to prevent the respondents from rendering ineffectual an order relating to the subject matter of the complaint, it may grant appropriate injunctive relief upon such terms and conditions as it deems proper.

**7.** Not later than one year from the date of a conciliation agreement or an order issued under this section, and at any other times in its discretion, the division shall investigate whether the respondent is complying with the terms of such agreement or order. Upon a finding of non compliance, the division shall take appropriate action to assure compliance.

**8.** No officer, agent or employee of the division shall make public with respect to a particular person without his consent information from reports obtained by the division except as necessary to the conduct of a proceeding under this section.

9. Any person claiming to be aggrieved by an unlawful discriminatory practice shall have a cause of action in any court of appropriate jurisdiction for damages, including, in cases of housing discrimination only, punitive damages, and such other remedies as may be appropriate, including any civil fines and penalties provided in subdivision four of this section, unless such person had filed a complaint hereunder or with any local commission on human rights, or with the superintendent pursuant to the provisions of section two hundred ninety six a of this chapter, provided that, where the division has dismissed such complaint on the grounds of administrative convenience, on the grounds of untimeliness, or on the grounds that the election of remedies is annulled, such person shall maintain all rights to bring suit as if no complaint had been filed with the division. At any time prior to a hearing before a hearing examiner, a person who has a complaint pending at the division may request that the division dismiss the complaint and annul his or her election of remedies so that the human rights law claim may be pursued in court, and the division may, upon such request, dismiss the complaint on the grounds that such person's election of an administrative remedy is annulled. Notwithstanding subdivision (a) of section two hundred four of the civil practice law and rules, if a complaint is so annulled by the division, upon the request of the party bringing such complaint before the division, such party's rights to bring such cause of action before a court of appropriate jurisdiction shall be limited by the statute of limitations in effect in such court at the time the complaint was initially filed with the division. Any party to a housing discrimination complaint shall have the right within twenty days following a determination of probable cause pursuant to subdivision two of this section to elect to have an action commenced in a civil court, and an attorney representing the division of human rights will be appointed to present the complaint in court, or, with the consent of the division, the case may be presented by complainant's attorney. A complaint filed by the equal employment opportunity commission to comply with the requirements of 42 USC 2000e 5(c) and 42 USC 12117(a) and 29 USC 633(b) shall not constitute the filing of a complaint within the meaning of this subdivision. No person who has initiated any action in a court of competent jurisdiction or who has an action pending before any administrative agency under any other law of the state based upon an act which would be an unlawful discriminatory practice under this article, may file a complaint with respect to the same grievance under this section or under section two hundred ninety six a of this article.

10. **[Effective for actions commenced on or after January 19, 2016:]** With respect to all cases of housing discrimination and housing-related credit discrimination in an action or proceeding at law under this section or section two hundred ninety eight of this article, the commissioner or the court may in its discretion award reasonable attorney's fees to any prevailing or substantially prevailing party; and with respect to a claim of employment or credit discrimination where sex is a basis of such discrimination, in an action or proceeding at law under this section or section two hundred ninety-eight of this article, the commissioner or the court may in its discretion award reasonable attorney's fees attributable to such claim to any prevailing party; provided, however, that a prevailing respondent or defendant in order to recover such reasonable attorney's fees must make a motion requesting such fees and show that the action or proceeding brought was frivolous; and further provided that in a proceeding brought in the division of human rights, the commissioner may only award attorney's fees as part of a final order after a public hearing held pursuant to subdivision four of this section. In no case shall attorney's fees be awarded to the division, nor shall the division be liable to a prevailing or substantially prevailing party for attorney's fees, except in a case in which the division is a party



to the action or the proceeding in the division's capacity as an employer. In cases of employment discrimination, a respondent shall only be liable for attorney's fees under this subdivision if the respondent has been found liable for having committed an unlawful discriminatory practice. In order to find the action or proceeding to be frivolous, the court or the commissioner must find in writing one or more of the following:

(a) the action or proceeding was commenced, used or continued in bad faith, solely to delay or prolong the resolution of the litigation or to harass or maliciously injure another; or

(b) the action or proceeding was commenced or continued in bad faith without any reasonable basis and could not be supported by a good faith argument for an extension, modification or reversal of existing law. If the action or proceeding was promptly discontinued when the party or attorney learned or should have learned that the action or proceeding lacked such a reasonable basis, the court may find that the party or the attorney did not act in bad faith.

**10. [Effective until January 19, 2016:]** With respect to cases of housing discrimination only, in an action or proceeding at law under this section or section two hundred ninety eight of this article, the commissioner or the court may in its discretion award reasonable attorney's fees to any prevailing or substantially prevailing party; provided, however, that a prevailing respondent or defendant in order to recover such reasonable attorney's fees must make a motion requesting such fees and show that the action or proceeding brought was frivolous; and further provided that in a proceeding brought in the division of human rights, the commissioner may only award attorney's fees as part of a final order after a public hearing held pursuant to subdivision four of this section. In no case shall attorney's fees be awarded to the division, nor shall the division be liable to a prevailing or substantially prevailing party for attorney's fees, except in a case in which the division is a party to the action or the proceeding in the division's capacity as an employer. In order to find the action or proceeding to be frivolous, the court or the commissioner must find in writing one or more of the following:

(a) the action or proceeding was commenced, used or continued in bad faith, solely to delay or prolong the resolution of the litigation or to harass or maliciously injure another; or

(b) the action or proceeding was commenced or continued in bad faith without any reasonable basis and could not be supported by a good faith argument for an extension, modification or reversal of existing law. If the action or proceeding was promptly discontinued when the party or attorney learned or should have learned that the action or proceeding lacked such a reasonable basis, the court may find that the party or the attorney did not act in bad faith.

## **§ 298. Judicial review and enforcement.**

Any complainant, respondent or other person aggrieved by an order of the commissioner which is an order after public hearing, a cease and desist order, an order awarding damages, an order

dismissing a complaint, or by an order of the division which makes a final disposition of a complaint may obtain judicial review thereof, and the division may obtain an order of court for its enforcement and for the enforcement of any order of the commissioner which has not been appealed to the court, in a proceeding as provided in this section. Such proceeding shall be brought in the Supreme Court in the county wherein the unlawful discriminatory practice which is the subject of the order occurs or wherein any person required in the order to cease and desist from an unlawful discriminatory practice or to take other affirmative action resides or transacts business. Such proceeding shall be initiated by the filing of a notice of petition and petition in such court. Thereafter, at a time and in a manner to be specified by rules of court, the division shall file with the court a written transcript of the record of all prior proceedings. Upon the filing of a notice of petition and petition, the court shall have jurisdiction of the proceeding and of the questions determined therein, except that where the order sought to be reviewed was made as a result of a public hearing held pursuant to paragraph a of subdivision four of section two hundred ninety seven of this article, the court shall make an order directing that the proceeding be transferred for disposition to the appellate division of the supreme court in the judicial department embracing the county in which the proceeding was commenced. The court shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript an order enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part such order. No objection that has not been urged in prior proceedings shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. Any party may move the court to remit the case to the division in the interests of justice for the purpose of adducing additional specified and material evidence and seeking findings thereon, provided he or she shows reasonable grounds for the failure to adduce such evidence in prior proceedings. The findings of facts on which such order is based shall be conclusive if supported by sufficient evidence on the record considered as a whole. All such proceedings shall be heard and determined by the court and any appeal taken from its judgment or order shall be reviewed by the appropriate appellate court as expeditiously as possible and with lawful precedence over other matters. The jurisdiction of the courts over these proceedings, as provided for herein, shall be exclusive and their judgments and orders shall be final, subject to appellate review in the same manner and form and with the same effect as provided for appeals from a judgment in a special proceeding. The division's copy of the testimony shall be available at all reasonable times to all parties for examination without cost and for the purposes of judicial review of such order. Any appeal under this section and any proceeding, if instituted under article seventy eight of the civil practice law and rules to which the division or the board is a party shall be heard on the record without requirement of printing. The division may appear in court by one of its attorneys. A proceeding under this section when instituted by any complainant, respondent or other person aggrieved must be instituted within sixty days after the service of such order.

**§ 298-a. Application of article to certain acts committed outside the state of New York.**

**1.** The provisions of this article shall apply as hereinafter provided to an act committed outside this state against a resident of this state or against a corporation organized under the laws of this

state or authorized to do business in this state, if such act would constitute an unlawful discriminatory practice if committed within this state.

**2.** If a resident person or domestic corporation violates any provision of this article by virtue of the provisions of this section, this article shall apply to such person or corporation in the same manner and to the same extent as such provisions would have applied had such act been committed within this state except that the penal provisions of such article shall not be applicable.

**3.** If a non-resident person or foreign corporation violates any provision of this article by virtue of the provisions of this section, such person or corporation shall be prohibited from transacting any business within this state. Except as otherwise provided in this subdivision, the provisions of section two hundred ninety-seven of this article governing the procedure for determining and processing unlawful discriminatory practices shall apply to violations defined by this subdivision insofar as such provisions are or can be made applicable. If the division of human rights has reason to believe that a non-resident person or foreign corporation has committed or is about to commit outside of this state an act which if committed within this state would constitute an unlawful discriminatory practice and that such act is in violation of any provision of this article by virtue of the provisions of this section, it shall serve a copy of the complaint upon such person or corporation by personal service either within or without the state or by registered mail, return receipt requested, directed to such person or corporation at his or her or its last known place of residence or business, together with a notice requiring such person or corporation to appear at a hearing, specifying the time and place thereof, and to show cause why a cease and desist order should not be issued against such person or corporation. If such person or corporation shall fail to appear at such hearing or does not show sufficient cause why such order should not be issued, the division shall cause to be issued and served upon such person or corporation an order to cease or desist from the act or acts complained of. Failure to comply with any such order shall be followed by the issuance by the division of an order prohibiting such person or corporation from transacting any business within this state. A person or corporation who or which transacts business in this state in violation of any such order is guilty of a class A misdemeanor. Any order issued pursuant to this subdivision may be vacated by the division upon satisfactory proof of compliance with such order. All orders issued pursuant to this subdivision shall be subject to judicial review in the manner prescribed by article seventy-eight of the civil practice law and rules.

**§ 299. Penal provision.**

Any person, employer, labor organization or employment agency, who or which shall willfully resist, prevent, impede or interfere with the division or any of its employees or representatives in the performance of duty under this article, or shall willfully violate an order of the division or commissioner, shall be guilty of a misdemeanor and be punishable by imprisonment in a penitentiary, or county jail, for not more than one year, or by a fine of not more than five hundred dollars, or by both; but procedure for the review of the order shall not be deemed to be such willful conduct.

**§ 300. Construction.**

The provisions of this article shall be construed liberally for the accomplishment of the purposes thereof. Nothing contained in this article shall be deemed to repeal any of the provisions of the civil rights law or any other law of this state relating to discrimination because of race, creed, color or national origin; but, as to acts declared unlawful by section two hundred ninety six of this article, the procedure herein provided shall, while pending, be exclusive; and the final determination therein shall exclude any other action, civil or criminal, based on the same grievance of the individual concerned. If such individual institutes any action based on such grievance without resorting to the procedure provided in this article, he or she may not subsequently resort to the procedure herein.

**§ 301. Separability.**

If any clause, sentence, paragraph or part of this article or the application thereof to any person or circumstances, shall, for any reason, be adjudged by a court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder of this article.

Please proceed  
to the next page



## Division of Human Rights

ANDREW M. CUOMO  
Governor

HELEN DIANE FOSTER  
Commissioner

### GUIDANCE ON SEXUAL HARASSMENT FOR ALL EMPLOYERS IN NEW YORK STATE

#### STATUTORY REQUIREMENTS

**Sex discrimination** is unlawful pursuant to the New York Human Rights Law § 296.1 (codified as N.Y. Executive Law, Article 15), and the federal Civil Rights Act of 1964, Title VII (codified as 42 U.S.C. § 2000e et seq.). The Human Rights Law applies generally to employers with four or more employees. Federal Title VII applies to employers with 15 or more employees.

**Sexual harassment** is a form of sex discrimination. **Every** employee in the State of New York is entitled to a working environment free from sexual harassment. The provisions of the Human Rights Law generally apply to employers with four or more employees.

However, with regard specifically to **sexual harassment**, the Human Rights Law was amended in 2015 to apply to **all** employers, regardless of the number of employees. For sexual harassment occurring on or after January 19, 2015, the effective date of the amendment (Laws of 2015, chapter 363), a complaint may be filed under the Human Rights Law against employers with any number of employees, including those with fewer than four employees. Also, all domestic workers are protected from sexual harassment, and harassment on the basis of gender, race, national origin or religion.

#### THIS GUIDANCE

This Guidance is intended to fulfill the requirement of the Laws of 2015, chapter 362, directing that the Department of Labor and the Division of Human Rights

shall make training available to assist employers in developing training, policies and procedures to address discrimination and harassment in the workplace including, but not limited to issues relating to pregnancy, familial status, pay equity and sexual harassment. Such training shall take into account the needs of employers of various sizes. The department and division shall make such training available through, including but not limited to, online means. In developing such training materials, the department and division shall afford the public an opportunity to submit comments on such training.

This Guidance is available on the Division of Human Rights website, [www.dhr.ny.gov](http://www.dhr.ny.gov), or by calling the Division at 888-392-3644, and on the Department of Labor's website, [www.labor.ny.gov](http://www.labor.ny.gov), or by calling the Department of Labor at 888-469-7365.

## WHAT IS SEXUAL HARASSMENT?

Sexual harassment in the form of a “hostile environment” 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 also consists of 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.

A type of sexual harassment known as “quid pro quo” harassment occurs when a person in authority tries to trade job benefits for sexual favors. This can include hiring, promotion, continued employment or any other terms conditions or privileges of employment. Only supervisors and managers are deemed to engage in this kind of harassment, because co-workers do not have the authority to grant or withhold benefits.

Sexual harassment can occur between males and females, or between persons of the same sex. Sexual harassment that occurs because the victim is transgender is also unlawful.

A single incident of inappropriate sexual behavior may be enough to rise to the level of sexual harassment, depending on the severity of such incident. The law requires that the behavior be severe or pervasive, so that one joke or comment may not be enough to be sexual harassment. However, the courts have held that a single incident could be considered sexual harassment, depending on the circumstances.

See further below, the section on Descriptions and Examples of Sexual Harassment.

## WHEN IS THE EMPLOYER LIABLE FOR SEXUAL HARASSMENT?

Employers are strictly liable for harassment of an employee by an owner or high-level manager. This means if one owner or manager harasses an employee, even without the knowledge of the other owners or managers, the employer is nevertheless legally responsible.

Employers may be strictly liable for harassment by a lower-level manager, or by a supervisor if that supervisor has a sufficient degree of control over the working conditions of the victim. This means that the employer may be legally responsible for such harassment, even if no owner or manager knew about it. See further below, on how such liability may be avoided by having a sexual harassment policy, and using it effectively.

Employers may be liable for the harassment of an employee coworkers, if the employer knew or should have known about the harassment. This means the employer will be liable if the employer was negligent about preventing or stopping harassment.

Furthermore, if an employee complains of harassment to any supervisor or manager, the knowledge of the supervisor or manager will be considered to be the knowledge of the employer. Therefore it is very important that the employer have a sexual harassment policy that requires supervisors and managers to report any complaint of sexual harassment, and any possible harassment that comes to their attention for any reason. See further below Employer Policy on Sexual Harassment.

## RETALIATION IS UNLAWFUL

It is unlawful for any employer, or any agent or employee of the employer, to retaliate against an employee who has complained of sexual harassment.

The Human Rights Law protects any individual who has engaged in “protected activity.”

Protected activity occurs when a person has

- filed a formal written complaint of sexual harassment, either internally with management or human resources, or with any anti-discrimination agency,
- testified or assisted in a proceeding involving sexual harassment under the Human Rights Law,
- opposed sexual harassment by making a verbal or informal complaint to management, or by simply informing a supervisor or manager of harassment,
- complained that another employee has been sexually harassed, or
- encouraged a fellow employee to report harassment.

(For employers with four or more employees, retaliation also applies to opposition to any other actions forbidden by the Human Rights Law.)

If the employee has participated in a proceeding before the Division of Human Rights, or in a court of law, that 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.

Even if the alleged harassment does not turn out to rise to the level of 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. However, the retaliation provision is not intended to protect persons making intentionally false charges of harassment.



## WHAT IS RETALIATION?

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 harassment or any other practices forbidden by the Law. 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.

## HAVING AN EFFECTIVE SEXUAL HARASSMENT POLICY

Having a policy that recognizes that sexual harassment is unlawful, and that signals to all persons in the organization that sexual harassment will not be tolerated, is an important step in limiting the employer's liability by

- preventing sexual harassment,
- providing a means for employees to alert management if sexual harassment is occurring,
- providing for investigation of all allegations of sexual harassment, and
- providing for prompt and effective corrective action to be taken when sexual harassment has occurred.

Employers may avoid legal responsibility for sexually harassing actions by lower-level managers, supervisor and coworkers if they

- provide employees with a reasonable opportunity to complain of harassment, and
- take prompt and effective corrective action to stop the harassment once it is reported, or otherwise known about.

This means that the employer should have a policy, as explained more fully below in the section on Employer Policy on Sexual Harassment, that

- advises employees that sexual harassment is against the employer's workplace policy and will not be tolerated,
- tells employees to whom they can complain if they are a victim, or if they see harassment of others,
- assures employees that they will not be retaliated against for complaining, and
- indicates that all complaints will be investigated and dealt with appropriately.

An employer may still be liable, however, if they have a history of not following their own policy, such as by taking no action to stop harassment once they know of the harassment. Such failure to enforce the anti-harassment policy may signal to employees that complaining is futile, and the employer may become liable for all harassing conduct, regardless of whether owners or managers knew it was happening, or had a policy that purported to prevent sexual harassment.

## RECOMMENDED CONTENT OF EMPLOYER POLICY ON SEXUAL HARASSMENT

A Policy on Sexual Harassment should contain the following statements:

- the employer is committed to maintaining a workplace free from sexual harassment
- sexual harassment is unlawful and subjects the employer to liability
- any possible sexual harassment will be investigated whenever management receives a complaint or otherwise knows of possible sexual harassment occurring
- those who engage in sexual harassment will be subject to disciplinary action

The Policy should also contain information:

- explaining and defining sexual harassment, so that employees will know what actions are prohibited (see further below section on Descriptions and Examples of Sexual Harassment)
- encouraging employees to complain of sexual harassment that they experience or know about
- indicating to whom employees can complain about sexual harassment (this should, particularly with smaller employers, include all owners and managers, or otherwise provide open access for employee complaints)
- requiring employees to cooperate with management during any investigation of sexual harassment
- requiring all supervisory and management staff to report any complaint that they receive, or any harassment that they observe (supervisor or manager's knowledge of sexual harassment may create liability for the employer)

## DESCRIPTIONS AND EXAMPLES OF SEXUAL HARASSMENT

For the legal definition of sexual harassment, see the above section What is Sexual Harassment? Further descriptions and examples include the following.

Sexual harassment includes unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature, when:

- Such conduct is made either explicitly or implicitly a term or condition of employment,
- Submission to or rejection of such conduct is used as the basis for employment decisions affecting an individual's employment; or

- Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment, even if the complaining individual is not the intended target of the sexual harassment.

The following describes some of the types of acts that may be unlawful sexual harassment:

- Physical assaults of a sexual nature, such as:
  - Rape, sexual battery, molestation, or attempts to commit these assaults.
  - Intentional or unintentional physical conduct which is sexual in nature, such as touching, pinching, patting, grabbing, brushing against another employee's body, or poking another employees' body.
- Unwanted sexual advances, propositions or other sexual comments, such as:
  - Requests for sexual favors accompanied by implied or overt threats concerning the victim's job performance evaluation, a promotion, or other job benefits or detriments;
  - Subtle or obvious pressure for unwelcome sexual activities;
  - Sexually oriented gestures, noises, remarks, jokes or comments about a person's sexuality or sexual experience which are sufficiently severe or pervasive to create a hostile work environment.
- Sexual or discriminatory displays or publications anywhere in the workplace, such as:
  - Displaying pictures, posters, calendars, graffiti, objects, promotional material, reading materials, or other materials that are sexually demeaning, pornographic.

Please proceed  
to the next page

CHAPTER 1. COMMISSION ON HUMAN RIGHTS.

**§ 8-101 Policy.**

In the city of New York, with its great cosmopolitan population, there is no greater danger to the health, morals, safety and welfare of the city and its inhabitants than the existence of groups prejudiced against one another and antagonistic to each other because of their actual or perceived differences, including those based on race, color, creed, age, national origin, alienage or citizenship status, gender, sexual orientation, disability, marital status, partnership status, caregiver status, uniformed service, any lawful source of income, status as a victim of domestic violence or status as a victim of sex offenses or stalking, whether children are, may be or would be residing with a person or conviction or arrest record. The council hereby finds and declares that prejudice, intolerance, bigotry, and discrimination, bias-related violence or harassment and disorder occasioned thereby threaten the rights and proper privileges of its inhabitants and menace the institutions and foundation of a free democratic state. A city agency is hereby created with power to eliminate and prevent discrimination from playing any role in actions relating to employment, public accommodations, and housing and other real estate, and to take other actions against prejudice, intolerance, bigotry, discrimination and bias-related violence or harassment as herein provided; and the commission established hereunder is hereby given general jurisdiction and power for such purposes.

**§ 8-102 Definitions.**

When used in this chapter:

1. The term "person" includes one or more natural persons, proprietorships, partnerships, associations, group associations, organizations, governmental bodies or agencies, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.
2. The term "employment agency" includes any person undertaking to procure employees or opportunities to work.
3. 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.
4. The term "unlawful discriminatory practice" includes only those practices specified in sections 8-107 and 8-107.1 of this chapter.
5. For purposes of subdivisions one, two, three, eleven-a, twenty-two, subparagraph one of paragraph a of subdivision twenty-one, and paragraph e of subdivision twenty-one of section 8-107 of this chapter, the term "employer" does not include any employer with fewer than four persons in his or her employ. For purposes of this subdivision, natural 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.
6. The term "commission" unless a different meaning clearly appears from the text, means the city commission on human rights created by this chapter.
7. The term "national origin" shall, for the purposes of this chapter, include "ancestry."

8. The term "educational institution" includes kindergartens, primary and secondary schools, academies, colleges, universities, professional schools, extension courses, and all other educational facilities.

9. The term "place or provider of public accommodation" shall 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. A club shall not be considered in its nature distinctly private if it has more than four hundred members, provides regular meal service and regularly receives payment for dues, fees, use of space, facilities, services, meals or beverages directly or indirectly from or on behalf of non-members for the furtherance of trade or business. For the purposes of this section 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 shall be deemed to be in its nature distinctly private. No club which sponsors or conducts any amateur athletic contest or sparring exhibition and advertises or bills such contest or exhibition as a New York state championship contest or uses the words "New York state" in its announcement shall be deemed a private exhibition within the meaning of this section.

10. The term "housing accommodation" includes 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.

11. The term "publicly-assisted housing accommodations" shall include:

(a) Publicly-owned or operated housing accommodations.

(b) Housing accommodations operated by housing companies under the supervision of the state commissioner of housing and community renewal, or the department of housing preservation and development.

(c) Housing accommodations constructed after July first, nineteen hundred fifty, and housing accommodations sold after July first, nineteen hundred ninety-one:

(1) which are exempt in whole or in part from taxes levied by the state or any of its political subdivisions,

(2) which are constructed on land sold below cost by the state or any of its political subdivisions or any agency thereof, pursuant to the federal housing act of nineteen hundred forty-nine,

(3) which are constructed in whole or in part on property acquired or assembled by the state or any of its political subdivisions or any agency thereof through the power of condemnation or otherwise for the purpose of such construction, or

(4) for the acquisition, construction, repair or maintenance for which the state or any of its political subdivisions or any agency thereof supplies funds or other financial assistance.

(d) Housing accommodations, the acquisition, construction, rehabilitation, repair or maintenance of which is, after July first, nineteen hundred fifty-five, financed in whole or in part by a loan, whether or not secured by a mortgage, the repayment of which is guaranteed or insured by the federal government or any agency thereof, or the state or any of its political subdivisions or any agency thereof.

12. The term "family" as used in subparagraph four of paragraph a of subdivision five of section 8-107 of this chapter, means either a person occupying a dwelling and maintaining a household, with not more than four boarders, roomers or lodgers, or two or more persons occupying a dwelling, living together and maintaining a common household, with not more than four boarders, roomers or lodgers. A "boarder," "roomer" or "lodger" residing with a family means a person living within the household who pays a consideration for such residence and does not occupy such space within the household as an incident of employment therein.

13. The term "commercial space" means any space in a building, structure, or portion thereof which is used or occupied or is intended, arranged or designed to be used or occupied for the manufacture, sale, resale, processing, reprocessing, displaying, storing, handling, garaging or distribution of personal property; and any space which is used or occupied, or is intended, arranged or designed to be used or occupied as a business or professional unit or office in any building, structure or portion thereof.

14. The term "real estate broker" means any person who, for another and for a fee, commission or other valuable consideration, lists for sale, sells, at auction or otherwise, exchanges, buys or rents, or offers or attempts to negotiate a sale at auction, or otherwise, exchange, purchase or rental of an estate or interest in real estate or collects or offers or attempts to collect rent for the use of real estate, or negotiates, or offers or attempts to negotiate, a loan secured or to be secured by a mortgage or other incumbrance upon or transfer of real estate. In the sale of lots pursuant to the provisions of article nine-a of the real property law, the term "real estate broker" shall also include any person employed by or on behalf of the owner or owners of lots or other parcels of real estate, at a stated salary, or upon commission, or upon a salary and commission, or otherwise, to sell such real estate, or any parts thereof, in lots or other parcels, and who shall sell or exchange, or offer or attempt or agree to negotiate the sale or exchange of any such lot or parcel of real estate.

15. The term "real estate salesperson" means a person employed by or authorized by a licensed real estate broker to list for sale, sell or offer for sale at auction or otherwise to buy or offer to buy or to negotiate the purchase or sale or exchange of real estate or to negotiate a loan on real estate or to lease or rent or offer to lease, rent or place for rent any real estate, or who collects or offers or attempts to collect rents for the use of real estate for or on behalf of such real estate broker.

16. (a) The term "disability" means any physical, medical, mental or psychological impairment, or a history or record of such impairment.

(b) The term "physical, medical, mental, or psychological impairment" means:

(1) an impairment of any system of the body; including, but not limited to: the neurological system; the musculoskeletal system; the special sense organs and respiratory organs, including, but not limited to, speech organs; the cardiovascular system; the reproductive system; the digestive and genitourinary systems; the hemic and lymphatic systems; the immunological systems; the skin; and the endocrine system; or

(2) a mental or psychological impairment.

(c) In the case of alcoholism, drug addiction or other substance abuse, the term "disability" shall only apply to a person who (1) is recovering or has recovered and (2) currently is free of such abuse, and shall not include an individual who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.

17. The term "covered entity" means a person required to comply with any provision of sections 8-107 or 8-107.1 of this chapter.

18. The term "reasonable accommodation" means such accommodation that can be made that shall not cause undue hardship in the conduct of the covered entity's business. The covered entity shall have the burden of proving undue hardship. In making a determination of undue hardship with respect to claims filed under subdivisions one, two, or twenty-two of section 8-107, or section 8-107.1 of this chapter, the factors which may be considered include but shall not be limited to:

(a) the nature and cost of the accommodation;

(b) the overall financial resources of the facility or the facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

(c) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees, the number, type, and location of its facilities; and

(d) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity. In making a determination of undue hardship with respect to claims for reasonable accommodation to an employee's or prospective employee's religious observance filed under subdivision three of section 8-107 of this chapter, the definition of "undue hardship" set forth in paragraph b of such subdivision shall apply.

19. The term "occupation" means any lawful vocation, trade, profession or field of specialization.

20. The term "sexual orientation" means heterosexuality, homosexuality, or bisexuality.

21. The term "alienage or citizenship status" means:

(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.

22. The term "hate crime" means a crime that manifests evidence of prejudice based on race, religion, ethnicity, disability, sexual orientation, national origin, age, gender, or alienage or citizenship status.

23. The term "gender" shall include actual or perceived sex and shall also include a person'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 assigned to that person at birth.

24. The term "partnership status" means the status of being in a domestic partnership, as defined by § 3-240(a) of the administrative code of the city of New York.

25. The term "lawful source of income" shall include income derived from social security, or any form of federal, state or local public assistance or housing assistance including section 8 vouchers.

26. The term "cyberbullying" means willful and repeated harm inflicted through the use of computers, cell phones, and other electronic devices that is intended to frighten, harass, cause harm to, extort, or otherwise target another.



27. The terms "unemployed" or "unemployment" shall mean not having a job, being available for work, and seeking employment.

28. The term "intern" shall mean an individual who performs work for an employer on a temporary basis whose work: (a) provides training or supplements training given in an educational environment such that the employability of the individual performing the work may be enhanced; (b) provides experience for the benefit of the individual performing the work; and (c) is performed under the close supervision of existing staff. The term shall include such individuals without regard to whether the employer pays them a salary or wage.

29. The term "consumer credit history" means an individual's credit worthiness, credit standing, credit capacity, or payment history, as indicated by: (a) a consumer credit report; (b) credit score; or (c) information an employer obtains directly from the individual regarding (1) details about credit accounts, including the individual's number of credit accounts, late or missed payments, charged-off debts, items in collections, credit limit, prior credit report inquiries, or (2) bankruptcies, judgments or liens. A consumer credit report shall include any written or other communication of any information by a consumer reporting agency that bears on a consumer's creditworthiness, credit standing, credit capacity or credit history.

30. (a) The term "caregiver" means a person who provides direct and ongoing care for a minor child or a care recipient.

(b) The term "care recipient" means a person with a disability who: (i) is a covered relative, or a person who resides in the caregiver's household; and (ii) relies on the caregiver for medical care or to meet the needs of daily living.

(c) The term "covered relative" means a caregiver's child, spouse, domestic partner, parent, sibling, grandchild or grandparent, or the child or parent of the caregiver's spouse or domestic partner, or any other individual in a familial relationship with the caregiver as designated by the rules of the Commission.

(d) The term "grandchild" means a child of a caregiver's child.

(e) The term "grandparent" means a parent of a caregiver's parent.

(f) The term "parent" means a biological, foster, step- or adoptive parent, or a legal guardian of a caregiver, or a person who stood in loco parentis when the caregiver was a minor child.

(g) The term "sibling" means a caregiver's brother or sister, including half-siblings, step-siblings and siblings related through adoption.

(h) The term "spouse" means a person to whom a caregiver is legally married under the laws of the state of New York.

(i) The term "child" means a biological, adopted or foster child, a legal ward, or a child of a caregiver standing in loco parentis.

(j) The term "minor child" means a child under the age of 18.

31. The term "domestic partner" means any person who has a registered domestic partnership pursuant to section 3-240 of the code, a domestic partnership registered in accordance with executive order number 123, dated August 7, 1989, or a domestic partnership registered in accordance with executive order number 48, dated January 7, 1993.

32. a. The term "person aggrieved," except as used in section 8-123, includes a person whose right created, granted or protected by this chapter is violated by a covered entity directly or through conduct of the covered entity to which the person's agent or employee is subjected while the agent or employee was acting, or as a result of the agent or employee having acted, within the scope of the agency or employment relationship. For purposes of this subdivision, an agent or employee's protected status is imputed to that person's principal or employer when the agent or employee acts within the scope of the agency or employment relationship. It is irrelevant whether or not the covered entity knows of the agency or employment relationship.

b. A person is aggrieved even if that person's only injury is the deprivation of a right granted or protected by this chapter.

c. This subdivision does not limit or exclude any other basis for a cause of action.

33. The term "uniformed service" means:

a. Current or prior service in

(1) The United States army, navy, air force, marine corps, coast guard, the commissioned corps of the national oceanic and atmospheric administration, the commissioned corps of the United States public health services, army national guard or the air national guard;

(2) The organized militia of the state of New York, as described in section 2 of the military law, or the organized militia of any other state, territory or possession of the United States;

(3) Any other service designated as part of the "uniformed services" pursuant to subsection (16) of section 4303 of title 38 of the United States code.

b. Membership in any reserve component of the United States army, navy, air force, marine corps, or coast guard; or

c. Being listed on the state reserve list or the state retired list as described in section 2 of the military law or comparable status for any other state, territory or possession of the United States.

### **§ 8-103 Commission on human rights.**

There is hereby created a commission on human rights. It shall consist of fifteen members, to be appointed by the mayor, one of whom shall be designated by the mayor as its chairperson and shall serve as such at the pleasure of the mayor. The chairperson shall devote his or her entire time to the chairperson's duties and shall not engage in any other occupation, profession or employment. Members other than the chairperson shall serve without compensation. Of the fifteen members first appointed, five shall be appointed for one year, five for two years and five for three years; thereafter all appointments to the commission shall be for a term of three years. In the event of the death or resignation of any member, his or her successor shall be appointed to serve for the unexpired period of the term for which such member had been appointed.

### **§ 8-104 Functions.**

The functions of the commission shall be:

(1) To foster mutual understanding and respect among all persons in the city of New York;

- (2) To encourage equality of treatment for, and prevent discrimination against, any group or its members;
- (3) To cooperate with governmental and non-governmental agencies and organizations having like or kindred functions; and
- (4) To make such investigations and studies in the field of human relations as in the judgment of the commission will aid in effectuating its general purposes.

**§ 8-105 Powers and duties.**

The powers and duties of the commission shall be:

- (1) To work together with federal, state, and city agencies in developing courses of instruction, for presentation to city employees and in public and private schools, public libraries, museums and other suitable places, on techniques for achieving harmonious intergroup relations within the city of New York, on types of bias-related harassment and repeated hostile behavior including conduct or verbal threats, taunting, intimidation, abuse, and cyberbullying, and to engage in other anti-discrimination activities.
- (2) To enlist the cooperation of various groups, and organizations, in mediation efforts, programs and campaigns devoted to eliminating group prejudice, intolerance, hate crimes, bigotry and discrimination.
- (3) To study the problems of prejudice, intolerance, bigotry, discrimination and disorder occasioned thereby in all or any fields of human relationship.
- (4) (a) To receive, investigate and pass upon complaints and to initiate its own investigations of:
  - (i) Group tensions, prejudice, intolerance, bigotry and disorder occasioned thereby.
  - (ii) Discrimination against any person or group of persons, provided, however, that with respect to discrimination alleged to be committed by city officials or city agencies, such investigation shall be commenced after consultation with the mayor. Upon its own motion, to make, sign and file complaints alleging violations of this chapter.
  - (b) In the event that any investigation undertaken pursuant to paragraph a of this subdivision discloses information that any person or group of persons may be engaged in a pattern or practice that results in the denial to any person or group of persons of the full enjoyment of any right secured by this chapter, in addition to making, signing and filing a complaint upon its own motion pursuant to paragraph a of this subdivision, to refer such information to the corporation counsel for the purpose of commencing a civil action pursuant to chapter four of this title.
- (5) (a) To issue subpoenas in the manner provided for in the civil practice law and rules compelling the attendance of witnesses and requiring the production of any evidence relating to any matter under investigation or any question before the commission, and to take proof with respect thereto;
  - (b) To hold hearings, administer oaths and take the testimony of any person under oath; and
  - (c) In accordance with applicable law, to require the production of any names of persons necessary for the investigation of any institution, club or other place or provider of accommodation.
- (6) In accordance with the provision of subdivision b of section 8-114 of this chapter, to require any person or persons who are the subject of an investigation by the commission to preserve such records as are in the possession of such person or persons and to continue to make and keep the type of records that

have been made and kept by such person or persons in the ordinary course of business within the previous year, which records are relevant to the determination whether such person or persons have committed unlawful discriminatory practices with respect to activities in the city.

(7) To issue publications and reports of investigations and research designed to promote good will and minimize or eliminate prejudice, intolerance, bigotry, discrimination and disorder occasioned thereby.

(8) To appoint such employees and agents as it deems to be necessary to carry out its functions, powers and duties and to assign to such persons any of such functions, powers and duties; provided, however, that the commission shall not delegate its power to adopt rules, and, provided further, that the commission's power to order that records be preserved or made and kept pursuant to subdivision b of section 8-114 of this chapter and the commission's power to determine that a respondent has engaged in an unlawful discriminatory practice and to issue an order for such relief as is necessary and proper shall be delegated only to members of the commission. The expenses for the carrying on of the commission's activities shall be paid out of the funds in the city treasury. The commission's appointment and assignment powers as set forth in this subdivision may be exercised by the chairperson of the commission.

(9) To recommend to the mayor and to the council, legislation to aid in carrying out the purpose of this chapter.

(10) To submit an annual report by March 1 to the mayor and the council which shall be published in the City Record. Such annual report shall include information for the calendar year that is the subject of the report regarding: (i) inquiries received by the commission from the public; provided that such information for calendar years 2009 and 2010 must only be included in the annual report submitted by March 1, 2012, (ii) investigations initiated by the commission; (iii) complaints filed with the commission, and (iv) education and outreach efforts made by the commission.

(a) The information regarding inquiries received by the commission from the public shall include, but not be limited to: (i) the total number of inquiries; (ii) the number of inquiries made by limited English proficient persons disaggregated by language; (iii) the subject matter of inquiries disaggregated by the alleged category of unlawful discriminatory practice as set forth by sections 8-107 and 8-107.1(2) of this chapter and the protected class of person, and (iv) the number of inquiries resolved by pre-complaint intervention.

(b) The information regarding investigations initiated by the commission shall include, but not be limited to: (i) the total number of investigations initiated by the commission disaggregated by the category of unlawful discriminatory practice as set forth by sections 8-107 and 8-107.1(2) of this chapter and the protected class at issue; (ii) the total number of commission-initiated complaints filed pursuant to section 8-109 of this chapter after an investigation finding that a person or group of persons may be engaged in a pattern or practice of discrimination; (iii) the total number of investigations referred to the corporation counsel for the purpose of commencing a civil action pursuant to chapter four of this title; and (iv) the total number of publications and reports of investigations designed to promote good will and minimize or eliminate prejudice, intolerance, bigotry, discrimination and disorder occasioned thereby.

(c) The information regarding complaints filed with the commission shall include, but not be limited to, the number of complaints filed with the commission and shall be disaggregated by: (i) the category of unlawful discriminatory practice, as set forth by sections 8-107 and 8-107.1(2) of this chapter, alleged; (ii) the basis of the alleged discriminatory practice based on protected class of the complainant; (iii) whether the complaint was resolved by mediation and conciliation, as set forth in section 8-115 of this chapter; a

determination of no probable cause, as set forth in section 8-116 of this chapter; or a hearing, as set forth by section 8-119 of this chapter; (iv) the number of days the complaint was outstanding at the time such resolution occurred; and (v) whether a fine, penalty, or cash award was imposed and, if so, the dollar amount of such fine, penalty or cash award.

(d) The information regarding the commission's education and outreach efforts as required by sections 8-105(1) and 8-105(2) of this chapter shall include, but not be limited to: (i) the types of outreach initiated; (ii) the number of people with whom the commission made contact as a result of outreach; (iii) the number of limited English proficient persons served; and (iv) the languages in which such outreach was conducted.

(11) To adopt rules to carry out the provisions of this chapter and the policies and procedures of the commission in connection therewith.

### **§ 8-106 Relations with city departments and agencies.**

So far as practicable and subject to the approval of the mayor, the services of all other city departments and agencies shall be made available by their respective heads to the commission for the carrying out of the functions herein stated. The head of any department or agency shall furnish information in the possession of such department or agency when the commission so requests. The corporation counsel, upon request of the chairperson of the commission, may assign counsel to assist the commission in the conduct of its investigatory or prosecutorial functions.

### **§ 8-107 Unlawful discriminatory practices.**

1. Employment. It shall be an unlawful discriminatory practice:

(a) For an employer or an employee or agent thereof, because of the actual or perceived age, race, creed, color, national origin, gender, disability, marital status, partnership status, caregiver status, sexual orientation, uniformed service or alienage or citizenship status of any person:

(1) To represent that any employment or position is not available when in fact it is available;

(2) To refuse to hire or employ or to bar or to discharge from employment such person; or

(3) To discriminate against such person in compensation or in terms, conditions or privileges of employment.

(b) For an employment agency or an employee or agent thereof to discriminate against any person because of such person's actual or perceived age, race, creed, color, national origin, gender, disability, marital status, partnership status, caregiver status, sexual orientation, uniformed service or alienage or citizenship status in receiving, classifying, disposing or otherwise acting upon applications for its services, including by representing to such person that any employment or position is not available when in fact it is available, or in referring an applicant or applicants for its services to an employer or employers.

(c) For a labor organization or an employee or agent thereof, because of the actual or perceived age, race, creed, color, national origin, gender, disability, marital status, partnership status, caregiver status, sexual orientation, uniformed service or alienage or citizenship status of any person, to exclude or to expel from its membership such person, to represent that membership is not available when it is in fact available, or to discriminate in any way against any of its members or against any employer or any person employed by an employer.

(d) For any employer, labor organization or employment agency or an employee or agent thereof to declare, print or circulate or cause to be declared, printed or circulated any statement, advertisement or publication, or to use any form of application for employment or to make any inquiry in connection with prospective employment, which expresses, directly or indirectly, any limitation, specification or discrimination as to age, race, creed, color, national origin, gender, disability, marital status, partnership status, caregiver status, sexual orientation, uniformed service or alienage or citizenship status, or any intent to make any such limitation, specification or discrimination.

(e) The provisions of this subdivision and subdivision two of this section: (i) as they apply to employee benefit plans, shall not be construed to preclude an employer from observing the provisions of any plan covered by the federal employment retirement income security act of nineteen hundred seventy-four that is in compliance with applicable federal discrimination laws where the application of the provisions of such subdivisions to such plan would be preempted by such act; (ii) shall not preclude the varying of insurance coverages according to an employee's age; (iii) shall not be construed to affect any retirement policy or system that is permitted pursuant to paragraph (e) and (f) of subdivision three-a of section two hundred ninety-six of the executive law; (iv) shall not be construed to affect the retirement policy or system of an employer where such policy or system is not a subterfuge to evade the purposes of this chapter.

(f) The provisions of this subdivision shall not govern the employment by an employer of his or her parents, spouse, domestic partner, or children; provided, however, that such family members shall be counted as persons employed by an employer for the purposes of subdivision five of section 8-102 of this chapter.

2. Apprentice training programs. It shall be an unlawful discriminatory practice for an employer, labor organization, employment agency or any joint labor-management committee controlling apprentice training programs or an employee or agent thereof:

(a) To select persons for an apprentice training program registered with the state of New York on any basis other than their qualifications, as determined by objective criteria which permit review.

(b) To deny to or withhold from any person because of his or her actual or perceived race, creed, color, national origin, gender, age, disability, marital status, partnership status, sexual orientation, uniformed service or alienage or citizenship status the right to be admitted to or participate in, a guidance program, an apprentice training program, on-the-job training program, or other occupational training or retraining program, or to represent that such program is not available when in fact it is available.

(c) To discriminate against any person in his or her pursuit of such program or to discriminate against such a person in the terms, conditions or privileges of such program because of actual or perceived race, creed, color, national origin, gender, age, disability, marital status, partnership status, sexual orientation, uniformed service or alienage or citizenship status.

(d) To declare, print or circulate or cause to be declared, printed or circulated any statement, advertisement or publication, or to use any form of application for such program or to make any inquiry in connection with such program which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color, national origin, gender, age, disability, marital status, partnership status, sexual orientation, uniformed service or alienage or citizenship status, or any intent to make any such limitation, specification or discrimination.

3. Employment; religious observance.

(a) It shall be an unlawful discriminatory practice for an employer or an employee or agent thereof to impose upon a person as a condition of obtaining or retaining employment any terms or conditions, compliance with which would require such person to violate, or forego a practice of, his or her creed or religion, including but not limited to the observance of any particular day or days or any portion thereof as a sabbath or holy day or the observance of any religious custom or usage, and the employer shall make reasonable accommodation to the religious needs of such person. Without in any way limiting the foregoing, no person shall be required to remain at his or her place of employment during any day or days or portion thereof that, as a requirement of such person's religion, he or she observes as a sabbath or other holy day, including a reasonable time prior and subsequent thereto for travel between his or her place of employment and his or her home, provided, however, that any such absence from work shall, wherever practicable in the judgment of the employer, be made up by an equivalent amount of time at some other mutually convenient time.

(b) "Reasonable accommodation", as used in this subdivision, shall mean such accommodation to an employee's or prospective employee's religious observance or practice as shall not cause undue hardship in the conduct of the employer's business. The employer shall have the burden of proof to show such hardship. "Undue hardship" as used in this subdivision shall mean an accommodation requiring significant expense or difficulty (including a significant interference with the safe or efficient operation of the workplace or a violation of a bona fide seniority system). Factors to be considered in determining whether the accommodation constitutes an undue economic hardship shall include, but not be limited to:

(i) the identifiable cost of the accommodation, including the costs of loss of productivity and of retaining or hiring employees or transferring employees from one facility to another, in relation to the size and operating cost of the employer;

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

(iii) for an employer with multiple facilities, the degree to which the geographic separateness or administrative or fiscal relationship of the facilities will make the accommodation more difficult or expensive. Provided, however, an accommodation shall be considered to constitute an undue hardship, for purposes of this subdivision, if it will result in the inability of an employee who is seeking a religious accommodation to perform the essential functions of the position in which he or she is employed.

#### 4. Public accommodations.

a. It shall be an unlawful discriminatory practice for any person who is the owner, franchisor, franchisee, lessor, lessee, proprietor, manager, superintendent, agent or employee of any place or provider of public accommodation:

1. Because of any person's actual or perceived race, creed, color, national origin, age, gender, disability, marital status, partnership status, sexual orientation, uniformed service or alienage or citizenship status, directly or indirectly:

(a) To refuse, withhold from or deny to such person 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; or

(b) To represent to any person that any accommodation, advantage, facility or privilege of any such place or provider of public accommodation is not available when in fact it is available; or

2. Directly or indirectly to make any declaration, publish, circulate, issue, display, post or mail any written or printed communication, notice or advertisement, to the effect that:

(a) Full and equal enjoyment, on equal terms and conditions, of any of the accommodations, advantages, facilities and privileges of any such place or provider of public accommodation shall be refused, withheld from or denied to any person on account of race, creed, color, national origin, age, gender, disability, marital status, partnership status, sexual orientation, uniformed service or alienage or citizenship status; or

(b) The patronage or custom of any person is unwelcome, objectionable, not acceptable, undesired or unsolicited because of such person's actual or perceived race, creed, color, national origin, age, gender, disability, marital status, partnership status, sexual orientation, uniformed service or alienage or citizenship status.

b. Notwithstanding the foregoing, the provisions of this subdivision shall not apply, with respect to age or gender, to places or providers of public accommodation where the commission grants an exemption based on bona fide considerations of public policy.

c. The provisions of this subdivision relating to discrimination on the basis of gender shall not prohibit any educational institution subject to this subdivision from making gender distinctions which would be permitted (i) for educational institutions which are subject to section thirty-two hundred one-a of the education law or any rules or regulations promulgated by the state commissioner of education relating to gender or (ii) under 45 CFR §§ 86.32, 86.33 and 86.34 for educational institutions covered thereunder.

d. Nothing in this subdivision shall be construed to preclude an educational institution—other than a publicly-operated educational institution—which establishes or maintains a policy of educating persons of one gender exclusively from limiting admissions to students of that gender.

e. The provisions of this section relating to disparate impact shall not apply to the use of standardized tests as defined by section three hundred forty of the education law by an educational institution subject to this subdivision provided that such test is used in the manner and for the purpose prescribed by the test agency which designed the test.

f. The provisions of this subdivision as they relate to unlawful discriminatory practices by educational institutions shall not apply to matters that are strictly educational or pedagogical in nature.

5. Housing accommodations, land, commercial space and lending practices.

(a) Housing accommodations. It shall be an unlawful discriminatory practice for 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:

(1) Because of the actual or perceived race, creed, color, national origin, gender, age, disability, sexual orientation, uniformed service, marital status, partnership status, or alienage or citizenship status of any person or group of persons, or because of any lawful source of income of such person or persons, or because children are, may be or would be residing with such person or persons:

(a) To refuse to sell, rent, lease, approve the sale, rental or lease or otherwise deny to or withhold from any such person or group of persons such a housing accommodation or an interest therein;



(b) To discriminate against any such person or persons in the terms, conditions or privileges of the sale, rental or lease of any such housing accommodation or an interest therein or in the furnishing of facilities or services in connection therewith; or

(c) To represent to such person or persons that any housing accommodation or an interest therein is not available for inspection, sale, rental or lease when in fact it is available to such person.

(2) To declare, print or circulate or cause to be declared, printed or circulated any statement, advertisement or publication, or to use any form of application for the purchase, rental or lease of such a housing accommodation or an interest therein or to make any record or inquiry in conjunction with the prospective purchase, rental or lease of such a housing accommodation or an interest therein which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color, national origin, gender, age, disability, sexual orientation, uniformed service, marital status, partnership status, or alienage or citizenship status, or any lawful source of income, or whether children are, may be, or would be residing with a person, or any intent to make such limitation, specification or discrimination.

(3) [Deleted.]

(4) The provisions of this paragraph (a) shall not apply:

(1) to 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 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.

(b) Land and commercial space. It shall be an unlawful discriminatory practice for the owner, lessor, lessee, sublessee, or managing agent of, or other person having the right of ownership or possession of or the right to sell, rent, or lease, or approve the sale, rental or lease of land or commercial space or an interest therein, or any agency or employee thereof:

(1) Because of the actual or perceived race, creed, color, national origin, gender, age, disability, sexual orientation, uniformed service, marital status, partnership status, or alienage or citizenship status of any person or group of persons, or because children are, may be or would be residing with any person or persons:

(A) To refuse to sell, rent, lease, approve the sale, rental or lease or otherwise deny or to withhold from any such person or group of persons land or commercial space or an interest therein;

(B) To discriminate against any such person or persons in the terms, conditions or privileges of the sale, rental or lease of any such land or commercial space or an interest therein or in the furnishing of facilities or services in connection therewith; or

(C) To represent to any person or persons that any land or commercial space or an interest therein is not available for inspection, sale, rental or lease when in fact it is available.

(2) To declare, print or circulate or cause to be declared, printed or circulated any statement, advertisement or publication, or to use any form of application for the purchase, rental or lease of such land or commercial space or an interest therein or to make any record or inquiry in connection with the prospective purchase, rental or lease of such land or commercial space or an interest therein which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color, national origin, gender, age, disability, sexual orientation, uniformed service, marital status, partnership status, or alienage or citizenship status, or whether children are, may be or would be residing with such person, or any intent to make any such limitation, specification or discrimination.

(c) Real estate brokers. It shall be an unlawful discriminatory practice for any real estate broker, real estate salesperson or employee or agent thereof:

(1) To refuse to sell, rent or lease any housing accommodation, land or commercial space or an interest therein to any person or group of persons or to refuse to negotiate for the sale, rental or lease, of any housing accommodation, land or commercial space or an interest therein to any person or group of persons because of the actual or perceived race, creed, color, national origin, gender, age, disability, sexual orientation, uniformed service, marital status, partnership status, or alienage or citizenship status of such person or persons, or because of any lawful source of income of such person or persons, or because children are, may be or would be residing with such person or persons, or to represent that any housing accommodation, land or commercial space or an interest therein is not available for inspection, sale, rental or lease when in fact it is so available, or otherwise to deny or withhold any housing accommodation, land or commercial space or an interest therein or any facilities of any housing accommodation, land or commercial space or an interest therein from any person or group of persons because of the actual or perceived race, creed, color, national origin, gender, age, disability, sexual orientation, uniformed service, marital status, partnership status, or alienage or citizenship status of such person or persons, or because of any lawful source of income of such person or persons, or because children are, may be or would be residing with such person or persons.

(2) To declare, print or circulate or cause to be declared, printed or circulated any statement, advertisement or publication, or to use any form of application for the purchase, rental or lease of any housing accommodation, land or commercial space or an interest therein or to make any record or inquiry in connection with the prospective purchase, rental or lease of any housing accommodation, land or commercial space or an interest therein which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color, national origin, gender, age, disability, sexual orientation, uniformed service, marital status, partnership status, or alienage or citizenship status, or any lawful source of income, or to whether children are, may be or would be residing with a person, or any intent to make such limitation, specification or discrimination.

(3) To induce or attempt to induce any person to sell or rent any housing accommodation, land or commercial space or an interest therein by representations, explicit or implicit, regarding the entry or prospective entry into the neighborhood or area of a person or persons of any race, creed, color, gender, age, disability, sexual orientation, uniformed service, marital status, partnership status, national origin, alienage or citizenship status, or a person or persons with any lawful source of income, or a person or persons with whom children are, may be or would be residing.

(d) Lending practices.

(1) It shall be an unlawful discriminatory practice for any person, bank, trust company, private banker, savings bank, industrial bank, savings and loan association, credit union, investment company, mortgage company, insurance company, or other financial institution or lender, doing business in the city,

including unincorporated entities and entities incorporated in any jurisdiction, or any officer, agent or employee thereof to whom application is made for a loan, mortgage or other form of financial assistance for the purchase, acquisition, construction, rehabilitation, repair or maintenance of any housing accommodation, land or commercial space or an interest therein:

(A) To discriminate against such applicant in the granting, withholding, extending or renewing, or in the fixing of rates, terms or conditions of any such financial assistance or in the appraisal of any housing accommodation, land or commercial space or an interest therein:

(i) Because of the actual or perceived race, creed, color, national origin, gender, disability, sexual orientation, age, marital status, uniformed service, partnership status, or alienage or citizenship status of such applicant, any member, stockholder, director, officer or employee of such applicant, or the occupants or tenants or prospective occupants or tenants of such housing accommodation, land or commercial space; or

(ii) Because children are, may be or would be residing with such applicant or other person.

(B) To use any form of application for a loan, mortgage, or other form of financial assistance, or to make any record or inquiry in connection with applications for such financial assistance, or in connection with the appraisal of any housing accommodation, land or commercial space or an interest therein, which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color, national origin, gender, disability, sexual orientation, uniformed service, age, marital status, partnership status, or alienage or citizenship status, or whether children are, may be, or would be residing with a person.

(2) It shall be an unlawful discriminatory practice for any person, bank, trust company, private banker, savings bank, industrial bank, savings and loan association, credit union, investment company, mortgage company, insurance company, or other financial institution or lender, doing business in the city, including unincorporated entities and entities incorporated in any jurisdiction, or any officer, agent or employee thereof to represent to any person that any type or term of loan, mortgage or other form of financial assistance for the purchase, acquisition, construction, rehabilitation, repair or maintenance of such housing accommodation, land or commercial space or an interest therein is not available when in fact it is available:

(A) Because of the actual or perceived race, creed, color, national origin, gender, disability, sexual orientation, uniformed service, age, marital status, partnership status, or alienage or citizenship status of such person, any member, stockholder, director, officer or employee of such person, or the occupants or tenants or prospective occupants or tenants of such housing accommodation, land or commercial space; or

(B) Because children are, may be or would be residing with a person.

(e) Real estate services. It shall be an unlawful discriminatory practice, because of the actual or perceived race, creed, color, national origin, gender, disability, sexual orientation, uniformed service, age, marital status, partnership status, or alienage or citizenship status of any person or because children are, may be or would be residing with such person:

(1) To deny such person access to, membership in or participation in a multiple listing service, real estate brokers' organization, or other service ; or

(2) To represent to such person that access to or membership in such service or organization is not available, when in fact it is available.

(f) Real estate related transactions. It shall be an unlawful discriminatory practice for any person whose business includes the appraisal of housing accommodations, land or commercial space or interest therein or an employee or agent thereof to discriminate in making available or in the terms or conditions of such appraisal on the basis of the actual or perceived race, creed, color, national origin, gender, disability, sexual orientation, uniformed service, age, marital status, partnership status, or alienage or citizenship status of any person or because children are, may be or would be residing with such person.

(g) Applicability; persons under eighteen years of age. The provisions of this subdivision, as they relate to unlawful discriminatory practices in housing accommodations, land and commercial space or an interest therein and lending practices on the basis of age, shall not apply to unemancipated persons under the age of eighteen years.

(h) Applicability; discrimination against persons with children. The provisions of this subdivision with respect to discrimination against persons with whom children are, may be or would be residing shall not apply to housing for older persons as defined in paragraphs two and three of 42 U.S.C. § 3607(b) and any regulations promulgated thereunder.

(i) Applicability; senior citizen housing. The provisions of this subdivision with respect to discrimination on the basis of age shall not apply to the restriction of the sale, rental or lease of any housing accommodation, land or commercial space or an interest therein exclusively to persons fifty-five years of age or older. This paragraph shall not be construed to permit discrimination against such persons fifty-five years of age or older on the basis of whether children are, may be or would be residing in such housing accommodation or land or an interest therein unless such discrimination is otherwise permitted pursuant to paragraph (h) of this subdivision.

(j) Applicability; dormitory residence operated by educational institution. The provisions of this subdivision relating to discrimination on the basis of gender in housing accommodations shall not prohibit any educational institution from making gender distinctions in dormitory residences which would be permitted under 45 CFR §§ 86.32 and 86.33 for educational institutions covered thereunder.

(k) Applicability; dormitory-type housing accommodations. The provisions of this subdivision which prohibit distinctions on the basis of gender and whether children are, may be or would be residing with a person shall not apply to dormitory-type housing accommodations including, but not limited to, shelters for the homeless where such distinctions are intended to recognize generally accepted values of personal modesty and privacy or to protect the health, safety or welfare of families with children.

(l) Exemption for special needs of particular age group in publicly-assisted housing accommodations. Nothing in this subdivision shall restrict the consideration of age in the rental of publicly-assisted housing accommodations if the state division of human rights grants an exemption pursuant to section two hundred ninety-six of the executive law based on bona fide considerations of public policy for the purpose of providing for the special needs of a particular age group without the intent of prejudicing other age groups; provided however, that this paragraph shall not be construed to permit discrimination on the basis of whether children are, may be or would be residing in such housing accommodations unless such discrimination is otherwise permitted pursuant to paragraph (h) of this section.

(m) **Applicability; use of criteria or qualifications in publicly-assisted housing accommodations.** The provisions of this subdivision shall not be construed to prohibit the use of criteria or qualifications of eligibility for the sale, rental, leasing or occupancy of publicly-assisted housing accommodations where such criteria or qualifications are required to comply with federal or state law, or are necessary to obtain the benefits of a federal or state program, or to prohibit the use of statements, advertisements, publications, applications or inquiries to the extent that they state such criteria or qualifications or request information necessary to determine or verify the eligibility of an applicant, tenant, purchaser, lessee or occupant.

(n) **Discrimination on the basis of occupation prohibited in housing accommodations.** Where a housing accommodation or an interest therein is sought or occupied exclusively for residential purposes, the provisions of this subdivision shall be construed to prohibit discrimination on account of a person's occupation in:

- (1) The sale, rental, or leasing of such housing accommodation or interest therein;
- (2) The terms, conditions and privileges of the sale, rental or leasing of such housing accommodation or interest therein;
- (3) Furnishing facilities or services in connection therewith; and
- (4) Representing whether or not such housing accommodation or interest therein is available for sale, rental, or leasing.

(o) **Applicability; lawful source of income.** The provisions of this subdivision, as they relate to unlawful discriminatory practices on the basis of lawful source of income, shall not apply to housing accommodations that contain a total of five or fewer housing units, provided, however:

(i) the provisions of this subdivision shall apply to tenants subject to rent control laws who reside in housing accommodations that contain a total of five or fewer units at the time of the enactment of this local law; and provided, however

(ii) the provisions of this subdivision shall apply to all housing accommodations, regardless of the number of units contained in each, of any person who has the right to sell, rent or lease or approve the sale, rental or lease of at least one housing accommodation within New York City that contains six or more housing units, constructed or to be constructed, or an interest therein.

6. **Aiding and abetting.** It shall be an unlawful discriminatory practice for any person to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this chapter, or to attempt to do so.

7. **Retaliation.** It shall be an unlawful discriminatory practice for any person engaged in any activity to which this chapter applies to retaliate or discriminate in any manner against any person because such person has (i) opposed any practice forbidden under this chapter, (ii) filed a complaint, testified or assisted in any proceeding under this chapter, (iii) commenced a civil action alleging the commission of an act which would be an unlawful discriminatory practice under this chapter, (iv) assisted the commission or the corporation counsel in an investigation commenced pursuant to this title, or (v) provided any information to the commission pursuant to the terms of a conciliation agreement made pursuant to section 8-115 of this chapter. The retaliation or discrimination complained of under this subdivision need not result in an ultimate action with respect to employment, housing or a public accommodation or in a materially adverse change in the terms and conditions of employment, housing, or

a public accommodation, provided, however, that the retaliatory or discriminatory act or acts complained of must be reasonably likely to deter a person from engaging in protected activity.

8. Violation of conciliation agreement. It shall be an unlawful discriminatory practice for any party to a conciliation agreement made pursuant to section 8-115 of this chapter to violate the terms of such agreement.

9. Licenses, registrations and permits.

(a) It shall be an unlawful discriminatory practice:

(1) Except as otherwise provided in paragraph c of this subdivision, for an agency authorized to issue a license, registration or permit or an employee thereof to falsely deny the availability of such license, registration or permit, or otherwise discriminate against an applicant, or a putative or prospective applicant for a license, registration or permit because of the actual or perceived race, creed, color, national origin, age, gender, marital status, partnership status, disability, sexual orientation, uniformed service or alienage or citizenship status of such applicant.

(2) Except as otherwise provided in paragraph (c) of this subdivision, for an agency authorized to issue a license, registration or permit or an employee thereof to declare, print or circulate or cause to be declared, printed or circulated any statement, advertisement or publication, or to use any form of application for a license, registration or permit or to make any inquiry in connection with any such application, which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color, national origin, age, gender, marital status, partnership status, disability, sexual orientation, uniformed service or alienage or citizenship status, or any intent to make any such limitation, specification or discrimination.

(3) For any person to deny any license, registration or permit to any applicant, or act adversely upon any holder of a license, registration or permit by reason of his or her having been convicted of one or more criminal offenses, or by reason of a finding of a lack of "good moral character" which is based on his or her having been convicted of one or more criminal offenses, when such denial or adverse action is in violation of the provisions of article twenty-three-a of the correction law.

(4) For any person to deny any license, registration or permit to any applicant, or act adversely upon any holder of a license, registration or permit by reason of his or her having been arrested or accused of committing a crime when such denial or adverse action is in violation of subdivision 16 of section 296 of article 15 of the New York state executive law.

(5) For any person to make any inquiry, in writing or otherwise, regarding any arrest or criminal accusation of an applicant for any license, registration or permit when such inquiry is in violation of subdivision 16 of section 296 of article 15 of the New York state executive law.

(b) (1) Except as otherwise provided in this paragraph, it shall be an unlawful discriminatory practice for an agency to request or use for licensing, registration or permitting purposes information contained in the consumer credit history of an applicant, licensee, registrant or permittee for licensing or permitting purposes.

(2) Subparagraph (1) of this paragraph shall not apply to an agency required by state or federal law or regulations to use an individual's consumer credit history for licensing, registration or permitting purposes.

(3) Subparagraph (1) of this paragraph shall not be construed to affect the ability of an agency to consider an applicant's, licensee's, registrant's or permittee's failure to pay any tax, fine, penalty, or fee for which liability has been admitted by the person liable therefor, or for which judgment has been entered by a court or administrative tribunal of competent jurisdiction, or any tax for which a government agency has issued a warrant, or a lien or levy on property.

(4) Nothing in this paragraph shall preclude a licensing agency from requesting, receiving, or using consumer credit history information obtained pursuant to a lawful subpoena, court order or law enforcement investigation.

(c) The prohibition of this subdivision relating to inquiries, denials or other adverse action related to a person's record of arrests or convictions shall not apply to licensing activities in relation to the regulation of explosives, pistols, handguns, rifles, shotguns, or other firearms and deadly weapons. Nothing contained in this subdivision shall be construed to bar an agency authorized to issue a license, registration or permit from using age, disability, criminal conviction or arrest record as a criterion for determining eligibility or continuing fitness for a license, registration or permit when specifically required to do so by any other provision of law.

(d) (1) Except as otherwise provided in this paragraph, it shall be an unlawful discriminatory practice for an agency to request or use for licensing or permitting purposes information contained in the consumer credit history of an applicant, licensee or permittee for licensing or permitting purposes.

(2) Subparagraph (1) of this paragraph shall not apply to an agency required by state or federal law or regulations to use an individual's consumer credit history for licensing or permitting purposes.

(3) Subparagraph (1) of this paragraph shall not be construed to affect the ability of an agency to consider an applicant's, licensee's, registrant's or permittee's failure to pay any tax, fine, penalty, or fee for which liability has been admitted by the person liable therefor, or for which judgment has been entered by a court or administrative tribunal of competent jurisdiction, or any tax for which a government agency has issued a warrant, or a lien or levy on property.

(4) Nothing in this paragraph shall preclude a licensing agency from requesting, receiving, or using consumer credit history information obtained pursuant to a lawful subpoena, court order or law enforcement investigation.

(e) The provisions of this subdivision shall be enforceable against public agencies and employees thereof by a proceeding brought pursuant to article 78 of the civil practice law and rules.

Editor's note: the provisions of this division 9(e) are retroactive to 10/25/2015; see L.L. 2016/040 §§ 12, 19, 4/6/2016.

#### 10. Criminal conviction; employment.

(a) It shall be an unlawful discriminatory practice for any employer, employment agency or agent thereof to deny employment to any person or take adverse action against any employee by reason of such person or employee having been convicted of one or more criminal offenses, or by reason of a finding of a lack of "good moral character" which is based on such person or employee having been convicted of one or more criminal offenses, when such denial or adverse action is in violation of the provisions of article twenty-three-a of the correction law.

(b) For purposes of this subdivision, "employment" shall not include membership in any law enforcement agency.

(c) Pursuant to section seven hundred fifty-five of the correction law, the provisions of this subdivision shall be enforceable against public agencies by a proceeding brought pursuant to article seventy-eight of the Civil Practice Law and Rules, and the provisions of this subdivision shall be enforceable against private employers by the commission through the administrative procedure provided for in this chapter or as provided in chapter five of this title. For purposes of this paragraph only, the terms "public agency" and "private employer" shall have the meaning given such terms in section seven hundred fifty of the correction law.

11. Arrest record; employment. It shall be an unlawful discriminatory practice, unless specifically required or permitted by any other law, for any person to:

(a) deny employment to any applicant or act adversely upon any employee by reason of an arrest or criminal accusation of such applicant or employee when such denial or adverse action is in violation of subdivision 16 of section 296 of article 15 of the New York state executive law; or

(b) make any inquiry in writing or otherwise, regarding any arrest or criminal accusation of an applicant or employee when such inquiry is in violation of subdivision 16 of section 296 of article 15 of the New York state executive law.

11-a. Arrest and conviction records; employer inquiries.

(a) In addition to the restrictions in subdivision 11 of this section, it shall be an unlawful discriminatory practice for any employer, employment agency or agent thereof to:

(1) Declare, print or circulate or cause to be declared, printed or circulated any solicitation, advertisement or publication, which expresses, directly or indirectly, any limitation, or specification in employment based on a person's arrest or criminal conviction;

(2) Because of any person's arrest or criminal conviction, represent that any employment or position is not available, when in fact it is available to such person; or

(3) Make any inquiry or statement related to the pending arrest or criminal conviction record of any person who is in the process of applying for employment with such employer or agent thereof until after such employer or agent thereof has extended a conditional offer of employment to the applicant. For purposes of this subdivision, with respect to an applicant for temporary employment at a temporary help firm as such term is defined by subdivision five of section 916 of article 31 of the labor law, an offer to be placed in the temporary help firm's general candidate pool shall constitute a conditional offer of employment. For purposes of this subdivision, "any inquiry" means any question communicated to an applicant in writing or otherwise, or any searches of publicly available records or consumer reports that are conducted for the purpose of obtaining an applicant's criminal background information, and "any statement" means a statement communicated in writing or otherwise to the applicant for purposes of obtaining an applicant's criminal background information regarding: (i) an arrest record; (ii) a conviction record; or (iii) a criminal background check.

(b) After extending an applicant a conditional offer of employment, an employer, employment agency or agent thereof may inquire about the applicant's arrest or conviction record if before taking any adverse employment action based on such inquiry, the employer, employment agency or agent thereof:

(i) provides a written copy of the inquiry to the applicant in a manner to be determined by the commission;



(ii) performs an analysis of the applicant under article twenty-three-a of the correction law and provides a written copy of such analysis to the applicant in a manner to be determined by the commission, which shall include but not be limited to supporting documents that formed the basis for an adverse action based on such analysis and the employer's or employment agency's reasons for taking any adverse action against such applicant; and

(iii) after giving the applicant the inquiry and analysis in writing pursuant to subparagraphs (i) and (ii) of this paragraph, allows the applicant a reasonable time to respond, which shall be no less than three business days and during this time, holds the position open for the applicant.

(c) Nothing in this subdivision shall prevent an employer, employment agency or agent thereof from taking adverse action against any employee or denying employment to any applicant for reasons other than such employee or applicant's arrest or criminal conviction record.

(d) An applicant shall not be required to respond to any inquiry or statement that violates paragraph (a) of this subdivision and any refusal to respond to such inquiry or statement shall not disqualify an applicant from the prospective employment.

(e) This subdivision shall not apply to any actions taken by an employer or agent thereof pursuant to any state, federal or local law that requires criminal background checks for employment purposes or bars employment based on criminal history. For purposes of this paragraph federal law shall include rules or regulations promulgated by a self-regulatory organization as defined in section 3(a)(26) of the securities exchange act of 1934, as amended.

(f) This subdivision shall not apply to any actions taken by an employer or agent thereof with regard to an applicant for employment:

(1) as a police officer or peace officer, as those terms are defined in subdivisions thirty-three and thirty-four of section 1.20 of the criminal procedure law, respectively, or at a law enforcement agency as that term is used in article 23-a of the correction law, including but not limited to the police department, the fire department, the department of correction, the department of investigation, the department of probation, the division of youth and family services, the business integrity commission, and the district attorneys' offices; or

(2) listed in the determinations of personnel published as a commissioner's calendar item and listed on the website of the department of citywide administrative services upon a determination by the commissioner of citywide administrative services that the position involves law enforcement, is susceptible to bribery or other corruption, or entails the provision of services to or safeguarding of persons who, because of age, disability, infirmity or other condition, are vulnerable to abuse. If the department takes adverse action against any applicant based on the applicant's arrest or criminal conviction record, it shall provide a written copy of such analysis performed under article twenty-three a of the correction law to the applicant in a form and manner to be determined by the department.

(g) The provisions of this subdivision shall be enforceable against public agencies by a proceeding brought pursuant to article seventy-eight of the Civil Practice Law and Rules, and the provisions of this subdivision shall be enforceable against private employers by the commission through the administrative procedure provided for in this chapter or as provided in chapter five of this title. For purposes of this paragraph only, the terms "public agency" and "private employer" shall have the meaning given such terms in section seven hundred fifty of the correction law.

11-b. Arrest record; credit application. For purposes of issuing credit, it shall be an unlawful discriminatory practice, unless specifically required or permitted by any other law, to:

(a) Deny or act adversely upon any person seeking credit by reason of an arrest or criminal accusation of such person when such denial or adverse action is in violation of subdivision 16 of section 296 of article 15 of the executive law;

(b) Make any inquiry in writing or otherwise, regarding any arrest or criminal accusation of a person seeking credit when such inquiry is in violation of subdivision 16 of section 296 of article 15 of the executive law; or

(c) Because of any arrest or criminal accusation of a person seeking credit, represent to such person that credit is not available, when in fact it is available to such person.

12. Religious principles. Nothing contained in this section shall be construed to bar any religious or denominational institution or organization or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization, from limiting employment or sales or rentals of housing accommodations or admission to or giving preference to persons of the same religion or denomination or from making such selection as is calculated by such organization to promote the religious principles for which it is established or maintained.

13. Employer liability for discriminatory conduct by employee, agent or independent contractor.

a. An employer shall be liable for an unlawful discriminatory practice based upon the conduct of an employee or agent which is in violation of any provision of this section other than subdivisions one and two of this section.

b. An employer shall be liable for an unlawful discriminatory practice based upon the conduct of an employee or agent which is in violation of subdivision one or two of this section only where:

(1) the employee or agent exercised managerial or supervisory responsibility; or

(2) the employer knew of the employee's or agent's discriminatory conduct, and acquiesced in such conduct or failed to take immediate and appropriate corrective action; an employer shall be deemed to have knowledge of an employee's or agent's discriminatory conduct where that conduct was known by another employee or agent who exercised managerial or supervisory responsibility; or

(3) the employer should have known of the employee's or agent's discriminatory conduct and failed to exercise reasonable diligence to prevent such discriminatory conduct.

c. An employer shall be liable for an unlawful discriminatory practice committed by a person employed as an independent contractor, other than an agent of such employer, to carry out work in furtherance of the employer's business enterprise only where such discriminatory conduct was committed in the course of such employment and the employer had actual knowledge of and acquiesced in such conduct.

d. Where liability of an employer has been established pursuant to this section and is based solely on the conduct of an employee, agent, or independent contractor, the employer shall be permitted to plead and prove to the discriminatory conduct for which it was found liable it had:

(1) Established and complied with policies, programs and procedures for the prevention and detection of unlawful discriminatory practices by employees, agents and persons employed as independent contractors, including but not limited to:

(i) A meaningful and responsive procedure for investigating complaints of discriminatory practices by employees, agents and persons employed as independent contractors and for taking appropriate action against those persons who are found to have engaged in such practices;

(ii) A firm policy against such practices which is effectively communicated to employees, agents and persons employed as independent contractors;

(iii) A program to educate employees and agents about unlawful discriminatory practices under local, state, and federal law; and

(iv) Procedures for the supervision of employees and agents and for the oversight of persons employed as independent contractors specifically directed at the prevention and detection of such practices; and

(2) A record of no, or relatively few, prior incidents of discriminatory conduct by such employee, agent or person employed as an independent contractor or other employees, agents or persons employed as independent contractors.

e. The demonstration of any or all of the factors listed above in addition to any other relevant factors shall be considered in mitigation of the amount of civil penalties to be imposed by the commission pursuant to this chapter or in mitigation of civil penalties or punitive damages which may be imposed pursuant to chapter four or five of this title and shall be among the factors considered in determining an employer's liability under subparagraph three of paragraph b of this subdivision.

f. The commission may establish by rule policies, programs and procedures which may be implemented by employers for the prevention and detection of unlawful discriminatory practices by employees, agents and persons employed as independent contractors. Notwithstanding any other provision of law to the contrary, an employer found to be liable for an unlawful discriminatory practice based solely on the conduct of an employee, agent or person employed as an independent contractor who pleads and proves that such policies, programs and procedures had been implemented and complied with at the time of the unlawful conduct shall not be liable for any civil penalties which may be imposed pursuant to this chapter or any civil penalties or punitive damages which may be imposed pursuant to chapter four or five of this title for such unlawful discriminatory practice.

14. Applicability; alienage or citizenship status. 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.

15. Applicability; persons with disabilities.

(a) Requirement to make reasonable accommodation to the needs of persons with disabilities. Except as provided in paragraph (b), any person prohibited by the provisions of this section from discriminating on the basis of disability shall make reasonable accommodation to enable a person with a disability to satisfy the essential requisites of a job or enjoy the right or rights in question provided that the disability is known or should have been known by the covered entity.

(b) Affirmative defense in disability cases. In any case where the need for reasonable accommodation is placed in issue, it shall be an affirmative defense that the person aggrieved by the alleged discriminatory practice could not, with reasonable accommodation, satisfy the essential requisites of the job or enjoy the right or rights in question.

(c) Use of drugs or alcohol. Nothing contained in this chapter shall be construed to prohibit a covered entity from (i) prohibiting the illegal use of drugs or the use of alcohol at the workplace or on duty impairment from the illegal use of drugs or the use of alcohol, or (ii) conducting drug testing which is otherwise lawful.

16. [Repealed.]

17. Disparate impact.

a. An unlawful discriminatory practice based upon disparate impact is established when:

(1) the commission or a person who may bring an action under chapter four or five of this title demonstrates that a policy or practice of a covered entity or a group of policies or practices of a covered entity results in a disparate impact to the detriment of any group protected by the provisions of this chapter; and

(2) the covered entity fails to plead and prove as an affirmative defense that each such policy or practice bears a significant relationship to a significant business objective of the covered entity or does not contribute to the disparate impact; provided, however, that if the commission or such person who may bring an action demonstrates that a group of policies or practices results in a disparate impact, the commission or such person shall not be required to demonstrate which specific policies or practices within the group results in such disparate impact; provided further, that a policy or practice or group of policies or practices demonstrated to result in a disparate impact shall be unlawful where the commission or such person who may bring an action produces substantial evidence that an alternative policy or practice with less disparate impact is available to the covered entity and the covered entity fails to prove that such alternative policy or practice would not serve the covered entity as well. "Significant business objective" shall include, but not be limited to, successful performance of the job.

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.

c. Nothing contained in this subdivision shall be construed to mandate or endorse the use of quotas; provided, however, that nothing contained in this subdivision shall be construed to limit the scope of the commission's authority pursuant to sections 8-115 and 8-120 of this chapter or to affect court-ordered remedies or settlements that are otherwise in accordance with law.

18. Unlawful boycott or blacklist. It shall be an unlawful discriminatory practice (i) for any person to discriminate against, boycott or blacklist or to refuse to buy from, sell to or trade with, any person, because of such person's actual or perceived race, creed, color, national origin, gender, disability, age, marital status, partnership status, sexual orientation, uniformed service or alienage or citizenship status or of such person's partners, members, stockholders, directors, officers, managers, superintendents, agents, employees, business associates, suppliers or customers, or (ii) for any person willfully to do any act or refrain from doing any act which enables any such person to take such action. This subdivision shall not apply to:

- (a) Boycotts connected with labor disputes;
- (b) Boycotts to protest unlawful discriminatory practices; or
- (c) Any form of expression that is protected by the First Amendment.

19. Interference with protected rights. It shall be an unlawful discriminatory practice for any person to coerce, intimidate, threaten or interfere with, or attempt to coerce, intimidate, threaten or interfere with, any person in the exercise or enjoyment of, or on account of his or her having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected pursuant to this section.

20. Relationship or association. The provisions of this section set forth as unlawful discriminatory practices shall be construed to prohibit such discrimination against a person because of the actual or perceived race, creed, color, national origin, disability, age, sexual orientation, uniformed service or alienage or citizenship status of a person with whom such person has a known relationship or association.

21. Employment; an individual's unemployment.

- a. Prohibition of discrimination based on an individual's unemployment.

(1) Except as provided in paragraphs b and c of this subdivision, an employer, employment agency, or agent thereof shall not:

(a) Because of a person's unemployment, represent that any employment or position is not available when in fact it is available; or

(b) Base an employment decision with regard to hiring, compensation or the terms, conditions or privileges of employment on an applicant's unemployment.

(2) Unless otherwise permitted by city, state or federal law, no employer, employment agency, or agent thereof shall publish, in print or in any other medium, an advertisement for any job vacancy in this city that contains one or more of the following:

(a) Any provision stating or indicating that being currently employed is a requirement or qualification for the job;

(b) Any provision stating or indicating that an employer, employment agency, or agent thereof will not consider individuals for employment based on their unemployment.

- b. Effect of subdivision.

(1) Paragraph a of this subdivision shall not be construed to prohibit an employer, employment agency, or agent thereof from (a) considering an applicant's unemployment, where there is a substantially

job-related reason for doing so; or (b) inquiring into the circumstances surrounding an applicant's separation from prior employment.

(2) Nothing set forth in this subdivision shall be construed as prohibiting an employer, employment agency, or agent thereof, when making employment decisions with regard to hiring, compensation, or the terms, conditions or privileges of employment, from considering any substantially job-related qualifications, including but not limited to: a current and valid professional or occupational license; a certificate, registration, permit, or other credential; a minimum level of education or training; or a minimum level of professional, occupational, or field experience.

(3) Nothing set forth in this subdivision shall be construed as prohibiting an employer, employment agency, or agent thereof from publishing, in print or in any other medium, an advertisement for any job vacancy in this city that contains any provision setting forth any substantially job-related qualifications, including but not limited to: a current and valid professional or occupational license; a certificate, registration, permit, or other credential; a minimum level of education or training; or a minimum level of professional, occupational, or field experience.

(4) (a) Nothing set forth in this subdivision shall be construed as prohibiting an employer, employment agency, or agent thereof, when making employment decisions with regard to hiring, compensation, or the terms, conditions or privileges of employment, from determining that only applicants who are currently employed by the employer will be considered for employment or given priority for employment or with respect to compensation or terms, conditions or privileges of employment. In addition, nothing set forth in this subdivision shall prevent an employer from setting compensation or terms or conditions of employment for a person based on that person's actual amount of experience.

(b) For the purposes of this subparagraph, all persons whose salary or wages are paid from the city treasury, and all persons who are employed by public agencies or entities headed by officers or boards including one or more individuals appointed or recommended by officials of the city of New York, shall be deemed to have the same employer.

c. Applicability of subdivision.

(1) This subdivision shall not apply to:

(a) actions taken by the New York city department of citywide administrative services in furtherance of its responsibility for city personnel matters pursuant to chapter thirty-five of the charter or as a municipal civil service commission administering the civil service law and other applicable laws, or by the mayor in furtherance of the mayor's duties relating to city personnel matters pursuant to chapter thirty-five of the charter, including, but not limited to, the administration of competitive examinations, the establishment and administration of eligible lists, and the establishment and implementation of minimum qualifications for appointment to positions;

(b) actions taken by officers or employees of other public agencies or entities charged with performing functions comparable to those performed by the department of citywide administrative services or the mayor as described in paragraph one of this subdivision;

(c) agency appointments to competitive positions from eligible lists pursuant to subsection one of section sixty-one of the state civil service law; or

(d) the exercise of any right of an employer or employee pursuant to a collective bargaining agreement.

(2) This subdivision shall apply to individual hiring decisions made by an agency or entity with respect to positions for which appointments are not required to be made from an eligible list resulting from a competitive examination.

d. Public education campaign. The commission shall develop courses of instruction and conduct ongoing public education efforts as necessary to inform employers, employment agencies, and job applicants about their rights and responsibilities under this subdivision.

e. Disparate impact. An unlawful discriminatory practice based on disparate impact under this subdivision is established when: (1) the commission or a person who may bring an action under chapter four or five of this title demonstrates that a policy or practice of an employer, employment agency, or agent thereof, or a group of policies or practices of such an entity results in a disparate impact to the detriment of any group protected by the provisions of this subdivision; and (2) such entity fails to plead and prove as an affirmative defense that each such policy or practice has as its basis a substantially job-related qualification or does not contribute to the disparate impact; provided, however, that if the commission or such person who may bring an action demonstrates that a group of policies or practices results in a disparate impact, the commission or such person shall not be required to demonstrate which specific policies or practices within the group results in such disparate impact; provided further, that a policy or practice or group of policies or practices demonstrated to result in a disparate impact shall be unlawful where the commission or such person who may bring an action produces substantial evidence that an alternative policy or practice with less disparate impact is available to such entity and such entity fails to prove that such alternative policy or practice would not serve such entity as well. A "substantially job-related qualification" shall include, but not be limited to, a current and valid professional or occupational license; a certificate, registration, permit, or other credential; a minimum level of education or training; or a minimum level of professional, occupational, or field experience.

22. Employment; pregnancy, childbirth, or a related medical condition.

(a) It shall be an unlawful discriminatory practice for an employer to refuse to provide a reasonable accommodation, as defined in subdivision eighteen of section 8-102 of this chapter, to the needs of an employee for her pregnancy, childbirth, or related medical condition that will allow the employee to perform the essential requisites of the job, provided that such employee's pregnancy, childbirth, or related medical condition is known or should have been known by the employer. In any case pursuant to this subdivision where the need for reasonable accommodation is placed in issue, it shall be an affirmative defense that the person aggrieved by the alleged discriminatory practice could not, with reasonable accommodation, satisfy the essential requisites of the job.

(b) Notice of rights. (i) An employer shall provide written notice in a form and manner to be determined by the commission of the right to be free from discrimination in relation to pregnancy, childbirth, and related medical conditions pursuant to this subdivision to: (1) new employees at the commencement of employment; and (2) existing employees within one hundred twenty days after the effective date of the local law that added this subdivision. Such notice may also be conspicuously posted at an employer's place of business in an area accessible to employees. (ii) The commission shall develop courses of instruction and conduct ongoing public education efforts as necessary to inform employers, employees, employment agencies, and job applicants about their rights and responsibilities under this subdivision.

(c) This subdivision shall not be construed to affect any other provision of law relating to sex discrimination or pregnancy, or in any way to diminish the coverage of pregnancy, childbirth, or a medical condition related to pregnancy or childbirth under any other provision of this section.

23. The provisions of this chapter relating to employees shall apply to interns.

24. Employment; consumer credit history.

(a) Except as provided in this subdivision, it shall be an unlawful discriminatory practice for an employer, labor organization, employment agency, or agent thereof to request or to use for employment purposes the consumer credit history of an applicant for employment or employee, or otherwise discriminate against an applicant or employee with regard to hiring, compensation, or the terms, conditions or privileges of employment based on the consumer credit history of the applicant or employee.

(b) Paragraph (a) of this subdivision shall not apply to:

(1) an employer, or agent thereof, that is required by state or federal law or regulations or by a self-regulatory organization as defined in section 3(a)(26) of the securities exchange act of 1934, as amended to use an individual's consumer credit history for employment purposes;

(2) persons applying for positions as or employed:

(A) as police officers or peace officers, as those terms are defined in subdivisions thirty-three and thirty-four of section 1.20 of the criminal procedure law, respectively, or in a position with a law enforcement or investigative function at the department of investigation;

(B) in a position that is subject to background investigation by the department of investigation, provided, however, that the appointing agency may not use consumer credit history information for employment purposes unless the position is an appointed position in which a high degree of public trust, as defined by the commission in rules, has been reposed.

(C) in a position in which an employee is required to be bonded under City, state or federal law;

(D) in a position in which an employee is required to possess security clearance under federal law or the law of any state;

(E) in a non-clerical position having regular access to trade secrets, intelligence information or national security information;

(F) in a position: (i) having signatory authority over third party funds or assets valued at \$10,000 or more; or (ii) that involves a fiduciary responsibility to the employer with the authority to enter financial agreements valued at \$10,000 or more on behalf of the employer.

(G) in a position with regular duties that allow the employee to modify digital security systems established to prevent the unauthorized use of the employer's or client's networks or databases.

(c) Paragraph (a) of this subdivision shall not be construed to affect the obligations of persons required by section 12-110 of this code or by mayoral executive order relating to disclosures by city employees to the conflicts of interest board to report information regarding their creditors or debts, or the use of such information by government agencies for the purposes for which such information is collected.

(d) As used in this subdivision:



(1) The term "intelligence information" means records and data compiled for the purpose of criminal investigation or counterterrorism, including records and data relating to the order or security of a correctional facility, reports of informants, investigators or other persons, or from any type of surveillance associated with an identifiable individual, or investigation or analysis of potential terrorist threats.

(2) The term "national security information" means any knowledge relating to the national defense or foreign relations of the United States, regardless of its physical form or characteristics, that is owned by, produced by or for, or is under the control of the United States government and is defined as such by the United States government and its agencies and departments.

(3) The term "trade secrets" means information that: (a) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; (b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy; and (c) can reasonably be said to be the end product of significant innovation. The term "trade secrets" does not include general proprietary company information such as handbooks and policies. The term "regular access to trade secrets" does not include access to or the use of client, customer or mailing lists.

(e) Nothing in this subdivision shall preclude an employer from requesting or receiving consumer credit history information pursuant to a lawful subpoena, court order or law enforcement investigation.

25. Employment; inquiries regarding salary history.

(a) For purposes of this subdivision, "to inquire" means to communicate any question or statement to an applicant, an applicant's current or prior employer, or a current or former employee or agent of the applicant's current or prior employer, in writing or otherwise, for the purpose of obtaining an applicant's salary history, or to conduct a search of publicly available records or reports for the purpose of obtaining an applicant's salary history, but does not include informing the applicant in writing or otherwise about the position's proposed or anticipated salary or salary range. For purposes of this subdivision, "salary history" includes the applicant's current or prior wage, benefits or other compensation. "Salary history" does not include any objective measure of the applicant's productivity such as revenue, sales, or other production reports.

(b) Except as otherwise provided in this subdivision, it is an unlawful discriminatory practice for an employer, employment agency, or employee or agent thereof:

1. To inquire about the salary history of an applicant for employment; or
2. To rely on the salary history of an applicant in determining the salary, benefits or other compensation for such applicant during the hiring process, including the negotiation of a contract.

(c) Notwithstanding paragraph (b) of this subdivision, an employer, employment agency, or employee or agent thereof may, without inquiring about salary history, engage in discussion with the applicant about their expectations with respect to salary, benefits and other compensation, including but not limited to unvested equity or deferred compensation that an applicant would forfeit or have cancelled by virtue of the applicant's resignation from their current employer.

(d) Notwithstanding subparagraph 2 of paragraph (b) of this subdivision, where an applicant voluntarily and without prompting discloses salary history to an employer, employment agency, or employee or agent thereof, such employer, employment agency, or employee or agent thereof may

consider salary history in determining salary, benefits and other compensation for such applicant, and may verify such applicant's salary history.

(e) This subdivision shall not apply to:

(1) Any actions taken by an employer, employment agency, or employee or agent thereof pursuant to any federal, state or local law that specifically authorizes the disclosure or verification of salary history for employment purposes, or specifically requires knowledge of salary history to determine an employee's compensation;

(2) Applicants for internal transfer or promotion with their current employer;

(3) Any attempt by an employer, employment agency, or employee or agent thereof, to verify an applicant's disclosure of non-salary related information or conduct a background check, provided that if such verification or background check discloses the applicant's salary history, such disclosure shall not be relied upon for purposes of determining the salary, benefits or other compensation of such applicant during the hiring process, including the negotiation of a contract; or

(4) Public employee positions for which salary, benefits or other compensation are determined pursuant to procedures established by collective bargaining.

26. Applicability; uniformed service. Notwithstanding any other provision of this section and except as otherwise provided by law, it is not an unlawful discriminatory practice for any person to afford any other person a preference or privilege based on such other person's uniformed service, or to declare, print or circulate or cause to be declared, printed or circulated any statement, advertisement or publication, or to use any form of application or make any inquiry indicating any such lawful preference or privilege.

### **§ 8-107.1 Victims of domestic violence, sex offenses or stalking.**

a. Definitions. Whenever used in this chapter the following terms have the following meanings:

"Acts or threats of violence" includes, but is not limited to, acts, which would constitute violations of the penal law.

"Victim of domestic violence" means a person who has been subjected to acts or threats of violence, not including acts of self-defense, committed by a current or former spouse of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim, by a person who is or has been in a continuing social relationship of a romantic or intimate nature with the victim, or a person who is or has continually or at regular intervals lived in the same household as the victim.

"Victim of sex offenses or stalking" means a victim of acts which would constitute violations of article 130 of the penal law, or a victim of acts which would constitute violations of sections 120.45, 120.50, 120.55, or 120.60 of the penal law.

Practices "based on," "because of," "on account of," "as to," "on the basis of," or "motivated by" an individual's "status as a victim of domestic violence," or "status as a victim of sex offenses or stalking" include, but are not limited to, those based solely upon the actions of a person who has perpetrated acts or threats of violence against the individual.

b. Unlawful discriminatory practices.

1. (a) It shall be an unlawful discriminatory practice for an employer, or an agent thereof, because of any individual's actual or perceived status as a victim of domestic violence, or as a victim of sex offenses or stalking:

- (1) To represent that any employment or position is not available when in fact it is available;
- (2) To refuse to hire or employ or to bar or to discharge from employment; or
- (3) To discriminate against an individual in compensation or other terms, conditions, or privileges of employment.

(b) Requirement to make reasonable accommodation to the needs of victims of domestic violence, sex offenses or stalking. Except as provided in subparagraph(d), any person prohibited by paragraph 1 from discriminating on the basis of actual or perceived status as a victim of domestic violence or a victim of sex offenses or stalking shall make reasonable accommodation to enable a person who is a victim of domestic violence, or a victim of sex offenses or stalking to satisfy the essential requisites of a job provided that the status as a victim of domestic violence or a victim of sex offenses or stalking is known or should have been known by the covered entity.

(c) Documentation of status. Any person required by subparagraph (b) to make reasonable accommodation may require a person requesting reasonable accommodation pursuant to subparagraph (b) to provide certification that the person is a victim of domestic violence, sex offenses or stalking. The person requesting reasonable accommodation pursuant to subparagraph(b) shall provide a copy of such certification to the covered entity within a reasonable period after the request is made. A person may satisfy the certification requirement of this paragraph by providing documentation from an employee, agent, or volunteer of a victim services organization, an attorney, a member of the clergy, or a medical or other professional service provider, from whom the individual seeking a reasonable accommodation or that individual's family or household member has sought assistance in addressing domestic violence, sex offenses or stalking and the effects of the violence or stalking; a police or court record; or other corroborating evidence. All information provided to the covered entity pursuant to this paragraph, including a statement of the person requesting a reasonable accommodation or any other documentation, record, or corroborating evidence, and the fact that the individual has requested or obtained a reasonable accommodation pursuant to this section, shall be retained in the strictest confidence by the covered entity, except to the extent that disclosure is requested or consented to in writing by the person requesting the reasonable accommodation; or otherwise required by applicable federal, state or local law.

(d) Affirmative defense in domestic violence, sex offenses or stalking cases. In any case where the need for reasonable accommodation is placed in issue, it shall be an affirmative defense that the person aggrieved by the alleged discriminatory practice could not, with reasonable accommodation, satisfy the essential requisites of the job or enjoy the right or rights in question.

2. (a) It shall be an unlawful discriminatory practice for 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, because of any individual's actual or perceived status as a victim of domestic violence, or as a victim of sex offenses or stalking:

- (1) To refuse to sell, rent, lease, approve the sale, rental or lease or otherwise deny to or withhold from any person or group of persons such a housing accommodation or an interest therein, or to discriminate in the terms, conditions, or privileges of the sale, rental or lease of any such housing

accommodation or an interest therein or in the furnishing of facilities or services in connection therewith because of an actual or perceived status of said individual as a victim of domestic violence, or as a victim of sex offenses or stalking; or

(2) To represent that such housing accommodation or an interest therein is not available when in fact it is available.

(b) The provisions of this paragraph 2 shall not apply:

(1) To 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.

#### **§ 8-109 Complaint.**

(a) Any person aggrieved by an unlawful discriminatory practice or an act of discriminatory harassment or violence as set forth in chapter six of this title may, by himself or herself or such person's attorney, make, sign and file with the commission a verified complaint in writing which shall: (i) state the name of the person alleged to have committed the unlawful discriminatory practice or act of discriminatory harassment or violence complained of, and the address of such person if known; (ii) set forth the particulars of the alleged unlawful discriminatory practice or act of discriminatory harassment or violence; and (iii) contain such other information as may be required by the commission. The commission shall acknowledge the filing of the complaint and advise the complainant of the time limits set forth in this chapter.

(b) Any employer whose employee or agent refuses or threatens to refuse to cooperate with the provisions of this chapter may file with the commission a verified complaint asking for assistance by conciliation or other remedial action.

(c) Commission-initiated complaints. The commission may itself make, sign and file a verified complaint alleging that a person has committed an unlawful discriminatory practice or an act of discriminatory harassment or violence as set forth in chapter six of this title.

(d) The commission shall serve a copy of the complaint upon the respondent and all persons it deems to be necessary parties and shall advise the respondent of his or her procedural rights and obligations as set forth herein.

(e) The commission shall not have jurisdiction over any complaint that has been filed more than one year after the alleged unlawful discriminatory practice or act of discriminatory harassment or violence as set forth in chapter six of this title occurred.

(f) The commission shall not have jurisdiction to entertain a complaint if:

(i) the complainant has previously initiated a civil action in a court of competent jurisdiction alleging an unlawful discriminatory practice as defined by this chapter or an act of discriminatory harassment or

violence as set forth in chapter six of this title with respect to the same grievance which is the subject of the complaint under this chapter, unless such civil action has been dismissed without prejudice or withdrawn without prejudice; or

(ii) the complainant has previously filed and has an action or proceeding before any administrative agency under any other law of the state alleging an unlawful discriminatory practice as defined by this chapter or an act of discriminatory harassment or violence as set forth in chapter six of this title with respect to the same grievance which is the subject of the complaint under this chapter; or

(iii) the complainant has previously filed a complaint with the state division of human rights alleging an unlawful discriminatory practice as defined by this chapter or an act of discriminatory harassment or violence as set forth in chapter six of this title with respect to the same grievance with is the subject of the complaint under this chapter and a final determination has been made thereon.

(g) In relation to complaints filed on or after September first, nineteen hundred ninety one, the commission shall commence proceedings with respect to the complaint, complete a thorough investigation of the allegations of the complaint and make a final disposition of the complaint promptly and within the time periods to be prescribed by rule of the commission. If the commission is unable to comply with the time periods specified for completing its investigation and for final disposition of the complaint, it shall notify the complainant, respondent, and any necessary party in writing of the reasons for not doing so.

(h) Any complaint filed pursuant to this section may be amended pursuant to procedures prescribed by rule of the commission by filing such amended complaint with the commission and serving a copy thereof upon all parties to the proceeding.

(i) Whenever a complaint is filed pursuant to paragraph (d) of subdivision five of section 8-107 of this chapter, no member of the commission nor any member of the commission staff shall make public in any manner whatsoever the name of any borrower or identify by a specific description the collateral for any loan to such borrower except when ordered to do so by a court of competent jurisdiction or where express permission has been first obtained in writing from the lender and the borrower to such publication; provided, however, that the name of any borrower and a specific description of the collateral for any loan to such borrower may, if otherwise relevant, be introduced in evidence in any hearing before the commission or any review by a court of competent jurisdiction of any order or decision by the commission.

**§ 8-111 Answer.**

a. Within thirty days after a copy of the complaint is served upon the respondent by the commission, the respondent shall file a written, verified answer thereto with the commission, and the commission shall cause a copy of such answer to be served upon the complainant and any necessary party.

b. The respondent shall specifically admit, deny, or explain each of the facts alleged in the complaint, unless the respondent is without knowledge or information sufficient to form a belief, in which case the respondent shall so state, and such statement shall operate as a denial.

c. Any allegation in the complaint not specifically denied or explained shall be deemed admitted and shall be so found by the commission unless good cause to the contrary is shown.

d. All affirmative defenses shall be stated separately in the answer.

e. Upon request of the respondent and for good cause shown, the period within which an answer is required to be filed may be extended in accordance with the rules of the commission.

f. Any necessary party may file with the commission a written, verified answer to the complaint, and the commission shall cause a copy of such answer to be served upon the complainant, respondent and any other necessary party.

g. Any answer filed pursuant to this section may be amended pursuant to procedures prescribed by rule of the commission by filing such amended answer with the commission and serving a copy thereof upon the complainant and any necessary party to the proceeding.

**§ 8-112 Withdrawal of complaints.**

a. A complaint filed pursuant to section 8-109 of this chapter may be withdrawn by the complainant in accordance with rules of the commission at any time prior to the service of a notice that the complaint has been referred to an administrative law judge. Such a withdrawal shall be in writing and signed by the complainant.

b. A complaint may be withdrawn after the service of such notice at the discretion of the commission.

c. Unless such complaint is withdrawn pursuant to a conciliation agreement, the withdrawal of a complaint shall be without prejudice:

(i) to the continued prosecution of the complaint by the commission in accordance with rules of the commission;

(ii) to the initiation of a complaint by the commission based in whole or in part upon the same facts;  
or

(iii) to the commencement of a civil action by the corporation counsel based upon the same facts pursuant to chapter four of this title.

**§ 8-113 Dismissal of complaint.**

a. The commission may, in its discretion, dismiss a complaint for administrative convenience at any time prior to the taking of testimony at a hearing. Administrative convenience shall include, but not be limited to, the following circumstances:

(1) commission personnel have been unable to locate the complainant after diligent efforts to do so;

(2) the complainant has repeatedly failed to appear at mutually agreed upon appointments with commission personnel or is unwilling to meet with commission personnel, provide requested documentation, or to attend a hearing;

(3) the complainant has repeatedly engaged in conduct which is disruptive to the orderly functioning of the commission;

(4) the complainant is unwilling to accept a reasonable proposed conciliation agreement;

(5) prosecution of the complaint will not serve the public interest; and

(6) the complainant requests such dismissal, one hundred eighty days have elapsed since the filing of the complaint with the commission finds (a) that the complaint has not been actively investigated, and (b) that the respondent will not be unduly prejudiced thereby.

b. The commission shall dismiss a complaint for administrative convenience at any time prior to the filing of an answer by the respondent, if the complainant requests such dismissal, unless the commission has conducted an investigation of the complaint or has engaged the parties in conciliation after the filing of the complaint.

c. In accordance with the rules of the commission, the commission shall dismiss a complaint if the complaint is not within the jurisdiction of the commission.

d. If after investigation the commission determines that probable cause does not exist to believe that the respondent has engaged or is engaging in an unlawful discriminatory practice or an act of discriminatory harassment or violence as set forth in chapter six of this title, the commission shall dismiss the complaint as to such respondent.

e. The commission shall promptly serve notice upon the complainant, respondent and any necessary party of any dismissal pursuant to this section.

f. The complainant or respondent may, within thirty days of such service, and in accordance with the rules of the commission, apply to the chairperson for review of any dismissal pursuant to this section. Upon such application, the chairperson shall review such action and issue an order affirming, reversing or modifying such determination or remanding the matter for further investigation and action. A copy of such order shall be served upon the complainant, respondent and any necessary party.

#### **§ 8-114 Investigations and investigative record keeping.**

a. The commission may at any time issue subpoenas requiring attendance and giving of testimony by witnesses and the production of books, papers, documents and other evidence relating to any matter under investigation or any question before the commission. The issuance of such subpoenas shall be governed by the civil practice law and rules.

b. Where the commission has initiated its own investigation or has conducted an investigation in connection with the filing of a complaint pursuant to this chapter, the commission may demand that any person or persons who are the subject of such investigation (i) preserve those records in the possession of such person or persons which are relevant to the determination of whether such person or persons have committed unlawful discriminatory practices with respect to activities in the city, and (ii) continue to make and keep the type of records made and kept by such person or persons in the ordinary course of business within the year preceding such demand which are relevant to the determination of whether such person or persons have committed unlawful discriminatory practices with respect to activities in the city. A demand made pursuant to this subdivision shall be effective immediately upon its service on the subject of an investigation and shall remain in effect until the termination of all proceedings relating to any complaint filed pursuant to this chapter or civil action commenced pursuant to chapter four of this title or if no complaint or civil action is filed or commenced shall expire two years after the date of such service. The commission's demand shall require that such records be made available for inspection by the commission and/or be filed with the commission.

c. Any person upon whom a demand has been made pursuant to subdivision b of this section may, pursuant to procedures established by rule of the commission, assert an objection to such demand. Unless the commission orders otherwise, the assertion of an objection shall not stay compliance with the demand. The commission shall make a determination on an objection to a demand within thirty days after such an objection is filed with the commission, unless the party filing the objection consents to an extension of time.

d. Upon the expiration of the time set pursuant to such rules for making an objection to such demand, or upon a determination that an objection to the demand shall not be sustained, the commission shall order compliance with the demand.

e. Upon a determination that an objection to a demand shall be sustained, the commission shall order that the demand be vacated or modified.

f. A proceeding may be brought on behalf of the commission in any court of competent jurisdiction seeking an order to compel compliance with an order issued pursuant to subdivision d of this section.

**§ 8-115 Mediation and conciliation.**

a. If in the judgment of the commission circumstances so warrant, it may at any time after the filing of a complaint endeavor to resolve the complaint by any method of dispute resolution prescribed by rule of the commission including, but not limited to, mediation and conciliation.

b. The terms of any conciliation agreement may contain such provisions as may be agreed upon by the commission, the complainant and the respondent, including a provision for the entry in court of a consent decree embodying the terms of the conciliation agreement.

c. The members of the commission and its staff shall not publicly disclose what transpired in the course of mediation and conciliation efforts.

d. If a conciliation agreement is entered into, the commission shall embody such agreement in an order and serve a copy of such order upon all parties to the conciliation agreement. Violation of such an order may cause the imposition of civil penalties under section 8-124 of this chapter. Every conciliation agreement shall be made public unless the complainant and respondent agree otherwise and the commission determines that disclosure is not required to further the purposes of this chapter.

**§ 8-116 Determination of probable cause.**

a. Except in connection with commission-initiated complaints which shall not require a determination of probable cause, where the commission determines that probable cause exists to believe that the respondent has engaged or is engaging in an unlawful discriminatory practice or an act of discriminatory harassment or violence as set forth in chapter six of this title, the commission shall issue a written notice to complainant and respondent so stating. A determination of probable cause is not a final order of the commission and shall not be administratively or judicially reviewable.

b. If there is a determination of probable cause pursuant to subdivision a of this section in relation to a complaint alleging discrimination in housing accommodations, land or commercial space or an interest therein, or if a commission-initiated complaint relating to discrimination in housing accommodations, land or commercial space or an interest therein has been filed, and the property owner or the owner's duly authorized agent will not agree voluntarily to withhold from the market the subject housing accommodations, land or commercial space or an interest therein for a period of ten days from the date of such request the commission may cause to be posted for a period of ten days from the date of such request, in a conspicuous place on the land or on the door of such housing accommodations or commercial space, a notice stating that such accommodations, land or commercial space are the subject of a complaint before the commission and that prospective transferees will take such accommodations, land or commercial space at their peril. Any destruction, defacement, alteration or removal of such notice by the owner or the owner's agents or employees shall be a misdemeanor punishable on conviction thereof by a fine of not more than one thousand dollars or by imprisonment for not more than one year or both.



c. If a determination is made pursuant to subdivision a of this section that probable cause exists, or if a commission-initiated complaint has been filed, the commission shall refer the complaint to an administrative law judge and shall serve a notice upon the complainant, respondent and any necessary party that the complaint has been so referred.

**§ 8-117 Rules of Procedure.**

The commission shall adopt rules providing for hearing and pre-hearing procedure. These rules shall include rules providing that the commission, by its prosecutorial bureau, shall be a party to all complaints and that a complainant shall be a party if the complainant has intervened in the manner set forth in the rules of the commission. These rules shall also include rules governing discovery, motion practice and the issuance of subpoenas. Wherever necessary, the commission shall issue orders compelling discovery. In accordance with the commission's discovery rules, any party from whom discovery is sought may assert an objection to such discovery based upon a claim of privilege or other defense and the commission shall rule upon such objection.

**§ 8-118 Noncompliance with discovery order or order relating to records.**

Whenever a party fails to comply with an order of the commission pursuant to section 8-117 of this chapter compelling discovery or an order pursuant to section 8-114 of this chapter relating to records the commission may, on its own motion or at the request of any part, and, after notice and opportunity for all parties to be heard in opposition or support, make such orders or take such action as may be just for the purpose of permitting the resolution of relevant issues or disposition of the complaint without unnecessary delay, including but not limited to:

- (a) An order that the matter concerning which the order compelling discovery or relating to records was issued be established adversely to the claim of the noncomplying party;
- (b) An order prohibiting the noncomplying party from introducing evidence or testimony, cross-examining witnesses or otherwise supporting or opposing designated claims or defenses;
- (c) An order striking out pleadings or parts thereof;
- (d) An order that the noncomplying party may not be heard to object to the introduction and use of secondary evidence to show what the withheld testimony, documents, other evidence or required records would have shown; and
- (e) Infer that the material or testimony is withheld or records not preserved, made, kept, produced or made available for inspection because such material, testimony or records would prove to be unfavorable to the noncomplying party and use such inference to establish facts in support of a final determination pursuant to section 8-120 of this chapter.

**§ 8-119 Hearing.**

- a. A hearing on the complaint shall be held before an administrative law judge designated by the commission. The place of any such hearing shall be the office of the commission or such other place as may be designated by the commission. Notice of the date, time and place of such hearing shall be served upon the complainant, respondent and any necessary party.
- b. The case in support of the complaint shall be presented before the commission by the commission's prosecutorial bureau. The complainant may present additional testimony and cross-examine witnesses, in

person or by counsel, if the complainant shall have intervened pursuant to rules established by the commission.

c. The administrative law judge may, in his or her discretion, permit any person who has a substantial interest in the complaint to intervene as a party and may require the joinder of necessary parties.

d. Evidence relating to endeavors at mediation or conciliation by, between or among the commission, the complainant and the respondent shall not be admissible.

e. If the respondent has failed to answer the complaint within the time period prescribed in section 8-111 of this chapter, the administrative law judge may enter a default and the hearing shall proceed to determine the evidence in support of the complaint. Upon application, the administrative law judge may, for good cause shown, open a default in answering, upon equitable terms and conditions, including the taking of an oral answer.

f. Except as otherwise provided in section 8-118 of this chapter, the commission by its prosecutorial bureau, a respondent who has filed an answer or whose default in answering has been set aside for good cause shown, a necessary party, and a complainant or other person who has intervened pursuant to the rules of the commission, may appear at such hearing in person or otherwise, with or without counsel, cross-examine witnesses, present testimony and offer evidence.

g. The commission shall not be bound by the strict rules of evidence prevailing in courts of the state of New York. The testimony taken at the hearing shall be under oath and shall be transcribed.

#### **§ 8-120 Decision and order.**

a. If, upon all the evidence at the hearing, and upon the findings of fact, conclusions of law and relief recommended by an administrative law judge, the commission shall find that a respondent has engaged in any unlawful discriminatory practice or any act of discriminatory harassment or violence as set forth in chapter six of this title, the commission shall state its findings of fact and conclusions of law and shall issue and cause to be served on such respondent an order requiring such respondent to cease and desist from such unlawful discriminatory practice or acts of discriminatory harassment or violence. Such order shall require the respondent to take such affirmative action as, in the judgment of the commission, will effectuate the purposes of this chapter including, but not limited to:

- (1) hiring, reinstatement or upgrading of employees;
- (2) the award of back pay and front pay;
- (3) admission to membership in any respondent labor organization;
- (4) admission to or participation in a program, apprentice training program, on-the-job training program or other occupational training or retraining program;
- (5) the extension of full, equal and unsegregated accommodations, advantages, facilities and privileges;
- (6) evaluating applications for membership in a club that is not distinctly private without discrimination based on race, creed, color, age, national origin, disability, marital status, partnership status, gender, sexual orientation or alienage or citizenship status;

(7) selling, renting or leasing, or approving the sale, rental or lease of housing accommodations, land or commercial space or an interest therein, or the provision of credit with respect thereto, without unlawful discrimination;

(8) payment of compensatory damages to the person aggrieved by such practice or act;

(9) submission of reports with respect to the manner of compliance; and

(10) payment of the complainant's reasonable attorney's fees, expert fees and other costs. The commission may consider matter-specific factors when determining the complainant's attorney's fee award, including, but not limited to:

(i) novelty or difficulty of the issues presented;

(ii) skill and experience of the complainant's attorney; and

(iii) the hourly rate charged by attorneys of similar skill and experience litigating similar cases in New York county.

b. If, upon all the evidence at the hearing, and upon the findings of fact and conclusions of law recommended by the administrative law judge, the commission shall find that a respondent has not engaged in any such unlawful discriminatory practice or act of discriminatory harassment or violence as set forth in chapter six of this title, the commission shall state its findings of fact and conclusions of law and shall issue and cause to be served on the complainant, respondent, and any necessary party and on any complainant who has not intervened an order dismissing the complaint as to such respondent.

#### **§ 8-121 Reopening of proceeding by commission.**

The commission may reopen any proceeding, or vacate or modify any order or determination of the commission, whenever justice so requires, in accordance with the rules of the commission.

#### **§ 8-122 Injunction and temporary restraining order.**

At any time after the filing of a complaint alleging an unlawful discriminatory practice under this chapter or an act of discriminatory harassment or violence as set forth in chapter six of this title, if the commission has reason to believe that the respondent or other person acting in concert with respondent is doing or procuring to be done any act or acts, tending to render ineffectual relief that could be ordered by the commission after a hearing as provided by section 8-120 of this chapter, a special proceeding may be commenced in accordance with article sixty-three of the civil practice law and rules on behalf of the commission in the supreme court for an order to show cause why the respondent and such other persons who are believed to be acting in concert with respondent should not be enjoined from doing or procuring to be done such acts. The special proceeding may be commenced in any county within the city of New York where the alleged unlawful discriminatory practice or act of discriminatory harassment or violence was committed, or where the commission maintains its principal office for the transaction of business, or where any respondent resides or maintains an office for the transaction of business, or where any person aggrieved by the unlawful discriminatory practice or act of discriminatory harassment or violence resides, or, if the complaint alleges an unlawful discriminatory practice under paragraphs (a), (b) or (c) of subdivision five of section 8-107 of this chapter, where the housing accommodation, land or commercial space specified in the complaint is located. The order to show cause may contain a temporary restraining order and shall be served in the manner provided therein. On the return date of the order to show cause, and after affording the commission, the person aggrieved and the respondent and any person alleged to be

acting in concert with the respondent an opportunity to be heard, the court may grant appropriate injunctive relief upon such terms and conditions as the court deems proper.

**§ 8-123 Judicial review.**

a. Any complainant, respondent or other person aggrieved by a final order of the commission issued pursuant to section 8-120 or section 8-126 of this chapter or an order of the chairperson issued pursuant to subdivision f of section 8-113 of this chapter affirming the dismissal of a complaint may obtain judicial review thereof in a proceeding as provided in this section.

b. Such proceeding shall be brought in the supreme court of the state within any county within the city of New York wherein the unlawful discriminatory practice or act of discriminatory harassment or violence as set forth in chapter six of this title which is the subject of the commission's order occurs or wherein any person required in the order to cease and desist from an unlawful discriminatory practice or act of discriminatory harassment or violence or to take other affirmative action resides or transacts business.

c. Such proceeding shall be initiated by the filing of a petition in such court, together with a written transcript of the record upon the hearing, before the commission, and the issuance and service of a notice of motion returnable before such court. Thereupon the court shall have jurisdiction of the proceeding and of the questions determined therein, and shall have power to grant such relief as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript an order annulling, confirming or modifying the order of the commission in whole or in part. No objection that has not been urged before the commission shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.

d. Any part may move the court to remit the case to the commission in the interests of justice for the purpose of adducing additional specified and materials evidenced and seeking findings thereon, provided such party shows reasonable grounds for the failure to adduce such evidence before the commission.

e. The findings of the commission as to the facts shall be conclusive if supported by substantial evidence on the record considered as a whole.

f. All such proceedings shall be heard and determined by the court and by any appellate court as expeditiously as possible and with lawful precedence over other matters. The jurisdiction of the supreme court shall be exclusive and its judgment and order shall be final, subject to review by the appellate division of the supreme court and the court of appeals in the same manner and form and with the same effect as provided for appeals from a judgment in a special proceeding.

g. The commission's copy of the testimony shall be available at all reasonable times to all parties for examination without cost and for the purposes of judicial review of the order of the commission. The appeal shall be heard on the record without requirement of printing.

h. A proceeding under this section must be instituted within thirty days after the service of the order of the commission.

**§ 8-124 Civil penalties for violating commission orders.**

Any person who fails to comply with an order issued by the commission pursuant to section 8-115 or section 8-120 of this chapter shall be liable for a civil penalty of not more than fifty thousand dollars and an additional civil penalty of not more than one hundred dollars per day for each day that the violation continues.

**§ 8-125 Enforcement.**

a. Any action or proceeding that may be appropriate or necessary for the enforcement of any order issued by the commission pursuant to this chapter, including actions to secure permanent injunctions enjoining any acts or practices which constitute a violation of any such order, mandating compliance with the provisions of any such order, imposing penalties pursuant to section 8-124 of this chapter, or for such other relief as may be appropriate, may be initiated in any court of competent jurisdiction on behalf of the commission. In any such action or proceeding, application may be made for a temporary restraining order or preliminary injunction, enforcing and restraining all persons from violating any provisions of any such order, or for such other relief as may be just and proper, until hearing and determination of such action or proceeding and the entry of final judgment or order thereon. The court to which such application is made may make any or all of the orders specified, as may be required in such application, with or without notice, and may make such other or further orders or directions as may be necessary to render the same effectual.

b. In any action or proceeding brought pursuant to subdivision a of this section, no person shall be entitled to contest the terms of the order sought to be enforced unless that person has timely commenced a proceeding for review of the order pursuant to section 8-123 of this chapter.

**§ 8-126 Civil penalties imposed by commission for unlawful discriminatory practices or acts of discriminatory harassment or violence.**

a. Except as otherwise provided in subdivision thirteen of section 8-107 of this chapter, in addition to any of the remedies and penalties set forth in subdivision a of section 8-120 of this chapter, where the commission finds that a person has engaged in an unlawful discriminatory practice, the commission may, to vindicate the public interest, impose a civil penalty of not more than one hundred and twenty-five thousand dollars. Where the commission finds that an unlawful discriminatory practice was the result of the respondent's willful, wanton or malicious act or where the commission finds that an act of discriminatory harassment or violence as set forth in chapter six of this title has occurred, the commission may, to vindicate the public interest, impose a civil penalty of not more than two hundred and fifty thousand dollars.

b. A respondent that is found liable for an unlawful discriminatory practice or an act of discriminatory harassment or violence, as set forth in chapter six of this title, may, in relation to the determination of the appropriate amount of civil penalties to be imposed pursuant to subdivision a of this section, plead and prove any relevant mitigating factor.

c. In addition to any other penalties or sanctions which may be imposed pursuant to any other law, any person who knowingly makes a material false statement in any proceeding conducted, or document or record filed with the commission, or record required to be preserved or made and kept and subject to inspection by the commission pursuant to this chapter shall be liable for a civil penalty of not more than ten thousand dollars.

d. An action or proceeding may be commenced in any court of competent jurisdiction on behalf of the commission for the recovery of the civil penalties provided for in this section.

**§ 8-127 Disposition of civil penalties.**

a. Any civil penalties recovered pursuant to this chapter shall be paid into the general fund of the city.

b. Notwithstanding the foregoing provision, where an action or proceeding is commenced against a city agency for the enforcement of a final order issued by the commission pursuant to section 8-120 of the code after a finding that such agency has engaged in an unlawful discriminatory practice and in such action or proceeding civil penalties are sought for violation of such order, any civil penalties which are imposed by the court against such agency shall be budgeted in a separate account. Such account shall be used solely to support city agencies' anti-bias education programs, activities sponsored by city agencies that are designed to eradicate discrimination or to fund remedial programs that are necessary to address the city's liability for discriminatory acts or practices. Funds in such account shall not be used to support or benefit the commission. The disposition of such funds shall be under the direction of the mayor.

**§ 8-128 Institution of actions or proceedings.**

Where any of the provisions of this chapter authorize an application to be made, or an action or proceeding to be commenced on behalf of the commission in a court, such application may be made or such action or proceeding may be instituted only by the corporation counsel, such attorneys employed by the commission as are designated by the corporation counsel or other persons designated by the corporation counsel.

**§ 8-129 Criminal penalties.**

In addition to any other penalties or sanctions which may be imposed pursuant to this chapter or any other law, any person who shall wilfully resist, prevent, impede or interfere with the commission or any of its members or representatives in the performance of any duty under this chapter, or shall wilfully violate an order of the commission issued pursuant to section 8-115 or section 8-120 of this chapter, shall be guilty of a misdemeanor and be punishable by imprisonment for not more than one year, or by a fine of not more than ten thousand dollars, or by both; but the procedure for the review of the order shall not be deemed to be such wilful conduct.

**§ 8-130 Construction.**

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.

b. Exceptions to and exemptions from the provisions of this title shall be construed narrowly in order to maximize deterrence of discriminatory conduct.

c. Cases that have correctly understood and analyzed the liberal construction requirement of subdivision a of this section and that have developed legal doctrines accordingly that reflect the broad and remedial purposes of this title include *Albunio v. City of New York*, 16 N.Y.3d 472 (2011), *Bennett v. Health Management Systems, Inc.*, 92 A.D.3d 29 (1st Dep't 2011), and the majority opinion in *Williams v. New York City Housing Authority*, 61 A.D.3d 62 (1st Dep't 2009).

**§ 8-131 Applicability.**

The provisions of this chapter which make acts of discriminatory harassment or violence as set forth in chapter six of this title subject to the jurisdiction of the commission shall not apply to acts committed by members of the police department in the course of performing their official duties as police officers whether the police officer is on or off duty.

Please proceed  
to the next page

		Number 915.002
EEOC	NOTICE	Date 5/23/07

**SUBJECT:** Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities

**PURPOSE:** This document provides guidance regarding unlawful disparate treatment under the federal EEO laws of workers with caregiving responsibilities .

**EFFECTIVE DATE:** Upon receipt.

**EXPIRATION DATE:** As an exception to EEOC Order 205.001, Appendix B, Attachment, § a(5), this Notice will remain in effect until rescinded or superseded.

**ORIGINATOR:** Title VII/EPA/ADEA Division, Office of Legal Counsel

**SUBJECT MATTER:** File after Section 615 of Volume II of the Compliance Manual.

Naomi C. Earp  
Chair

See Also:

- [Employer Best Practices for Workers with Caregiving Responsibilities](#)
- [Questions and Answers about EEOC's Enforcement Guidance on Unlawful Disparate Treatment of Workers with Caregiving Responsibilities](#)

## ENFORCEMENT GUIDANCE: UNLAWFUL DISPARATE TREATMENT OF WORKERS WITH CAREGIVING RESPONSIBILITIES

### Table of Contents

- I. [Background and Introduction](#)
  - A. [Caregiving Responsibilities of Workers](#)
  - B. [Work-Family Conflicts](#)
- II. [Unlawful Disparate Treatment of Caregivers](#)
  - A. [Sex-based Disparate Treatment of Female Caregivers](#)
    - 1. [Analysis of Evidence](#)
    - 2. [Unlawful Disparate Treatment of Female Caregivers as Compared with Male Caregivers](#)
    - 3. [Unlawful Gender Role Stereotyping of Working Women](#)
      - [Gender-based Assumptions About Future Caregiving Responsibilities](#)
      - [Mixed-motives Cases](#)
      - [Assumptions About the Work Performance of Female Caregivers](#)
      - ["Benevolent" Stereotyping](#)
    - 4. [Effects of Stereotyping on Subjective Assessments of Work Performance](#)
  - B. [Pregnancy Discrimination](#)
  - C. [Discrimination Against Male Caregivers](#)
  - D. [Discrimination Against Women of Color](#)
  - E. [Unlawful Caregiver Stereotyping Under the Americans with Disabilities Act](#)
  - F. [Hostile Work Environment](#)
- III. [Retaliation](#)

### Notice Concerning The Americans With Disabilities Act Amendments Act Of 2008

The Americans with Disabilities Act (ADA) Amendments Act of 2008 was signed into law on September 25, 2008 and becomes effective January 1, 2009. Because this law makes several significant changes, including changes to the definition of the term "disability," the EEOC will be evaluating the impact of these changes on this document and other publications. See the [list of specific changes to the ADA](#) made by the ADA Amendments Act.

Although the federal EEO laws do not prohibit discrimination against caregivers per se, there are circumstances in which discrimination against caregivers might constitute unlawful disparate treatment. The purpose of this document is to assist investigators, employees, and employers in assessing whether a particular employment decision affecting a caregiver might unlawfully discriminate on the basis of prohibited characteristics under Title VII of the Civil Rights Act of 1964 or the Americans with Disabilities Act of 1990. This document is not intended to create a new protected category but rather to illustrate circumstances in which stereotyping or other forms of disparate treatment may violate Title VII or the prohibition under the ADA against discrimination based on a worker's association with an individual with a disability. An employer may also have specific obligations towards caregivers under other federal statutes, such as the Family and Medical Leave Act, or under state or local laws.<sup>1</sup>

#### I. BACKGROUND AND INTRODUCTION



### A. *Caregiving Responsibilities of Workers*

The prohibition against sex discrimination under Title VII has made it easier for women to enter the labor force. Since Congress enacted Title VII, the proportion of women who work outside the home has significantly increased,<sup>2</sup> and women now comprise nearly half of the U.S. labor force.<sup>3</sup> The rise has been most dramatic for mothers of young children, who are almost twice as likely to be employed today as were their counterparts 30 years ago.<sup>4</sup> The total amount of time that couples with children spend working also has increased.<sup>5</sup> Income from women's employment is important to the economic security of many families, particularly among lower-paid workers, and accounts for over one-third of the income in families where both parents work.<sup>6</sup> Despite these changes, women continue to be most families' primary caregivers.<sup>7</sup>

Of course, workers' caregiving responsibilities are not limited to childcare, and include many other forms of caregiving. An increasing proportion of caregiving goes to the elderly, and this trend will likely continue as the Baby Boomer population ages.<sup>8</sup> As with childcare, women are primarily responsible for caring for society's elderly, including care of parents, in-laws, and spouses.<sup>9</sup> Unlike childcare, however, eldercare responsibilities generally increase over time as the person cared for ages, and eldercare can be much less predictable than childcare because of health crises that typically arise.<sup>10</sup> As eldercare becomes more common, workers in the "sandwich generation," those between the ages of 30 and 60, are more likely to face work responsibilities alongside both childcare and eldercare responsibilities.<sup>11</sup>

Caring for individuals with disabilities – including care of adult children, spouses, or parents – is also a common responsibility of workers.<sup>12</sup> According to the most recent U.S. census, nearly a third of families have at least one family member with a disability, and about one in ten families with children under 18 years of age includes a child with a disability.<sup>13</sup> Most men and women who provide care to relatives or other individuals with a disability are employed.<sup>14</sup>

While caregiving responsibilities disproportionately affect working women generally, their effects may be even more pronounced among some women of color, particularly African American women,<sup>15</sup> who have a long history of working outside the home.<sup>16</sup> African American mothers with young children are more likely to be employed than other women raising young children,<sup>17</sup> and both African American and Hispanic women are more likely to be raising children in a single-parent household than are White or Asian American women.<sup>18</sup> Women of color also may devote more time to caring for extended family members, including both grandchildren<sup>19</sup> and elderly relatives,<sup>20</sup> than do their White counterparts.

Although women are still responsible for a disproportionate share of family caregiving, men's role has increased. Between 1965 and 2003, the amount of time that men spent on childcare nearly tripled, and men spent more than twice as long performing household chores in 2003 as they did in 1965.<sup>21</sup> Working mothers are also increasingly relying on fathers as primary childcare providers.<sup>22</sup>

### B. *Work-Family Conflicts*

As more mothers have entered the labor force, families have increasingly faced conflicts between work and family responsibilities, sometimes resulting in a "maternal wall" that limits the employment opportunities of workers with caregiving responsibilities.<sup>23</sup> These conflicts are perhaps felt most profoundly by lower-paid workers,<sup>24</sup> who are disproportionately people of color.<sup>25</sup> Unable to afford to hire a childcare provider, many couples "tag team" by working opposite shifts and taking turns caring for their children. In comparison to professionals, lower-paid workers tend to have much less control over their schedules and are more likely to face inflexible employer policies, such as mandatory overtime.<sup>26</sup> Family crises can sometimes lead to discipline or even discharge when a worker violates an employer policy in order to address caregiving responsibilities.<sup>27</sup>

The impact of work-family conflicts also extends to professional workers, contributing to the maternal wall or "glass ceiling" that prevents many women from advancing in their careers. As a recent EEOC report reflects, even though women constitute about half of the labor force, they are a much smaller proportion of managers and officials.<sup>28</sup> The disparity is greatest at the highest levels in the business world, with women accounting for only 1.4% of Fortune 500 CEOs.<sup>29</sup> Thus, one of the recommendations made by the federal Glass Ceiling Commission in 1995 was for organizations to adopt policies that allow workers to balance work and family responsibilities throughout their careers.<sup>30</sup>

Individuals with caregiving responsibilities also may encounter the maternal wall through employer stereotyping. Writing for the Supreme Court in 2003, Chief Justice Rehnquist noted that "the faultline between work and family [is] precisely where sex-based overgeneralization has been and remains strongest."<sup>31</sup> Sex-based stereotyping about caregiving responsibilities is not limited to childcare and includes other forms of caregiving, such as care of a sick parent or spouse.<sup>32</sup> Thus, women with caregiving responsibilities may be perceived as more committed to caregiving than to their jobs and as less competent than other workers, regardless of how their caregiving responsibilities actually impact their work.<sup>33</sup> Male caregivers may face the mirror image stereotype: that men are poorly suited to caregiving. As a result, men may be denied parental leave or other benefits routinely afforded their female counterparts.<sup>34</sup> Racial and ethnic stereotypes may further limit employment opportunities for people of color.<sup>35</sup>

Employment decisions based on such stereotypes violate the federal antidiscrimination statutes,<sup>36</sup> even when an employer acts upon such stereotypes unconsciously or reflexively.<sup>37</sup> As the Supreme Court has explained, "[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they match the stereotype associated with their group."<sup>38</sup> Thus, for example, employment decisions based on stereotypes about working mothers are unlawful because "the antidiscrimination laws entitle individuals to be evaluated as individuals rather than as members of groups having certain average characteristics."<sup>39</sup>

Although some employment decisions that adversely affect caregivers may not constitute unlawful discrimination based on sex or another protected characteristic, the Commission strongly encourages employers to adopt best practices to make it easier for all workers, whether male or female, to balance work and personal responsibilities. There is substantial evidence that workplace flexibility enhances employee satisfaction and job performance.<sup>40</sup> Thus, employers can benefit by adopting such flexible workplace policies<sup>41</sup> by, for example, saving millions of dollars in retention costs.<sup>42</sup>

## II. *UNLAWFUL DISPARATE TREATMENT OF CAREGIVERS*

This section illustrates various circumstances under which discrimination against a worker with caregiving responsibilities constitutes unlawful disparate treatment under Title VII or the ADA. Part A discusses sex-based disparate treatment of female caregivers, focusing on sex-based stereotypes. Part B discusses stereotyping and other disparate treatment of pregnant workers. Part C discusses sex-based disparate treatment of male caregivers, such as the denial of childcare leave that is available to female workers. Part D discusses disparate treatment of women of color who have caregiving responsibilities. Part E discusses disparate treatment of a worker with caregiving responsibilities for an individual with a disability, such as a child or a parent. Finally, part F discusses harassment resulting in a hostile work environment for a worker with caregiving responsibilities.

#### A. *Sex-based Disparate Treatment of Female Caregivers*

##### 1. *Analysis of Evidence*

Intentional sex discrimination against workers with caregiving responsibilities can be proven using any of the types of evidence used in other sex discrimination cases. As with any other charge, investigators faced with a charge alleging sex-based disparate treatment of female caregivers should examine the totality of the evidence to determine whether the particular challenged action was unlawfully discriminatory. All evidence should be examined in context. The presence or absence of any particular kind of evidence is not dispositive. For example, while comparative evidence is often useful, it is not necessary to establish a violation.<sup>43</sup> There may be evidence of comments by officials about the reliability of working mothers or evidence that, despite the absence of a decline in work performance, women were subjected to less favorable treatment after they had a baby. It is essential that there be evidence that the adverse action taken against the caregiver was based on sex.

Relevant evidence in charges alleging disparate treatment of female caregivers may include, but is not limited to, any of the following:

- Whether the respondent asked female applicants, but not male applicants, whether they were married or had young children, or about their childcare and other caregiving responsibilities;
- Whether decisionmakers or other officials made stereotypical or derogatory comments about pregnant workers or about working mothers or other female caregivers;<sup>44</sup>
- Whether the respondent began subjecting the charging party or other women to less favorable treatment soon after it became aware that they were pregnant;<sup>45</sup>
- Whether, despite the absence of a decline in work performance, the respondent began subjecting the charging party or other women to less favorable treatment after they assumed caregiving responsibilities;
- Whether female workers without children or other caregiving responsibilities received more favorable treatment than female caregivers based upon stereotypes of mothers or other female caregivers;
- Whether the respondent steered or assigned women with caregiving responsibilities to less prestigious or lower-paid positions;
- Whether male workers with caregiving responsibilities received more favorable treatment than female workers;<sup>46</sup>
- Whether statistical evidence shows disparate treatment against pregnant workers or female caregivers;<sup>47</sup>
- Whether respondent deviated from workplace policy when it took the challenged action;
- Whether the respondent's asserted reason for the challenged action is credible.<sup>48</sup>

##### 2. *Unlawful Disparate Treatment of Female Caregivers as Compared with Male Caregivers*

Employment decisions that discriminate against workers with caregiving responsibilities are prohibited by Title VII if they are based on sex or another protected characteristic, regardless of whether the employer discriminates more broadly against all members of the protected class. For example, sex discrimination against working mothers is prohibited by Title VII even if the employer does not discriminate against childless women.<sup>49</sup>

#### EXAMPLE 1 UNLAWFUL DISCRIMINATION AGAINST WOMEN WITH YOUNG CHILDREN

Charmaine, a mother of two preschool-age children, files an EEOC charge alleging sex discrimination after she is rejected for an opening in her employer's executive training program. The employer asserts that it rejected Charmaine because candidates who were selected had better performance appraisals or more managerial experience and because she is not "executive material." The employer also contends that the fact that half of the selectees were women shows that her rejection could not have been because of sex. However, the investigation reveals that Charmaine had more managerial experience or better performance appraisals than several selectees and was better qualified than some selectees, including both men and women, as weighted pursuant to the employer's written selection policy. In addition, while the employer selected both men and women for the program, the only selectees with preschool age children were men. Under the circumstances, the investigator determines that Charmaine was subjected to discrimination based on her sex.

Title VII does not prohibit discrimination based solely on parental or other caregiver status, so an employer does not generally violate Title VII's disparate treatment proscription if, for example, it treats working mothers and working fathers in a similar unfavorable (or favorable) manner as compared to childless workers.

##### 3. *Unlawful Gender Role Stereotyping of Working Women*

Although women actually do assume the bulk of caretaking responsibilities in most families and many women do curtail their work responsibilities when they become caregivers, Title VII does not permit employers to treat female workers less favorably merely on the gender-based assumption that a particular female worker will assume caretaking responsibilities or that a female worker's caretaking responsibilities will interfere with her work performance.<sup>50</sup> Because

stereotypes that female caregivers should not, will not, or cannot be committed to their jobs are sex-based, employment decisions based on such stereotypes violate Title VII.<sup>51</sup>

#### Gender-based Assumptions About Future Caregiving Responsibilities

Relying on stereotypes of traditional gender roles and the division of domestic and workplace responsibilities, some employers may assume that childcare responsibilities will make female employees less dependable than male employees, even if a female worker is not pregnant and has not suggested that she will become pregnant.<sup>52</sup> Fear of such stereotyping may even prompt married female job applicants to remove their wedding rings before going into an interview.<sup>53</sup>

### EXAMPLE 2 UNLAWFUL STEREOTYPING DURING HIRING PROCESS

Patricia, a recent business school graduate, was interviewed for a position as a marketing assistant for a public relations firm. At the interview, Bob, the manager of the department with the vacancy being filled, noticed Patricia's wedding ring and asked, "How many kids do you have?" Patricia told Bob that she had no children yet but that she planned to once she and her husband had gotten their careers underway. Bob explained that the duties of a marketing assistant are very demanding, and rather than discuss Patricia's qualifications, he asked how she would balance work and childcare responsibilities when the need arose. Patricia explained that she would share childcare responsibilities with her husband, but Bob responded that men are not reliable caregivers. Bob later told his secretary that he was concerned about hiring a young married woman – he thought she might have kids, and he didn't believe that being a mother was "compatible with a fast-paced business environment." A week after the interview, Patricia was notified that she was not hired.

Believing that she was well qualified and that the interviewer's questions reflected gender bias, Patricia filed a sex discrimination charge with the EEOC. The investigator discovered that the employer reposted the position after rejecting Patricia. The employer said that it reposted the position because it was not satisfied with the experience level of the applicants in the first round. However, the investigation showed that Patricia easily met the requirements for the position and had as much experience as some other individuals recently hired as marketing assistants. Under the circumstances, the investigator determines that the respondent rejected Patricia from the first round of hiring because of sex-based stereotypes in violation of Title VII.

#### Mixed-motives Cases

An employer violates Title VII if the charging party's sex was a motivating factor in the challenged employment decision, regardless of whether the employer was also motivated by legitimate business reasons.<sup>54</sup> However, when an employer shows that it would have taken the same action even absent the discriminatory motive, the complaining employee will not be entitled to reinstatement, back pay, or damages.<sup>55</sup>

### EXAMPLE 3 DECISION MOTIVATED BY BOTH UNLAWFUL STEREOTYPING AND LEGITIMATE BUSINESS REASON

Same facts as above except that the employer did not repost the position but rather hired Tom from the same round of candidates that Patricia was in. In addition, the record showed that other than Tom's greater experience, Tom and Patricia had similar qualifications but that the employer consistently used relevant experience as a tiebreaking factor in filling marketing positions. The investigator determines that the employer has violated Title VII because sex was a motivating factor in the employer's decision not to hire Patricia as evidenced by Bob's focus on caregiving responsibilities, rather than qualifications, when he interviewed Patricia and other female candidates. However, the employer would have selected Tom, even absent the discriminatory motive, based on his greater experience. Thus, Patricia may be entitled to attorney's fees and/or injunctive relief, but is not entitled to reinstatement, back pay, or compensatory or punitive damages.

#### Assumptions About the Work Performance of Female Caregivers

The effects of stereotypes may be compounded after female employees become pregnant or actually begin assuming caregiving responsibilities. For example, employers may make the stereotypical assumptions that women with young children will (or should) not work long hours and that new mothers are less committed to their jobs than they were before they had children.<sup>56</sup> Relying on such stereotypes, some employers may deny female caregivers opportunities based on assumptions about how they might balance work and family responsibilities. Employers may further stereotype female caregivers who adopt part-time or flexible work schedules as "homemakers" who are less committed to the workplace than their full-time colleagues.<sup>57</sup> Adverse employment decisions based on such sex-based assumptions or speculation, rather than on the specific work performance of a particular employee, violate Title VII.

### EXAMPLE 4 UNLAWFUL SEX-BASED ASSUMPTIONS ABOUT WORK PERFORMANCE

Anjali, a police detective, had received glowing performance reviews during her first four years with the City's police department and was assumed to be on a fast track for promotion. However, after she returned from leave to adopt a child during her fifth year with the department, her supervisor frequently asked how Anjali was going to manage to stay on top of her case load while caring for an infant. Although Anjali continued to work the same hours and close as many cases as she had before the adoption, her supervisor pointed out that none of her superiors were mothers, and he removed her from her high-profile cases, assigning her smaller, more routine cases normally handled by inexperienced detectives. The City has

violated Title VII by treating Anjull less favorably because of gender-based stereotypes about working mothers.

#### EXAMPLE 5

##### UNLAWFUL STEREOTYPING BASED ON PARTICIPATION IN FLEXIBLE WORK ARRANGEMENT

Emily, an assistant professor of mathematics at the University for the past seven years, files a charge alleging that she was denied tenure based on her sex. Emily applied for tenure after she returned from six months of leave to care for her father. The University's flexible work program allowed employees to take leave for a year without penalty. Before taking leave, Emily had always received excellent performance reviews and had published three highly regarded books in her field. After returning from leave, however, Emily believed she was held to a higher standard of review than her colleagues who were not caregivers or had not taken advantage of the leave policies, as reflected in the lower performance evaluations that she received from the Dean of her department after returning from leave. Emily applied for tenure, but the promotion was denied by the Dean, who had a history of criticizing female faculty members who took time off from their careers and was heard commenting that "she's just like the other women who think they can come and go as they please to take care of their families."

While the University acknowledges that Emily was eligible for tenure, it asserts that it denied Emily tenure because of a decline in her performance. The investigation reveals, however, that Emily's post-leave work output and classroom evaluations were comparable to her work performance before taking leave. In addition, The University does not identify any specific deficiencies in Emily's performance that warranted the decline in its evaluation of her work. Under the circumstances, the investigator determines that Emily was denied tenure because of her sex.

Employment decisions that are based on an employee's actual work performance, rather than assumptions or stereotypes, do not generally violate Title VII, even if an employee's unsatisfactory work performance is attributable to caregiving responsibilities.

#### EXAMPLE 6

##### EMPLOYMENT DECISION LAWFULLY BASED ON ACTUAL WORK PERFORMANCE

After Carla, an associate in a law firm, returned from maternity leave, she began missing work frequently because of her difficulty in obtaining childcare and was unable to meet several important deadlines. As a result, the firm lost a big client, and Carla was given a written warning about her performance. Carla's continued childcare difficulties resulted in her missing further deadlines for several important projects. Two months after Carla was given the written warning, the firm transferred her to another department, where she would be excluded from most high-profile cases but would perform work that has fewer time constraints. Carla filed a charge alleging sex discrimination. The investigation revealed that Carla was treated comparably to other employees, both male and female, who had missed deadlines on high-profile projects or otherwise performed unsatisfactorily and had failed to improve within a reasonable period of time. Therefore, the employer did not violate Title VII by transferring Carla.

#### "Benevolent" Stereotyping

Adverse employment decisions based on gender stereotypes are sometimes well-intentioned and perceived by the employer as being in the employee's best interest.<sup>58</sup> For example, an employer might assume that a working mother would not want to relocate to another city, even if it would mean a promotion.<sup>59</sup> Of course, adverse actions that are based on sex stereotyping violate Title VII, even if the employer is not acting out of hostility.<sup>60</sup>

#### EXAMPLE 7

##### STEREOTYPING UNLAWFUL EVEN IF FOR BENEVOLENT REASONS

Rhonda, a CPA at a mid-size accounting firm, mentioned to her boss that she had become the guardian of her niece and nephew and they were coming to live with her, so she would need a few days off to help them settle in. Rhonda's boss expressed concern that Rhonda would be unable to balance her new family responsibilities with her demanding career, and was worried that Rhonda would suffer from stress and exhaustion. Two weeks later, he moved her from her lead position on three of the firm's biggest accounts and assigned her to supporting roles handling several smaller accounts. In doing so, the boss told Rhonda that he was transferring her so that she "would have more time to spend with her new family," despite the fact that Rhonda had asked for no additional leave and had been completing her work in a timely and satisfactory manner. At the end of the year, Rhonda, for the first time in her 7-year stint at the firm, is denied a pay raise, even though many other workers did receive raises. When she asks for an explanation, she is told that she needs to be available to work on bigger accounts if she wants to receive raises. Here, the employer has engaged in unlawful sex discrimination by taking an adverse action against a female employee based on stereotypical assumptions about women with caregiving responsibilities, even if the employer believed that it was acting in the employee's best interest.

In some circumstances, an employer will take an action that unlawfully imposes on a female worker the employer's own stereotypical views of how the worker *should* act even though the employer is aware that the worker objects. Thus, if a supervisor believes that mothers should not work full time, he or she might refuse to consider a working mother for a promotion that would involve a substantial increase in hours, even if that worker has made it clear that she would accept the promotion if offered.

#### EXAMPLE 8

##### DENIAL OF PROMOTION BASED ON STEREOTYPE OF HOW MOTHERS SHOULD ACT

Sun, a mid-level manager in a data services company, applied for a promotion to a newly created upper-level management position. At the interview for the promotion, the selecting official, Charlie, who had never met Sun before, asked her about her childcare responsibilities. Sun explained that she had two teenage

children and that she commuted every week between her home in New York and the employer's main office in Northern Virginia. Charlie asked Sun how her husband handled the fact that she was "away from home so much, not caring for the family except on weekends." Sun explained that her husband and their children "helped each other" to function as "a successful family," but Charlie responded that he had "a very difficult time understanding why any man would allow his wife to live away from home during the work week." After Sun is denied the promotion, she files an EEOC charge alleging sex discrimination. According to the employer, it considered Sun and one other candidate for the promotion, and, although they were both well qualified, it did not select Sun because it felt that it was unfair to Sun's children for their mother to work so far from home. Under the circumstances, the investigator determines that the employer denied Sun the promotion because of unlawful sex discrimination, basing its decision in particular on stereotypes that women with children should not live away from home during the week.<sup>61</sup>

#### 4. *Effects of Stereotyping on Subjective Assessments of Work Performance*

In addition to leading to assumptions about how female employees might balance work and caregiving responsibilities, gender stereotypes of caregivers may more broadly affect perceptions of a worker's general competence.<sup>62</sup> Once female workers have children, they may be perceived by employers as being less capable and skilled than their childless female counterparts or their male counterparts, regardless of whether the male employees have children.<sup>63</sup> These gender-based stereotypes may even place some working mothers in a "double bind," in which they are simultaneously viewed by their employers as "bad mothers" for investing time and resources into their careers and "bad workers" for devoting time and attention to their families.<sup>64</sup> The double bind may be particularly acute for mothers or other female caregivers who work part time. Colleagues may view part-time working mothers as uncommitted to work while viewing full-time working mothers as inattentive mothers.<sup>65</sup> Men who work part time may encounter different, though equally harmful, stereotypes.<sup>66</sup>

Investigators should be aware that it may be more difficult to recognize sex stereotyping when it affects an employer's evaluation of a worker's general competence than when it leads to assumptions about how a worker will balance work and caregiving responsibilities. Such stereotyping can be based on unconscious bias, particularly where officials engage in subjective decisionmaking. As with other forms of gender stereotyping, comparative evidence showing more favorable treatment of male caregivers than female caregivers is helpful but not necessary to establish a violation.<sup>67</sup> Investigators should be particularly attentive, for example, to evidence of the following:

- Changes in an employer's assessment of a worker's performance that are not linked to changes in the worker's actual performance and that arise after the worker becomes pregnant or assumes caregiving responsibilities;
- Subjective assessments that are not supported by specific objective criteria; and
- Changes in assignments or duties that are not readily explained by nondiscriminatory reasons.

#### EXAMPLE 9 EFFECTS OF STEREOTYPING ON EMPLOYER'S PERCEPTION OF EMPLOYEE

Barbara, a highly successful marketing executive at a large public relations firm, recently became the primary caregiver for her two young grandchildren. Twice a month, Barbara and her marketing colleagues are expected to attend a 9 a.m. corporate sales meeting. Last month, Barbara arrived a few minutes late to the meeting. Barbara did not think her tardiness was noteworthy since one of her colleagues, Jim, regularly arrived late to the meetings. However, after her late arrival, Barbara's boss, Susan, severely criticized her for the incident and informed her that she needed to start keeping a daily log of her activities.

The next month, Susan announced that one of the firm's marketing executives would be promoted to the position of Vice President. After Susan selected Jim, Barbara filed a charge alleging that she was denied the promotion because of her sex. According to Susan, she selected Jim because she believed that he was more "dependable, reliable, and committed to his work" than other candidates. Susan explained to the investigator that she thought as highly of Barbara's work as she did of Jim's, but she decided not to promote a worker who arrived late to sales meetings, even if it was because of childcare responsibilities. Other employees stated that they could only remember Barbara's being late on one occasion, but that Jim had been late on numerous occasions. When asked about this, Susan admitted that she might have forgotten about the times when Jim was late, but still considered Jim to be much more dependable. The investigator asks Susan for more specifics, but Susan merely responds that her opinion was based on many years of experience working with both Barbara and Jim. Under the circumstances, the investigator concludes that Susan denied Barbara the promotion because of her sex.

#### EXAMPLE 10 SUBJECTIVE DECISIONMAKING BASED ON NONDISCRIMINATORY FACTORS

Simone, the mother of two elementary-school-age children, files an EEOC charge alleging sex discrimination after she is terminated from her position as a reporter with a medium-size newspaper. The employer asserts that it laid Simone off as part of a reduction in force in response to decreased revenue. The employer states that Simone's supervisor, Alex, compared Simone with two other reporters in the same department to determine whom to lay off. According to Alex, he considered Jocelyn (an older woman with two grown children) to be a superior worker to Simone because Jocelyn's work needed less editing and supervision and she had the most experience of anyone in the department. Alex said he also favored Louis (a young male worker with no children) over Simone because Louis had shown exceptional initiative and creativity by writing several stories that had received national publicity and by creating a new feature to increase youth readership and advertising revenue. Alex said that he considered Simone's work satisfactory, but that she lacked the unique talents that Jocelyn and Louis brought to the department. Because the investigation does not reveal that the reasons provided by Alex are a pretext for sex discrimination, the investigator does not find that Simone was subjected to sex discrimination.

#### B. *Pregnancy Discrimination*

Employers can also violate Title VII by making assumptions about pregnancy, such as assumptions about the commitment of pregnant workers or their ability to perform certain physical tasks.<sup>69</sup> As the Supreme Court has noted, “[W]omen as capable of doing their jobs as their male counterparts may not be forced to choose between having a child and having a job.”<sup>69</sup> Title VII’s prohibition against sex discrimination includes a prohibition against employment decisions based on pregnancy, even where an employer does not discriminate against women generally.<sup>70</sup> As with other sex-based stereotypes, Title VII prohibits an employer from basing an adverse employment decision on stereotypical assumptions about the effect of pregnancy on an employee’s job performance, regardless of whether the employer is acting out of hostility or a belief that it is acting in the employee’s best interest.

Because Title VII prohibits discrimination based on pregnancy, employers should not make pregnancy-related inquiries. The EEOC will generally regard a pregnancy-related inquiry as evidence of pregnancy discrimination where the employer subsequently makes an unfavorable job decision affecting a pregnant worker.<sup>71</sup> Employers should be aware that pregnancy testing also implicates the ADA, which restricts employers’ use of medical examinations.<sup>72</sup> Given the potential Title VII and ADA implications, the Commission strongly discourages employers from making pregnancy-related inquiries or conducting pregnancy tests.

An employer also may not treat a pregnant worker who is temporarily unable to perform some of her job duties because of pregnancy less favorably than workers whose job performance is similarly restricted because of conditions other than pregnancy. For example, if an employer provides up to eight weeks of paid leave for temporary medical conditions, then the employer must provide up to eight weeks of paid leave for pregnancy or related medical conditions.<sup>73</sup>

For more information on pregnancy discrimination under Title VII, see “Questions and Answers on the Pregnancy Discrimination Act,” 29 C.F.R. Part 1604 Appendix (1978).

#### EXAMPLE 11 UNLAWFUL STEREOTYPING BASED ON PREGNANCY

Anna, a records administrator for a health maintenance organization, was five months pregnant when she missed two days of work due to a pregnancy-related illness. Upon her return to work, Anna’s supervisor, Tom, called her into his office and told her that “her body was trying to tell her something” and that “her attendance was becoming a serious problem.” Anna reminded him that she had only missed two days and that her doctor had found no continuing complications related to her brief illness. However, Tom responded, “Well, now that you’re pregnant, you will probably miss a lot of work, and we need someone who will be dependable.” Tom placed Anna on an unpaid leave of absence, telling her that she would be able to return to work after she had delivered her baby and had time to recuperate and that “not working [was] the best thing for [her] right now.” In response to Anna’s EEOC charge alleging pregnancy discrimination, the employer states that it placed Anna on leave because of poor attendance. The investigation reveals, however, that Anna had an excellent attendance record before she was placed on leave. In the prior year, she had missed only three days of work because of illness, including two days for her pregnancy-related illness and one day when she was ill before she became pregnant. The investigator concludes that the employer subjected Anna to impermissible sex discrimination under Title VII by basing its action on a stereotypical assumption that pregnant women are poor attendees and that Anna would be unable to meet the requirements of the job.<sup>74</sup>

#### EXAMPLE 12 UNLAWFUL REFUSAL TO MODIFY DUTIES

Ingrid, a pregnant machine operator at a bottling company, is told by her doctor to temporarily refrain from lifting more than 20 pounds. As part of her job as a machine operator, Ingrid is required to carry certain materials weighing more than 20 pounds to and from her machine several times each day. She asks her supervisor if she can be temporarily relieved of this function. The supervisor refuses, stating that he can’t reassign her job duties but can transfer her temporarily to another lower-paying position for the duration of the lifting restriction. Ingrid reluctantly accepts the transfer but also files an EEOC charge alleging sex discrimination. The investigation reveals that in the previous six months, the employer had reassigned the lifting duties of three other machine operators, including a man who injured his arm in an automobile accident and a woman who had undergone surgery to treat a hernia. Under the circumstances, the investigator determines that the employer subjected Ingrid to discrimination based on sex (i.e., pregnancy).

### C. *Discrimination Against Male Caregivers*<sup>75</sup>

The Supreme Court has observed that gender-based stereotypes also influence how male workers are perceived: “Stereotypes about women’s domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination.”<sup>76</sup> Stereotypes of men as “bread winners” can further lead to the perception that a man who works part time is not a good father, even if he does so to care for his children.<sup>77</sup> Thus, while working women have generally borne the brunt of gender-based stereotyping, unlawful assumptions about working fathers and other male caregivers have sometimes led employers to deny male employees opportunities that have been provided to working women or to subject men who are primary caregivers to harassment or other disparate treatment.<sup>78</sup> For example, some employers have denied male employees’ requests for leave for childcare purposes even while granting female employees’ requests. For more information on how to determine whether an employee has been subjected to unlawful disparate treatment, see the discussion at § II.A.1, above, “Sex-based Disparate Treatment of Female Caregivers – Analysis of Evidence.”

Significantly, while employers are permitted by Title VII to provide women with leave specifically for the period that they are incapacitated because of pregnancy, childbirth, and related medical conditions, employers may not treat either sex more favorably with respect to other kinds of leave, such as leave for childcare purposes.<sup>79</sup> To avoid a potential Title VII violation, employers should carefully distinguish between pregnancy-related leave and other forms of leave, ensuring that any leave specifically provided to women alone is limited to the period that women are incapacitated by pregnancy and childbirth.<sup>80</sup>

**EXAMPLE 13**  
**EMPLOYER UNLAWFULLY DENIED BENEFIT TO MALE WORKER BECAUSE OF GENDER-BASED STEREOTYPE**

Eric, an elementary school teacher, requests unpaid leave for the upcoming school year for the purpose of caring for his newborn son. Although the school has a collective bargaining agreement that allows for up to one year of unpaid leave for various personal reasons, including to care for a newborn, the Personnel Director denies the request. When Eric points out that women have been granted childcare leave, the Director says, "That's different. We have to give childcare leave to women." He suggests that Eric instead request unpaid emergency leave, though that is limited to 90 days. This is a violation of Title VII because the employer is denying male employees a type of leave, unrelated to pregnancy, that it is granting to female employees.

**EXAMPLE 14**  
**EMPLOYER UNLAWFULLY DENIED PART-TIME POSITION TO MALE WORKER BECAUSE OF SEX**

Tyler, a service technician for a communications company, requests reassignment to a part-time position so that he can help care for his two-year-old daughter when his wife returns to work. Tyler's supervisor, however, rejects the request, saying that the department has only one open slot for a part-time technician, and he has reserved it in case it is needed by a female technician. Tyler's supervisor says that Tyler can have a part-time position should another one open up. After two months, no additional slots have opened up, and Tyler files an EEOC charge alleging sex discrimination. Under the circumstances the employer has discriminated against Tyler based on sex by denying him a part-time position.

**D. Discrimination Against Women of Color**

In addition to sex discrimination, race or national origin discrimination may be a further employment barrier faced by women of color who are caregivers. For example, a Latina working mother might be subjected to discrimination by her supervisor based on his stereotypical notions about working mothers or pregnant workers, as well as his hostility toward Latinos generally. Women of color also may be subjected to intersectional discrimination that is specifically directed toward women of a particular race or ethnicity, rather than toward all women, resulting, for example, in less favorable treatment of an African American working mother than her White counterpart.<sup>81</sup>

**EXAMPLE 15**  
**UNLAWFUL DENIAL OF COMPENSATORY TIME BASED ON RACE**

Margaret, an African American employee in the City's Parks and Recreation Department, files an EEOC charge alleging that she was denied the opportunity to use compensatory time because of her race. She asked her supervisor, Sarah, for the opportunity to use compensatory time so she could occasionally be absent during regular work hours to address personal responsibilities, such as caring for her children when she does not have a sitter. Sarah rejected the request, explaining that Margaret's position has set hours and that any absences must be under the official leave policy. The investigation reveals that while the City does not have an official compensatory time policy, several White employees in Margaret's position have been allowed to use compensatory time for childcare purposes. When asked about this discrepancy, Sarah merely responds that those employees' situations were "different." In addition, the investigation reveals that while White employees have been allowed to use compensatory time, no African Americans have been allowed to do so. Under the circumstances, the investigator determines that Margaret was unlawfully denied the opportunity to use compensatory time based on her race.

**EXAMPLE 16**  
**UNLAWFUL HARASSMENT AND REASSIGNMENT BASED ON SEX AND NATIONAL ORIGIN**

Christina, a Mexican-American, filed an EEOC charge alleging that she was subjected to discrimination based on national origin and pregnancy. Christina had worked as a server waiting tables at a large chain restaurant until she was reassigned to a kitchen position when she was four months pregnant. One of Christina's supervisors has regularly made comments in the workplace about how Mexicans are entering the country illegally and taking jobs from other people. After Christina becomes pregnant, he began directing the comments at Christina, telling her that Mexican families are too large and that it is not fair for Mexicans to come to the United States and "take over" and use up tax dollars. When he reassigned Christina, he explained to her that he thought customers' appetites would be spoiled if they had their food brought to them by someone who was pregnant. Under these circumstances, the evidence shows that Christina was subjected to discrimination based on both sex (pregnancy) and national origin.

**E. Unlawful Caregiver Stereotyping Under the Americans with Disabilities Act**

In addition to prohibiting discrimination against a qualified worker because of his or her own disability, the Americans with Disabilities Act (ADA) prohibits discrimination because of the disability of an individual with whom the worker has a relationship or association, such as a child, spouse, or parent.<sup>82</sup> Under this provision, an employer may not treat a worker less favorably based on stereotypical assumptions about the worker's ability to perform job duties satisfactorily while also providing care to a relative or other individual with a disability. For example, an employer may not refuse to hire a job applicant whose wife has a disability because the employer assumes that the applicant would have to use frequent leave and arrive late due to his responsibility to care for his wife.<sup>83</sup> For more information, see EEOC's *Questions and Answers About the Association Provision of the ADA* at [https://www.eeoc.gov/facts/association\\_ada.html](https://www.eeoc.gov/facts/association_ada.html).

**EXAMPLE 17**  
**UNLAWFUL STEREOTYPING BASED ON ASSOCIATION WITH AN INDIVIDUAL WITH A DISABILITY**

An employer is interviewing applicants for a computer programmer position. The employer determines that one of the applicants, Arnold, is the best qualified, but is reluctant to hire him because he disclosed during the interview that he is a divorced father and has sole custody of his son, who has a disability. Because the employer

concludes that Arnold's caregiving responsibilities for a person with a disability may have a negative effect on his attendance and work performance, it decides to offer the position to the second best qualified candidate, Fred, and encourages Arnold to apply for any future openings if his caregiving responsibilities change. Under the circumstances, the employer has violated the ADA by refusing to hire Arnold because of his association with an individual with a disability.

#### F. Hostile Work Environment

Employers may be liable if workers with caregiving responsibilities are subjected to offensive comments or other harassment because of race, sex (including pregnancy), association with an individual with a disability,<sup>84</sup> or another protected characteristic and the conduct is sufficiently severe or pervasive to create a hostile work environment.<sup>85</sup> The same legal standards that apply to other forms of harassment prohibited by the EEO statutes also apply to unlawful harassment directed at caregivers or pregnant workers.

Employers should take steps to prevent harassment directed at caregivers or pregnant workers from occurring in the workplace and to promptly correct any such conduct that does occur. In turn, employees who are subjected to such harassment should follow the employer's harassment complaint process or otherwise notify the employer about the conduct, so that the employer can investigate the matter and take appropriate action. For more information on harassment claims generally, see *EEOC Policy Guidance on Current Issues of Sexual Harassment* (Mar. 19, 1990) at <https://www.eeoc.gov/policy/docs/currentissues.html>, and Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (June 19, 1999) at <https://www.eeoc.gov/policy/docs/harassment.html>.

#### EXAMPLE 18 HOSTILE WORK ENVIRONMENT BASED ON STEREOTYPES OF MOTHERS

After Yael, a supervisor at a construction site, returned to work from maternity leave, she asked her supervisor, Rochelle, for permission to use her lunch break to breastfeed her child at the child's day care center. Rochelle agreed, but added, "Now that you're a mother, you won't have the same dedication to the job. That's why I never had any kids! Maybe you should rethink being a supervisor." She also began monitoring Yael's time, tracking when Yael left and returned from her lunch break and admonishing her if she was late, even only a few minutes. Other employees who left the site during lunch were not similarly monitored. Rochelle warned Yael that if she had another child, she could "kiss her career goodbye," and that it was impossible for any woman to be a good mother and a good supervisor at the same time. Yael is very upset by her supervisor's conduct and reports it to a higher-level manager. However, the employer refuses to take any action, stating that Yael is merely complaining about a "personality conflict" and that he does not get involved in such personal matters. After the conduct continues for several more months, Yael files an EEOC charge alleging that she was subjected to sex-based harassment. Under the circumstances, the investigator determines that Yael was subjected to a hostile work environment based on sex and that the employer is liable.

#### EXAMPLE 19 HOSTILE WORK ENVIRONMENT BASED ON PREGNANCY

Ramona, an account representative, had been working at a computer software company for five years when she became pregnant. Until then, she had been considered a "top performer," and had received multiple promotions and favorable evaluations. During Ramona's pregnancy, her supervisor, Henry, frequently made pregnancy-related comments, such as, "You look like a balloon; why don't you waddle on over here?" and, "Pregnant workers hurt the company's bottom line." Henry also began treating Ramona differently from other account representatives by, for example, asking for advance notification and documentation of medical appointments – a request that was not made of other employees who took leave for medical appointments nor of Ramona before her pregnancy.

After Ramona returned from maternity leave, Henry continued to treat her differently from other account representatives. For example, shortly after Ramona returned from maternity leave, Henry gave Ramona's coworkers an afternoon off so that they could attend a local fair as a "reward" for having covered Ramona's workload while she was on leave, but required Ramona to stay in the office and answer the phones. On another occasion, Ramona requested a schedule change so that she could leave earlier to pick up her son from daycare, but Henry denied the request without explanation, even though other employees' requests for schedule changes were granted freely, regardless of the reason for the request. Henry also continued to make pregnancy-related comments to Ramona on a regular basis. For example, after Ramona returned from maternity leave, she and Henry were discussing a coworker's pregnancy, and Henry sarcastically commented to Ramona, "I suppose you'll be pregnant again soon, and we'll be picking up the slack for you just like the last time."

Ramona complained about Henry's conduct to the Human Resources Manager, but he told her he did not want to take sides and that matters like schedule changes were within managerial discretion. After the conduct had continued for several months, Ramona filed an EEOC charge alleging that she had been subjected to a hostile work environment because of her pregnancy and use of maternity leave. Noting that Ramona experienced ongoing abusive conduct after she became pregnant, the investigator determines that Ramona has been subjected to a hostile work environment based on pregnancy and that the employer is liable.<sup>86</sup>

#### EXAMPLE 20 HOSTILE WORK ENVIRONMENT BASED ON ASSOCIATION WITH AN INDIVIDUAL WITH A DISABILITY

Martin, a first-line supervisor in a department store, had an excellent working relationship with his supervisor, Adam, for many years. However, shortly after Adam learned that Martin's wife has a severe form of multiple sclerosis, his relationship with Martin deteriorated. Although Martin had always been a good performer, Adam repeatedly expressed his concern that Martin's responsibilities caring for his wife would prevent him from being able to meet the demands of his job. Adam removed Martin from team projects, stating that Martin's coworkers did not think that Martin could be expected to complete his share of the work "considering all of his wife's medical problems." Adam set unrealistic time frames for projects assigned to Martin and yelled at him in front of coworkers about the need to meet approaching deadlines. Adam also began requiring Martin to follow company policies that other employees were not required to follow, such as requesting leave at least a week in advance except in the



case of an emergency. Though Martin complained several times to upper management about Adam's behavior, the employer did nothing. Martin files an EEOC charge, and the investigator determines that the employer is liable for harassment on the basis of Martin's association with an individual with a disability.

### III. RETALIATION

Employers are prohibited from retaliating against workers for opposing unlawful discrimination, such as by complaining to their employers about gender stereotyping of working mothers, or for participating in the EEOC charge process, such as by filing a charge or testifying on behalf of another worker who has filed a charge. Because discrimination against caregivers may violate the EEO statutes, retaliation against workers who complain about such discrimination also may violate the EEO statutes.<sup>87</sup>

The retaliation provisions under the EEO statutes protect individuals against any form of retaliation that would be reasonably likely to deter someone from engaging in protected activity.<sup>88</sup> Caregivers may be particularly vulnerable to unlawful retaliation because of the challenges they face in balancing work and family responsibilities. An action that would be likely to deter a working mother from filing a future EEOC complaint might be less likely to deter someone who does not have substantial caregiving responsibilities. As the Supreme Court noted in a 2006 decision, "A schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school age children."<sup>89</sup> Thus, the EEO statutes would prohibit such a retaliatory schedule change or any other act that would be reasonably likely to deter a working mother or other caregiver from engaging in protected activity.

#### Footnotes

<sup>1</sup> For more information on the FMLA, see Compliance Assistance – Family and Medical Leave Act, <http://www.dol.gov/whd/fmla/> (U.S. Department of Labor web page); see also EEOC Fact Sheet, *The Family and Medical Leave Act, the Americans with Disabilities Act, and Title VII of the Civil Rights Act of 1964* (1995), <https://www.eeoc.gov/policy/docs/fmlaada.html> (discussing questions that arise under Title VII and the ADA when the FMLA also applies).

While federal law does not prohibit discrimination based on parental status, some state and local laws do prohibit discrimination based on parental or similar status. *E.g.*, ALASKA STAT. § 18.80.200 (prohibiting employment discrimination based on "parenthood"); D.C. Human Rights Act, D.C. CODE § 2-1402.11 (prohibiting employment discrimination based on "family responsibilities").

<sup>2</sup> In 1970, 43% of women were in the labor force while 59% of women were in the labor force in 2005. BUREAU OF LABOR STATISTICS, DEPT OF LABOR, WOMEN IN THE LABOR FORCE: A DATABOOK 1 (2006) [hereinafter DATABOOK], <http://www.bls.gov/cps/wlf-databook-2006.pdf>.

<sup>3</sup> AFL-CIO, PROFESSIONAL WOMEN: VITAL STATISTICS (2006), <http://www.pay-equity.org/PDFs/ProfWomen.pdf> (in 2005, women accounted for 46.4% of the labor force).

<sup>4</sup> DATABOOK, *supra* note 2, Table 7 (59% of mothers with children under 3 were in the civilian labor force in 2005, compared with 34% in 1975).

<sup>5</sup> BUREAU OF LABOR STATISTICS, DEPT OF LABOR, WORKING IN THE 21ST CENTURY, <http://www.bls.gov/opub/working/home.htm> (combined work hours per week for married couples with children under 18 increased from 55 hours in 1969 to 66 hours in 2000).

<sup>6</sup> Testimony of Heather Boushey, Senior Economist, Center for Economic and Policy Research, to the EEOC, Apr. 17, 2007, <https://www.eeoc.gov/abouteeoc/meetings/4-17-07/boushey.html> ("For many families, having a working wife can make the difference between being middle class and not. . . . The shift in women's work participation is not simply about women wanting to work, but it is also about their families needing them to work.").

<sup>7</sup> See generally Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women's Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory*, 34 U. MICH. J.L. REFORM 371, 378-80 (2001) (discussing women's continued role as primary caregivers in our society and citing studies).

BUREAU OF LABOR STATISTICS, DEPT OF LABOR, AMERICAN TIME-USE SURVEY (2006), Table 8, <http://www.bls.gov/news.release/pdf/atus.pdf> (in 2005, in households with children under 6, working women spent an average of 2.17 hours per day providing care for household members compared with 1.31 hours for working men; in households with children 6 to 17, working women spent an average of .99 hours per day providing care for household members compared with .50 for working men).

<sup>8</sup> See generally Peggie R. Smith, *Elder Care, Gender, and Work: The Work-Family Issue of the 21st Century*, 25 BERKELEY J. EMP. & LAB. L. 351, 355-60 (2004).

<sup>9</sup> *Id.* at 360 (noting that women provide about 70% of unpaid elder care); see also *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 738 (2003) (noting that working women provide two-thirds of the nonprofessional care for older, chronically ill, and disabled individuals); Cathy D. Martin, *More Than the Work: Race and Gender Differences in Caregiving Burden*, 21 JOURNAL OF FAMILY ISSUES 986, 989-90 (2000) (discussing greater role women play in providing eldercare).

<sup>10</sup> Smith, *supra* note 8, at 365-70.

<sup>11</sup> See BOSTON COLL. CTR. FOR WORK & FAMILY, EXECUTIVE BRIEFING SERIES, EXPLORING THE COMPLEXITIES OF EXCEPTIONAL CAREGIVING (2006) (contact the Center to order copies of the Executive Briefing Series, 617-552-2865 or [cwf@bc.edu](mailto:cwf@bc.edu)).

<sup>12</sup> See generally DEPT OF HEALTH & HUMAN SERVS., INFORMAL CAREGIVING: COMPASSION IN ACTION (1998) (hereinafter INFORMAL CAREGIVING), <http://aspe.hhs.gov/daltcp/reports/carebro2.pdf>.

<sup>13</sup> U.S. CENSUS BUREAU, DISABILITY AND AMERICAN FAMILIES: 2000, at 3, 16 (2005), <http://www.census.gov/prod/2005pubs/censr-23.pdf>.

<sup>14</sup> INFORMAL CAREGIVING, *supra* note 12, at 11.

<sup>15</sup> See, e.g., Lynette Clemetson, *Work vs. Family, Complicated by Race*, N.Y. TIMES, Feb. 9, 2006, at G1 (discussing unique work-family conflicts faced by African American women).

<sup>16</sup> For example, by 1900, 26% of married African American women were wage earners, compared with 3.2% of their White counterparts. JENNIFER TUCKER & LESLIE R. WOLFE, CTR. FOR WOMEN POLICY STUDIES, *DEFINING WORK AND FAMILY ISSUES: LISTENING TO THE VOICES OF WOMEN OF COLOR 4* (1994) (citing other sources). More recently, in 1970, more than 70% of married African American middle-class women and nearly 45% of married African American working-class women were in the labor force compared with 48% and 32%, respectively, of their White counterparts. LONNAE O'NEAL PARKER, *I'M EVERY WOMAN: REMIXED STORIES OF MARRIAGE, MOTHERHOOD AND WORK 29* (2005).

<sup>17</sup> DATABOOK, *supra* note 2, Table 5 (in 2005, 68% of African American women with children under the age of 3 were in the workforce compared with 58% of White women, 53% of Asian American women, and 45% of Hispanic women).

<sup>18</sup> POPULATION REFERENCE BUREAU, *Diversity, Poverty Characterize Female Headed Households*, <http://www.prb.org/Articles/2003/DiversityPovertyCharacterizeFemaleHeadedHouseholds.aspx> (about 5% of White or Asian American households are female-headed households with children compared with 22% of African American households and 14% of Hispanic households).

Native American women may have greater childcare responsibilities and are less likely to be employed than their White or African American counterparts. Native American women may have special family and community obligations based on tribal culture and often have more children than do White or African American women. Job opportunities may be further limited since Native American women often live in remote areas where the few available jobs tend to be in traditionally male-dominated industries. THE NATIVE NORTH AMERICAN ALMANAC 1088 (2d ed. 2001).

<sup>19</sup> U.S. CENSUS BUREAU, *GRANDPARENTS LIVING WITH GRANDCHILDREN: 2000*, Table 1 (2003), <http://www.census.gov/prod/2003pubs/c2kbr-31.pdf> (showing a higher proportion of African American and Native American grandmothers responsible for raising grandchildren than White, Asian, or Hispanic grandmothers).

<sup>20</sup> See NAT'L ASS'N OF STATE UNITS ON AGING, *IN THE MIDDLE: A REPORT ON MULTICULTURAL BOOMERS COPING WITH FAMILY AND AGING ISSUES* (2001), <http://www.nasua.org/familycaregiver/rbv1/rbv1b11.pdf> (in survey of Baby Boomers in the "sandwich generation," one in five White respondents reported providing eldercare or financial assistance to their parents, compared with two in five Asian Americans or one in three Hispanics or African Americans); see also Karen Bullock et al., *Employment and Caregiving: Exploration of African American Caregivers*, SOCIAL WORK 150 (Apr. 2003) (discussing impact of eldercare responsibilities on employment status of African Americans).

<sup>21</sup> Donna St. George, *Fathers Are No Longer Glued to Their Recliners*, WASH. POST, Mar. 20, 2007, at A11 (men's childcare work increased from 2.5 hours to 7 hours per week between 1965 and 2003). The total workload of married mothers and fathers combining paid work, childcare, and housework is about equal at 65 hours per week for mothers and 64 hours per week for fathers. *Id.*; see also SUZANNE BIANCHI ET AL., *CHANGING RHYTHMS OF AMERICAN FAMILY LIFE* (2006).

<sup>22</sup> See, e.g., KAREN L. BREWSTER & BRYAN GIBLIN, *EXPLAINING TRENDS IN COUPLES' USE OF FATHERS AS CHILDCARE PROVIDERS, 1985-2002*, at 2.3 (2005), <http://www.fsu.edu/~popctr/papers/floridastate/05-151paper.pdf> (percentage of employed married women who relied on their husbands as the primary childcare provider increased from 16.6% in 1985 to 23.2% in 2002).

<sup>23</sup> See generally Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 HARV. WOMEN'S L.J. 77 (2003) (discussing "maternal wall" discrimination, which limits the employment opportunities of workers with caregiving responsibilities). See also MARY STILL, UNIV. OF CAL., HASTINGS COLL. OF LAW, *LITIGATING THE MATERNAL WALL: U.S. LAWSUITS CHARGING DISCRIMINATION AGAINST WORKERS WITH FAMILY RESPONSIBILITIES* (2005), [http://www.uchastings.edu/site\\_files/WLL/FRDreport.pdf](http://www.uchastings.edu/site_files/WLL/FRDreport.pdf) (documenting rise in lawsuits alleging discrimination against caregivers).

<sup>24</sup> See generally JOAN WILLIAMS, UNIV. OF CAL., HASTINGS COLL. OF LAW, *ONE SICK CHILD AWAY FROM BEING FIRED: WHEN "OPTING OUT" IS NOT AN OPTION* (2006), <http://www.worklifelaw.org/pubs/onesickchild.pdf>.

<sup>25</sup> The median weekly earnings of full-time wage and salary workers in 2005 were \$596 for White women compared with \$499 for African American women and \$429 for Hispanic women. DATABOOK, *supra* note 2, Table 16. While the weekly median earnings for Asian American women, \$665, exceed the earnings of White women, *id.*, the earnings of Asian American women vary widely depending on national origin. See *Socioeconomic Statistics and Demographics*, Asian Nation, <http://www.asian-nation.org/demographics.shtml> (discussing the wide disparity in socioeconomic attainment rates among Asian Americans).

<sup>26</sup> ONE SICK CHILD AWAY FROM BEING FIRED, *supra* note 24, at 8.

<sup>27</sup> E.g., ONE SICK CHILD AWAY FROM BEING FIRED, *supra* note 24, at 23 (discussing case presented to arbitrator where employee with nine years of service was discharged for absenteeism when she left work after receiving a phone call that her four-year-old daughter had fallen and was being taken to the emergency room).

<sup>28</sup> EQUAL EMPLOYMENT OPPORTUNITY COMM'N, *GLASS CEILING: THE STATUS OF WOMEN AS OFFICIALS AND MANAGERS IN THE PRIVATE SECTOR* (2004), <https://www.eeoc.gov/stats/reports/glassceiling/index.html>.

<sup>29</sup> Diane Stafford, *Wanted: Women in the Workplace*, MONTEREY COUNTY HERALD, Apr. 5, 2006, available at 2006 WLNR 5689048.

<sup>30</sup> GOOD FOR BUSINESS: MAKING FULL USE OF THE NATION'S HUMAN CAPITAL, Washington, D.C.: U.S. Gov't Printing Office, at 3. The Glass Ceiling Commission was established under the Civil Rights Act of 1991 to complete a study of the barriers to advancement faced by women and minorities. A copy of the Commission's 1995 fact-finding report is available at [http://digitalcommons.ilr.cornell.edu/key\\_workplace/116](http://digitalcommons.ilr.cornell.edu/key_workplace/116).

<sup>31</sup> *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 738 (2003) (holding that the family-leave provision of the Family and Medical Leave Act is a valid exercise of congressional power to combat sex discrimination by the states); see also *Phillips v. Martin Marietta Corp.*,

400 U.S. 542, 545 (1971) (Marshall, J., concurring) (Title VII does not permit "ancient canards about the proper role of women to be a basis for discrimination").

<sup>32</sup> *Hibbs*, 538 U.S. at 731 (in an FMLA claim brought by a male worker who was denied leave to care for his ailing wife, the Court noted that states' administration of leave benefits has fostered the "pervasive sex-role stereotype that caring for family members is women's work").

<sup>33</sup> See *SHELLEY CORRELL & STEPHEN BENARD, GETTING A JOB: IS THERE A MOTHERHOOD PENALTY?* (2005) (women with children were recommended for hire and promotion at a much lower rate than women without children).

<sup>34</sup> See *Knussman v. Maryland*, 272 F.3d 625, 629-30 (4th Cir. 2001) (male employee was not eligible for "nurturing leave" as primary caregiver of newborn unless his wife were "In a coma or dead").

<sup>35</sup> See § II.D, *infra* (discussing disparate treatment of women of color who are caregivers).

<sup>36</sup> This document addresses only disparate treatment, or intentional discrimination, against caregivers. It does not address disparate impact discrimination.

<sup>37</sup> See *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 61 (1st Cir. 1999) ("concept of 'stereotyping' includes not only simple beliefs such as 'women are not aggressive' but also a host of more subtle cognitive phenomena which can skew perceptions and judgments").

<sup>38</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (plurality opinion).

<sup>39</sup> *Lust v. Sealy, Inc.*, 383 F.3d 580, 583 (7th Cir. 2004).

<sup>40</sup> For example, results of internal employee surveys as reported by Eli Lilly revealed that employees with the most flexibility and control over their hours reported more job satisfaction, greater sense of control, and less intention to leave than those on other schedules. CORPORATE VOICES FOR WORKING FAMILIES, BUSINESS IMPACTS OF FLEXIBILITY: AN IMPERATIVE FOR EXPANSION (2005) 13, [http://www.cvworkingfamilies.org/flex\\_report/flex\\_report.shtml](http://www.cvworkingfamilies.org/flex_report/flex_report.shtml).

<sup>41</sup> In a 2005 study, almost half of the employers that offer flexible work schedules or other programs to help employees balance work and family responsibilities stated that the main reason they did so was to recruit and retain employees, and one-quarter said they did so mainly to enhance productivity and commitment. FAMILIES AND WORK INST., NATIONAL STUDY OF EMPLOYERS 26 (2005), <http://familiesandwork.org/site/research/reports/2005nse.pdf>; see also Work Life, Fortune Special Section, [http://www.timeinc.net/fortune/services/sections/fortune/corp/2004\\_09worklife.html](http://www.timeinc.net/fortune/services/sections/fortune/corp/2004_09worklife.html) (2004) (noting that "smart companies are retaining talent by offering employees programs to help them manage their work and personal life priorities").

<sup>42</sup> For example, based on the proportion of workers who said they would have left in the absence of flexible workplace policies, the accounting firm Deloitte and Touche calculated that it saved \$41.5 million in turnover-related costs in 2003 alone. CORPORATE VOICES, *supra* note 40, at 10.

<sup>43</sup> See *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 121 (2d Cir. 2004) (female school psychologist with a young child could show that she was denied tenure because of her sex by relying on evidence of gender-based comments about working mothers and other evidence of sex stereotyping and was not required to show that similarly situated male workers were treated more favorably); *Plaetzer v. Borton Auto., Inc.*, No. Civ. 02-3089 JRT/JSM, 2004 WL 2066770, at \*6 n.3 (D. Minn. Aug. 13, 2004) (evidence of more favorable treatment of working fathers is not needed to show sex discrimination against working mothers where an "employer's objection to an employee's parental duties is actually a veiled assertion that mothers, because they are women, are insufficiently devoted to work, or that work and motherhood are incompatible"); cf. *Lust*, 383 F.3d at 583 (reasonable jury could have concluded that the plaintiff's supervisor did not recommend her for a promotion because he assumed that, as a working mother, the plaintiff would not accept a promotion that would require her to move because of its disruptive effect on her children). But see *Phillipsen v. University of Mich. Bd. of Regents*, No. 06-CV-11977-DT, 2007 WL 907822 (E.D. Mich. Mar. 22, 2007) (holding that a plaintiff cannot establish a prima facie case of sex discrimination against women with young children in the absence of comparative evidence that men with young children are treated more favorably). While the Commission agrees that the plaintiff raised no inference of sex discrimination, it believes that cases should be resolved on the totality of the evidence and concurs with *Back* and *Plaetzer* that comments evincing sex-based stereotypical views of women with children may support an inference of discrimination even absent comparative evidence about the treatment of men with children.

<sup>44</sup> E.g., *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 55 (1st Cir. 2000) (comments by decisionmakers reflecting concern that the plaintiff might not be able to balance work and family responsibilities after she had a second child could lead a jury to conclude that the plaintiff was fired because of sex).

<sup>45</sup> *Sigmon v. Parker Chapin Flattau & Klimpl*, 901 F. Supp. 667, 678 (S.D.N.Y. 1995) (the plaintiff's only "deeply critical" performance evaluation was received shortly after she announced her pregnancy and therefore could be discounted).

<sup>46</sup> *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (evidence showed that the employer had a policy of not hiring women with preschool age children, but did not have a policy of not hiring men with preschool age children).

<sup>47</sup> *Sigmon*, 901 F. Supp. at 678 (reasonable factfinder could conclude that the decreasing number of women in the corporate department was caused by sex discrimination where tension between female associates and the employer regarding the maternity leave policy contributed to the high separation rate of pregnant women and mothers).

<sup>48</sup> For more information on the kinds of evidence that may be relevant in a disparate treatment case, see EEOC Compliance Manual: *Race Discrimination*, Volume II, § 15-V, A.2, "Conducting a Thorough Investigation" (2006), <https://www.eeoc.gov/policy/docs/race-color.html#VA2>.

<sup>49</sup> *Martin Marietta Corp.*, 400 U.S. at 545 (Title VII prohibits employer from hiring men with preschool age children while refusing to hire women with preschool age children). Some courts and commentators have used the term "sex plus" to describe cases in which the employer discriminates against a subclass of women or men, i.e., sex plus another characteristic, such as caregiving or marriage. See, e.g., *Phillipsen v. University of Mich. Bd. of Regents*, No. 06-CV-11977-DT, 2007 WL 907822, at \*4 (E.D. Mich. Mar. 22, 2007) ("sex plus" discrimination is discrimination based on sex in conjunction with another characteristic); *Gee-Thomas v. Cingular Wireless*, 324 F. Supp. 2d

875 (M.D. Tenn. 2004) ("Title VII also prohibits so-called 'gender plus' or 'sex plus' discrimination, by which an employer discriminates, not against the class of men or women as a whole, but against a subclass of men or women so designated by their sex plus another characteristic."); Regina E. Gray, Comment, *The Rise and Fall of the "Sex Plus" Discrimination Theory: An Analysis of Fisher v. Vassar College*, 42 How. L. J. 71 (1998). In *Back*, the Second Circuit explained that the term "sex plus" is merely a concept used to illustrate that a Title VII plaintiff can sometimes survive summary judgment even when not all members of the protected class are subjected to discrimination. The Commission agrees with the *Back* court that, in practice, the term "sex plus" is "often more than a little muddy" and that the "[t]he relevant issue is not whether a claim is characterized as 'sex plus' or 'gender plus,' but rather, whether the plaintiff provides evidence of purposefully sex-discriminatory acts." 365 F.3d at 118-19 & n.8.

<sup>50</sup> *Lust v. Sealy, Inc.*, 383 F.3d 580, 583 (7th Cir. 2004) ("Realism requires acknowledgment that the average mother is more sensitive than the average father to the possibly disruptive effect on children of moving to another city, but the antidiscrimination laws entitle individuals to be evaluated as individuals rather than as members of groups having certain average characteristics."); see also *Manhart v. City of Los Angeles, Dep't of Water & Power*, 435 U.S. 702, 708 (1978) ("[Title VII's] focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual, or national class. . . . Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply.").

<sup>51</sup> *Back*, 365 F.3d at 121 (In a sex discrimination claim under 42 U.S.C. § 1983, the court stated that "where stereotypes are considered, the notions that mothers are insufficiently devoted to work, and that work and motherhood are incompatible, are properly considered to be, themselves, gender-based").

<sup>52</sup> Marion Crain, "Where Have All the Cowboys Gone?" *Marriage and Breadwinning in Postindustrial Society*, 60 OHIO ST. L.J. 1877, 1893 (1999) ("[T]he cultural assignment to women of the primary responsibility for nurturing children and making a home undermines their performance in the market. . . . Women who are not caregivers may be adversely affected as well, because employers will assume that their attachment to the waged labor market is secondary.").

<sup>53</sup> Felice N. Schwartz, BREAKING WITH TRADITION: WOMEN AND WORK, THE NEW FACTS OF LIFE 9-26 (1992) (commenting that "even today, women sometimes are advised to remove their wedding rings when they interview for employment, presumably to avoid the inference that they will have children and not be serious about their careers"), cited in Williams & Segal, *supra* note 23, at 97; Edward J. McCaffery, *Slouching Towards Equality: Gender Discrimination, Market Efficiency, and Social Change*, 103 YALE L.J. 595, 631 n.124 (1993) (stating that "getting married itself is an act that sends out the wrong signal on this score [of commitment to the labor market] – that is, it does for women – and thus the evidence that married women hide their wedding rings prior to job interviews is not surprising").

<sup>54</sup> 42 U.S.C. § 2000e-3(m).

<sup>55</sup> *Id.* § 2000e-5(g)(2).

<sup>56</sup> *Back*, 365 F.3d at 120 ("It takes no special training to discern stereotyping in the view that a woman cannot 'be a good mother' and have a job that requires long hours, or in the statement that a mother who received tenure 'would not show the same level of commitment [she] had shown because [she] had little ones at home'").

<sup>57</sup> See Alice H. Eagly & Valerie J. Steffen, *Gender Stereotypes, Occupational Roles, and Beliefs About Part-Time Employees*, 10 PSYCH. WOMEN. Q. 252, 260-61 (1986) (finding that "[f]or women, part-time employment is generally associated with substantial domestic obligations, and female part-time employees are consequently perceived as similar to homemakers"). In contrast, part-time employment in men is associated with difficulty in finding full-time paid employment.

Courts are divided as to whether the practice of paying part-time workers at a lower hourly rate than full-time workers implicates the Equal Pay Act. Compare *Lovell v. BBNT Solutions, LLC*, 295 F. Supp. 2d 611, 620-21 (E.D. Va. 2003) (part-time female worker could compare herself with full-time male worker for purposes of establishing a prima facie case under the EPA), with *EEOC v. Altmeyer's Home Stores, Inc.*, 672 F. Supp. 201, 214 (W.D. Pa. 1987) (EEOC could not establish sex-based pay discrimination by comparing part-time worker with full-time worker). See also Section 10: *Compensation Discrimination*, § 10-IV F.2.h, EEOC Compliance Manual, Volume II (BNA) (2000).

<sup>58</sup> Employers may think that they are behaving considerately when they act on stereotypes that they believe correspond to characteristics that women should have, such as the belief that working mothers with young children should avoid extensive travel. See KATHLEEN FUEGEN ET AL., *Mothers and Fathers in the Workplace: How Gender and Parental Status Influence Judgments of Job-Related Competence*, 60 J. SOC. ISSUES 737, 751 (2004); Williams & Segal, *supra* note 23, at 95.

<sup>59</sup> *Lust*, 383 F.3d 580 (upholding jury's finding that employee was denied promotion based on sex where supervisor did not consider plaintiff for a promotion that would have required relocation to Chicago because she had children and he assumed that she would not want to move, even though she had never told him that and, in fact, had told him repeatedly that she was interested in a promotion despite the fact that there was no indication that a position would be available soon at her own office in Madison).

<sup>60</sup> *Cf. International Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Johnson Controls*, 499 U.S. 187, 199-200 (1991) (in rejecting employer policy that excluded fertile women from positions that would expose them to fetal hazards, the Court stated that the "beneficence of an employer's purpose does not undermine the conclusion that an explicit gender-based policy is sex discrimination").

<sup>61</sup> See *Lettieri v. Equant Inc.*, 478 F.3d 640 (4th Cir. 2007) (evidence was sufficient for finder of fact to conclude that the plaintiff was denied a promotion because of discriminatory belief that women with children should not live away from home during the work week).

<sup>62</sup> See *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 42, 59-61 (1st Cir. 1999) ("concept of 'stereotyping' includes not only simple beliefs such as 'women are not aggressive' but also a host of more subtle cognitive phenomena which can skew perceptions and judgments").

<sup>63</sup> See Amy J.C. Cuddy et al., *When Professionals Become Mothers, Warmth Doesn't Cut the Ice*, 60 J. SOC. ISSUES 701, 711 (2004) ("Not only are [working mothers] viewed as less competent and less worthy of training than their childless female counterparts, they are also viewed as less competent than they were before they had children. Merely adding a child caused people to view the woman as lower on traits such as capable and skillful, and decreased people's interest in training, hiring, and promoting her.").

<sup>64</sup> See *Back*, 365 F.3d at 115 (employer told employee that it was "not possible for [her] to be a good mother and have this job"); *Trezza v. Hartford, Inc.*, No. 98 CIV. 2205 (MBM), 1998 WL 912101, at \*2 (S.D.N.Y. Dec. 30, 1998) (employer remarked to employee that, in attempting to balance career and motherhood, "I don't see how you can do either job well"); see also Cecilia L. Ridgeway & Shelley J. Correll, *Motherhood as a Status Characteristic*, 60 J. SOC. ISSUES 683, 690 (2004) (noting that while mothers are expected always to be

"on call for their children," a worker is expected to be "unencumbered by competing demands and be always there for his or her employer").

<sup>65</sup> See, e.g., Nicole Buonocore Porter, *Re-defining Superwoman: An Essay on Overcoming the "Maternal Wall" in the Legal Workplace*, 13 DUKE J. GENDER L. & POL'Y 55, 61-62 (Spring 2006).

<sup>66</sup> See *infra* § II.C.

<sup>67</sup> See *supra* § II.A.1.

<sup>68</sup> For information on protections under the Family and Medical Leave Act, see Compliance Assistance – Family and Medical Leave Act, <http://www.dol.gov/whd/fmla/>.

<sup>69</sup> *International Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Johnson Controls*, 499 U.S. 187, 204 (1991).

<sup>70</sup> Title VII defines the terms "because of sex" or "on the basis of sex" as including "because of or on the basis of pregnancy, childbirth, or related medical conditions" and provides that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work." 42 U.S.C. § 2000e(k).

<sup>71</sup> Some employers' improper pregnancy-related "inquiries" have even included pregnancy testing. See, e.g., *Justice Department Settles Pregnancy Discrimination Charges Against D.C. Fire Department*, U.S. FED. NEWS, Sept. 8, 2005, 2005 WLNR 14256220 (reporting on settlement between DOJ and District of Columbia regarding complaint that employment offers as emergency medical technicians were contingent on negative pregnancy test result and that technicians who became pregnant during first year of employment were threatened with termination).

<sup>72</sup> See EEOC Enforcement Guidance: *Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act*, Question 2 (2000), <https://www.eeoc.gov/policy/docs/guidance-inquiries.html> ("A 'medical examination' is a procedure or test that seeks information about an individual's physical or mental impairments or health.") (emphasis added). For information on the ADA's specific restrictions on the use of medical examinations, see 29 C.F.R. §§ 1630.13, .14 & Appendix to Part 1630.

<sup>73</sup> 29 C.F.R. Part 1604 Appendix, Question 5 (1978).

<sup>74</sup> Cf. *Troy v. Bay State Computer Group, Inc.*, 141 F.3d 378 (1st Cir. 1998).

<sup>75</sup> This document supersedes EEOC's *Policy Guidance on Parental Leave* (Aug. 27, 1990).

<sup>76</sup> *Hibbs*, 538 U.S. at 736.

<sup>77</sup> See Williams & Segal, *supra* note 23, at 101-02 (discussing stereotypes of men who take active role in childcare).

<sup>78</sup> For information on protections under the Family and Medical Leave Act, see Compliance Assistance – Family and Medical Leave Act, <http://www.dol.gov/whd/fmla/>.

<sup>79</sup> See *California Fed. Sav. & Loan Ass'n v. Guerra*, 472 U.S. 272, 290 (1987) (upholding state pregnancy disability-leave statute requiring employers to provide leave for the period of time that a woman is physically disabled by pregnancy, childbirth, and related medical conditions).

<sup>80</sup> This period includes the postpartum period that a woman remains incapacitated as a result of having given birth. See generally Pat McGovern et al., *Postpartum Health of Employed Mothers 5 Weeks After Childbirth*, ANNALS OF FAMILY MEDICINE, Mar. 2006, at 159, available at <http://www.pubmedcentral.nih.gov/articlerender.fcgi?artid=1467019>.

<sup>81</sup> See EEOC Compliance Manual: Race Discrimination, Volume II, § 15-IV, C, "Intersectional Discrimination" (2006), <https://www.eeoc.gov/policy/docs/race-color.html#IVC>.

<sup>82</sup> 42 U.S.C. § 12112(b)(4). Section 501 of the Rehabilitation Act provides the same protection to federal workers. 29 U.S.C. § 791(g) (Incorporating ADA standards).

<sup>83</sup> *Abdel-Khalke v. Ernst & Young, LLP*, No. 97 CIV 4514 JGK, 1999 WL 190790 (S.D.N.Y. Apr. 7, 1999) (issues of fact regarding whether employer refused to hire applicant because of concern that she would take time off to care for her child with a disability).

<sup>84</sup> 29 U.S.C. § 1630.8 (ADA makes it unlawful for employer to "deny equal jobs or benefits to, or otherwise discriminate against," a worker based on his or her association with an individual with a disability) (emphasis added).

<sup>85</sup> 29 C.F.R. § 1604.11 (Sexual Harassment Guidelines); *EEOC Policy Guidance on Current Issues of Sexual Harassment* (Mar. 19, 1990) (sex-based harassment – harassment not involving sexual activity or language – may give rise to Title VII liability if it is "sufficiently patterned or pervasive"), <https://www.eeoc.gov/policy/docs/currentissues.html>.

<sup>86</sup> This example is based on *Walsh v. National Computer Systems, Inc.*, 332 F.3d 1150 (8th Cir. 2003) (upholding jury verdict that the plaintiff was subjected to a hostile work environment in violation of Title VII when she was harassed because she had been pregnant, taken pregnancy-related leave, and might become pregnant again).

<sup>87</sup> E.g., *Gallina v. Mintz, Levin, Cohn, Ferris, Glosky & Popeo, P.C.*, Nos. 03-1883, 03-1947, 2005 WL 240390 (4th Cir. Feb. 2, 2005) (unpublished) (plaintiff presented sufficient evidence for reasonable jury to conclude that she was denied a pay raise and terminated for complaining about harassment and other adverse conduct that began after the acting manager learned that the plaintiff had a small child).

<sup>88</sup> See *Burlington N. & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2415 (2006) ("plaintiff must show that a reasonable employee would have found the challenged action materially adverse, 'which in this context means it well might have "dissuaded a reasonable worker from making or supporting a charge of discrimination"'") (citations omitted).

<sup>89</sup>*Id.*

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*This page was last modified on February 8, 2011.*



[Return to Home Page](#)

Please proceed  
to the next page

# **STATISTICAL MATERIALS REGARDING WOMEN ATTORNEYS**

**COMPILED BY: ANDREA M. ALONSO**



**EXHIBIT “A”**



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## 2017 NAWL Survey at a Glance

- The likelihood that women will become equity partners remains largely unchanged in the last 10 years (16% in 2007 to 19% in 2017).
- Despite being hired in nearly equal numbers as men at the associate level, women are the minority of both equity (19%) and non-equity partners (30%).
- The gender pay gap persists across all levels of attorneys, with men out-earning women from associates to equity partners. Women earn 90 – 94% of what men in the same position earn.
- Among equity partners, women work just as many hours as men, but their client billings are 92% of those of men.
- Men continue to dominate the top earner spots. 97% of firms report their top earner is a man, and nearly 70% of firms have 1 or no women in their top 10 earners.
- Women make up 25% of firm governance roles, such as serving on the highest governance committee, the compensation committee, or as a managing or practice group partner/leader, nearly doubling in the last decade.
- Firms with established to mature women's initiatives had a higher percentage (18-19%) of women equity partners compared to firms with newer initiatives.
- The median woman equity partner earns 94% of what a median man equity partner makes in firms with more established women's initiatives, compared to 82% in the handful of firms reporting relatively new initiatives.
- People of color make up about 6% of equity partners, and women of color are only 2% of equity partners. Openly LGBTQ people represent only 2% of equity partners, and persons with disabilities represent less than 1%.

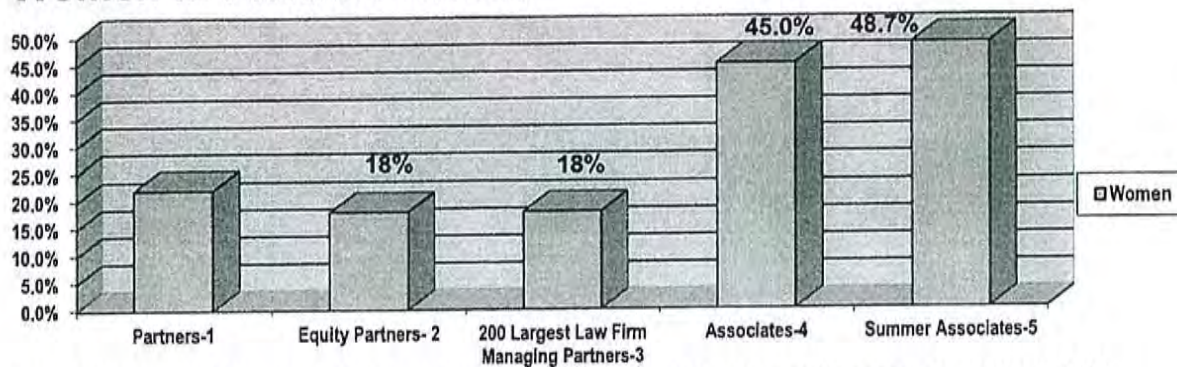
**EXHIBIT “B”**

## Women in the Legal Profession



American Bar Association Market Research Department, April, 2016.

## Women in Private Practice



<sup>1</sup> 2016 Report on Diversity in U.S. Law Firms. National Association for Law Placement, January, 2017. [www.nalp.org/uploads/2016NALPReportonDiversityinUSLawFirms.pdf](http://www.nalp.org/uploads/2016NALPReportonDiversityinUSLawFirms.pdf)

<sup>2</sup> Report of the Ninth Annual National Survey on Retention and Promotion of Women in Law Firms. National Association of Women Lawyers and NAWL Foundation, October 2015. [www.nawl.org/p/cm/ld/fid=82#surveys](http://www.nawl.org/p/cm/ld/fid=82#surveys)

<sup>3</sup> Report of the Ninth Annual National Survey on Retention and Promotion of Women in Law Firms. National Association of Women Lawyers and NAWL Foundation, October 2015. This figure represents the 25 firms that reported having a single managing partner. [www.nawl.org/p/cm/ld/fid=82#surveys](http://www.nawl.org/p/cm/ld/fid=82#surveys)

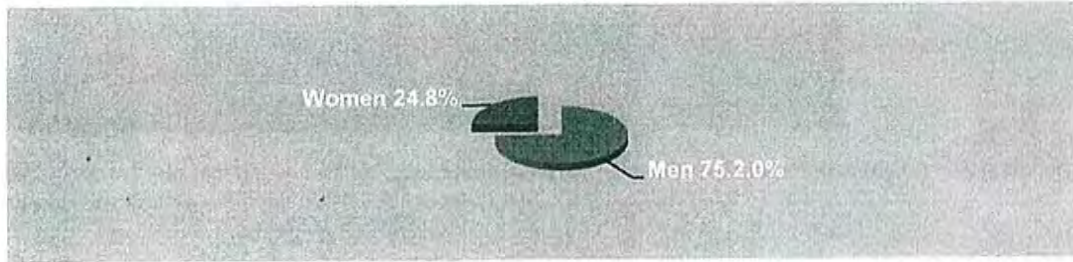
<sup>4</sup> 2016 Report on Diversity in U.S. Law Firms. National Association for Law Placement, January, 2017. [www.nalp.org/uploads/2016NALPReportonDiversityinUSLawFirms.pdf](http://www.nalp.org/uploads/2016NALPReportonDiversityinUSLawFirms.pdf)

<sup>5</sup> 2016 Report on Diversity in U.S. Law Firms. National Association for Law Placement, January, 2017. [www.nalp.org/uploads/2016NALPReportonDiversityinUSLawFirms.pdf](http://www.nalp.org/uploads/2016NALPReportonDiversityinUSLawFirms.pdf)

**EXHIBIT “C”**

## Women in Corporations

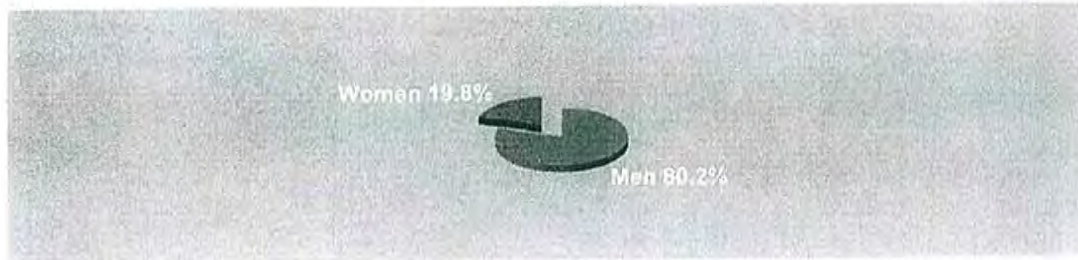
### Fortune 500 General Counsel



MCCA's 17<sup>th</sup> Annual General Counsel Survey: *Breaking Barriers, One Person at a Time*. Minority Corporate Counsel Association, November/ December 2016.

[www.diversityandthebardigital.com/datab/november\\_december\\_2016?pg=21#pg22](http://www.diversityandthebardigital.com/datab/november_december_2016?pg=21#pg22)

### Fortune 501-1000 General Counsel



MCCA's 17<sup>th</sup> Annual General Counsel Survey: *Breaking Barriers, One Person at a Time*. Minority Corporate Counsel Association, November/ December 2016.

[www.diversityandthebardigital.com/datab/november\\_december\\_2016?pg=26#pg26](http://www.diversityandthebardigital.com/datab/november_december_2016?pg=26#pg26)

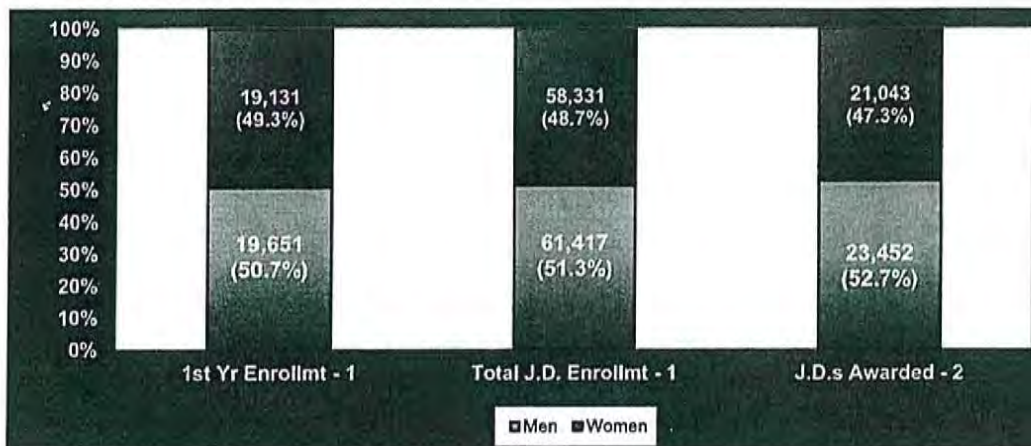
**EXHIBIT “D”**

## Law School Administration - Deans



Association of American Law Schools (January 13, 2016). This represents 183 deans at AALS member schools, three of which have two co-deans each, and includes permanent and interim deans.

## Women in Law Schools



<sup>1</sup>Enrollment and Degrees Awarded, 2014-2015 Academic Year. American Bar Association Section of Legal Education and Admissions to the Bar.

<sup>2</sup>J.D. and LL.B. Degrees Awarded, 2010-2011 Academic Year. American Bar Association Section of Legal Education and Admissions to the Bar.

[www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/statistics/jd\\_llb\\_degrees\\_awarded.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/jd_llb_degrees_awarded.pdf)

## Women on Law Reviews<sup>1</sup>

Survey	Leadership Positions	Editors-in-Chief
Top 50 schools ranked by <i>U.S. News &amp; World Report</i>	46%	38%
<i>New York Law School Law Review</i> (NYLS) – all law schools not ranked in Top 50	56%	51%
Combined sample (Top 50 & NYLS)	54%	49%

<sup>1</sup> 2012-2013 *Law Review Diversity Report*. *New York Law School Law Review* and Ms. JD, December 2013.

[www.nylslawreview.com/wp-content/uploads/sites/16/2013/12/Law-Review-Diversity-Report-2013.pdf](http://www.nylslawreview.com/wp-content/uploads/sites/16/2013/12/Law-Review-Diversity-Report-2013.pdf)



**EXHIBIT “E”**

## Women in the Judiciary

### Representation of United States Federal Court Women Judges

Type of Court	Total # of Seats	Women	% of Women
United States Supreme Court	8	3	37.5%
Circuit Court of Appeals (Active) <sup>1</sup>	167 active	60	35.9%
Federal District Court Judges (Active) in the U.S.			33% <sup>2</sup>

<sup>1</sup> *Women in the Federal Judiciary: Still a Long Way to Go*. National Women's Law Center, October, 2016. <http://nwlc.org/wp-content/uploads/2016/07/JudgesCourtsWomeninFedJud10.13.2016.pdf>

<sup>2</sup> *Women in the Federal Judiciary: Still a Long Way to Go*. National Women's Law Center, October, 2016. <http://nwlc.org/wp-content/uploads/2016/07/JudgesCourtsWomeninFedJud10.13.2016.pdf>

### 2016 Representation of United States State Court Women Judges

Type of Court	Total # of Seats	Women	% of Women
State Final Appellate Jurisdiction Courts	353	122	34.6%
State Intermediate Appellate Jurisdiction Courts	991	344	34.7%
State General Jurisdiction Courts	11,778	3,502	29.7%
State Limited and Special Jurisdiction Courts	4,884	1,628	33.3%
All State Court Judges in the U.S.	18,006	5,596	31.1%

National Association of Women Judges. [www.nawj.org/statistics/2016-us-state-court-women-judges](http://www.nawj.org/statistics/2016-us-state-court-women-judges)

### Total Representation of Women - Federal & State Judgeships



*Women in Federal and State-Level Judgeships: A Report of the Center for Women in Government & Civil Society, Rockefeller College of Public Affairs & Policy, University at Albany, State University of New York.* Summer 2012. [www.albany.edu/womeningov/publications/summer2012\\_judgeships.pdf](http://www.albany.edu/womeningov/publications/summer2012_judgeships.pdf)

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Claire Rush is a trial attorney and founding member of Rush & Sabbatino PLLC, a wholly women owned law firm located in New York City. Claire has been practicing law for 30 years and has successfully defended public and private entities against bus, truck, auto, railway, construction, premises, elevator, escalator, environmental, security, excessive use of force, false arrest, malicious prosecution and 42 U.S.C. §1983 actions. She has tried more than 100 jury cases to verdict in New York State.

Claire has received a Preeminent AV rating of 5.0 / 5.0 from Martindale-Hubbell and has been identified as one of the top personal injury defense attorneys in the Metro New York area by Super Lawyer Magazine, American Legal Media, and Martindale-Hubbell. She has been recognized by the Bar Register of Preeminent Women Lawyers, the New York Times and *AVENUE Magazine* as one of New York City's top women lawyers in the area of trial practice.

Claire is frequently called upon by bar organizations and private corporations to lecture and publish about the art of trial advocacy and the various areas of substantive law in which she specializes. Her current presentations focus on how to defend traumatic brain injury cases, detect fraud and leverage biomechanical experts, event data recorders and social media when defending high stakes litigation. Claire is committed to promoting the advancement of women and diverse attorneys and holds leadership positions in a number of defense organizations. A diversity initiative she spearheaded for the Defense Association of New York was honored by the Defense Research Institute and the New York Law Journal as one of the top diversity programs of 2015.

Please proceed  
to the next page

ANDREA MARIA ALONSO was admitted to the bar in 1982 in New York. She is also admitted to practice in the U.S. Court of Appeals, 2<sup>nd</sup> Circuit; U.S. District Court, Southern and Eastern Districts of New York and U.S. Supreme Court. Ms. Alonso graduated from St. John's University (B.A., 1978) and then from St. John's University School of Law (J.D., 1981). She has been associated with Morris Duffy Alonso & Faley since graduating from law school in 1981 and became a named partner in 1992.

Ms. Alonso specializes in appellate litigation. She has argued in the Appellate Divisions of the State of New York, the New York Court of Appeals and the Second Circuit Court of Appeals.

Please proceed  
to the next page



## **KAREN CAMPBELL**

**Partner, New York & Newark**

212.232.1391 | [Karen.Campbell@lewisbrisbois.com](mailto:Karen.Campbell@lewisbrisbois.com)

[LewisBrisbois.com](http://LewisBrisbois.com)

### **Primary Practice(s)**

- General Liability
- Miscellaneous Professional Liability
- Long-Term Care & Elder Law
- Toxic Tort & Environmental Litigation
- Healthcare
- Hospitality

### **Admissions**

- New York
- New Jersey
- United States District Courts for the Southern, Western, and Eastern Districts of New York
- United States District Court of New Jersey
- Supreme Court of the United States of America

Karen Campbell is a partner in the New York office of Lewis Brisbois and a vice-chair of the General Liability Practice. Ms. Campbell is a trial attorney with 30 years of experience. Her practice focuses on the defense of long-term care providers in skilled nursing home and assisted living facility matters, general liability litigation at both the primary and excess levels, employment discrimination matters, defense of toxic tort claims, including lead-based paint exposure and mold, and the representation of defendants in bodily injury claims brought under New York Labor Law Sections, 200, 240 and 241 and related common law construction accident claims, including with respect to indemnity issues and third party actions. Ms. Campbell also handles miscellaneous professional liability matters, including negligence, sexual abuse/misconduct, discrimination and errors in judgment claims, on behalf of social services agencies such as foster care agencies, outpatient mental health, addiction and counseling clinics, senior citizen and day care centers, and medical, beauty and personal care facilities.

Prior to entering private practice in 1991, Ms. Campbell was an Assistant District Attorney with the Kings County District Attorneys office in Brooklyn, New York where she prosecuted and tried violent felony crimes. After leaving the District Attorney's office in 1991, she became associated with a mid-sized firm specializing in environmental insurance coverage and defense of personal injury actions. In 1996, Ms. Campbell became a member of the firm. In 1998, Ms. Campbell joined the New York office of a large California firm as Special Counsel and served as one of the office's trial counsel. She handled a variety of general liability cases and also concentrated her practice on the defense of hospitals, physicians and podiatrists in medical malpractice litigation arising from cardiovascular, pulmonary, neurological, eye, ear and nose, podiatry diseases or disorders. Most recently, in 2002, she joined a regional Massachusetts firm as the Managing Attorney of the New York office. Ms. Campbell served as the principal trial attorney in New York while



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overseeing the overall growth and development of the office from two attorneys to more than 17 employees. Ms. Campbell has successfully tried more than 55 cases in Kings, New York, Bronx, Suffolk and Westchester counties and in the Southern District of New York. She has obtained defense verdicts, directed verdicts and verdicts awarding minimal damages as well as handling the negotiation of favorable settlements both before and during trial.

### **Associations**

- American Board of Trial Advocates (ABOTA)
- Board Member, The Defense Association of New York (DANY)
- Member, Federation of Defense & Corporate Counsel, 2008; State Representative for New York, 2012; Diversity Initiative Committee - Vice Chair, 2012
- Executive Board Member, National Association of Insurance Woman, 2006-2008, 2009-2010
- Member, Defense Research Institute
- Member, Claims & Litigation Management Alliance

### **Awards & Honors**

- 2005 Toxic Tort verdict selected by the New York Law Journal as one of the noteworthy cases from 2005 that resulted in a defense verdict.
- While earning her law degree, Ms. Campbell was a member of the Moot Court Board and was honored as a member of the Order of Barristers.

### **Professional Presentations**

- Presenter, Impeachment of Witnesses in Civil Litigation, Clear Law Institute, September 27, 2017
- Panelist, "Getting a Seat at the Table: Tips for Women Lawyers," Practicing Law Institute Women Lawyers in Leadership 2017
- Panelist, Mentoring Panel, 2016 Women's Leadership Forum, Claims Litigation Management Alliance, October 6, 2016
- Seminar, Defending Premises Security Claims, Housing Authority Insurance Group Training Seminar, February 2016
- Panelist, Intro to Civil Practice Skills: Torts, Personal Injury and Insurance Law, New York State Bar Association CLE Program, October 2015
- Panelist, Throwing Away Your Case: How to Preserve Evidence in a Hospitality Lawsuit, Lewis Brisbois Webinar, August 20, 2015.
- Karen L. Campbell, et al., Avatar in the Courtroom: Is 3D Technology Ready for Primetime?, 63 Fed'n Def. & Corp. Couns. 295, 295-317 (2013).
- Faculty Member, "Transforming Confidence into Expertise," Graduate Program of the Litigation Management College, Federation of Defense & Corporate Counsel, June 2012, 2013
- Presentation, Effective Litigation Management, CEU Institute, October 2011
- Seminar, Damages, April 2011
- Presentation, Best Practices for Managing Catastrophic Claims, March 2011
- Panelist, "Litigation Trends, Trials and Take Aways," National Risk Retention Association, October 2011

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- Panelist, "How to Get to the Point: Making Expert Testimony Easy to Interpret for the Jury," Federation of Defense & Corporate Counsel, July 2011
  - Speaker, "Strategies for Success - Navigating Diversity on Rough Seas," DRI Annual Meeting, 2010
  - Speaker, Early Case Evaluation Settlement Strategies and Evaluation of Risk, Minority Corporate Counsel Association CLE Expo, March 2008

### **Publications**

- Karen L. Campbell, David B. Datny & Lauren A. Jones, *Avatar in the Courtroom: Is 3D Technology Ready for Primetime?*, 2013
- Co-author, "The Lawyer's Guide to Lead Paint, Asbestos and Chinese Drywall" American Bar Association, 2010

### **Education**

- Tulane University School of Law, *Juris Doctor*, 1987
- University of Virginia, Bachelor of Arts, 1984

Please proceed  
to the next page

Suzanne M. Halbardier attended University of Maryland (*cum laude*) and Georgetown University Law Center (JD). She is one of the managing partners and an owner of Barry McTiernan & Moore LLC. Ms. Halbardier oversees the firm's toxic tort unit and also specializes in civil rights cases. Ms. Halbardier has handled cases of a sensitive nature, including sexual harassment, sexual and physical abuse, and molestation in the foster care, school and security settings. Ms. Halbardier has tried many cases to verdict in New York state and federal court. Ms. Halbardier has been included in the New York Times list of New York Super Lawyers and New York Top Women Lawyers for several years.

Please proceed  
to the next page



## MARGARET G. KLEIN

400 Second Avenue, Apt. 25A  
New York, NY 10010

917-545-1666  
mgklein@gny.com

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*Attorney* with extensive litigation and management experience. Expertise in tort defense and insurance law. Proven ability to effectively manage litigation and to improve customer relations. Strong leadership, administrative and organizational skills.

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### PROFESSIONAL EXPERIENCE

#### **MARGARET G. KLEIN & ASSOCIATES**

**2006-present**

*(Staff Counsel to Greater New York Insurance Company (GNY))*

#### ***Attorney of Record/Vice President of Legal***

Reorganized and increased GNY's staff counsel office to handle its New York State litigation from inception of case through trial or settlement.

- Increased existing staff of 8 attorneys to 20 and reorganized and expanded support staff from 10 paralegals and secretaries to 18.
- Developed performance plans and objectives for each individual employee.
- Oversee the handling of approximately 1400 personal injury cases involving premises liability, building security, labor law and risk transfer.
- Set standards for all file handling with emphasis on developing case towards summary judgment motion disposition or trial.
- Developed reporting requirements with emphasis on communication of defense strategy
- Provide ongoing education to attorney staff and claims department by regular updates of all appellate decisions relevant to our practice.
- Monitor quality of all summary judgment motions to ensure quality work.
- Strategize and work closely with attorneys and with claims personnel in monitoring all trials.

#### **LAW OFFICES OF MARGARET G. KLEIN**

**2002-2006**

Served as of-counsel to several law firms specializing in insurance defense of personal injury and property damage claims.

**KLEIN & DiSOMMA, New York, NY**  
*(Staff Counsel to Crum & Forster Insurance Company)*

**1998-2002**

**Managing Trial Attorney**

Managed 800-1000 cases for New York City staff counsel office in defense of premises liability, labor law/contractual liability, products liability and automobile liability cases. Cases involved serious injuries, including fractures, amputations, brain damage, loss of sight and fatalities.

- Supervised more than 45 trials to verdicts, more than 60% of which resulted in defense verdicts and the balance in verdicts within the recommended settlement range.
- Developed and administered \$2.4 million annual operating budget.
- Organized and developed highly effective legal team consisting of 13 attorneys and 11 support personnel.
- Established litigation guidelines for case handling from inception to trial.
- Developed individual performance plans and clearly defined objectives for 24 employees.

**KELLY & McGLYNN, New York, NY**  
*(Staff Counsel to Crum & Forster Insurance Company)*

**1992-1998**

**Senior Trial Attorney**

Handled the defense of labor law, products, premises and automobile liability cases from inception to trial or settlement. All cases involved claims on policies of \$1 million and above.

- Ranked #1 each year out of staff of 12 attorneys for compliance with reporting requirements.
- Ranked #1 on all three company audits for effective file management.
- Obtained five favorable jury verdicts in high exposure claims.
- Won dismissals of more than 40 cases as a result of summary judgment motions.
- Promoted to Managing Attorney.

**TOBIAS & TURNER, New York, NY**  
*(Staff Counsel to Fireman's Fund Insurance Company Company)*

**1986-1992**

**Senior Trial Attorney (1991 - 1992)**

**Trial Attorney (1988 - 1991)**

**Associate Attorney (1986 - 1988)**

Handled all aspects of personal injury defense from inception through trial or settlement. Specialized in labor law, premises liability and professional malpractice cases.

- Handled more than 3000 discovery conferences and more than 1500 depositions.
- Prepared and opposed more than 120 summary judgment motions with favorable outcomes.
- Mediated more than 100 personal injury cases in various mediation forums.
- Handled successfully more than 10 bench and 8 jury trials.
- Designated as lead attorney on brokers' Error and Omissions account.

## **EDUCATION & QUALIFICATIONS**

**Bar Admissions:**

New York State Courts - 1984

United States District Courts-Southern and Eastern Districts – 1984 and 1998

Republic of Ireland - 1980

University College Galway, Ireland

LL.B - 1979

B.A. (Legal Science and Gaelic) - 1977

## **BAR ASSOCIATIONS AFFILIATIONS**

Defense Association of New York – President (2016)

New York State Bar Association

Defense Research Institute

Please proceed  
to the next page



## **MOYA M. O'CONNOR**

Moya M. O'Connor serves as a Senior Trial Attorney at MetLife. She is admitted to the New York State Bar as well as the US District Courts of the Southern and Eastern Districts of NY.

Moya's practice focuses on the defense of complex matters in State, Appellate, and Federal Court. More specifically, Moya provides litigation counsel in the fields of premises liability, automobile liability, property damage, subrogation, personal injury, and other intricate tort matters.

Moya graduated from Georgetown University in 2006, receiving a B.A. in Government with a Sociology minor. In 2009, Moya received her J.D. from Brooklyn Law School, where she was inducted into the Moot Court Honor Society and served as a coach for the Thurgood Marshall Moot Court Team.

Outside of the office, Moya is very active in the legal community. She is the Founder & CEO of Caribbean Attorneys Network, Inc. (CAN), a professional organization geared towards the development of attorneys, law students, and legal professionals of Caribbean descent. CAN was the 2016 recipient of the Bar Leaders Innovation Award from the New York State Bar Association. In 2017, The Network Journal recognized Moya as a 40 under Forty Honoree, and the publication, News Americas Now, included Moya on its list of "12 Caribbean Executives You Should Know." In 2016, Moya was also chosen to be a member of the Defense Association of New York's Diversity Initiative Class of 2016.

Further, Moya is a member of the Diversity & Inclusion Committee of the Claims & Litigation Management Alliance, Metropolitan Black Bar Association, Association of Black Women Attorneys, and Corporate Counsel Women of Color. Moya has also been published in the New York State Bar Association Torts, Insurance, & Compensation Law Section Journal.

Please proceed  
to the next page

**Doris Rios Duffy, Esq.**  
**Senior Trial Attorney, AIG Staff Counsel**  
**Kowalski & DeVito**

Doris Rios Duffy is an in-house attorney with AIG. She has held the position of Senior Trial Attorney with AIG Staff Counsel for nine years. She litigates in the New York State and federal courts and has been practicing since 1983.

She is a board member of the Defense Association of New York (DANY) and the co-chair of DANY pro bono committee.

Prior to her work at AIG, she was in private practice and represented individuals and small business in litigation. As a volunteer, she was active in local community organizations including the local Chamber of Commerce, the PTA and community organizations concerned with local issues including zoning and redistricting.

Defense Association of New York --  
Continuing Legal Education - May 10, 2018

Taming the Elephant in the  
Courtroom- Strategies for  
female lawyers and their  
supporters to identify, defuse  
and combat bias in the  
courtroom and in the boardroom

Thank you for your attention!