

November 15, 2023

New York State and City Employment Law Update (November 2023)

This memorandum reports on three recent legislative employment law changes in New York City and New York State: (1) a New York City ordinance prohibiting workplace discrimination on the basis of height or weight (the “NYC Height and Weight Ordinance”); (2) a New York State law requiring employers to provide certain employees with written notice of their eligibility for unemployment benefits (the “NYS Unemployment Benefits Notice Requirement”); and (3) a New York State law prohibiting employers from asking employees or job applicants to disclose their personal social media account credentials (the “NYS Employer Social Media Access Restrictions”).

The NYS Unemployment Benefits Notice Requirement became effective on November 13, 2023. The NYC Height and Weight Ordinance will become effective on November 22, 2023. The NYS Employer Social Media Access Restrictions will become effective on March 12, 2024.

NYC Height and Weight Ordinance

In May 2023, New York City enacted the NYC Height and Weight Ordinance prohibiting employers from discriminating against an individual on the basis of the individual’s actual or perceived height or weight, amending the New York City Human Rights Law (the “NYCCHRL”) to add these two bases to the list of legally protected characteristics.¹ The NYC Height and Weight Ordinance will go into effect on November 22, 2023, amid a wave of similar legislation across the country, including in Washington, D.C., San Francisco, CA, Madison, WI, Washington and Michigan.²

Under the NYC Height and Weight Ordinance, considering height or weight will remain permissible in the workplace under limited circumstances: (1) if required by federal, state, or local law or regulation; or (2) if New York City’s Commission on Human Rights (the “NYCCHR”) determines that height or weight may prevent a person from performing essential job requirements and no alternative is available, or it determines that considering height or weight is reasonably necessary for the business’s normal operation.³ The NYCCHR has not yet provided guidance or regulations governing these exemptions.⁴

In a similar vein, where an employer’s decision based on an individual’s height or weight is not required by law or regulation, an employer may avoid liability if it can prove either of the two affirmative defenses: (1) an employee’s height or weight prevents

¹ N.Y.C. Int. No. 209-A, Enactment No. 2023/061, available at <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=5570369&GUID=DF289A07-73A5-4AFE-8932-7EA5D1FA6577> [hereinafter “NYC Height and Weight Ordinance”]; NYC, *Mayor Adams Signs Legislation To Prohibit Height Or Weight Discrimination In Employment, Housing, And Public Accommodations* (May 26, 2023), available at <https://www.nyc.gov/office-of-the-mayor/news/364-23/mayor-adams-signs-legislation-prohibit-height-weight-discrimination-employment-housing-#/0>.

² Chris Marr, *Caste, Weight Emerge Among Expanding Bias-Protected Traits*, Bloomberg L. (July 3, 2023), <https://news.bloomberglaw.com/daily-labor-report/caste-weight-emerge-among-expanding-bias-protected-traits>; Emma G. Fitzsimmons, *You Can Be Fired for Being Overweight. Should New York Change That?*, N.Y. Times (Apr. 6, 2023), <https://www.nytimes.com/2023/04/06/nyregion/weight-discrimination-law-nyc.html>.

³ NYC Height and Weight Ordinance § 3.

⁴ N.Y.C. Human Rights, *Legal Enforcement Guidance*, <https://www.nyc.gov/site/cchr/law/legal-guidances.page>.

him or her from performing “the essential requisites of the job” and there is no alternative action that the employer could reasonably take to allow the employee to perform such requisites or (2) the employer’s consideration of height or weight is “reasonably necessary” to execute its “normal operations.”⁵ Employers are also expressly allowed to offer incentives that support weight management through voluntary wellness programs.⁶

NYS Unemployment Benefits Notice Requirement

Starting on November 13, 2023, covered employers in New York State will be required to inform employees of their right to apply for unemployment benefits through the New York State Department of Labor (the “NYSDOL”) when they are permanently or temporarily terminated or if their hours are reduced.⁷ More specifically, any “permanent or indefinite separation from employment, reduction in hours, temporary separation, and any other interruption of continued employment that results in total or partial unemployment” triggers the notice requirement.⁸

To comply with the new law, employers must provide notice to the employee in writing on a form furnished or approved by the NYSDOL no more than five working days after the employment is terminated or reduced.⁹ Moreover, notice must include the employer’s name and registration number, the employer’s address in case of requests for remuneration and employment information, and any other information that may be required by the NYSDOL commissioner.¹⁰

NYS Employer Social Media Access Restrictions

Starting on March 12, 2024, employers in New York State will be prohibited from requesting or requiring employees or job applicants to provide their social media credentials as a condition of hiring, a condition of employment, or for use in a disciplinary action.¹¹ Employers will also be prohibited from requiring employees or job applicants to access their personal social media accounts in the employer’s presence or to reproduce photos, videos, or other information from their personal accounts.¹² Moreover, employers are prohibited from retaliating against an employee or refusing to hire a job applicant as a result of his or her refusal to disclose the above-mentioned social media information.¹³

Notably, the term “employer” is defined to include any “person or entity engaged in a business, industry, profession, trade or other enterprise in [New York],” as well as any “agent, representative or designee of the employer.”¹⁴ Accordingly, the law may cover third parties acting as an employer’s agent, such as background check vendors.

Requiring employees to disclose log-in information for accounts provided by the employer for business purposes will remain permissible so long as employees are given advance notice that their employer may rightfully request such information. The new law also expressly allows employers to access devices they paid for in whole or in part (excluding any personal accounts on such

⁵ NYC Height and Weight Ordinance § 3.

⁶ *Id.*

⁷ S. Assemb., S04878A, Cal. No. 419 (N.Y. 2023), available at https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=S04878&term=2023&Summary=Y&Text=Y [hereinafter “NYS Unemployment Benefits Notice Requirement”].

⁸ *Id.* § 1.

⁹ *Id.* § 2; N.Y. State Dep’t of Labor, *Notices to Employees*, <https://dol.ny.gov/notices-employees>.

¹⁰ NYS Unemployment Benefits Notice Requirement § 2.

¹¹ S. Assemb., S02518A, Cal. No. 259 (N.Y. 2023), available at https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=S02518&term=2023&Summary=Y&Text=Y.

¹² *Id.* § 2.

¹³ *Id.* § 3.

¹⁴ *Id.* § 1.

devices) if the employee previously received notice that the employer may request such access as a condition for financing the device.¹⁵

Implications for Employers

- Updating internal policies, training, and compliance frameworks to align with these legislative shifts should be a priority for employers with operations in New York.
- **NYC Height and Weight Ordinance:** Employers may wish to ensure that their internal policies and anti-discrimination training discuss height and weight as protected categories under the NYCHRL. When conducting compliance reviews, employers should be attuned to potential ways in which comments or conduct implicating height or weight may contribute to a hostile workplace environment. Given the emergence of similar legislation across the country, employers may also wish to consider harmonizing any policies that apply across different jurisdictions to minimize liability.
- **NYS Unemployment Benefits Notice Requirement:** Employers may wish to create or update their written notice of unemployment benefits to conform with NYSDOL’s requirements and make sure that notice is provided not only to employees who are permanently or temporarily terminated, but to those who remain employed on a reduced basis.
- **NYS Employer Social Media Access Restrictions:** Employers may wish to review the terms of their online business social media accounts and any electronic device policies or agreements to make sure that they provide employees with any necessary notice of future intent to access information on employer-sponsored accounts or devices. Employers may also wish to review hiring protocols and trainings to ensure that employees and candidates are not asked to provide personal social media account information.

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¹⁵ *Id.* § 5.

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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