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Commission on Human Rights

Legal Enforcement Guidance on Discrimination on the Basis of Disability

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NYC Commission on Human Rights Legal Enforcement Guidance on Discrimination on the Basis of Disability

Introduction

In New York City, approximately one million residents live with a disability.[1] Many of us will have at least one disability during our lifetimes, and count people living with disabilities among our neighbors, colleagues, family members, and friends.

Prioritizing accessible and inclusive spaces across New York City enables people with disabilities to participate more fully in our city, ensuring all individuals can engage with their communities, access services, find and maintain employment, and secure housing that best meets their needs. Our city is at its best when it draws on the abilities of everyone and is accessible to all. Creating and maintaining accessible environments through measures like providing reasonable accommodations benefits all New Yorkers, including residents, visitors, business owners, and employees. Investing in equitable access yields long-term economic and social gains.

New York City is dedicated to advancing accessibility and ensuring all New Yorkers are able to live, work, and thrive here. The New York City Commission on Human Rights ("Commission") is committed to furthering these goals. The Commission works to ensure that New

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[1] United States Census Bureau, American Community Survey Data (2024), https://data.census.gov/table?t=Disability&g=160XX00US3651000&y=2024&d=ACS+1-Year+Estimates+Selected+Population+Profiles.

Yorkers with disabilities can live their lives free from discrimination by enforcing the New York City Human Rights Law ("NYCHRL"), one of the broadest and most protective anti-discrimination laws in the nation, which prohibits discrimination in housing, employment, and public accommodations.

> The NYCHRL prohibits discrimination on the basis of more than twenty-five protected classes, including discrimination based on actual or perceived disability.[2] The NYCHRL defines which employers, places and providers of public accommodation, and housing providers have obligations under the Law.[3]

Pursuant to Local Law No. 85 (2005) ("Local Civil Rights Restoration Act of 2005" or "Restoration Act"), the NYCHRL must be construed "independently from similar or identical provisions of New York State or federal statutes," such that "similarly worded provisions of federal and state civil rights laws [are] a floor below which the City's Human Rights law cannot fall, rather than a ceiling above which the local law cannot rise."[4] Additionally, exemptions to the NYCHRL must be construed "narrowly in order to maximize deterrence of discriminatory

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[2] N.Y.C. Admin. Code § 8-107. This guidance uses the terms "disability" and "disabilities" interchangeably because the Commission recognizes that individuals may live with one or more disability. More information on the NYCHRL can be found at https://www.nyc.gov/site/cchr/law/the-law.page.

[3] *Id*.

[4] Local Law No. 85 § 1 (2005); *see also* N.Y.C. Admin. Code § 8-130(a) ("The provisions of this title shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York state civil and human rights laws, including those laws with provisions worded comparably to provisions of this title, have been so construed.").

conduct."[5] The NYCHRL also prohibits discriminatory harassment[6] and bias-based profiling by law enforcement.[7]

A. Definition of Disability in the City Human Rights Law

The provisions of the NYCHRL that prohibit discrimination on the basis of disability, which are the focus of this guidance document,[8] are broader than the federal Americans with Disabilities Act ("ADA") and Fair Housing Act ("FHA"),[9] and the provisions are generally as broad or broader than the New York State Human Rights Law ("NYSHRL") as well.[10]

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[5] Local Law No. 35 (2016) (amending N.Y.C. Admin. Code § 8-130(b)).

[6] N.Y.C. Admin. Code §§ 8-602–8-604.

[7] N.Y.C. Admin. Code § 14-151.

[8] While this document specifically reflects the Commission's interpretation of the NYCHRL, the Commission has included references to related federal and state authority where it is persuasive and instructive.

[9] *See* 42 U.S.C.A. §§ 12101 *et seq*.; 42 U.S.C.A. §§ 3601 *et seq*.

[10] *Compare* N.Y. EXEC. L. §§ 290-301 *with* N.Y.C. Admin. Code Title 8. The NYSHRL is a similar, but not analogous, state anti-discrimination law that is enforced by the New York State Division of Human Rights. This guidance does not discuss the NYSHRL in detail but notes that, despite similar construction provisions, the NYCHRL's disability protections are generally as protective or more protective than the NYSHRL's.

The NYCHRL defines disability as any "physical, medical, mental, or psychological impairment," or a history of such impairment,[11] and includes a full range of sensory, mental, physical, mobility, developmental, learning, and psychological disabilities—whether or not they are visible or apparent.

> This definition encompasses the impairment of any bodily system, such as the neurological system; the musculoskeletal system; the respiratory system; the cardiovascular system; the reproductive system; the digestive and genito-urinary systems; the immunological systems; and the endocrine system.[12]

Both temporary and short-term injuries, as well as chronic conditions, may qualify as disabilities. These conditions can meet the definition of disability under the NYCHRL even if the impairments, when treated, permit the aggrieved individual to perform physical activities without limitation, and/or the conditions do not substantially limit the individual's major life activities, which is distinct from federal law.[13]

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[11] N.Y.C. Admin. Code § 8-102. In the case of alcoholism, drug addiction or other substance abuse, the term "disability" applies to a person who "is recovering or has recovered" and "currently is free of such abuse." *Id.*

[12] *Id*.

[13] *See*, *e.g.*, *Weissman v. Dawn Joy Fashions, Inc.*, 214 F.3d 224, 233 (2d Cir. 2000) (stating that "disability" is "more broadly defined" under the NYCHRL than it is under the ADA); *Pustilinik v. Battery Park City Authority*, 71 Misc. 3d 1058, 1068-69 (N.Y. Sup. Ct. 2021) (clarifying that plaintiffs asserting, *inter alia*, disability discrimination under the NYCHRL must satisfy the less demanding requirement that plaintiff's disability was a motivating factor, as opposed to the but-for cause standard required by the ADA); *Primmer v. CBS Studios, Inc.*, 667 F.

Disabilities can manifest in ways that are obvious, and in ways that are subtle or less apparent to others. Having low vision, hearing impairment, and/or a mobility limitation constitute disabilities that may be apparent to others; however, they also present in ways that are less obvious. Disabilities can also manifest as chronic conditions that may be asymptomatic for periods of time before noticeable symptoms occur or reoccur.

A disability may also be a condition that is not readily apparent to other people. Diabetes, allergies, arthritis, and mental health diagnoses are examples of conditions that may manifest for individuals in ways that remain "invisible" to others. Covered entities—public accommodations, housing providers, and employers—have a responsibility to ensure that all staff, and especially managers, are equipped to engage respectfully with colleagues, patrons, tenants, and employees, regardless of disabilities. This is especially important for staff that are involved in handling potential accommodation requests. Such requests require engaging in a cooperative dialogue in a timely fashion, even where a particular individual's need for an accommodation is not immediately obvious or the condition related to the requested accommodation is unfamiliar. Cooperative dialogues should also be free from assumptions or biases about an individual's capacity and limitations.

Supp. 2d 248 (S.D.N.Y. 2009) (emphasizing that the NYCHRL has a "considerably broader" definition of disability than the ADA); *Attis v. Solow Realty Dev. Co.*, 522 F. Supp. 2d 623, 631–32 (S.D.N.Y. 2007) (finding that any "medically diagnosable impairment" is sufficient to constitute a disability under the NYCHRL); *Sussle v. Sirina Prot. Sys. Corp.*, 269 F. Supp. 2d 285, 316 (S.D.N.Y. 2003) (finding that an employee's failure to establish that he suffered from a disability within meaning of ADA did not necessarily vitiate NYCHRL claims).

B. Disability-Based Causes of Action

The NYCHRL, Title 8 of the N.Y.C. Admin. Code, creates seven (7) causes of action related to disability discrimination, and an additional cause of action arises under Title 14 of the N.Y.C. Admin. Code. Each is described briefly here.

i. Discriminating against a person or persons based on actual or perceived disability.

Under the City Human Rights Law, most covered entities are prohibited from expressing, directly or indirectly, any limitation, specification, or discrimination against an individual with a disability in actions related to housing, employment, or public accommodations.[14]

ii. Failure to provide reasonable accommodations to individuals with disabilities.

Covered entities are required to provide accommodations to individuals with disabilities to enable them "to satisfy the essential requisites of a job" in employment or "enjoy the right or rights in question provided that the disability is known or should have been known by the covered entity" in housing or public accommodations.[15] "Reasonable accommodation" is defined in the NYCHRL as an accommodation that can be made that does not cause undue hardship in the conduct of the covered entity's business.[16] The concepts of "reasonable accommodation" and "undue hardship" are inextricably intertwined in the NYCHRL.

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[14] N.Y.C. Admin. Code § 8-107.

[15] *Id.* § 8-107(15)(a).

[16] *Id.* § 8-102.

iii. Failure to engage in a cooperative dialogue[17] within a reasonable time.

Covered entities must engage in a cooperative dialogue with a person who has requested an accommodation or who the covered entity has notice may require such an accommodation.[18] Refusing or otherwise failing to engage in such a dialogue is a standalone violation of the NYCHRL. In addition, covered housing providers and employers are required to conclude every cooperative dialogue with a written final determination.[19]

iv. Failure to provide a written final determination at the conclusion of a cooperative dialogue in employment and housing.

Upon reaching a final determination at the conclusion of a cooperative dialogue, covered housing providers and employers are required to provide any person requesting an accommodation who participated in the cooperative dialogue with a written final determination identifying any accommodation(s) granted or denied.[20]

v. Retaliation.

When an individual speaks out against or opposes what they believe in good faith to be unlawful discrimination, it is illegal to take an action that is reasonably likely to deter them from speaking out, opposing, or participating in an investigation into the alleged discrimination.[21] The act of

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[17] *Id.* § 8-107(28).
[18] *Id*.
[19] *Id*.
[20] *Id*.
[21] *Id.* § 8-107(7).

requesting a reasonable accommodation is considered protected activity for the purposes of this section. Retaliation can be a materially adverse change to the terms and conditions of employment, housing, or participation in a program, or more subtle forms of negative treatment.[22]

vi. Discrimination based on one's "association" with an individual with an actual or perceived disability is prohibited.

Employers, housing providers, and public accommodations are prohibited from treating individuals less well because of their relationship or association with a person who has a disability.[23] A claim of "associational discrimination," requires that: (a) a covered entity caused harm to a person associated with an individual with a disability, and (b) the harm the associated individual suffers must be distinct from the harm to the individual with a disability.[24]

vii. Discriminatory Harassment.

The NYCHRL prohibits individuals from interfering or attempting to interfere with legal rights secured by the U.S. or New York State constitutions and other federal, state, or city laws through harm or threats of harm, when such actions are based, at least in part, on the actual or perceived disability of the person receiving the discriminatory harassment.[25]

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[22] *Id*.

[23] *Id.* § 8-107(20).

[24] *Id*.

[25] *Id.* § 8-602.

viii. Bias-Based Profiling

Local law prohibits law enforcement officers from "rel[ying] on actual or perceived" protected categories, including disability, as "the determinative factor in initiating law enforcement action against an individual" in order to ensure that decision-making is based on specific behavior or circumstances linked to suspected illegal behavior.[26] Potential remedies for bias-based profiling claims are limited to injunctive and declaratory relief.[27]

C. Covered Entities

Employers, places and providers of public accommodations, and housing providers are required to abide by the obligations set forth in the NYCHRL unless they fall within a small number of specified exemptions. The phrase "covered entity(ies)" refers to all entities with obligations, and "covered employers," "covered places and providers of public accommodations," and "covered housing providers" refer to entities with obligations under the NYCHRL in a particular area of jurisdiction.[28]

Part I of this guidance focuses on City Human Rights Law provisions related to claims of disability discrimination based on differential treatment and disparate impact, as well as the cooperative dialogue process and reasonable accommodations. Part II gives an overview of the potential claims and protections in each of the main NYCHRL jurisdictions: employment, housing, and public accommodations. Part III focuses on additional NYCHRL disability protections, including

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[26] *Id.* § 14-151.
[27] *Id.* §14-151(d).
[28] *See id.* § 8-107(2).

retaliation,[29] associational discrimination,[30] and discriminatory harassment.[31] Part IV explains how the NYCHRL is enforced and explains how individuals can contact the New York City Commission on Human Rights.

This document does not constitute, and is not intended to serve as, an exhaustive list of all forms of disability-related discrimination claims under the NYCHRL.

PART I: Overview of Disability Discrimination that Violates the NYCHRL

A. Disparate Treatment

i. Treating People Less Well Because of Disability

Disparate treatment occurs when a covered entity treats an individual less favorably than others because of a protected characteristic.[32] Treating an individual less well than others because of any actual or perceived disability in public accommodations, housing, and employment violates the NYCHRL.[33]

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[29] *Id.* § 8-107(7).
[30] *Id.* § 8-107(20).
[31] *Id.* § 8-602.
[32] *Raytheon Co. v. Hernandez*, 540 U.S. 44, 52 (2003).
[33] The NYCHRL also applies in several other contexts, such as licensing, real estate, credit, and discriminatory harassment. N.Y.C. Admin. Code §§ 8-107(5)(b)-(e), 8-107(9), 8-602.

Adverse treatment may be overt, such as refusing to serve an individual with a service animal; refusing to accept a rental application for an apartment because the applicant has a disability; deciding not to hire an applicant because of their disability; or firing an employee because of their disability.

Discriminatory conduct on the basis of disability often also occurs in more indirect ways. Treating an employee differently because of their disability, or making decisions in hiring, assignments, or promotions based on assumptions about what an applicant or employee with a disability can or cannot do are all examples of unlawful disability-based discrimination under the NYCHRL. Not making repairs to a unit because of a tenant's actual or perceived disability is also a violation of the NYCHRL. Refusing to rent a second-floor walk-up apartment to a person who relies on a cane is a violation of the NYCHRL. Failing to serve an individual who uses a wheelchair in a restaurant or theater may also violate the NYCHRL because it denies a patron the full and equal enjoyment of the premises that other patrons experience.

These forms of discrimination are actionable under the NYCHRL because they subject individuals with disabilities to worse treatment than someone without a disability. Such actions contribute to the exclusion of individuals with disabilities from jobs, housing, and places of public accommodation, and violate the NYCHRL.

The NYCHRL explicitly prohibits statements or inquiries that express, directly or indirectly, any limitation, specification, or discrimination against an individual with a disability.

- Housing providers cannot express such limits in inquiries in connection with the prospective purchase, rental, or lease of a housing accommodation.

- Employers cannot express such limits in inquiries in connection with prospective employment.
- Public accommodations that have applications or interviews for their programs, such as some drug treatment programs or schools, after-school programs, and some clubs, are prohibited from communicating that applicants with disabilities are unwelcome, undesired, or unacceptable or from other actions that limit availability of their premises or services to people on the basis of an actual or perceived disability.

ii. Establishing Disparate Treatment Claims

To establish a disparate treatment claim under the NYCHRL, an individual must show they were treated less well or subjected to an adverse action that was motivated, at least in part, by discriminatory animus. An individual may demonstrate this through direct evidence of discrimination or indirect evidence that gives rise to an inference of discrimination.[34] Where a showing of discrimination relies on indirect evidence, the covered entity may put forward a legitimate, non-discriminatory justification for the alleged discriminatory conduct. If the covered entity provides such a non-discriminatory basis, the burden shifts back to the aggrieved individual to show that the proffered non-discriminatory basis was pretextual, false, or misleading, or that discrimination motivated the conduct at least in part.[35]

iii. Harassment

Disparate treatment can manifest as harassment when the incident or behavior creates an environment or reflects or fosters a culture or atmosphere of stereotyping, degradation, humiliation, bias, or objectification. These are considered hostile environments. Creating a

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[34] Examples of direct evidence could include explicit statements by a covered entity that an adverse action was based on a protected status or explicitly discriminatory policies. *See In re Comm'n on Human Rights ex rel. Stamm v. E&E Bagels,* OATH Index No. 803/14, Comm'n Dec. & Order, 2016 WL 1644879, at *4 (Apr. 21, 2016).

[35] *See Bennett v. Health Mgmt. Sys., Inc.*, 92 A.D.3d 29, 40-41 (1st Dep't 2011) (describing several ways that a plaintiff could respond to a defendant's showing of non-discriminatory reasons for its actions, including by showing "pretext and independent evidence of the existence of an improper discriminatory motive" or that "discrimination was just one of the motivations for the conduct" while using direct or circumstantial evidence).

hostile environment on the basis of disability constitutes a violation of the NYCHRL. Harassment related to an individual's actual or perceived disability is a form of discrimination, and may consist of a single or isolated incident, or a pattern of repeated acts or behavior. Under the NYCHRL, harassment related to disability covers a broad range of conduct and occurs generally when an individual is treated less well on account of their disability. Harassment may include comments, gestures, jokes, or pictures that target an individual based on their disability, or about disabilities more generally. Harassment can occur in the context of employment, housing, and public accommodations, such as schools, hospitals, or public transportation. The severity or pervasiveness of the harassment is only relevant to damages.[36]

iv. Discriminatory Policies

Policies that treat individuals with disabilities distinctly constitute unlawful discrimination except where a covered entity can demonstrate a legitimate, non-discriminatory justification for the disparate treatment. Policies that categorically exclude individuals on account of a disability without taking individual circumstances into account are unlawful. This includes policies that: (a) exclude workers

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[36] *See Goffe v. NYU Hosp. Ctr.*, 201 F. Supp. 3d 337, 351 (E.D.N.Y. 2016) (stating that "the federal severe or pervasive standard of liability no longer applies to NYCHRL claims, and the severity or pervasiveness of conduct is relevant only to the scope of damages…"); *Fernandez v. Wenig Saltiel LLP*, No. 19-CV-1979 (AMD) (MMH), 2024 WL 1345645, at *15-16 (E.D.N.Y. Mar. 29, 2024) ("The NYCHRL imposes liability for hostile conduct even where the conduct does not rise to the level of severe or pervasive, as questions of severity or pervasiveness are applicable to the consideration of the scope of permissible damages, but not to the question of underlying liability.")

with disabilities from specific job categories or positions without assessing individual candidate capacity and skills in light of the essential requisites of the job; (b) deny housing to individuals with disabilities; (c) deny entry to individuals with disabilities to public accommodations; or (d) impose conditions on people on account of their disabilities. Using safety concerns as a pretext for discrimination or in a manner that reinforces stereotypes and assumptions about people with disabilities is unlawful. Reasonable and legitimate health and safety considerations may, however, be taken into account by covered entities. In limited instances, when relevant in the circumstances, inquiries about an individual's capacity are permissible. For example, an employer may require a note from an individual's health professional stating that the individual who had been out on leave related to a disability is able to return to work with or without a reasonable accommodation, but only if an employer has a reasonable belief that either (a) the person's ability to perform the essential requisites of the job will be impaired or (b) the person will pose a direct threat to themselves or the safety of others due to a medical condition.[37]

v. Actions Based on Stereotypes and Assumptions

It is unlawful under the NYCHRL for covered entities to act on stereotypes or assumptions. Judgments and stereotypes about individuals with disabilities, including their physical and mental capabilities, are pervasive in our society, but they do not justify differential treatment or provide a legitimate basis for unlawful discriminatory actions in employment, housing, and public accommodations.

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[37] *See* U.S. Equal Emp't Opportunity Comm'n, Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans With Disabilities Act (ADA) (July 27, 2000), https://www.eeoc.gov/policy/docs/guidance-inquiries.html#9.

B. Neutral Policies that have a Discriminatory Impact

As explained above, the central question in a disparate treatment claim is whether the protected trait motivated a covered entity's decision or actions, at least in part. In contrast, disparate impact claims involve policies or practices that are facially neutral but disproportionately or more negatively impact persons in a particular group, such as persons with disabilities. Unless such policies or practices bear a significant relationship to a significant business objective of the covered entity, they are unlawful under the NYCHRL.[38] A facially neutral policy or practice may constitute unlawful disparate impact discrimination even in the absence of evidence of a covered entity's subjective intent to discriminate.[39] For example, a public accommodation's "no animals" policy that imposes a total ban on animals in the establishment without an exception for allowing service animals or an employer's leave policy that does not allow for disability accommodations may appear facially neutral, but these policies may disparately impact individuals with disabilities. If that is the case, the policy may be unlawful under the NYCHRL. By contrast, a policy that allows for the possibility of additional sick leave as a reasonable accommodation for individuals with disabilities would not run afoul of the NYCHRL.

The NYCHRL explicitly creates a disparate impact cause of action in employment, housing, and public accommodations.[40]

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[38] N.Y.C. Admin. Code § 8-107(17)(2).

[39] *Raytheon Co. v. Hernandez*, 540 U.S. 44, 52–53 (2003).

[40] N.Y.C. Admin. Code §8-107(17); *see also Levin v. Yeshiva Univ.*, 96 N.Y.2d 484, 492–93 (2001).

i. Establishing Disparate Impact Claims

The standard for establishing a *prima facie* case of disparate impact discrimination under the NYCHRL is lower than the standard for similar claims under other laws, including the ADA and Title VII.[41]

Under the NYCHRL, a successful complaint based on disparate impact must show that a covered entity's facially neutral policy or practice has a disparate impact on a protected group.[42] Once such a showing has been made, the covered entity has an opportunity to plead and prove as an affirmative defense that either: (1) the policy or practice complained of bears a significant relationship to a significant business objective; or (2) the policy or practice does not contribute to the disparate impact.[43] However, this defense is defeated if there is substantial evidence of an available alternative policy or practice that would have a lesser disparate impact, and the covered entity is unable to establish that an alternative policy or practice would not serve its business objective as well as the existing policy or practice.[44]

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[41] *Teasdale v. N.Y.C. Fire Dep't, FDNY*, 574 F. App'x 50, 52 (2d Cir. 2014) (summary order); *see also Gittens-Bridges v. City of New York*, No. 19 Civ. 272 (ER), 2022 WL 954462, at *16 (S.D.N.Y. Mar. 30, 2024).

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

[43] *Id.* § 8-107(17)(2).

[44] *Id*.

A “significant business objective” in the employment context includes, but is not limited to, successful performance of the job.[45]

To comply with the NYCHRL, covered entities should review and modify policies and practices that could have a disparate impact on individuals with disabilities and ensure that they have mechanisms in place to provide modifications or exceptions to policies and practices that may have a disparate impact as reasonable accommodations. Written policies that express limitations or prohibitions, such as a “maximum leave policy” in an employee handbook or a “no pets” policy in a lease or public accommodation, should include the availability of modifications or exceptions as reasonable accommodations, and the process for individuals to seek such exception or modification to the policy as a reasonable accommodation. In determining whether a covered entity’s facially neutral policy or practice has a discriminatory impact, the Commission will consider all written policies, including employee handbooks and manuals, whether and how staff are trained to receive and respond to requests for accommodations, and how the policy has been implemented.

C. Artificial Intelligence

Artificial intelligence (“AI”) increasingly is a part of everyday life. The increased use of AI, algorithms, and other machine learning technology by housing providers, public accommodations, and employers presents both positive opportunities for individuals with disabilities—the potential for more suitable accommodations—as well as novel accessibility challenges.[46]

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[45] *Id.*

[46] *See* Christo El Morr, Bushra Kundi, Fariah Mobeen, Sarah Taleghani, Yahya El-Lahib, & Rachel Gorman, *AI and disability: A*

Covered entities are responsible for ensuring that they are not relying on any technology or artificial intelligence in a manner that results in discrimination.[47] This includes ensuring that use of seemingly neutral technology, algorithms, and AI does not cause disparate treatment or create a disparate impact on individuals with disabilities. Covered entities are responsible for the actions and decision-making of AI systems and other technology they utilize, and they may not avoid liability for unlawful discrimination by asserting that the discrimination was caused by technology or AI rather than human decision-making. However, there is a valid defense to a disparate impact claim where the technology used has a significant relationship to a significant business objective.[48]

- The use of technology in employment may constitute unlawful discrimination under the NYCHRL if the employer does not allow for people to request reasonable accommodations in order to use the application or offer an alternative method to apply for positions, and the NYC Administrative Code prohibits employers from using automated employment decision tools to screen a candidate or employee for an employment decision unless such tool has been the subject of a bias audit.[49] Similarly, if an

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systematic scoping review, 30 HEALTH INFORMATICS J., Sept. 17, 2024, at 1, 10-13 https://journals.sagepub.com/doi/epub/10.1177/14604582241285743 [https://doi.org/10.1177/14604582241285743].

[47] N.Y.C. Admin. Code §§ 8-107(1), (4), (5).

[48] *Id.* § 8-107(17)(a)(2).

[49] Local Law No. 144 (2021), codified at N.Y.C. Admin. Code § 20-871; *see also* U.S. Dep't of Just., Civil Rights Div., *Algorithms, Artificial Intelligence, and Disability Discrimination in Hiring*, https://www.ada.gov/assets/pdfs/ai-guidance.pdf (last visited Dec. 22, 2025).

algorithm rejects applicants with disabilities, its use may result in discrimination. Employers should have mechanisms or measures in place to ensure that employment decisions are not unlawfully discriminating on the basis of disability. Employers, employment agencies, and their agents can be liable under the NYCHRL for discrimination that results from the use of technology or AI.[50]

- Housing providers and their agents can be liable under the NYCHRL for discrimination that results from the use of technology or AI.[51] For example, virtual doormen may be installed at heights that prevent individuals who use wheelchairs from being captured by the video camera or reaching the keypad, and facial recognition software that screens visitors may not recognize and permit individuals with certain disabilities.[52]
- Public accommodations likewise must make sure that technology or AI they utilize is not used in a manner that discriminates against individuals with disabilities.[53] Businesses and public venues that utilize facial recognition technology, and public accommodations that use algorithms to automate application selection processes should not employ this technology in ways that violate the NYCHRL.[54] Public accommodations must ensure that they have policies and processes in place to provide reasonable accommodations to patrons with disabilities to foster full and equal enjoyment of the services of the public

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[50] N.Y.C. Admin. Code §§ 8-107(1), (15).

[51] *Id.* §§ 8-107(5), (15).

[52] *See* ARIANA ABOULAFIA & HENRY CLAYPOOL, CTR. FOR DEMOCRACY & TECH. AND THE AM. ASS'N FOR PEOPLE WITH DISABILITIES, *Building a Disability-Inclusive AI Ecosystem* (March 11, 2025), at 38-39, https://cdt.org/wp-content/uploads/2025/03/2025-03-11-CDT-Building-A-Disability-Inclusive-AI-Ecosystem-report-final.pdf.

[53] N.Y.C. Admin. Code § 8-107(4).

[54] Aboulafia, s*upra* note 52.

accommodations, unless doing so causes or would cause an undue hardship.[55]

D. Reasonable Accommodations

Under the NYCHRL, employers, housing providers, and places of public accommodation have an obligation to make reasonable accommodations that meet the needs of the individual or individuals that request reasonable accommodations.

- In employment, reasonable accommodations enable persons with disabilities "to satisfy the essential requisites of a job."[56]
- In employment, housing, and public accommodations, reasonable accommodations enable persons with disabilities "to enjoy the right or rights in question."[57]
- In public accommodations, reasonable accommodations enable persons with disabilities to enjoy the "full and equal enjoyment, on equal terms and conditions, of any of the public accommodation's accommodations, advantages, services, facilities, or privileges."[58]

The obligation to make a reasonable accommodation exists when "the disability is known or should be known by the covered entity."[59] Accommodations are considered reasonable unless a covered entity shows that providing an accommodation would cause it an "undue hardship."[60] In making a determination of undue hardship, the

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[55] N.Y.C. Admin. Code § 8-107(15).
[56] *Id.* § 8-107(15)(a).
[57] *Id*.
[58] *Id.* §§ 8-107(4), (15).
[59] *Id*.
[60] *Id.* § 8-102; *see infra* Sections II(A)(iv)(a), II(B)(iii)(a), and II(C)(iv)(a) for discussions about undue hardship.

NYCHRL sets forth the following non-exhaustive list of factors that are relevant to an undue hardship determination:

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.[61]

To establish a *prima facie* failure to accommodate claim under the NYCHRL, an employee, tenant, or patron need only establish that: (1) they have a disability; (2) the covered entity knew or should have known about the disability; (3) an accommodation would enable the employee, tenant, or customer to perform the essential requisites of the job or enjoy the rights in question; and (4) the covered entity failed to provide an accommodation.[62] The burden then shifts to the covered entity to show that the proposed reasonable accommodation would cause it an undue hardship. The NYCHRL standard is more protective

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[61] *See* N.Y.C. Admin. Code § 8-102. These factors are enumerated specifically for the workplace but are used across covered entities.
[62] *See In re Comm'n on Human Rights ex rel. Stamm v. E&E Bagels,* OATH Index No. 803/14, Comm'n Dec. & Order, 2016 WL 1644879, at *6 (Apr. 21, 2016).

than other laws, including federal laws like the ADA and Fair Housing Act. The NYCHRL imposes no requirement on employees, tenants, or patrons to prove that an accommodation is readily achievable or necessary, or to show that the accommodation does not pose an undue hardship.[63] An undue hardship analysis is based upon an array of factors, which include the type of accommodation and its cost, and the overall financial resources of a covered entity.[64]

Each reasonable accommodation request must be assessed on a case-by-case basis given the needs of the individual requesting the accommodation and the unique circumstances of the covered entity. This case-by-case assessment includes whether an entity should have known an accommodation was necessary, and the type of accommodation requested. Covered entities also may consider the duration that the accommodation is needed in determining whether the time and expense to provide the accommodation would cause an undue hardship. Under the NYCHRL, the covered entity is responsible for the cost of accommodations except in the case of undue hardship.[65] Where a covered entity establishes clearly that an

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[63] *See*, *e.g.*, *Romanello v. Intesa Sanpaolo, S.P.A.*, 22 N.Y.3d 881, 885 (2013). The Fair Housing Act requires residents to show that modifications are "necessary," and even then, only obligate a landlord to "permit" reasonable modifications, not to provide them. *See* 42 U.S.C. § 3604(f)(3)(A).

[64] *See supra* note 61.

[65] N.Y.C. Admin. Code § 8-107(15)(a); *see also In re Comm'n on Human Rights ex rel. Blue v. Jovic*, OATH Index No. 1624/16, Comm'n Dec. & Order, 2017 WL 2491797, at *18 (May 26, 2017), *aff'd sub nom. Jovic v. N.Y.C. Comm'n on Human Rights*, Index No. 100838/2017 (Sup. Ct. N.Y. Cnty. Feb. 14, 2018) ("Consistent with §§ 8-102 . . . and 8-107(15)(a) of the NYCHRL, Respondent . . . shall bear the full cost of providing the reasonable accommodation and is

accommodation will pose an undue financial hardship, such covered entity is encouraged but not required to explore the possibility of: seeking third party funding through a grant or other means; assisting the individual in applying for a grant to obtain the accommodation; or presenting the possibility of having the individual pay for part or all of the accommodation.

Given the requirement that each accommodation request be assessed on a case-by-case basis, covered entities must be flexible when considering accommodation requests, proposing alternative accommodations, and engaging in a cooperative dialogue. The fact that a requested accommodation is novel, or has constituted an undue hardship in the past, does not serve as a basis for denying the request. The feasibility of an accommodation should be assessed holistically at the time it is requested.

i. Service Animals and Emotional Support Animals

Service animals and emotional support animals are common types of accommodations for New Yorkers. Housing providers, employers, and public accommodations must *all* accept service animals, and make any necessary modifications to any "no pets" or "no animals" policies in order to allow for service animals, unless doing so would cause an undue hardship. A service animal is an animal that does work or performs tasks for an individual with a disability.[66] Housing providers

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prohibited from passing directly or indirectly any portion of that expense onto Complainants through any fee, rent increase, or other charge.").

[66] *See Phillips v. City of New York*, 66 A.D.3d 170, 182 n.12 (1st Dep't 2009), *overruled on other grounds by Jacobsen v. N.Y.C. Health & Hosps. Corp.*, 22 N.Y.3d 824 (2014) ("'Accommodation,' as distinct from 'reasonable accommodation' is not a defined term, but from its

must also permit emotional support animals and make any necessary modifications to any “no pets” or “no animals” policies as well as any policies that charge fees for or limit animals by size, weight, species, or breed for emotional support animals, unless doing so would cause an undue hardship. An emotional support animal is not a pet, it is an animal that allows a resident to use and enjoy housing as other tenants do,[67] and housing providers must consider allowing them as a reasonable accommodation, even when the housing provider does not permit pets. These types of accommodations are discussed in more detail in the parts of this document that cover Employment,[68] Public Accommodations,[69] and Housing.[70]

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use in both sections 8-102 . . . and 8-107(15), it is clear that the term is intended to connote any action, modification, or forbearance that helps ameliorate *at least to some extent* a need created by a disability.”); N.Y.C. Admin. Code § 8-102 (defining reasonable accommodation).

[67] Under the NYCHRL, a person need only show that the presence of the emotional support animal in some way alleviates symptoms of their disability in order to justify their request for the accommodation. They need not show that the animal is “necessary” to their use and enjoyment of the residential unit. *In re Comm’n on Human Rights ex rel. L.D. v. Riverbay Corp.*, OATH Index No. 1300/11, OATH Report & Recommendation, 2011 WL 12687937, at *11-12 (Aug. 26, 2011), *aff’d, Comm’n* Dec. & Order, 2012 WL 1657555 (Jan. 9, 2012).

[68] *See infra* Part (II)(A)(iii)(b) for a discussion of service animals in the employment context.

[69] *See infra* Part II(B)(ii)(b) for a discussion of service animals in the public accommodation context.

[70] *See infra* Part II(C)(iii)(c) for a discussion of service animals and emotional support animals in the housing context.

ii. Reasonable Accommodation Process

The NYCHRL requires three main steps in the process of making reasonable accommodations: (1) initiating the cooperative dialogue; (2) engaging in the cooperative dialogue; and (3) concluding the cooperative dialogue. Each step is described briefly here, and more details follow in the parts on housing, employment, and public accommodations.

a. *Initiating a Cooperative Dialogue*

The NYCHRL's reasonable accommodation process' cooperative dialogue requirement is initiated when: (1) an individual requests an accommodation from a covered entity; or (2) when a covered entity has notice that an individual may need an accommodation.[71] It is unlawful for a covered entity to fail to engage in a cooperative dialogue in either of these circumstances.[72]

The NYCHRL requires a "cooperative dialogue" that is a "good faith ... written or oral dialogue concerning the person's accommodation needs; potential accommodations that may address the person's accommodation needs, including alternatives to a requested accommodation; and any challenges that such potential accommodations may pose for the covered entity."[73] A cooperative dialogue is the opportunity to evaluate an individual's needs and to consider possible accommodations that would allow a person to perform the essential requisites of the job or enjoy the right or rights in question, without causing an undue hardship for the covered entity.[74]

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[71] Local Law No. 59 § 1 (2018); N.Y.C. Admin. Code § 8-107(28).
[72] N.Y.C. Admin. Code §§ 8-102, 8-107(28). *See infra* Part I(D)(ii)(h) for greater detail about failure to engage in a cooperative dialogue.
[73] N.Y.C. Admin. Code § 8-102.
[74] *Id*.

When a covered entity learns, either directly or indirectly, that an individual requires an accommodation due to their disability, the covered entity has an affirmative obligation to engage in a cooperative dialogue with the individual. The NYCHRL imposes a duty on covered entities to provide reasonable accommodations in situations where the covered entity knows or should have known about the individual's disability,[75] regardless of whether the individual explicitly requested an accommodation. Accordingly, if a covered entity has knowledge that an employee's performance at work is diminished or that their ability to use and enjoy housing or public accommodations has changed, and the covered entity has a reasonable basis to believe that the issue is related to a disability, the entity must initiate a cooperative dialogue to explore whether an accommodation may be needed. Where a covered entity initiates a conversation, the goal should be to facilitate open and exploratory conversation that invites the individual to understand their rights and fosters an environment conducive to making a request. However, a covered entity should not assume that an employee, patron, or tenant has a disability or that they need an accommodation, because acting on such an assumption could itself be unlawful discriminatory conduct. Covered entities can open a discussion by ensuring that patrons, employees, tenants, and applicants are generally aware that reasonable accommodation requests can be made at any time. If a covered entity has a specific basis for believing that an individual may require a reasonable accommodation, the covered entity may mention the observed issue (such as diminished work performance or other change) and start an open-ended conversation to assess if there is any action a covered entity can take to assist the individual.

If the person chooses not to disclose that they have a disability in that conversation, the covered entity has met their obligation to initiate a cooperative dialogue. If a covered entity approaches an individual to

[75] *Id.* § 8-107(15)(a).

initiate a cooperative dialogue and the person does not reveal that they have a disability or request a reasonable accommodation in that conversation, the individual does not waive their opportunity to reveal their disability and initiate a cooperative dialogue with the covered entity at a later time.

A covered entity has an obligation to engage in a cooperative dialogue when it knows or should know that an individual may need a reasonable accommodation. Regarding requests by individuals, a covered entity may have a preferred form or format for receiving requests for accommodations, however, if an individual makes a request for an accommodation in another format that puts the covered entity on notice of the individual's potential need for an accommodation, the covered entity is obligated to engage in the cooperative dialogue. A covered entity that has a preferred form for individuals to use to request an accommodation must also offer assistance in completing the form where such assistance is needed.

It is unlawful to take an adverse action against someone who does not volunteer information about having a disability or a need for an accommodation at the stage they initially seek services or apply for a job or housing. For example, terminating an employee because they failed to disclose their disability status or need for a reasonable accommodation prior to receiving their offer of employment is a violation of the NYCHRL.[76] Similarly, a housing provider cannot penalize a current or prospective tenant for failing to volunteer information about their disability or potential need for a reasonable accommodation at the time of applying for housing, whether a prospective tenant, resident, or buyer, except where housing has legally specified disability requirements for residency.[77] This applies to

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[76] *Hirschmann v. Hassapoyannes,* 11 Misc. 3d 265, 270 (Sup. Ct. N.Y. Cnty. 2005).

[77] *See* N.Y.C. Admin. Code § 8-107(5)(m).

all potential accommodations, including use of a service or emotional support animal.[78]

b. *Engaging in a Cooperative Dialogue*

The cooperative dialogue itself is a critical step in the reasonable accommodation process. The covered entity need not always provide the specific accommodation sought by the person making the request, so long as they propose reasonable alternatives that meet the specific needs of the individual or that specifically address the impairment at issue.[79]

A cooperative dialogue involves both a covered entity and an individual requesting an accommodation communicating in good faith in a transparent and prompt manner, particularly given the time-sensitive nature of many accommodation requests. If a covered entity offers an accommodation and the individual requesting the accommodation reasonably determines that the accommodation offered is not sufficient to meet their needs, the covered entity may not have met their obligation to engage in the cooperative dialogue. In such circumstances, the covered entity must continue to engage in the cooperative dialogue in good faith with the person to determine if there are alternatives that would meet the person's needs. Both parties must engage in the cooperative dialogue "in good faith," and as a result, an individual with a disability cannot simply reject a potential accommodation that would be sufficient to meet their needs on the basis that it is not the individual's preferred accommodation.

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[78] *Hirschmann v. Hassapoyannes*, 16 Misc. 3d 1014, 1018–20 (Sup. Ct. N.Y. Cnty. 2007), *aff'd*, 859 N.Y.S.2d 150 (1st Dep't 2008).
[79] *See Cruz v. Schriro*, 51 Misc. 3d 1203(A), at *11 (Sup. Ct. N.Y. Cnty. 2016) ("[A]n employer is not obligated to provide a disabled employee with the specific accommodation that the employee requests or prefers...").

During the cooperative dialogue, the covered entity should focus on understanding the person's need for the request and ways to effectively accommodate that need.

The cooperative dialogue requirement is flexible and contemplates a variety of formats, such as in-person conversations, written communications such as letters or emails, phone calls, or via electronic video chat or conferencing software. If a covered entity does not have enough information to understand the person's needs in order to fashion an appropriate accommodation, the covered entity may ask for additional information about the specific limitations and needs that result from the person's disability, however an overly invasive inquiry into an individual's medical history can be considered unlawful discriminatory harassment.

c. *Establishing Good Faith in a Cooperative Dialogue*

The NYCHRL requires that all parties to a cooperative dialogue engage in the dialogue in good faith.[80] This includes the covered entity and the person requesting an accommodation. In evaluating whether or not a covered entity has engaged in a cooperative dialogue in good faith with a person who is entitled to a reasonable accommodation, the Commission will consider various factors, including, without limitation: (1) whether the covered entity has a

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[80] N.Y.C. Admin. Code § 8-107(2) ("The term 'cooperative dialogue' means the process by which a covered entity and a person entitled to an accommodation, or who may be entitled to an accommodation under the law, engage in good faith in a written or oral dialogue concerning the person's accommodation needs; potential accommodations that may address the person's accommodation needs, including alternatives to a requested accommodation; and the difficulties that such potential accommodations may pose for the covered entity."); *see also* N.Y.C. Admin. Code § 8-107(28).

policy informing employees, residents, or patrons how to request accommodations based on disability;[81] (2) whether the covered entity initiated a cooperative dialogue or responded to a request in a timely manner in light of the urgency and reasonableness of the request; and (3) whether the covered entity sought to obstruct or delay the cooperative dialogue or in any way intimidate or deter the person from requesting the accommodation. An indeterminate delay may have the same effect as an outright denial.[82]

d. *Concluding a Cooperative Dialogue*

The third and final step in the cooperative dialogue process is concluding the cooperative dialogue. A cooperative dialogue is ongoing until one of the following occurs:

(1) a reasonable accommodation is provided; or
(2) the covered entity reasonably arrives at the conclusion that:
    a) there is no accommodation available that will not cause the covered entity an undue hardship;
    b) a reasonable accommodation was identified that meets the person's needs, but the person did not accept it and no reasonable alternative was identified during the cooperative dialogue; or

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[81] It is a best practice for covered entities to have a written policy that they disseminate to all employees, residents, and, if practicable for a place or provider of public accommodations, post the written policy in a conspicuous place the public has access to.

[82] *See Logan v. Matveevskii*, 57 F. Supp. 3d 234, 257 (S.D.N.Y. 2014) (finding that under the Fair Housing Act, a refusal of a request for a reasonable accommodation can be actual or constructive, and therefore an indeterminate delay has the same effect as an outright denial).

c) there is no accommodation available that will allow the person to perform the essential requisites of the job, or otherwise enjoy the rights in question.

Covered employers and housing providers must conclude every cooperative dialogue with a written final determination identifying the accommodation(s) granted or denied.[83] Failure by an employer or housing provider to provide the required written final determination to the individual requesting the accommodation is a distinct violation of the NYCHRL. There is no requirement for a written determination in the context of public accommodations, but places of public accommodation are encouraged to document in writing, especially in circumstances where the individual may have a longstanding relationship with the place of public accommodation, such as a school setting.

In most circumstances, if an individual with a disability rejects an accommodation offered by the covered entity, the covered entity should continue to engage with the individual to identify alternatives. However, if the individual rejects proposed accommodations that would not cause an undue hardship to the covered entity and would effectively meet the individual's needs and/or would allow the person to perform the essential requisites of the job and is unwilling to propose any alternative options that would address the individual's needs, the covered entity may conclude the cooperative dialogue as summarized in the preceding paragraph.

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[83] Local Law No. 59 § 2 (2018); N.Y.C. Admin. Code § 8-107(28)(d) ("Upon reaching a final determination at the conclusion of a cooperative dialogue pursuant to [subsection 28] . . . [housing providers and employers] shall provide any person requesting an accommodation who participated in the cooperative dialogue with a written final determination identifying any accommodation granted or denied.").

In a situation where there are two or more possible accommodations that equally meet the needs of a person with disabilities and one costs more or is more burdensome than the other(s), the preference of the individual requesting the accommodation should be given primary consideration, but the covered entity may choose the less expensive or burdensome accommodation. However, in situations where multiple potential accommodations have been identified, and one best enables the individual entitled to an accommodation to enjoy the right(s) in question, while the other accommodation(s) would result in more limited enjoyment of the rights in question, the covered entity must provide the accommodation that best enables full enjoyment of the right(s), unless doing so would cause an undue hardship.[84] For example, if a resident with mobility issues requests making the building where they live accessible as an accommodation, a housing provider must make the primary entrance accessible, unless doing so would cause an undue hardship.[85]

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[84] *See* N.Y.C. Admin. Code §§ 8-107(1),(4),(5),(15); 8-130.

[85] See, e.g., In re Comm'n on Human Rights ex rel. Rose v. Riverbay Corp., OATH Index No. 1831/10, Comm'n Dec. & Order, 2010 WL 8625897, at *2 (Nov. 1, 2010), modified on penalty sub nom. Riverbay Corp. v. NYC Comm'n on Human Rights, Index No. 260832/10 (Sup. Ct. Bronx Cnty. 2011) (stating that ". . . the Commission interprets the [NYCHRL] as requiring that housing providers, public accommodations and employers (where applicable), make the main entrance to a building accessible unless doing so creates an undue hardship, or is architecturally infeasible. Only then, should an alternative entrance be considered . . . [The NYCHRL] requires that every entrance or exit available to an able-bodied person be made accessible for a disabled person, assuming it would be architecturally feasible and not cause an undue hardship").

e. *Follow the Three-Step Process for Every Accommodation*

People's conditions may change over time, and individuals may make new requests for different or additional accommodations. Each time an individual makes a new request, the covered entity must begin a new cooperative dialogue with the individual. Where an accommodation proposed by an individual with a disability is immediately agreed to by a covered entity, the cooperative dialogue will consist solely of the individual with a disability making the request and the covered entity granting the accommodation; even in these circumstances, written documentation of the final determination is still required in the contexts of employment and housing.

f. *Scope of Cooperative Dialogues and Documentation for New Patrons, Housing Applicants, and Job Applicants*

The NYCHRL prohibits covered entities from expressing, directly or indirectly, any limitation, specification, or discrimination against an individual with a disability in applications or interviews. However, if an individual requests a reasonable accommodation during the application process, the covered entity is entitled to obtain the information necessary to evaluate if the requested accommodation is being sought due to a disability.[86] If a disability is readily apparent—for example, if an individual requesting a ramp is in a wheelchair—formal medical documentation or additional information is not

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[86] *See* U.S. Dep't of Hous. & Urban Dev. & U.S. Dep't of Just., Joint Statement: Reasonable Accommodations Under the Fair Housing Act (May 17, 2004), https://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/joint_statement_ra.pdf; U.S. Equal Emp. Opportunity Comm'n, *supra* note 37.

necessary to evaluate the accommodation. A covered entity may only make inquiries that will allow them to assess the individual needs of the requester and the reasonableness of the request as part of the cooperative dialogue.

g. *Scope of Cooperative Dialogues and Documentation for Existing Patrons, Residents, and Employees*

When an individual requests an accommodation, the need for which is not readily apparent, a covered entity may ask the individual to provide medical documentation, such as a note from the individual's health professional, that is sufficient to substantiate: (1) that the requester has a disability; (2) identifies the functional limitation due to the disability; and (3) explains how the requested accommodation will address the functional limitation identified.[87] Unless the exact diagnosis is necessary to determine what accommodation may be needed, a covered entity cannot require that the specific disability or diagnosis be disclosed and is only permitted to request information or medical documentation related to the impairment and need at issue. A covered entity may not ask for unrelated documentation, such as complete medical records.[88] Any information or documentation shared must be kept confidential.

In some circumstances where an individual's disability and the need for the requested accommodation is readily apparent or otherwise known to the covered entity, making additional inquiries or asking for medical documentation about the requester's disability or the

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[87] *See* U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 37. An employer may not require an employee to provide medical confirmation of pregnancy, childbirth, or related medical condition, unless it is a pregnancy-related disability.

[88] *See id*.

disability-related need for the accommodation may constitute unlawful harassment.[89]

If the requester's disability is known or readily apparent to the covered entity, but the need for the accommodation is not readily apparent or known, the entity is only permitted to request information that is necessary to evaluate how the accommodation would ameliorate the impacts of the person's disability on their ability to perform essential job duties or enjoy the rights in question.[90]

While covered entities may require medical documentation to support a request for an accommodation, they cannot require a specific *type* or *form* of documentation. Medical documentation should be considered broadly. Covered entities should focus on the content of the medical documentation and not its form. If a covered entity has reason to believe that the provided documentation is insufficient, it should not reject the accommodation request, but should instead request additional documentation or, upon the consent of the individual, speak with the health care provider who provided the documentation before denying the request for this reason. A covered entity must allow an individual to submit sufficient supplemental written verification should an individual not want the covered entity speaking with their health professional.[91]

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[89] *See supra* notes 86, 87, and 88.

[90] See *id*.

[91] "Health professional" is used in this guidance to refer to a person who provides medical care, therapy, or counseling to persons with disabilities, including, but not limited to, doctors, physician assistants, nurse practitioners, psychiatrists, psychologists, or social workers.

h. *Failure to Engage in a Cooperative Dialogue*

A covered entity's failure to engage in a cooperative dialogue with an individual requesting an accommodation is an independent violation of the NYCHRL.[92] Without engaging in a cooperative dialogue, a covered entity will be unable to completely assess the individual needs of the person requesting an accommodation. Failure to engage in a cooperative dialogue can occur if a covered entity: never responds to an individual's request for an accommodation; creates an undue delay in responding to a request; or does not initiate a dialogue when a covered entity knows or should have known about a person's need for an accommodation.

iii. Defenses to Reasonable Accommodations Claims

Potential defenses to claims of unlawful discrimination do not automatically prevent a complaint from being filed or limit the ability of the Commission's Law Enforcement Bureau ("Bureau") to conduct an investigation regarding alleged violations in absence of a complaint. When a Respondent raises one or more defenses in its Answer, the Respondent should provide sufficient evidence to substantiate the basis for each defense.

If a covered entity fails to provide an accommodation, the entity may assert, as a defense, that there is no accommodation available that will meet the needs of the individual requesting an accommodation that does not pose an undue hardship or, in the employment context, that would allow the employee to perform the essential requisites of

[92] *See supra* note 83.

the job.[93] Engaging in a cooperative dialogue is not a defense to a claim of failure to provide a reasonable accommodation.[94]

All accommodations are presumed reasonable unless the covered entity shows that they pose an undue hardship. Where a covered entity believes the initial accommodation requested by an individual would cause an undue hardship, the covered entity is required to propose one or more alternatives that would not cause an undue hardship, if such alternative(s) exist(s).[95] The covered entity has the burden to prove undue hardship by showing the unavailability of a reasonable accommodation.[96] Evidence of undue hardship is assessed by a preponderance of the evidence standard.[97]

There is no accommodation—whether indefinite leave or any other need created by a disability—that is categorically excluded from the universe of potentially reasonable accommodations under the

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[93] *See* Part II(A)(iv) for a discussion of defenses to claims of failure to provide reasonable accommodations in employment.

[94] *See supra* note 83.

[95] N.Y.C. Admin. Code § 8-102 ("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."); *see also Romanello*, 22 N.Y.3d at 884-85, (citing *Phillips*, 66 A.D.3d at 185) ("Under the City HRL . . . the concepts of 'reasonable accommodation' and 'undue hardship' are inextricably intertwined. An accommodation under Administrative Code § 8-102 . . . cannot be considered unreasonable unless the covered entity proves that the accommodation would cause undue hardship.").

[96] N.Y.C. Admin. Code § 8-102.

[97] *See In re Comm'n on Human Rights ex rel. Agosto v. Am. Construction Assocs.*, OATH Index No. 1964/15, Amended Comm'n Dec. & Order, 2017 WL 1335244, at *5 (Apr. 5, 2017).

NYCHRL because a covered entity must assess on a case-by-case basis whether a particular accommodation would cause an undue hardship in light of the specific needs and circumstances surrounding each request.[98]

PART II: NYCHRL Disability Protections in Employment, Public Accommodations, and Housing

A. Disability Protections in Employment

It is unlawful to fire or refuse to hire or promote an individual or to discriminate in the terms and conditions of employment because of an employee's actual or perceived disability.[99] Terms and conditions of employment include, but are not limited to, salary, work assignments, employee benefits, and keeping the workplace free from harassment.

Entities that must comply with the NYCHRL and are prohibited from unlawful discriminatory practices in employment include employers,

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[98] *See*, *e.g.*, *Phillips*, 66 A.D.3d at 182; *Forgione v. City of N.Y.*, No. 11 Civ. 5248, 2012 WL 4049832, at *9 (E.D.N.Y. Sept. 13, 2012); *Am. Council of the Blind v. City of N.Y.,* 579 F. Supp. 3d 539, 571-72 (S.D.N.Y. 2021).

[99] N.Y.C. Admin. Code § 8-107(1).

labor organizations,[100] employment agencies,[101] joint labor-management committees controlling apprentice training programs, or any employee(s) or agent(s) thereof.[102] The NYCHRL defines covered employers to include any entity or individual with four or more persons in their employ, or with one or more domestic workers. Independent contractors working in furtherance of a business enterprise, and an employer's spouse, domestic partner, parent, or child are included in these counts.[103]

i. Postings, Applications, and Selection Processes

a. *Job Postings and Advertisements*

Under the NYCHRL, it is unlawful for an employer to "declare, print or circulate or cause to be declared, printed or circulated any statement, advertisement or publication" which "expresses, directly or indirectly, any limitation, specification or discrimination" against individuals with disabilities, or "any intent to make any such limitation, specification or discrimination."[104] Job postings or advertisements that state physical requirements or specifications that are unrelated to the essential requisites of the job may violate the NYCHRL by directly or indirectly expressing a limitation or specification that discriminates against individuals with disabilities.

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[100] *Id.* § 8-102. ("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.").
[101] *Id.* ("The term 'employment agency' includes any person undertaking to procure employees or opportunities to work.").
[102] *Id.* §§ 8-107(1)-(2).
[103] *Id.* § 8-102.
[104] *Id.* § 8-107(1)(d).

Employers should be careful to word job postings in a way that conveys the essential requisites of the job without implicitly excluding individuals with disabilities. Furthermore, employers are encouraged to include in their advertisements a statement that informs applicants that they can request reasonable accommodation(s) for interviews and to satisfy the essential requisites of the job.

b. *Applications*

Under the NYCHRL, it is unlawful for an employer 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" against individuals with disabilities, or "any intent to make any such limitation, specification or discrimination."[105] Having an application available in only one format, such as an electronic application form only, may also violate the NYCHRL because it can limit accessibility for individuals with disabilities. To address this, the employer should be prepared to offer alternative ways to make an application. In this instance, offering a paper form or ensuring screen readability could help meet the needs of persons with low vision, as could having a staff member assist an individual with the application.

Additionally, application forms that include inquiries about an applicant's disability may violate the NYCHRL, however, there are some circumstances where such inquiries are allowed. For example, an application may include a "yes or no" question about an applicant's ability to perform essential job duties with or without an accommodation. Additionally, some federal, state, or local laws or regulations may require inquiries into disability status to determine eligibility in certain employment programs, such as those applicable to veterans with disabilities. Inquiries about disabilities may be

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[105] *Id*.

necessary under such laws to identify applicants with disabilities in order to confirm that the applicants are qualified to participate in the program.[106] In these instances, the employer may request information or documentation of the disability needed to qualify for the program. Employers are advised to ensure that any medical or disability-related information is kept confidential and in medical files separate from an employee's general personnel file to avoid unnecessarily disclosing the applicant's private medical documents and to ensure that managers and other employees are not accidentally given access to the information.[107]

c. *Interviews*

The NYCHRL's prohibitions against inquiries that express any limitation, specification, or discrimination based on an individual's disability, or the intent to do so apply to communications with prospective employees, including interviews.[108] Employers should focus their interview questions on the ability of the applicant to perform the essential requisites of the job, and the skills and experience they bring to the workplace. For example, while it may be unlawful for the employer to ask a job applicant if he has a disability, it generally is not unlawful for an employer to ask a job applicant whether he can perform the essential requisites of the job, with or without an accommodation. Employers are also required to provide reasonable accommodations for applicants during the interview process.[109]

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[106] *See* U.S. Equal Emp. Opportunity Comm'n & U.S. Dep't Of Just., Civil Rights Div., The ADA: Questions and Answers (May 2002), https://www.eeoc.gov/laws/guidance/ada-questions-and-answers.
[107] *See*, *e.g.*, 29 C.F.R. § 1630.14.
[108] N.Y.C. Admin. Code § 8-107(1)(d).
[109] *See infra* Parts II(A)(i) and IV, discussing reasonable accommodations in the pre-employment context.

d. *Selection Process After Interviews*

Employers cannot use qualification standards, employment tests, or other selection criteria that intentionally or unintentionally screen out persons with disabilities, or disproportionately screen out persons with disabilities, unless the standard, test, or other selection criteria, as used by the employer, bears a significant relationship to a significant business objective of the covered entity.[110] As such, selection criteria should be focused on the essential requisites of the job. Employers are also required to engage in the cooperative dialogue process and provide reasonable accommodations for applicants during pre-employment testing.[111]

i. Example of a Lawful Pre-Employment Test

> Applicants for an accounting position may be required to take a test of accounting knowledge. However, the employer must provide reasonable accommodations, if necessary, such as providing screen reading software for a visually impaired applicant, to ensure that all applicants are fairly assessed on the essential requisites of the job.

Generally, requiring the passage or completion of a medical exam, medical inquiry, or medical test prior to a conditional offer of employment is a violation of the NYCHRL because it expresses or implies a limitation based on an individual's disability.[112] These are

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[110] N.Y.C. Admin. Code § 8-107(17). *See supra* Part I(ii), discussing neutral policies that have a disparate impact.

[111] *See supra* Part II(A)(i) and *infra* Part IV, discussing reasonable accommodations in the pre-employment context.

[112] *See* N.Y.C. Admin. Code § 8-107(1)(d); *see also* 42 U.S.C. § 12112(d)(3).

only permissible criteria for employment if: (a) required by law; or (b) applied consistently to all prospective employees, after a conditional offer of employment, regardless of the existence of an actual or perceived disability. Even if a medical exam, medical inquiry, or medical test does not occur until after a conditional offer, it may still be unlawful if used to screen out applicants with disabilities where the exclusionary criteria is not job-related and consistent with business necessity, and performance of the essential job requisites could be accomplished with a reasonable accommodation.[113] Employers should ensure that any medical information they obtain is kept confidential and in separate medical files to avoid unnecessarily disclosing an applicant's private medical documents and to ensure that managers and other employees are not accidentally given access to the information.

ii. Procedures Related to Current Employees

The NYCHRL prohibits discrimination against current employees with disabilities in compensation, terms, conditions, or privileges of employment.[114] It also generally prohibits policies or practices that result in a disparate impact to the detriment of individuals with disabilities.[115]

Employers that require all employees holding particular jobs to undergo periodic medical examinations in the regular course of business may do so only if such periodic medical examinations are

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[113] *See*, *e.g.*, 29 C.F.R. § 1630.14(b)(3).

[114] N.Y.C. Admin. Code § 8-107(1)(a)(2).

[115] The NYCHRL does allow policies that have a disparate impact when the policy or practice bears a significant relationship to a significant business objective and an alternative that would achieve a significant business objective without a disparate impact is unavailable. *See* N.Y.C. Admin. Code § 8-107(17)(a).

narrowly focused on the employee's ability to perform the essential requisites of the job.[116] Employers should not ask employees with disabilities questions about their disabilities or ask them to undergo disability-related medical examinations in other circumstances, except under one of three circumstances: (1) when an employer has reason to believe that an employee's ability to perform the essential requisites of the job is impaired by a medical condition; (2) the employer has a reasonable basis to be concerned that an employee will pose a direct threat[117] to the safety and security of themselves, other employees, or the public due to the medical condition;[118] or (3) the employer is engaging in a cooperative dialogue to determine

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[116] *See id.* Any medical information obtained by the employer during periodic medical examinations or in any other context, such as a request for reasonable accommodations, should be kept confidential and in separate medical files to avoid unnecessarily disclosing an applicant's private medical documents and to ensure that managers and other employees are not accidentally given access to the information.

[117] The Equal Employment Opportunity Commission's (EEOC) regulations implementing the ADA define a "direct threat" as "a significant risk of substantial harm to the health or safety of others that *cannot be eliminated or reduced by reasonable accommodation*." 41 C.F.R. § 60-741.2(e). The regulations further state that "[t]he determination that an individual with a disability poses a direct threat shall be based on an individualized assessment of the individual's present ability to perform safely the essential functions of the job" and in determining whether an individual would pose a direct threat, factors to be considered include: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm. *See id.*

[118] *See* U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 37.

whether a reasonable accommodation should be provided for the employee.

Employers may make disability-related inquiries or require a medical exam when a current employee seeks to return to work after taking leave for a medical condition, if an employer has a reasonable belief that an employee's ability to perform essential requisites of the job may be impaired by a medical condition, or that they may pose a direct threat due to a medical condition. Any inquiries or examination, however, must be limited in scope to what is needed to make an assessment of the employee's ability to work.[119]

iii. Reasonable Accommodations in Employment

As discussed above in Part I(D), the NYCHRL requires covered employers to provide reasonable accommodations for an individual's disability that will allow the individual to perform the essential requisites of the job, so long as the covered entity knew or should have known of the individual's disability. An accommodation is reasonable if it can be made without causing undue hardship to the covered entity's business.[120] This part emphasizes employment-specific considerations for reasonable accommodations. Part II(B) focuses on public accommodation-specific considerations and Part II(C) focuses on housing-specific considerations.

An employer considering accommodations for current employees needs to prioritize potential accommodations that will allow an employee to remain in their current position. When that is not possible, an employer may then consider whether the employee could be reassigned to a vacant position. In considering alternative positions, an employer should consider the qualifications necessary

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[119] *See id*.

[120] *See* N.Y.C. Admin. Code § 8-102.

for the position and whether the pay, status, and benefits are equivalent to the employee's current position. When a comparable position is unavailable, an employer may then explore alternative positions that are not comparable. In circumstances in which no other accommodation can be made, a paid or unpaid leave of absence may be offered as a temporary accommodation, as discussed below.

a. *Physical Space, Assistants, and Technology*

Often, a reasonable accommodation in the employment context will involve making the workplace more accessible for individuals with disabilities. Reasonable accommodations may include obtaining equipment or technology, making changes to existing equipment, providing an assistant, making changes to workspaces or support facilities such as restrooms and cafeterias, allowing an employee to work remotely, or altering methods of communication for certain materials and information. In existing facilities, structural changes may be necessary to the extent that they will allow an employee with a disability to perform the essential requisites of the job, including access to workstations and support facilities such as restrooms and cafeterias. While employers should provide equipment that is specifically needed to perform a job, they are not obligated to provide equipment that an employee uses in daily life, such as glasses, a cane, or a hearing aid, that are readily transportable to the workplace.

Employment activities should take place in integrated settings and employees with disabilities should not be segregated into particular facilities or parts of facilities, unless the segregated setting itself is part of a reasonable accommodation.[121]

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[121] For example, a segregated setting may be a reasonable accommodation for an employee with a disability that requires a quieter workspace with less noise or fewer distractions.

Individuals with speech disabilities or sensory disabilities, such as those relating to vision or hearing, should be able to communicate effectively with others in the workspace. In some employment contexts, an interpreter, reader, or note-taker may be an effective accommodation for an employee. In other contexts, technology or equipment such as assistive listening systems and devices, screen-reader software, magnification software and optical readers, or other electronic and information technology that is accessible may enable more effective communication. In assessing accommodations, the employer should engage in a cooperative dialogue with the employee to assess their specific needs in relation to their job tasks.

b. *Service Animals*

Service animals are not pets. A service animal is an animal that does work or performs tasks for an individual with a disability.[122] Employers are required to accommodate applicants and employees with disabilities who rely on service animals by providing exceptions to "no pet" or "no animal" policies. If an employer has policies prohibiting or restricting employees' ability to bring animals to work, exceptions to these policies are required if an individual brings, or requests to bring their service animal to the workplace due to a disability, unless such exceptions would cause the employer an undue hardship.

The possibility of incidental property damage does not usually constitute an undue hardship. Where a particular animal creates legitimate health or safety concerns or creates a nuisance, the employer must engage in a cooperative dialogue with the individual using the service animal to determine potential alternatives or pathways to address the legitimate concern before denying a service animal request, removing the service animal, or taking other adverse

[122] *See supra* note 66.

action.[123] Where city, state, or federal laws prohibit ownership of certain animals and no exception or waiver is provided, it will be an undue hardship for a covered entity to permit a prohibited animal as a service animal.[124]

When an individual seeks to have a service animal with them at their workplace, and the person's disability or the need for the service animal is not apparent, the employer may ask the employee to provide a statement from a health professional indicating: (1) that the person has a disability, but the employer should note that the employee is not required to reveal their specific medical diagnosis; and (2) that the service animal is trained to perform tasks that ameliorate one or more symptoms or effects of the employee's disability. If an employee requests to use or bring a service animal as an accommodation, and if both the employee's disability and the need for the requested animal are apparent or otherwise known to the employer, the employer entity may not inquire about the employee's

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[123] *See supra* Part I(D)(ii) for a discussion on cooperative dialogue. If the animal poses a direct threat to the health or safety of, or creates a nuisance for, other individuals that cannot be eliminated or reduced to an acceptable level by another reasonable accommodation, the employer may deny the request. The employer must base such a determination upon consideration of the behavior and actions of the particular animal at issue and not on speculation or fear about the types of harm or damage an animal may cause.

[124] The New York City Health Code enumerates a list of animals that are prohibited within the City of New York. 24 N.Y.C.R.R. § 161.01, *available at* https://www.nyc.gov/assets/doh/downloads/pdf/about/healthcode/health-code-article161.pdf.

disability or need for the service animal.[125] For example, if an individual who is blind requests an accommodation for the service animal who guides them, employers may not inquire about the individual's disability, the animal's training, require medical documentation to justify the need for the service animal, or require that the individual have the service animal demonstrate the tasks it is trained to perform.

Employers may not require individuals to provide medical records or details of a disability beyond what is necessary to demonstrate the existence of a disability and the relationship between the disability and the requested accommodation.

c. *Work Structuring or Reassignment*

Job restructuring may be a reasonable accommodation for an employee with a disability and may involve reallocating or redistributing one or more non-essential job duties. For example, an employer may reassign work at an office among coworkers, eliminate non-essential tasks, reassign visits to accessible sites, or permit working outside the traditional office setting.

If an employee develops their disability after being on the job and can no longer perform some or all of the essential requisites of the job, an employer must consider reassignment of the employee to a vacant

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[125] *See supra* Part I(D)(ii)(b), discussing how in circumstances where an employee's or applicant's disability and the need for the requested accommodation is readily apparent or otherwise known to the covered entity, making additional inquiries or asking for medical documentation about the requester's disability or the disability-related need for the accommodation may constitute harassment.

position within the organization, if doing so does not constitute an undue hardship.[126]

d. *Leave, Scheduling, and Remote Work*

One type of reasonable accommodation for an employee's disability is allowing the use of accrued paid leave or unpaid leave so that the employee can return to work after the leave period and resume performing the essential requisites of the job. In some circumstances, it may be an accommodation of last resort, or it may be the only or best option for the employee's needs. Employers should allow employees to exhaust accrued paid leave first and then provide unpaid leave. Leave related to an employee's disability or as an accommodation for a disability must be administered consistently with policies for other forms of leave (including whether benefits are continued beyond any other statutory requirements to maintain benefits) that do not treat individuals with disabilities differently than other employees on leave.

In some circumstances when an employee requests leave as a reasonable accommodation, the employee, or the employee's health professional, may be able to provide a definitive date on which the employee can return to work. In some instances, however, only an approximate date or range of dates can be provided. A projected return date or range of return dates may need to be modified to account for any change in circumstances that occurs, such as when

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[126] The new position should be one that the employee is qualified to perform and that pays a comparable salary. Reassignment does not require the employer to violate a bona fide seniority system or collective bargaining agreement under which someone else is entitled to the vacant position. Reassignment should be considered only if there are no reasonable accommodations available that would allow the employee to perform the essential functions of their current job.

an employee's recovery takes longer than expected. In order to determine if such accommodations, or subsequent adjustments, cause an undue hardship, they must be evaluated on a case-by-case basis.[127]

Leave as a reasonable accommodation includes the employee's right to return to their original position in circumstances where keeping that job open for the employee does not cause an undue hardship. In many instances, an employer can reassign work tasks, schedule additional workers to cover shifts, or hire a temporary or part-time employee on an interim basis to minimize any hardship. However, if an employer determines that holding open the position for the employee on leave will cause an undue hardship, then the employer must consider whether there are alternatives that permit the employee to complete the leave and return to work in a different position.

Another type of reasonable accommodation is allowing a change in an employee's regular work schedule or working with the employee to identify potential flexible leave options for them. A flexible work schedule may also be a reasonable accommodation for an employee's disability, allowing an employee to vary their arrival or departure times or take extended lunch breaks to make medical appointments.

Additionally, allowing an employee to work remotely may be a reasonable accommodation for an employee with a disability. While many employers rely on policies that require employees to "earn the privilege" of working remotely or create blanket prohibitions on working remotely, if an employee requests to work remotely as an

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[127] *See* U.S. EQUAL EMP. EMP'T OPPORTUNITY COMM'N, EMPLOYER-PROVIDED LEAVE AND THE AMERICANS WITH DISABILITIES ACT (May 9, 2016), https://www1.eeoc.gov//eeoc/publications/ada-leave.cfm?renderforprint=1.

accommodation, the employer cannot rely on such policies and must instead engage in a cooperative dialogue and do an individualized analysis of the employee's specific work tasks to see whether the employee can perform them remotely as requested, or if other accommodations exist that might address the employee's needs. The mere fact that the employee would be working outside of the physical office space some or all of the time during a given period generally will not be sufficient to support an undue hardship defense. Employers must be able to show why that particular employee's absence from the physical office, in relation to the essential duties or tasks of their position, would constitute an undue hardship, or that the employer has offered a different accommodation that would meet the employee's needs. Employers may place some parameters on remote work accommodations such as documentation of hours or tasks completed. Employers are also permitted to approve remote work as an accommodation for a specific period of time and require the employee with the remote work accommodation to make new or supplemental requests on a periodic basis to reevaluate the employee's needs, the position, and the employer's circumstances.

iv. Defenses to a Claim of Failure to Provide Reasonable Accommodations in Employment

If a covered employer fails to provide an accommodation, it may defend its decision by asserting that there is no accommodation available that will meet the needs of the individual with the disability that does not pose an undue hardship, or that will allow the employee to perform the essential functions of the job. It is not a defense to a claim of failing to provide a reasonable accommodation that the covered entity engaged in a cooperative dialogue.[128]

[128] *See supra* note 83.

a. *Undue Hardship*

All accommodations are presumed reasonable unless the covered employer shows that they cause an undue hardship.[129] The covered employer has the burden to prove undue hardship by showing that an accommodation which does not pose an undue hardship is unavailable.[130] Evidence of undue hardship is assessed by a preponderance of the evidence standard.[131]

There is no accommodation—whether indefinite leave, workstation or workplace changes, or providing specific equipment—that is categorically excluded from the universe of reasonable accommodations under the NYCHRL because a covered employer must assess on a case-by-case basis whether a particular accommodation would cause undue hardship.[132]

In making a determination of undue hardship in employment, the NYCHRL sets forth the following non-exhaustive list of factors:

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(ies); the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility(ies);
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

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[129] *See supra* note 95.
[130] N.Y.C. Admin. Code § 8-102.
[131] *See supra* note 97.
[132] *See supra* note 98.

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.[133]

A covered employer cannot refuse to provide an accommodation just because it involves cost. Instead, the employer must consider the overall resources available to the business or agency, including the entity as a whole, available outside resources, and tax incentives. Furthermore, as undue hardship is assessed on a case-by-case basis, a specific cost may result in undue hardship for one covered employer but may not for another.[134] If a covered employer asserts that providing an accommodation will cause an undue hardship based on financial cost, it will be expected to disclose to the Commission financial documents to allow for an assessment of the alleged financial hardship. Failure to provide relevant financial information or make the requisite evidentiary showing of financial hardship could result in a finding that the proposed accommodation does not cause an undue hardship. Further, failure to provide relevant financial information pursuant to a request by the Bureau may result in an adverse finding against the employer with respect to the determination of civil penalties.

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[133] *See* N.Y.C. Admin. Code § 8-102.

[134] *See* U.S. Equal Emp. Opportunity Comm'n, Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (Oct. 17, 2002), https://www.eeoc.gov/policy/docs/accommodation.html ("Undue hardship means significant difficulty or expense and focuses on the resources and circumstances of the particular employer in relationship to the cost or difficulty of providing a specific accommodation.").

A covered employer need not provide the specific accommodation sought; rather, a covered employer may propose reasonable alternatives that meet the specific needs of the person with the disability or that specifically address the limitation at issue.[135] Moreover, a covered employer is not required to substantially change its business processes or company structure to afford an accommodation; if such a change is required, it will likely constitute an undue hardship. Similarly, a covered employer will not be required to take extraordinary financial measures, such as closing business operations or changing compensation practices, to afford an accommodation. Where it is established clearly that a necessary accommodation will pose an undue hardship due to expense, a covered employer is encouraged but not required to explore the possibility of: seeking third party funding, through a grant or other means; assisting the individual in applying for a grant to obtain the accommodation; or presenting the possibility of having the individual pay for part or all of the accommodation.[136]

Requests for accommodations that require physical changes or accommodations to a space may constitute an undue hardship if, for example, they would be architecturally infeasible.[137] In addition, if a physical change or accommodation is needed for a limited period of time because an employee has a temporary disability, the period of time for which the accommodation is needed will be considered in

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[135] *See supra* note 62.

[136] *See In re Russell v. Chae Choe*, OATH Index No. 09-2617, Comm'n Dec. & Order, 2009 WL 6958753, at *2 (Dec. 10, 2009) (holding respondent liable for failure to accommodate where removal of a tub and installation of a shower would not cost the respondent any money, since United Cerebral Palsy of New York had agreed to bear the cost).

[137] *See supra* note 85.

determining whether the time and expense to provide the accommodation would cause an undue hardship.[138]

b. *Essential Requisites of the Job*

In employment cases regarding a reasonable accommodation, the employer may raise the affirmative defense that the person aggrieved by the alleged discriminatory practice could not, even with a reasonable accommodation, satisfy the essential requisites of the job.[139] The employer has the burden of proof.[140] One way an employer can establish this is by appropriately engaging in the good faith cooperative dialogue with the employee and arriving at this conclusion.

In raising a defense based on satisfying the essential requisites of the job, an employer must show that there are no comparable positions available for which the employee is qualified that would accommodate the employee, and that a lesser position or an unpaid leave of absence is either not acceptable to the employee or would pose an undue hardship.[141] This should all be documented in the written determination that an employer is required to provide to conclude the cooperative dialogue.

Essential requisites of a job, or essential job duties, are *not* synonymous with *all* the functions of the job. In evaluating whether

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[138] *See supra* Part I(D) for additional discussion of costs related to reasonable accommodations and the undue hardship analysis.

[139] N.Y.C. Admin. Code § 8-107(15)(b).

[140] *Phillips*, 66 A.D.3d at 183.

[141] *See supra* Part II(A)(iii)(d) for a discussion on when an employer may offer an alternative position or unpaid leave as a reasonable accommodation.

certain functions of a job are considered "essential," factors including, but not limited to, the following will be considered:

- Whether the position exists for performance of that particular function;
- Whether other employees perform that function and/or whether it can be reassigned;
- Whether the function is highly specialized so that the employee in the position is hired for their specific expertise or ability to perform it;
- Whether removal or reassignment of the function would fundamentally alter the position;
- How much time is spent performing the function;
- Whether there are consequences associated with failing to perform the function;
- Whether the function is merely a requirement "on paper" or is actually required of employees; and
- Whether the function is critical to one's job performance.[142]

In making this determination, no one factor is dispositive, and a fact-specific inquiry will be conducted into both the employer's description of a job and how the job is actually performed in practice.[143] A job description or job posting, while informative, is not considered an absolute list of essential job functions. The specific day-to-day essential tasks that an employee performs will also be considered.

c. *Requested Accommodation(s) That Implicate Other City, State, or Federal Laws*

In some instances, a requested accommodation may be prohibited by federal, state, or local laws or regulations. Where the requested

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[142] *See*, *e.g.*, 29 C.F.R. § 1630.2(n).

[143] *McMillan v. City of N.Y.*, 711 F.3d 120, 126 (2d Cir. 2013).

accommodation is the only option that would address the needs of the employee, and the requestor or employer is or becomes aware of a potential waiver from the applicable law(s), rule(s), or regulation(s), the employer should explore seeking a waiver. This means attempting to contact the agency or agencies with relevant enforcement or oversight authority to ascertain whether a waiver is possible and the process for the employer to request a waiver. If a waiver is unavailable, or the process of requesting a waiver would constitute an undue hardship, that accommodation may be found to be not reasonable. Employers can explore other avenues to meet the employee's needs in that instance.

B. Disability Protections in Public Accommodations

In New York City, places and providers of public accommodations are required to provide full and equal enjoyment on equal terms and conditions to patrons. The NYCHRL prohibits unlawful discriminatory practices in public accommodations and covers entities as well as any owner, franchisor, franchisee, lessor, lessee, proprietor, manager, superintendent, agent, or employee of any place or provider of public accommodation.[144] Public accommodations 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."[145]

It is unlawful for places and providers of public accommodations, their employees, or their agents to directly or indirectly deny any person, or communicate an intent to deny any person, the services, advantages,

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[144] N.Y.C. Admin. Code § 8-107(4).

[145] *See id.* § 8-102 for the NYCHRL definition of public accommodations and relevant exceptions.

facilities, or privileges of a public accommodation because of their actual or perceived disability, or to make their patronage feel unwelcome because of their actual or perceived disability.[146]

i. Postings, Applications, and Selection Processes

a. *Postings*

Under the NYCHRL, it is unlawful for a place or provider of public accommodation to "directly or indirectly . . . make any declaration, publish, circulate, issue, display, post or mail any written or printed communication, notice or advertisement"[147] which communicates that the full and equal enjoyment of any of the accommodations would "be refused, withheld from, or denied to any person"[148] on account of their disability or that the patronage of an individual with a disability is "unwelcome, objectionable, not acceptable, undesired, or unsolicited."[149]

b. *Criteria for Use and Enjoyment of Services and Facilities*

The NYCHRL prohibits places and providers of public accommodations from directly or indirectly expressing that patronage of an individual with a disability is not welcome, as described more fully in the above section on postings.[150]

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[146] *Id*.
[147] *Id.* § 8-107(4)(a)(2).
[148] *Id.* § 8-107(4)(a)(2)(a).
[149] *Id.* § 8-107(4)(a)(2)(b).
[150] *See supra* note 147.

Individuals cannot be refused entry to, or denied the services of, a public accommodation due to their disability.[151] Similarly, it is unlawful for places and providers of public accommodations to require that individuals provide information about a disability as a basis for utilizing the services of or entering a public accommodation.[152] Additionally, while it may be unlawful for a public accommodation to ask a potential patron if they have a disability, it is not necessarily unlawful for a public accommodation to ask whether a potential patron can avail themselves of available services with or without an accommodation.[153]

ii. Reasonable Accommodations in Public Accommodations

a. *Physical Space and Technology*

Places and providers of public accommodation are required to provide reasonable accommodations for people with disabilities to allow them "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."[154] These types of accommodations can include alterations to the existing physical space and structures or the use of assistive technology, unless they cause an undue hardship. For example, in restaurants, there should be space to seat individuals that use wheelchairs. Stores, movie theaters, and other public accommodation entrances should be

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[151] The Human Rights Law permits height and weight specifications or distinctions when such action is either required by law or regulation, or permitted by regulation adopted by the Commission on Human Rights because they are reasonably necessary to allow for normal operations. *See* N.Y.C. Admin. Code §§ 8-107(4)(g), (4)(a)(1).
[152] *Id.* § 8-107(4)(a)(1).
[153] *Id*. *See also id*. § 8-107(15).
[154] *Id.* §§ 8-107(4)(a)(1)(a), (15)(a).

accessible to individuals using canes or wheelchairs, which includes the installation of ramps or lifts, unless doing so would cause the public accommodation an undue hardship. Businesses that use websites should ensure that their websites are designed to be compatible with screen-reading technology.

b. *Service Animals*

Service animals are not pets. A service animal is an animal that does work or performs tasks for an individual with a disability.[155] Public accommodations are required to accommodate new and existing patrons with disabilities who rely on service animals by providing exceptions to "no pet" or "no animal" policies. If covered entities have policies prohibiting animals, limiting the breed, types, or categories of animals allowed, or that charge fees related to patrons bringing animals, exceptions to these policies are required when an individual seeks to enter or use a public accommodation with their service animal, unless such exceptions would cause an undue hardship.

Allowing an individual to have a service animal in places of public accommodation will rarely cause an undue hardship, even where no pets are permitted. The speculative possibility of incidental property damage does not usually constitute an undue hardship. Where a particular animal creates legitimate health or safety concerns or creates a nuisance, the public accommodation must engage in a cooperative dialogue with the individual using the service animal to determine potential alternatives, or pathways to address the legitimate concern, before requiring that the patron remove the service animal or taking other adverse action.[156] Where city, state, or federal laws

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[155] *See supra* note 66.

[156] *See supra* note 123 and Part I(D)(ii) for a discussion on cooperative dialogue.

prohibit certain animals, it will be an undue hardship for a covered entity to permit that prohibited animal as a service animal.[157]

When a patron seeks to have a service animal accompany them, and the person's disability or the need for the service animal is not apparent,[158] the public accommodation may ask the patron only two (2) verbal questions to confirm that: (1) the person has a disability, although the individual does not need to disclose their specific diagnosis; and (2) the service animal is trained to perform tasks that ameliorate one or more symptoms or effects of the disability. If an individual requests to use or bring a service animal as an accommodation, and if both the individual's disability and the need for the requested animal are apparent or otherwise known to the covered entity, the covered entity may not inquire about the individual's disability or the need for the service animal. For example, if an individual who is blind requests an accommodation for the service animal who guides them, public accommodations may not inquire about the patron's disability or the animal's training, require medical documentation to justify the need for the service animal, or require that the patron show the service animal performing its task.

Public accommodations may not require patrons to provide medical records or details of a disability beyond what is necessary to demonstrate the existence of a disability and the relationship between the disability and their need for a service animal.

c. *Policies and Practices*

Places and providers of public accommodations must also provide reasonable accommodations by making exceptions or changes to

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[157] *See supra* note 124.

[158] *See supra* note 125 and Part I(D)(ii).

their policies and practices where such alterations would allow for equal and independent access for individuals with disabilities.

Places and providers of public accommodations must permit service animals, even if they otherwise prohibit pets and animals from the public accommodation. Allergies or fear of animals by fellow patrons, staff members, or providers of public accommodations generally will not be a sufficient basis for denying access or refusing service to people using service animals. For example, if a person who is allergic to dogs and a person who uses a service dog must spend time in the same room or facility, they should both be accommodated by providing services to them, if possible, in different locations within the facility. Otherwise, individuals with disabilities who use service animals cannot be isolated from other patrons. "[S]ervice animals must be harnessed, leashed, or tethered, unless the individual's disability prevents using these devices or these devices interfere with the service animal's safe, effective performance of tasks. In that case, the individual must maintain control of the animal through voice, signal, or other effective controls."[159] Hypothetical or speculative concerns about damage to property or harm to other patrons and employees are insufficient for a place or provider of public accommodation to establish an undue hardship defense.

There may be circumstances where a law or regulation prohibits the presence of all animals or particular animals, and in those instances, service animals of the prohibited type(s) may be denied entry or asked to leave. Otherwise, an individual with a disability cannot be asked to remove their service animal from the premises unless: (1) the animal is out of control, and the handler does not take effective action to control it; or (2) the animal is not housebroken or otherwise

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[159] U.S. Dep't of Justice, Civil Rights Div., Disability Rights Section, ADA Requirements: Service Animals (February 28, 2020), https://www.ada.gov/resources/service-animals-2010-requirements/.

creates a nuisance. When there is a legitimate reason to ask that a service animal be removed, staff must offer the person with a disability the opportunity to obtain the goods or service without the animal's presence.[160]

When it is not apparent whether an animal is a service animal, only limited inquiries are allowed. Public accommodations may ask *only two* questions: (1) is the animal a service animal required because of a disability; and (2) what work or task has the service animal been trained to perform. Staff *cannot* ask about the person's disability, require medical documentation, require a special identification card or training documentation for the animal, or ask that the service animal demonstrate its ability to perform a specific task.[161]

d. *Process for Requesting or Offering Reasonable Accommodations in Public Accommodations*

The determination of whether a place or provider of public accommodation has failed to provide reasonable accommodations to individuals with disabilities involves an individualized assessment of the circumstances surrounding each accommodation request and cooperative dialogue. The Commission will generally consider the following factors in assessing reasonableness and the adequacy of the cooperative dialogue: (1) the nature of the relationship between the covered entity and the individual (a longer-term relationship such as a regular client, student, member, or patient, or a shorter-term relationship, such as a one-time or infrequent customer); (2) whether the covered entity knew or should have known of the individual's disability; (3) the nature and duration of the interaction; and (4) the accommodation requested. The type of service a public accommodation provides and the community it serves will be

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[160] *See id*.

[161] *See id*.

considered in determining whether a public accommodation was on notice that a reasonable accommodation should have been made to accommodate the needs of a patron. For example, a deli would generally not be required to provide a qualified sign language interpreter for a customer who is deaf during a short and relatively simple conversation regarding a purchase. Instead, the deli should find an alternative way to effectively accommodate the customer, such as exchanging written notes. A hospital, by comparison, may be obligated to provide sign language interpretation to a patient who is deaf as a reasonable accommodation because, in order for a patient in a hospital setting to "enjoy the right or rights in question,"[162] they require in-depth, time-sensitive, and nuanced communications with medical personnel. However, there are certain types of reasonable accommodations that all public accommodations must consider regardless of an individual customer's or member's need, including service animals, accessible entrances, and means to communicate with individuals who may be deaf or hard of hearing.

iii. Defenses to a Claim of Failure to Provide Reasonable Accommodations in Public Accommodations

a. *Undue Hardship*

All accommodations are presumed reasonable unless a public accommodation shows that they would pose an undue hardship.[163] Evidence of undue hardship is assessed by a preponderance of the evidence standard.[164]

There is no accommodation—whether structural change to a store or venue, amendments to or exemptions from existing policies, or

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[162] N.Y.C. Admin. Code § 8-107(15)(a).
[163] *See supra* note 95.
[164] *See supra* note 97.

providing specific equipment—that is categorically excluded from the universe of reasonable accommodations under the NYCHRL because a public accommodation must assess, on a case-by-case basis, whether a particular accommodation would cause undue hardship.[165] A public accommodation claiming an undue hardship has the burden to prove there is no reasonable accommodation available to meet the person's needs.[166]

b. *Requested Accommodation(s) That Implicate Other City, State, or Federal Laws*

In some instances, a requested accommodation may conflict with federal, state, or local laws or regulations. Where the requested accommodation is the only option that would allow a patron full enjoyment of the right(s) in question, and the requestor or the public accommodation is aware of or becomes aware of a potential waiver from the applicable laws, rules, or regulations, the public accommodation should explore seeking a waiver. This means attempting to contact the agency or agencies with relevant oversight or enforcement authority to ascertain whether a waiver is possible and the process for requesting a waiver. For example, if an individual requests that a public accommodation make its only entrance accessible by constructing a ramp, but the initial survey indicates that a compliant ramp cannot be installed due to building codes, the public accommodation should contact the agency responsible for enforcing building codes to see if it is possible to request a waiver of the applicable rule and, if so, how to engage in the waiver process. If a waiver is unavailable, the potential conflict of providing an accommodation that would violate another law may be an undue hardship. Public accommodations can explore other avenues to meet the patron's needs in that instance.

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[165] *See supra* note 98.

[166] N.Y.C. Admin. Code § 8-102.

C. Disability Protections in Housing

It is unlawful to refuse to sell, rent, or lease housing or to misrepresent the availability of housing to someone because of their actual or perceived disability.[167] It is also unlawful to set different terms, conditions, or privileges for the sale, rental, or lease of housing, such as providing different housing amenities or restricting access to building amenities, because of an individual's actual or perceived disability.[168]

The NYCHRL prohibits unlawful discriminatory practices in housing, and covers housing providers including the "owner, lessor, lessee, sublessee, assignee, or managing agent of, or other person having the right to sell, rent or lease or approve the sale, rental or lease of a housing accommodation, constructed or to be constructed, or an interest therein, or any agent or employee thereof."[169] Covered housing providers also include real estate brokers, real estate salespersons, or employees or agents thereof.[170] The NYCHRL defines the term "housing accommodation" to include "any building, structure, or portion thereof which is used or occupied or is intended, arranged or designed to be used or occupied, as the home, residence or sleeping place of one or more human beings," and generally includes publicly-assisted housing.[171]

The NYCHRL exempts only two types of housing from its provisions related to disabilities in housing, and the exemptions are construed narrowly:

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[167] *Id.* § 8-107(5)(a)(1).
[168] *Id.* § 8-107(5)(a)(1)(b).
[169] *Id.* § 8-107(5).
[170] *Id*.
[171] *Id.* § 8-102.

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.[172]
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.[173]

i. Postings

Under the NYCHRL, it is generally unlawful for a housing provider to "declare, print or circulate or cause to be declared, printed or circulated any statement, advertisement or publication" for "the purchase, rental or lease of . . . a housing accommodation or an interest therein" which "expresses, directly or indirectly, any limitation, specification or discrimination" against individuals with disabilities or "any intent to make any such limitation, specification or discrimination."[174]

ii. Applications and Selection Criteria

Under the NYCHRL, it is generally unlawful for a housing provider to "use any form of application for the purchase, rental or lease" of "a housing accommodation or an interest therein or to make any record

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[172] *Id.* § 8-107(5)(a)(4).
[173] *Id*.
[174] *Id.* § 8-107(5)(a)(2).

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" against individuals with disabilities, or "any intent to make any such limitation, specification or discrimination."[175] Applications and selections should instead focus inquiries on an applicant's ability to meet the requirements of the tenancy.

There are, however, a narrow set of circumstances in which a housing provider may inquire about a housing applicant's disability. For example, if a dwelling is legally available only to persons with a disability or to individuals with a particular type of disability, a housing provider may inquire about an applicant's disability status.[176] The housing provider should not, however, ask applicants if they have other types of medical conditions. Additionally, if an applicant's qualifying disability or need for accessible features is not readily apparent, the housing provider may only request information or documentation limited to what is necessary to demonstrate the applicant lives with the disability needed to qualify for the housing. However, it would be unlawful for housing providers to require medical documentation where the applicant has otherwise provided sufficient evidence of disability. Where a housing provider is inquiring about an individual's disability permissibly, the provider must explain why they are requesting this information. Any medical information obtained by the housing provider should be kept confidential.

iii. Reasonable Accommodations in Housing

It is important to note the breadth of the definition of housing accommodation under the NYCHRL, which includes, but is not limited to: market rate, rent stabilized, and rent controlled apartments;

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[175] *Id*.

[176] *See id.* § 8-107(5)(m).

condominiums; housing cooperatives; shelters; and supportive housing.[177] A reasonable accommodation in housing provides[178] an individual with a disability an equal opportunity to apply for, obtain recertification for, use, and enjoy a dwelling, including public and common use spaces.[179] This may involve a structural change to the physical space, or an exception or adjustment to a policy or practice. In considering accommodations for tenants or residents with disabilities, a housing provider's first obligation is to accommodate the individual so that they may remain in their current unit. When that is not possible, or would constitute an undue hardship, a housing provider may then consider whether the resident may be relocated to an accessible unit, or other potential accommodations that may allow the resident to equally use and enjoy their home.[180]

If a housing provider is required to make a reasonable accommodation for a tenant's disability, the housing provider generally is prohibited from passing, directly or indirectly, any portion

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[177] *Id.* § 8-107(2) ("The term 'housing accommodation' includes any building, structure or portion thereof that 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 includes a publicly-assisted housing accommodation.").

[178] The NYCHRL requires housing providers to grant reasonable accommodations that would enable a resident equal use and enjoyment of their housing unit. *See In re Comm'n on Human Rights ex rel. L.D. v. Riverbay Corp.*, 2011 WL 12687937, at *12.

[179] The NYCHRL does not make a distinction between modifications in common areas and non-common areas in apartment buildings.

[180] If a tenant is in a rent-stabilized or rent-controlled unit, the housing provider should make every reasonable effort to relocate the tenant to another rent-stabilized or rent-controlled unit.

of the cost of providing the reasonable accommodation onto the tenant through any fee, rent increase, or other charge.[181] Furthermore, once an accommodation is made, under the NYCHRL, a housing provider cannot require a tenant to restore the housing back to its original condition at the end of the tenancy or pass the cost of doing so onto the tenant.[182] Owners and shareholders of coops and condominiums are not required to cover costs for interior modifications of units owned by others in the coop or condominium, but must not inappropriately hinder interior modifications intended to make a unit accessible for an individual with a disability.

a. *Physical Space and Technology*

A reasonable accommodation will often involve making the housing accommodation more accessible for individuals with disabilities, either through alterations to the existing physical space and structures, or through the installation and/or use of technology, at the housing provider's expense.[183] Housing providers cannot require the tenant or

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[181] *See Phillips*, 66 A.D.3d at 177 n.5 (stating that "the City HRL . . . requires the housing provider to make the change, and does not shift the cost to the person with a disability (unless the housing provider demonstrates undue hardship)"); *see also In re Comm'n on Human Rights ex rel. Blue v. Jovic*, , 2017 WL 2491797, at *18 ("Consistent with §§ 8-102(18) and 8-107(15)(a) of the NYCHRL, Respondent . . . shall bear the full cost of providing the reasonable accommodation and is prohibited from passing directly or indirectly any portion of that expense onto Complainants through any fee, rent increase, or other charge.").

[182] N.Y.C. Admin. Code § 8-107(15).

[183] Unlike the Fair Housing Act, under which housing providers are only responsible for the cost of reasonable physical accommodations in buildings built after March 13, 1991, *see* 24 C.F.R. § 100.205, all

resident to agree to restore the housing accommodation or unit to its original structure when they vacate the unit, however, owners of condominium units and coop unit shares can be required to pay for the cost of an accommodation that is inside their unit.

If the main entrance to a building is not accessible and the housing provider receives an accommodation request, the housing provider must explore how to make the entrance accessible.[184] This may involve building a ramp; installing an electric door that opens automatically; installing a lift; installing intercoms or doorbells that light up instead of make sound; or issuing hard keys to individuals who have greater difficulty accessing doors with electronic key fobs. Under the NYCHRL, it is a best practice for housing providers to make every entrance or exit accessible to the extent that such alterations do not pose an undue hardship, where a tenant has made such a request.[185] If a main entrance cannot be made accessible because doing so would constitute an undue hardship, the housing provider must consider whether an alternative entrance could be made accessible.

It is impermissible for a housing provider to determine that a front entrance cannot be made accessible due to aesthetic concerns

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housing providers are responsible for the cost of reasonable physical accommodations to their buildings under the NYCHRL (although condo and coop boards are only responsible for the cost of accommodations in common areas). *See In re Comm'n on Human Rights ex rel. Blue v. Jovic*, , 2017 WL 2491797, at *17.

[184] Some factors that may be considered in determining whether a housing accommodation's entrance is a main entrance include the location of security, mailboxes, and the lobby area, access to elevators and other amenities in the building, and the area the residents consider the main entrance.

[185] *See In re Comm'n on Human Rights ex rel. Rose v. Riverbay* Corp., 2010 WL 8625897, at *2 n.1.

unrelated to legal requirements. Even where aesthetic concerns are tied to other laws or rules, such as those regarding landmark preservation, the housing provider should explore seeking a waiver if the requested accommodation is the only option that would allow a resident full enjoyment of the right(s) in question, and the requestor or the housing provider is aware of or becomes aware of a potential waiver from the applicable laws or rules.[186]

Apartment units and common spaces may be configured in a way that makes it extremely difficult or impossible for a resident with a disability to navigate or perform day-to-day activities such as bathing, cooking, or sleeping. In such circumstances, housing providers must provide alterations, such as widening doorways, installing grab bars to a bathtub, installing a roll-in shower, changing doorknobs and doorbells, or adjusting the location of appliances or other fixtures, unless such alterations pose an undue hardship.

When a housing accommodation has an elevator outage, it is a best practice for the housing provider to give notice of the disruption and provide a timeframe for the disruption to all residents. Reasonable accommodations for residents with disabilities who will be unable to use, access, or exit their dwelling due to the elevator outage or construction may include: relocating a resident to the ground floor if an apartment of suitable size to meet the resident's needs is available; relocating a resident to another building if the housing provider has multiple buildings on one site; relocating a resident to another complex; paying any reasonable moving expenses; paying for a hotel or other residential option; providing services (*i.e.*, grocery delivery or mail delivery to the individual); providing assistance to navigate the stairs; providing rent abatement if the resident cannot safely access or exit the apartment; or a combination of multiple items

[186] *See infra* Part II(C)(iv)(b) for additional discussion of waivers in the housing context.

listed above, provided that doing so will not cause the housing provider an undue hardship.[187]

b. *Policies and Practices*

Housing accommodations may also provide reasonable accommodations by making exceptions or changes to their policies and practices. This can include exemptions or modifications to policies requiring payments be made via specific methods; limiting the places and ways in which tenants or residents dispose of garbage; and regulating the use of common spaces or equipment, such as communal laundry facilities.

c. *Service Animals and Emotional Support Animals*

Housing providers are required to reasonably accommodate persons with disabilities who rely on service animals or emotional support animals by providing exceptions or making modifications to "no pet" or "no dog" policies. If housing providers have "no pets" policies, charge pet fees, or have breed, weight, or size restrictions on pets, they must make exceptions or modifications to these policies in situations in which a resident requests to keep a service animal or emotional support animal in their housing unit due to a disability, unless doing so would cause the housing provider an undue hardship.

Service animals and emotional support animals are not pets. Housing providers are required to accommodate residents with disabilities who rely on service animals and emotional support animals by providing exceptions to "no pet" or "no animal" policies. A service animal is an

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[187] *See*, *e.g.*, *Bentley v. Peace and Quiet Realty 2, LLC*, 367 F. Supp. 2d 341 (E.D.N.Y. 2015); *Birdwell v. Avalon Communities, Inc.*, 742 F. Supp. 3d 1024 (N.D. Cal. 2024); *Holland v. Related Companies, Inc.*, 2015 WL 4498776 (N.D. Cal. Jul. 23, 2015).

animal that does work or performs tasks for an individual with a disability.[188] An emotional support animal is not a pet, it serves as a reasonable accommodation that allows a resident to use and enjoy housing as other tenants do.[189] If housing providers have “no pet” or “no animal” policies, charge pet fees, or have breed, weight, or size restrictions on pets, exceptions to these policies are required when a resident asks to have a service animal or an emotional support animal in their unit, unless such exceptions would cause an undue hardship.

Allowing a resident to have a service animal or emotional support animal in their unit rarely will cause an undue hardship, even where there is a “no pet” policy. The possibility of incidental property damage does not usually constitute an undue hardship. Where a particular animal creates legitimate health or safety concerns or creates a nuisance, the housing provider must engage in a cooperative dialogue with the person using the service animal to determine potential alternatives or pathways to address the legitimate concern, before requiring that the resident remove the service animal or emotional support animal or taking other adverse action.[190] Where city, state, or federal laws prohibit ownership of certain animals and no exception or waiver is provided, it will be an undue hardship for a covered entity to permit the prohibited animal as a service or emotional support animal.[191]

When a resident seeks to have an service animal, and the person’s disability or the need for the service animal is not apparent,[192] the covered entity may ask that the person provide a statement from a

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[188] *See supra* note 66.

[189] *See supra* note 67.

[190] *See supra* note 123 and Part I(D)(ii) for a discussion on cooperative dialogue.

[191] *See supra* note 124.

[192] *See supra* note 125 and Part I(D)(ii).

health professional[193] indicating that: (1) the person has a disability, but the housing provider should note that the individual is not required to disclose their specific medical diagnosis; and (2) the service animal is trained to perform tasks that ameliorate one or more symptoms or effects of the disability. Similarly, when either a resident's disability or the need for a requested emotional support animal is not apparent,[194] the housing provider may ask that the resident provide a statement from a health professional indicating that: (1) the resident has a disability, but the housing provider should note that the individual is not required to disclose their specific diagnosis; and (2) an animal provides emotional support or other assistance that does or would ameliorate one or more symptoms or effects of the disability.
If an individual requests to use or bring a service animal or emotional support animal as an accommodation, and if both the individual's disability and the need for the requested animal are apparent or otherwise known to the covered entity, the covered entity may not inquire about the individual's disability or the need for the service animal. For example, if an individual who is blind requests an accommodation for the service animal who guides them, housing providers may not inquire about the person's disability, the animal's training, require medical documentation to justify the need for the service animal, or require that the individual demonstrate the animal's ability to perform its task.

Housing providers may not require individuals to provide medical records or details of a disability beyond what is necessary to demonstrate the existence of a disability and the relationship between the disability and the requested accommodation. Housing providers are permitted to request limited information regarding the animal's vaccinations, and to ask for photographs of the animal for identification.

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[193] *Id*.

[194] *Id.*

d. *Relocation*

Where a reasonable accommodation in a person's existing unit is not possible given certain structural limitations of the building, the housing provider must consider alternative accommodations. Alternatives may include a temporary or permanent relocation of the resident to a different apartment building within the housing provider's control, or to a different apartment within the same building. However, relocation, particularly to a different building, is generally an accommodation of last resort. A resident is not required to relocate if a physical modification to their unit is available and does not pose an undue hardship for the housing provider.

iv. Defenses to a Claim of Failure to Provide Reasonable Accommodations in Housing

If a covered housing provider fails to provide an accommodation, it may defend its decision by asserting that there is no accommodation available that will meet the needs of the individual with a disability that does not pose an undue hardship, or that allows the tenant or resident to enjoy the rights in question. It is not a defense to a reasonable accommodation claim that the covered entity engaged in a cooperative dialogue.[195]

a. *Undue Hardship*

All accommodations are presumed reasonable unless the covered housing provider shows that they pose an undue hardship.[196]

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[195] N.Y.C. Admin. Code § 8-107(28)(f); Local Law No. 59 (2018).
[196] *See supra* note 95.

Evidence of undue hardship is assessed by a preponderance of the evidence standard.[197]

There is no accommodation—whether structural change to a unit, entrance or common space, changes to or exemptions from existing policies, or providing specific equipment—that is categorically excluded from the universe of reasonable accommodations under the NYCHRL because a covered housing provider must assess on a case-by-case basis whether a particular accommodation would cause undue hardship.[198] A covered housing provider claiming an undue hardship has the burden to prove undue hardship by showing that no reasonable accommodation is available.[199]

b. *Requested Accommodation(s) That Implicate Other City, State, or Federal Laws*

In some instances, a requested accommodation may conflict with federal, state, or local laws or regulations. Where the requested accommodation is the only option that would address the needs of an individual, and the requestor or housing provider is aware or becomes aware of a potential waiver from applicable laws, rules, or regulations, the housing provider should explore seeking a waiver. This means attempting to contact the relevant oversight or enforcement authority to ascertain whether a waiver is possible and the process for the housing provider to request a waiver. For example, if an individual requests that a housing provider make the building where the individual lives accessible by constructing a ramp, but the initial survey indicates that a compliant ramp cannot be installed due to building codes, the housing provider should contact the agency responsible for enforcement of building codes to see if it is possible to

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[197] *See supra* note 97.

[198] *See supra* note 98.

[199] N.Y.C. Admin. Code § 8-102.

request a waiver of the applicable rule and, if so, how to engage in the waiver process. If a waiver is unavailable or the process of requesting a waiver would constitute an undue hardship, that accommodation may be found to be not reasonable.

PART III: Additional NYCHRL Disability Protections

A. Retaliation

The NYCHRL prohibits retaliation against an individual for opposing discrimination.[200] The purpose of the retaliation provision is to enable individuals to speak out against discrimination and to freely exercise their rights under the NYCHRL. Freedom from retaliation helps ensure that individuals needing accommodations will request them and promotes a culture where people are not afraid to exercise their rights. Retaliating against an individual because they opposed discrimination based on disability or perceived disability or requested a reasonable accommodation is a violation of the NYCHRL.

A covered entity may not retaliate against an individual because they engage in protected activity, including: (1) opposing any discriminatory practice prohibited by the NYCHRL; (2) filing a complaint or testifying or participating in any proceeding brought under the NYCHRL; (3) commencing a civil action alleging an unlawful discriminatory practice under the NYCHRL; (4) assisting the Commission or the corporation counsel in an investigation commenced pursuant to the NYCHRL; (5) requesting a reasonable accommodation; or (6) providing any information to the Commission pursuant to the terms of a conciliation agreement made pursuant to § 8-115 of this Chapter.[201] In order to establish a *prima facie* retaliation

[200] *Id.* § 8-107(7).
[201] *Id*.

claim, an individual must show that: (1) the individual engaged in a protected activity; (2) the covered entity was aware of the activity; (3) the individual suffered an adverse action; and (4) there was a causal connection between the protected activity and the adverse action.[202]

When an individual opposes what they believe in good faith to be unlawful discrimination, it is illegal to retaliate against the individual even if the conduct they opposed ultimately is determined not to violate the NYCHRL. For example, if an employee experiences an adverse action for raising concerns to their employer about the treatment of a colleague with disabilities, even if the treatment of the colleague does not amount to discrimination, the employee may have a claim for retaliation.[203]

An action taken against an individual that is reasonably likely to deter them or others from engaging in similar protected activities is considered unlawful retaliation. The adverse action need not rise to the level of a final action or a materially adverse change to the terms and conditions of employment, housing, or participation in a program or use of a public accommodation to be retaliatory under the NYCHRL.[204] The action could be as severe as termination, demotion, removal of job responsibilities, or eviction, but could also be relocating an employee to a less desirable part of the workspace, shifting an employee's schedule, failing to grant an accommodation, or failing to make repairs in a resident's unit.

An individual needing an accommodation for their disability must be able to seek assistance and engage in a cooperative dialogue with covered entities without fear of adverse consequences for making the request. It is unlawful retaliation under the NYCHRL for a covered

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[202] *Id*.

[203] *See, e.g.*, *Albunio v. City of N.Y.*, 16 N.Y.3d 472 (2011).

[204] N.Y.C. Admin. Code § 8-107(7).

entity to retaliate against an individual for requesting a reasonable accommodation on their own behalf or on behalf of someone else.[205] Additionally, claims for disability discrimination under the NYCHRL may be based on a failure to provide a reasonable accommodation.[206] Therefore, it would be retaliation for a covered entity to take an adverse action against an individual with a disability for making a complaint alleging a failure to provide a reasonable accommodation.[207]

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[205] *Id*.

[206] *Id.* § 8-107(15)(a).

[207] *See Piligian v. Icahn School of Medicine at Mount Sinai*, 490 F. Supp. 3d 707, 722-23 (S.D.N.Y. 2020).

i. Examples of Retaliation

- An employee is diagnosed with cancer and speaks to her employer about a reasonable accommodation that would allow her to attend regular appointments for treatment. Her employer fails to engage in a cooperative dialogue and ignores her request. The employee submits an internal complaint with Human Resources regarding her employer's failure to accommodate. When the employer learns of the employee's complaint, he demotes her.
- A tenant informs his landlord of his need to keep an emotional support animal in his apartment as a reasonable accommodation for his disability. While the landlord routinely approves such requests, she denies the request because the tenant had testified on behalf of another tenant's case alleging discrimination.

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

B. Associational Discrimination

i. Associational Disparate Treatment Claims

The NYCHRL's anti-discrimination protections extend to prohibiting unlawful discriminatory practices based on a person's relationship to or association with a person with an actual or perceived disability.[208] The Law does not require a familial relationship for an individual to be protected by the association provision; the relevant inquiry is whether the covered entity was motivated by the individual's relationship or association with a person who has a disability.

To establish a disparate treatment claim of associational discrimination based on disability under the NYCHRL, an individual must show that: (1) the covered entity knew of the individual's relationship or association with a person with an actual or perceived disability; (2) the individual suffered an independent injury, separate from any injury the person with a disability may have suffered;[209] and (3) the covered entity treated the individual less well and was at least in part motivated by discriminatory animus.[210] An individual may show this through direct evidence of discrimination. Alternatively, if an individual complainant provides evidence that would support an inference of discrimination, the burden shifts to the respondent to

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[208] N.Y.C. Admin. Code § 8-107(20).

[209] *Id. See Bartman v. Shenker*, 5 Misc. 3d 856, 860 (Sup. Ct. N.Y. Cnty. 2004); *Jing Zhang v. Jenzabar, Inc.*, No. 12 Civ. 2988, 2015 WL 1475793, at *12 (E.D.N.Y. Mar. 30, 2015) ("To maintain a claim for association discrimination, [plaintiff] must simply allege that it suffered an independent injury because of its relationship with [a person] who alleges unlawful discriminatory practices related to her terms, conditions, or privileges of employment.").

[210] *See In re Comm'n on Human Rights ex rel. Blue v. Jovic*, 2017 WL 2491797, at *9.

advance a legitimate, non-discriminatory reason for its actions. If a respondent is able to do so, the burden shifts back to the individual to demonstrate that discriminatory animus was at least a factor in the underlying treatment.[211]

The prohibition against associational disability discrimination prevents covered entities from taking adverse actions against individuals who associate with people who have disabilities based on unfounded stereotypes and assumptions. This means that a covered entity may not take adverse action based on unfounded concerns about the known disability of a family member or anyone else with whom the applicant, employee, or customer has a relationship or association.

ii. Associational Reasonable Accommodations Claims

A covered entity's failure to provide reasonable accommodations to an individual with a disability can cause harm to people beyond the individual. For example, caretakers, parents, children, or other persons related to or associated with an individual with a disability and who also have a relationship to the covered entity—*e.g.* as the co-tenant of the individual with a disability—may suffer independent harm as a direct result of the covered entity's failure to provide a reasonable accommodation. Such harms may include, but are not limited to, emotional distress and other damages associated with having to live without the accommodation. Therefore, if an individual

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[211] *Id. See Manon v. 878 Educ., LLC*, No. 13 Civ. 3476, 2015 WL 997725, at *6 (S.D.N.Y. Mar. 4, 2015) (holding that a complainant need not establish that but for her association with a person with a disability, the adverse action would not have occurred; rather, the NYCHRL standard for associational disability discrimination is far less onerous; a complainant need only point to a medical impairment and establish that discrimination was a motivating factor in the adverse action).

with a disability is unlawfully denied a reasonable accommodation, their relative or associate may also have an associational claim for failure to accommodate under the NYCHRL.[212]

To establish a claim of associational discrimination for failure to accommodate under the NYCHRL, an individual must show that: (1) the covered entity knew of the individual's relationship or association with a person with an actual or perceived disability; (2) the individual suffered a direct, independent injury as a result of the respondent's failure to provide a reasonable accommodation;[213] (3) a reasonable accommodation would enable the individual to use or enjoy a housing accommodation or public accommodation or to perform the essential

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[212] *See*, *e.g.*, *In re Comm'n on Human Rights ex rel. Blue v. Jovic*, 2017 WL 2491797, at *10; *In re Comm'n on Human Rights ex rel. Torres v. Prince Mgmt. Corp.*, OATH Index No. 301/98, OATH Report & Recommendation, 1997 WL 1129224, at *6 (Aug. 14, 1997), *adopted by*, Comm'n Dec. & Order, 1997 WL 34613064 (Oct. 27, 1997) (awarding damages to mother for independent injury arising from failure to accommodate children with disabilities); *accord Loeffler v. Staten Island Univ. Hosp.*, 582 F.3d 268, 278 (2d Cir. 2009) (reinstating NYCHRL claim of children who suffered a direct, independent injury because of the need to provide sign-language interpretation services to their parent with disabilities when hospital failed to provide reasonable accommodation). "A claim of associational discrimination under § 8-107(20) of the NYCHRL based on a failure to provide a reasonable accommodation is essentially the same as a claim for failure to accommodate under § 8-107(15) . . ." *In re Comm'n on Human Rights ex rel. Blue v. Jovic*, 2017 WL 2491797, at *10.

[213] *See In re Comm'n on Human Rights ex rel. Blue v. Jovic*, 2017 WL 2491797, at *10.

functions of their job; and (4) the covered entity has failed to provide an accommodation.[214]

a. *Examples of Associational Reasonable Accommodation Claims*

- A tenant who lives with her daughter requested that the landlord replace her bathtub as a reasonable accommodation for her daughter's disability. The landlord's failure to provide a reasonable accommodation caused the tenant to strain her back while helping her daughter in and out of the bathtub and created tensions in her relationship with her daughter, due to difficulties involved in bathing her safely.[215]
- A covered employer refuses to promote an employee because they are aware that the employer's spouse has a disability, and the employer is afraid the employee will not be able to give sufficient attention to the expanded role.
- A daycare refuses to take the children of a family with deaf parents because of concerns about how it will communicate with the parents regarding the needs of the children.

C. Discriminatory Harassment

The NYCHRL prohibits discriminatory harassment motivated by a person's actual or perceived disability.[216] Discriminatory harassment occurs when someone uses or threatens to use force against a victim

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[214] *See id. See also Nieblas-Love v. N.Y.C. Hous. Auth.*, 165 F. Supp. 3d 51 (S.D.N.Y. 2016) (discussing failure to provide reasonable accommodation in the employment context).

[215] *In re Comm'n on Human Rights ex rel. Blue v. Jovic*, 2017 WL 2491797, at *11.

[216] N.Y.C. Admin. Code §§ 8-602–8-604.

because of the victim's actual or perceived disability and interferes with their "exercise or enjoyment" of constitutional rights. Discriminatory harassment also occurs when someone damages or destroys another person's property because of their disability. Individuals can be found to violate the discriminatory harassment provisions of the City Human Rights Law even if they are not covered employers, housing providers, or places of public accommodation.

i. Examples of Discriminatory Harassment

- An individual who uses a cane due to a mobility disability is walking home from work. Two men who are approaching him on the sidewalk point at him and laugh, yelling insults such as "deformed" and "gimp." When the individual ignores them and continues on his way, one of the men kicks his cane out of his hand, while the other pushes him to the ground.
- An individual who uses a wheelchair is seated in an accessible area of a courtyard. Another patron is seated near her. When he sees her, he gets up, stands over her, and says, "Can you find somewhere else to park yourself? You're in my way. Move your stupid chair out of the way or I'll push you out of here myself," and hits the wheel of her wheelchair.

In these examples, the individual who threatened or perpetrated harm can be found liable for violating the NYCHRL.

PART IV: Enforcement of the City Human Rights Law and Contacting the Commission on Human Rights

Individuals interested in vindicating their rights under the NYCHRL can choose to file a complaint with the Commission's Law Enforcement Bureau within one (1) year of the discriminatory act,

except for complaints alleging gender-based harassment, which can be filed with the Commission within three (3) years, or they may file a complaint alleging violations of any portion of the NYCHRL in court within three (3) years of the discriminatory act.

When the Bureau investigates a covered entity based on a claim of a violation of the NYCHRL, the covered entity is strongly encouraged to cooperate immediately with the Bureau. The Bureau may, in its discretion, resolve the matter via early intervention by working with the aggrieved individual and a covered entity to resolve the issue the individual is experiencing. The Bureau and the parties must all agree to participate in an early intervention, which can provide expedited relief where violations are ongoing, among other factors. Such early interventions can include identifying an accommodation that meets a person's needs and does not pose an undue hardship to the covered entity. Where allegations of discrimination ultimately are addressed through filed complaints, a covered entity's early, full cooperation could serve to mitigate penalties and damages.

Individuals who feel they have experienced discrimination can contact the Commission in a number of ways:

1. Telephone: Individuals can call the Commission directly at (212) 416-0197, or they can call 311 and ask to speak with "Human Rights".

2. Website: Individuals can visit the Commission's website at https://www.nyc.gov/site/cchr/index.page, and they can file report discrimination on the Commission's website at, https://www.nyc.gov/site/cchr/about/report-discrimination.page.

3. Individuals can also come to one of the Commission's five borough offices, including the Commission's central office, which is located at 22 Reade Street, New York, NY 10007.