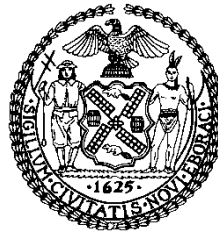


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## THE COUNCIL

### Committee Report of the Governmental Affairs Division

Robert Newman, Legislative Director  
Alix Pustilnik, Deputy Director, Governmental Affairs

#### COMMITTEE ON CIVIL RIGHTS

Hon. Deborah Rose, Chair

**Tuesday, August 16, 2011**

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**Proposed Int. No. 632:** By Council Members Weprin, Chin, Fidler, James, Koslowitz, Van Bramer and Rose

**Title:** A Local Law to amend the administrative code of the city of New York, in relation to unlawful discriminatory practices.

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## **I. Introduction**

On Tuesday, August 16, 2011, the Committee on Civil Rights, chaired by Council Member Deborah Rose, will vote on Proposed Introductory Bill Number 632-A (“Prop. Int. No. 632-A”), a Local Law to amend the administrative code of the city of New York, in relation to unlawful discriminatory practices. The Committee previously held a hearing on Introductory Bill Number 632 (“Int. No. 632”) on June 30, 2011.

## **II. Background**

New York City’s Human Rights Law (“City Human Rights Law”) is one of the strongest human rights laws in the country, providing protections from discrimination in employment, housing and public accommodation. Because the law is intended to be more liberally construed than similar state and federal laws,<sup>1</sup> adjudicators generally treat it as such. The City Human Rights Law prohibits discrimination in the workplace on the basis of an employee’s or prospective employee’s membership in a protected class. Protected classes include age, race, creed, color, national origin, gender, disability, marital status, partnership status, sexual orientation, alienage, citizenship status, or religious observance.<sup>2</sup> Specifically, employers cannot base hiring, firing or employment terms on an employee or prospective employee’s actual or perceived membership in a protected class.<sup>3</sup> Additionally, employers are prohibited from making any statement expressing prejudice or preference as to protected classes of persons.<sup>4</sup>

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<sup>1</sup> New York City Council’s Committee on General Welfare, Committee Report on Prop. Int. No. 22-A, 2 (Aug. 17, 2005).

<sup>2</sup> See Administrative Code of the City of New York §8-107(1), (3); New York City Commission on Human Rights, *Protected Classes Under the NYC Human Rights Law*, at <http://www.nyc.gov/html/cchr/html/aunderthelaw.html> (last visited June 29, 2011).

<sup>3</sup> See Admin. Code §8-107(1)(a).

<sup>4</sup> See Admin. Code §8-107(2)(a).

### **III. Protections from Religious Discrimination in the Workplace**

Under the City Human Rights Law, an employer cannot require an employee to violate a religious belief as a condition of obtaining or retaining employment.<sup>5</sup> Additionally, an employer must provide a reasonable accommodation to an employee's religious observance.<sup>6</sup> A "reasonable accommodation" is any accommodation to an employee's religious observance that does not cause undue hardship in the conduct of the employer's business.<sup>7</sup> If denying an employee an accommodation for religious observance, the burden is on the employer to establish the hardship.<sup>8</sup> The City Human Rights Law does not, however, provide a definition for "undue hardship," nor does it set forth factors to be considered in evaluating a claim of such hardship. Such vague language sometimes results in employers and adjudicators referring to the definition of undue hardship found in Title VII of the Civil Rights Act of 1964 ("Title VII").<sup>9</sup> Like the City Human Rights Law, Title VII requires an employer to provide a reasonable accommodation to an employee so long as such accommodation does not impose an undue hardship on the employer. Under Title VII, a religious accommodation that results in an undue hardship is one that creates more than a "de minimis cost or burden" to the employer.<sup>10</sup> The "de minimis cost or burden" standard, however, is a lower standard of proof for employers than the "significant difficulty or expense" standard, set forth by New York State's Human Rights Law ("State Human Rights Law").

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<sup>5</sup> See Admin. Code §8-107(2)(b).

<sup>6</sup> See Admin. Code §8-107(3).

<sup>7</sup> Admin. Code §8-107(3)(b).

<sup>8</sup> Id.

<sup>9</sup> Title VII prohibits employment discrimination on the basis of one's race, color, religion, sex and national origin. 42 USCA §2000e-2(a). Title VII only applies when an employer has 15 or more employees. 42 USCA §2000e(b).

<sup>10</sup> U.S. Equal Employment Opportunity Commission, *Questions and Answers: Religious Discrimination in the Workplace*, last modified Jan. 31, 2011, at [http://eeoc.gov/policy/docs/qanda\\_religion.html](http://eeoc.gov/policy/docs/qanda_religion.html) (last visited June 27, 2011).

Under State law, an employer may be excused from providing an employee a reasonable accommodation only if, after a genuine effort, the employer demonstrates that it is unable to reasonably accommodate an employee's sincerely held religious observance or practice without undue hardship on the conduct of the business.<sup>11</sup> The State Human Rights Law defines an "undue hardship" as "an accommodation requiring significant expense or difficulty" and sets forth factors to be considered when determining whether an undue hardship exists.<sup>12</sup> Today's amendment to the City Human Rights Law seeks to ensure that workers are protected from religious discrimination in the workplace, by defining "undue hardship" and clarifying the Council's intentions to provide greater protection to workers under the City Human Rights Law than the federal, and even the State, human rights provisions provide.

#### **IV. Prop. Int. No. 632-A**

Section one of the bill would amend subdivision 18 of section 8-102 of the Human Rights Law where "reasonable accommodation" and "undue hardship" are defined with respect to workplace discrimination claims based on an employee's or prospective employee's actual or perceived age, race, creed, color, national origin, gender, disability, marital status, partnership status, sexual orientation, alienage or citizenship status, or status as a victim of domestic violence, sexual assault or stalking. Language has been added to this subdivision to clarify that when determining undue hardship with respect to workplace discrimination claims based on religious observance, one should refer to section 8-107(3)(b).

Section two of the bill defines "undue hardship" as an "accommodation requiring significant expense or difficulty" and provides factors for an adjudicator to consider when determining whether an employer has met his or her duty to provide a reasonable

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<sup>11</sup> N.Y. Executive Law §296(10)(a).

<sup>12</sup> N.Y. Exec. Law §296(10)(d)(1).

accommodation for religious observance. Additionally, this section clarifies that this definition of undue hardship only applies when evaluating religious accommodation cases in employment.

This local law would take effect immediately after its enactment into law.

## **V. Penalties**

Upon a finding that an employer has engaged in an unlawful discriminatory practice in violation of the City Human Rights Law, the Commission will issue an order to the employer to “cease and desist” the unlawful discriminatory practice. In addition, the Commission will require the employer to hire, reinstate or upgrade employees; award back pay and front pay; extend full, equal and unsegregated accommodations; or pay compensatory damages, among other things.<sup>13</sup> Failure to comply with such an order may result in a civil penalty of no more than \$50,000 and an additional civil penalty of no more than \$100 per day.<sup>14</sup> Should the Commission find that an employer engaged in an unlawful discriminatory practice, it may impose a civil penalty of \$125,000.<sup>15</sup> If the unlawful discriminatory practice resulted from the employer’s “willful, wanton or malicious act,” the Commission may impose a civil penalty of not more than \$250,000.<sup>16</sup> Should a person willfully violate an order of the Commission, he or she will be guilty of a misdemeanor and be punishable by imprisonment for not more than one year, or by a fine of not more than \$10,000, or by both.<sup>17</sup>

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<sup>13</sup> Admin. Code §8-120(a)

<sup>14</sup> Admin. Code §8-124.

<sup>15</sup> Admin. Code §8-126(a).

<sup>16</sup> Id.

<sup>17</sup> Admin. Code §8-129.

Proposed Int. No. 632-A

By Council Members Weprin, Chin, Fidler, James, Koslowitz, Van Bramer and Rose

A LOCAL LAW

To amend the administrative code of the city of New York, in relation to unlawful discriminatory practices.

Be it enacted by the Council as follows:

Section 1. Subdivision 18 of section 8-102 of the administrative code of the city of New York, as amended by local law number 75 for the year 2003, is amended to read as follows:

18. The term “reasonable accommodation” means such accommodation that can be made that shall not cause undue hardship in the conduct of the covered entity’s business. The covered entity shall have the burden of proving undue hardship. In making a determination of undue hardship with respect to claims filed under subdivisions one or two of section 8-107 or section 8-107.1 of this chapter, the factors which may be considered include but shall not be limited to:

(a) the nature and cost of the accommodation;

(b) the overall financial resources of the facility or the facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

(c) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees, the number, type, and location of its facilities; and

(d) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

In making a determination of undue hardship with respect to claims for reasonable accommodation to an employee's or prospective employee's religious observance filed under subdivision three of section 8-107 of this chapter, the definition of "undue hardship" set forth in paragraph b of such subdivision shall apply.

§2. Paragraph b of subdivision 3 of section 8-107 of the administrative code of the city of New York, as amended by local law number 39 for the year 1991, is amended to read as follows:

(b) "Reasonable accommodation", as used in this subdivision, shall mean such accommodation to an employee's or prospective employee's religious observance or practice as shall not cause undue hardship in the conduct of the employer's business. The employer shall have the burden of proof to show such hardship. "Undue hardship" as used in this subdivision shall mean an accommodation requiring significant expense or difficulty (including a significant interference with the safe or efficient operation of the workplace or a violation of a bona fide seniority system). Factors to be considered in determining whether the accommodation constitutes an undue economic hardship shall include, but not be limited to:

(i) the identifiable cost of the accommodation, including the costs of loss of productivity and of retaining or hiring employees or transferring employees from one facility to another, in relation to the size and operating cost of the employer;

(ii) the number of individuals who will need the particular accommodation to a sincerely held religious observance or practice; and

(iii) for an employer with multiple facilities, the degree to which the geographic separateness or administrative or fiscal relationship of the facilities will make the accommodation more difficult or expensive.

Provided, however, an accommodation shall be considered to constitute an undue hardship, for purposes of this subdivision, if it will result in the inability of an employee who is seeking a religious accommodation to perform the essential functions of the position in which he or she is employed.

§3. This local law shall take effect immediately.

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