

2024

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# Introduction



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# **WORKPLACE 2023**

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# TODAY'S AGENDA

**Kristen Smith– (12:00PM-12:05PM)**

- Introduction / Agenda

**Lisa Feldman – (12:05PM-12:15PM)**

- Appearance Discrimination updates to the NYC Human Rights Law – NYS Coming Soon?

**Jeffrey Scheer – (12:15PM-12:25PM)**

- Digital Signatures: What You Need to Know

**Stephanie Fedorka – (12:25PM-12:35PM)**

- Changes to State and Federal Breastfeeding Accommodation Laws

**Kristen Smith – (12:45PM)**

- Wrap Up

# Appearance Discrimination Updates to the NYC Human Rights Law – NYS Coming Soon?



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# NYC Height and Weight Discrimination Bill

- Passed NYC Council - May 11, 2023
- Mayor has 30 days to sign, take no action, or veto
  - No action - becomes law
  - Veto - bill sent back to Council, can override with 2/3 vote
- Would take effect 180 days after becoming law

# Height and Weight Discrimination - NYCHRL

- ***Key Takeaway: Height and Weight would be added as protected classes within NYCHRL for employment, housing, and public accommodations***
  - Actual or perceived
  - Many provisions that you are already familiar with under the NYCHRL as being prohibited based on other protected classes would now be prohibited based on actual or perceived height and weight, as well

# Employment – Exceptions

- Would not apply to an action taken based on height or weight:
  - (A) when required by law or regulation (whether federal, state, or local), OR
  - (B) when permitted by regulation adopted by CCHR “identifying particular jobs or categories of jobs for which
    - (i) a person’s height or weight could prevent performing the **essential requisites** of the job, and
    - (ii) the commission has **not found alternative action** that covered entities could **reasonably take** to allow persons who do not meet the height or weight criteria to perform the essential requisites of the job or category of jobs, OR
  - (C) permitted by regulation adopted by the commission identifying particular jobs or categories of jobs for which consideration of height or weight criteria is **reasonably necessary** for the execution of the **normal operations** of such covered entity.”



# Employment - Affirmative Defense

If exception does not apply, affirmative defense available:

- “(A) A person’s height or weight prevents the person from performing the **essential requisites** of the job, and there is **no alternative action** the covered entity could **reasonably take** that would allow the person to perform the essential requisites of the job, OR
- (B) the covered entity’s decision based on height or weight criteria is **reasonably necessary** for the execution of the **normal operations** of such covered entity.”

# Employment - Voluntary Wellness Programs

- The bill expressly states it does not “prevent a covered entity from offering incentives that support weight management as part of a voluntary wellness program.”

# Public Accommodations - Exceptions

- Similar exceptions as employment, in that the provision would not apply to any action:
  - “(i) required by federal, state, or local law or regulation; or
  - (ii) permitted by regulation adopted by the commission allowing consideration of height or weight because such action is reasonably necessary for the normal operations of a particular place or provider of accommodation, or a category of such places or providers, and there is no alternative action the covered entity could reasonably take that would allow patrons to use or enjoy the accommodations, advantages, services, facilities, or privileges of the place or provider of public accommodation.”

# Public Accommodations – Affirmative Defense

Similar to Employment, if exceptions do not apply – affirmative defense available:

- The “covered entity took an action based on a person’s height or weight because such action is reasonably necessary for its normal operations and there is no alternative action the covered entity could reasonably take that would allow patrons to use or enjoy the accommodations, advantages, services, facilities, or privileges of the place or provider of public accommodation.”

# Housing under NYCHRL

- Height and weight would also become protected classes in housing, with no exceptions or affirmative defenses added



## Additional Pending Legislation

- Similar pending NYS legislation covering height and weight
- Additional NYC pending legislation on appearance discrimination - prohibiting employment discrimination on basis of tattoos

# Digital Signatures: What You Need to Know



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# Federal and State Law

- Federal Law
  - United States Electronic Signatures in Global and National Commerce (ESIGN) Act – 2000
- New York State Law
  - Electronic Signatures and Records Act (ESRA) – 1999 (updated in 2002)
- Other US Jurisdictions
  - Adopted a form of the Uniform Electronic Transactions Act (UETA)

# ESIGN Act and UETA

- No contract, signature, or record shall be denied legal effect solely because it is in electronic form.
- A contract relating to a transaction cannot be denied legal effect solely because an electronic signature or record was used in its formation.

# What is a Valid Electronic Signature?

- Intent to sign
- Consent to do business electronically
  - B2B
  - Consumer Transactions
    - Consumer consent
    - Affirmative agreement
    - No withdrawal
- Record of the digital signature
- Record retention



# What Can be Signed?

- Offer letters, new hire paperwork, and employee policy updates
- Non-disclosure agreements, statements of work, and sales contracts
- Purchase orders and master service agreements
- Account opening paperwork
- Insurance policy applications and claims
- Student services
- Patient intake forms

# What Cannot be Signed?

- Specific Federal or State Requirements
- A handwritten signature may be required for the following:
  - Wills and testamentary trusts
  - Court orders or official court documents
  - Notice of cancellation of utility services
  - Notice of default, foreclosure, or eviction for a primary residence of an individual
  - Termination notice for health or life insurance
  - Recall notices for products that demonstrate a considerable risk to health or safety
  - Any document legally required to transport hazardous materials, pesticides, or other toxic substance
  - Documents for the transfer of real property
  - UCC documents

# Remote/Electronic Notarization (NY)

- New York Executive Law 135-C (January 1, 2023)
- Permits notarization of a document by a notary present in New York State without the need for the signatory to be physically present
- Signer may be located in a different state or country
- Notaries must register their capability to perform electronic notarial acts with the state
- Any document may be notarized electronically, and a county clerk, city registrar, or other recording office must accept the notarized document as long as an original Certificate of Authenticity is attached to the document
- An electronic notary must have an audiovisual platform that is secure from interception, and the software or platform must permit the notary to communicate with and identify the signer with two or more different processes for authenticating identity in real time
- An electronic notary must affix a unique electronic stamp that is used only for electronic notarial acts, is capable of independent verification of the electronic notary, is retained under the electronic notary's control, and is linked to the document being notarized so that any subsequent alterations to the document are detectable
- The notary must make and keep an audiovisual recording of the electronic notarization and ensure there is a backup of the recording
- This recording must be kept for a minimum of 10 years.

# Changes to State and Federal Breastfeeding Accommodation Laws



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# Updates to Protections for Employee Expression of Breastmilk in the Workplace

- Federal Providing Urgent Maternal Protections for Nursing Mothers Act (“PUMP” Act)
- Pregnant Workers Fairness Act (“PWFA”)
- Amendments to NY Labor Law § 206-c
- Employer To Do List for Compliance & Practice Tips



# Federal PUMP Act

- **Enacted: December 29, 2022** President Biden signed Consolidated Appropriations Act, 2023
  - Included “PUMP for Nursing Mothers Act”
- **Amends Fair Labor Standards Act**
  - Expands protections previously provided for employees under FLSA
- **Effective: December 29, 2022**
  - Added remedies available for violations
    - **Effective for violations occurring on or after April 28, 2023**
- **USDOL Guidance Published:**
  - Field Assistance Bulletin No. 2023-2 (May 17, 2023)
  - WHD Fact Sheet #73 (Updated January 2023)
  - Updated FAQs – Pumping Breastmilk at Work (Updated May 2023)

# PUMP Act Changes to Federal Law

## State of the Law Now:

- Protections apply to all employees of FLSA covered employer (previously, only applied to non-exempt)
  - Special rules for certain rail carrier and motorcoach employees; airline flight crew members not covered under this
- **Break Time:**
  - Employees have right to take reasonable break time to express breast milk for their nursing child “each time such employee has need to express the milk” for up to one (1) year after the child’s birth
  - Employers cannot deny a covered employee a needed break to pump
- **Space to Pump:**
  - Employer must provide employees with “a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public”
  - Must be functional: place to sit, flat surface other than floor to place pump, but be able to safely store milk while at work (insulated cooler, personal cooler, refrigerator); recommends access to electricity and close to sink, if possible
- **Updated FLSA Poster** – April 2023 Version
- **Retaliation Prohibited** – (Not new, but always a good reminder)
- **Private Right of Action** – Available now for violations of PUMP Act that occur on or after April 28, 2023; remedies include backpay, liquidated damages, attorneys’ fees and costs
  - Employee notice and 10-day time to cure for space violations under certain circumstances
  - No notice required for violation of reasonable break time requirement
  - No notice required for filing complaint with USDOL WHD

## Clarifications – Not Exactly “New” But Explicit Now

- Clarified that employees do not need to be paid for such breaks, except when such breaks would be required to be paid under federal or state law or municipal ordinance
  - 20 minutes or less → Considered “hours worked” → Paid
  - 20 minutes or more → Unpaid unless otherwise required by other state or local law
  - If not relieved of duties → Considered “hours worked” → Paid
  - If employee utilizes other break time provided to all other employees, employee must be treated same way if used for expression of breast milk
    - If using employer provided paid break time → Paid
- Protections apply to remote workers on same basis

# Narrow Exemption for Small Employers

- Employers with fewer than 50 employees
- If compliance would impose an undue hardship, then exemption can apply
- Employer has burden of demonstrating undue hardship
  - High burden
  - Case by case/individual employee basis
  - Consider difficulty or expense of compliance in light of size, financial resources, nature, and structure of employer's business
  - Must prove “**significant**” difficulty or expense

# Federal Pregnant Workers Fairness Act

- **Enacted:** December 29, 2022
- **Effective:** June 27, 2023
- **Coverage:** Private and public sector employers with 15+ employees, employment agencies, labor organizations
- Requires employers to provide employees with known limitations related to pregnancy, childbirth, or related medical conditions unless the accommodation would cause the employer an “undue hardship”
- Essentially, PWFA extends the same interactive process and reasonable accommodation obligations and protections under the Americans with Disabilities Act to pregnant and postpartum employees

# PWFA Prohibitions

## Covered employers cannot:

- Require an employee to accept an accommodation without a discussion about the accommodation between the worker and the employer;
- Deny a job or other employment opportunities to a qualified employee or applicant based on the person's need for a reasonable accommodation;
- Require an employee to take leave if another reasonable accommodation can be provided that would let the employee keep working;
- Retaliate against an individual for reporting or opposing unlawful discrimination under the PWFA or participating in a PWFA proceeding (such as an investigation); or
- Interfere with any individual's rights under the PWFA.

# Amendments to NYLL § 206-c

- **Enacted: December 9, 2022** – Gov. Hochul signed Senate Bill S4844B into law
  - Amendments to NYLL 206-c – Rights of Nursing Employees
- **Coverage:** Applies to all private and public employers in NYS regardless of size
- **Break Requirements:** Employers must provide reasonable unpaid break time or permit employee to use paid break time or meal time to allow employee to express breast milk for nursing child each time such employee has reasonable need to express breastmilk for up to 3 years following childbirth
- **Effective:** 180 days → **June 7, 2023**

# Amendments to NYLL § 206-c – Space Requirements

## Space:

- Employer must designate room or location to be made available to nursing employee(s) upon request by such employee
- Must be in close proximity to work area; well lit; shielded from view; and free from intrusion from other persons in the workplace or public
- Cannot be restroom or toilet stall
- At a minimum must provide:
  - Chair
  - Working surface
  - Nearby access to clean running water
  - Electrical outlet (if workplace is supplied with electricity)
  - Must allow access to refrigerator for storage of breastmilk if employer provides refrigerator in workplace
- If sole purpose or function of such room is not dedicated to the use by employee for expressing breast milk, the room must be made available to a nursing employee when needed and not be used for any other purpose while in use by the nursing employee
- Employers must provide notice to all employees as soon as practicable when such room has been designated as a place for employees to express breast milk



# Amendments to NYLL § 206-c – Undue Hardship

- **Undue Hardship:** Where compliance with the minimum accommodation provisions would impose an undue hardship on the employer by causing significant difficulty or expense when considered in relation to size, financial resources, nature or structure of business, employer must still make reasonable efforts to provide a room or other location other than restroom or toilet seat, in close proximity to work area where employee can express breastmilk in private.
  - **Note:** This is high standard to prove and will depend on unique and specific circumstances of employer's business operations

# Amendments to NYLL § 206-c – Written Policy

## Written Policy Requirements:

- NYSDOL to develop and implement written policy for employer use → **Has not been published yet; stay tuned**
  - Inform employees of rights under NYLL 206-c
  - Specify means by which employee can request room or location to express breastmilk
  - Employer must respond to such request within reasonable timeframe but not to exceed 5 business days
- Policy must be provided to employees:
  - Upon hire
  - Annually
  - Upon returning to work following birth of child
- Anti-retaliation provision for exercising their rights under NYLL 206-c

# Practice Tips – Administering Policy

- Remember this is a sensitive and very personal subject
- Needs vary based on employee and their child
  - Don't assume what the employee needs
- Needs can and do change over time
  - Be prepared for employee's needed break time to change
- Be prepared to be flexible and work with employee in respectful manner to avoid discrimination or retaliation claims
  - Communication will be key
  - Supervisor training will also be key

# Employer To Do List

- ☐ Review your policies and procedures
  - ☐ What are your current policies and procedures to accommodate expression of breast milk in the workplace?
- ☐ Update written lactation break policy to comply with changes in the law by June 7, 2023
  - ☐ Be on lookout for updated policy from NYSDOL!
  - ☐ Distribute updated policy to employees (remember to distribute to new hires, annually, and upon return from childrearing leave)
- ☐ Update reasonable accommodation policy
- ☐ Identify suitable locations for expression of breast milk that complies with federal and state space requirements/minimum standards
- ☐ Train Supervisors/Managers on policy and procedures for handling requests and administering for accommodations and lactation breaks

# Your Questions



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Non-NYS Bar Association Members can purchase through Amazon [here](#).

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