SEYFARTH SHAW

# Management Alert

## As Effective Date for "Cooperative Dialogue" Approaches, New York City Issues Guidance

*By William P. Perkins, Howard M. Wexler, Samuel Sverdlov, Vlada Feldman, and Ryan B. Schneider*

***Seyfarth Synopsis:*** *On October 15, 2018, amendments to the New York City Human Rights Law which require employers to engage in a "cooperative dialogue" with individuals with disabilities and others regarding their accommodation needs will go into effect. The New York City Commission on Human Rights has provided employers with guidance as to how these new amendments will be enforced.*

In January 2018, the New York City Council amended the New York City Human Rights Law (NYCHRL) to expressly require housing providers, employers, and places of public accommodation to engage in a "cooperative dialogue" with individuals who may require accommodation due to religious needs, disability, pregnancy, childbirth or a related medical condition, or their status as a victim of domestic violence, sex offenses or stalking. (To learn more about the cooperative dialogue amendments, please see our previous article here.) This summer, the New York City Commission on Human Rights (Commission) issued guidance regarding the amendments.

As per the guidance, there are four far-reaching cooperative dialogue requirements for employers dealing with disabled employees who need an accommodation: (1) learn of the employee's need for an accommodation; (2) initiate a cooperative dialogue; (3) communicate in good faith with the employee; and (4) notify the employee, in writing, of the employer's determination regarding the accommodation.

Although employers were already obligated to comply with many of these requirements under the previous iteration of the NYCHRL, the critical change under the amendments is that employers are now obligated to provide employees with a written final determination identifying any accommodation granted or denied. Failing to provide employees with the written final determination, by itself, violates the NYCHRL.

### A Look Into the "Cooperative Dialogue"

According to the guidance, employers must engage in a cooperative dialogue not only when a disabled employee requests an accommodation, "but also when the covered entity 'should have . . . known' about the individual's disability, regardless of whether the individual requested an accommodation." By way of example, the guidance states that an employer might be on notice of an employee's need for an accommodation "if an employer has knowledge that an employee's performance at work is diminished or that their behavior at work could lead to an adverse employment action and has a reasonable basis to believe that the issue is related to a disability." It remains to be seen what the Commission will view as a "reasonable basis" to believe that an employee's performance relates to a disability.

Where the employer is deemed to have a "reasonable basis" to believe that the employee's diminished performance may be disability-related, the employer "should not ask the employee if the employee has a disability." Rather, the employer should "ask if there is anything going on that the employer can help with, inform the employee that various types of support are available, including reasonable accommodations, to enable employees to satisfy the essential requisites of the job, and remind [the employee] of workplace policies and procedures for requesting a reasonable accommodation." If the employee declines to disclose his or her disability during that conversation, the employer has met its obligations to engage in the cooperative dialogue. However, employers engaging in the cooperative dialogue are reminded to proceed cautiously and keep in mind that taking adverse employment action against individuals on the basis of a perceived disability is still prohibited under federal, state, and local law.

Further, employers must engage in the cooperative dialogue in good faith and "in a transparent and expeditious manner." Whether the employer communicates with the employee in good faith throughout the cooperative dialogue will be assessed based on whether the employer: (1) has a policy informing employees how to request accommodations; (2) responds timely to the employee's request based on the "urgency and reasonableness" of the request; and (3) attempts to obstruct or delay the cooperative dialogue. It appears that the Commission will assess how quickly an employer responds to an accommodation request on a case-by-case basis without an objective standard.

Finally, the employer must conclude the cooperative dialogue by either granting the employee a reasonable accommodation or "reasonably" concluding that (1) no accommodation can be made without undue hardship to the employer; (2) a sufficient accommodation was offered but rejected by the employee; or (3) no accommodation exists that will allow the employee to perform the essential requisites of the job. This determination must be provided to the employee in writing.

The Commission has published the following sample forms for employers to utilize to comply with these new requirements:

Sample Reasonable Accommodation Request Form (Employment)

Sample Grant or Denial of Reasonable Accommodation Request Form (Employment)

Sample Letter to Employee on Leave

## Employer Takeaways

The tone of the guidance suggests a broad reading of the NYCHRL and foreshadows aggressive enforcement by the Commission once the amendments go into effect. As a result, right now is an opportune time for employers to contact counsel to discuss compliance and possible adjustments to existing policies and practices to ensure compliance with the new amendments.

If you have any questions, please contact, William P. Perkins at *wperkins@seyfarth.com*, Howard M. Wexler at *hwexler@seyfarth.com*, Samuel Sverdlov at *ssverdlov@seyfarth.com*, Vlada Feldman at *vfeldman@seyfarth.com*, or Ryan B. Schneider at *rschneider@seyfarth.com*.