

STATE OF NEW YORK

9942

IN ASSEMBLY

February 27, 2020

Introduced by M. of A. FALL -- read once and referred to the Committee on Governmental Operations

AN ACT to amend the executive law, in relation to requiring employers to engage in a good faith cooperative dialogue with employees who request accommodation due to a religious practice or observance

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. Subdivision 10 of section 296 of the executive law, as
2 amended by chapter 166 of the laws of 2000, paragraph (a) as amended by
3 chapter 154 of the laws of 2019, and paragraph (b) as amended and para-
4 graphs (c) and (d) as added by chapter 539 of the laws of 2002, is
5 amended to read as follows:

6 10. (a) It shall be an unlawful discriminatory practice for any
7 employer, or an employee or agent thereof, to impose upon a person as a
8 condition of obtaining or retaining employment, including opportunities
9 for promotion, advancement or transfers, any terms or conditions that
10 would require such person to violate or forego a sincerely held practice
11 of his or her religion, including but not limited to the observance of
12 any particular day or days or any portion thereof as a sabbath or other
13 holy day or religious holiday in accordance with the requirements of his
14 or her religion or the wearing of any attire, clothing, or facial hair
15 in accordance with the requirements of his or her religion, unless,
16 after engaging in a bona fide effort which shall include a cooperative
17 dialogue, the employer demonstrates that it is unable to reasonably
18 accommodate the employee's or prospective employee's sincerely held
19 religious observance or practice without undue hardship on the conduct
20 of the employer's business. Notwithstanding any other provision of law
21 to the contrary, an employee shall not be entitled to premium wages or
22 premium benefits for work performed during hours to which such premium
23 wages or premium benefits would ordinarily be applicable, if the employ-
24 ee is working during such hours only as an accommodation to his or her
25 sincerely held religious requirements. Nothing in this paragraph or
26 paragraph (b) of this subdivision shall alter or abridge the rights

EXPLANATION--Matter in italics (underscored) is new; matter in brackets
[-] is old law to be omitted.

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1 granted to an employee concerning the payment of wages or privileges of
2 seniority accruing to that employee.

3 (b) Except where it would cause an employer to incur an undue hard-
4 ship, no person shall be required to be present or remain at his or her
5 place of employment during any day or days or portion thereof that, as a
6 requirement of his or her religion, he or she observes as his or her
7 sabbath or other holy day or religious holiday, including a reasonable
8 time prior and subsequent thereto for travel between his or her place of
9 employment and his or her home, provided however, that any such absence
10 from work shall, wherever practicable [~~in the reasonable judgment of~~]
11 and as agreed upon between the employer and the employee pursuant to a
12 cooperative dialogue, be made up by an equivalent amount of time and
13 work at some other mutually convenient time, or shall be charged against
14 any leave with pay ordinarily granted, other than sick leave, provided
15 further, however, that any such absence not so made up or charged, may
16 be treated by the employer of such person as leave taken without pay.

17 (c) It shall be an unlawful discriminatory practice for an employer to
18 refuse to permit an employee to utilize leave or to refuse to engage in
19 a cooperative dialogue requested by an employee, as provided in para-
20 graph (b) of this subdivision, solely because the leave will be used for
21 absence from work to accommodate the employee's sincerely held religious
22 observance or practice.

23 (d) As used in this subdivision: (1) "undue hardship" shall mean an
24 accommodation requiring significant expense or difficulty (including a
25 significant interference with the safe or efficient operation of the
26 workplace or a violation of a bona fide seniority system). Factors to be
27 considered in determining whether the accommodation constitutes an undue
28 economic hardship shall include, but not be limited to:

29 (i) the identifiable cost of the accommodation, including the costs of
30 loss of productivity and of retaining or hiring employees or trans-
31 ferring employees from one facility to another, in relation to the size
32 and operating cost of the employer;

33 (ii) the number of individuals who will need the particular accommo-
34 dation to a sincerely held religious observance or practice; and

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

38 Provided, however, an accommodation shall be considered to constitute
39 an undue hardship if it will result in the inability of an employee to
40 perform the essential functions of the position in which he or she is
41 employed.

42 (2) "premium wages" shall include overtime pay and compensatory time
43 off, and additional remuneration for night, weekend or holiday work, or
44 for standby or irregular duty.

45 (3) "premium benefit" shall mean an employment benefit, such as
46 seniority, group life insurance, health insurance, disability insurance,
47 sick leave, annual leave, or an educational or pension benefit that is
48 greater than the employment benefit due the employee for an equivalent
49 period of work performed during the regular work schedule of the employ-
50 ee.

51 (4) "cooperative dialogue" shall mean the process by which an employer
52 and employee engage in good faith written or oral dialogue concerning
53 such employee's needs for accommodation regarding his or her observance
54 of a sincerely held practice of his or her religion, potential accommo-
55 dations that may address such employee's accommodation needs, and the

1 difficulties that such potential accommodations may pose for such
2 employer.

3 In the case of any employer other than the state, any of its political
4 subdivisions or any school district, this subdivision shall not apply
5 where the uniform application of terms and conditions of attendance to
6 employees is essential to prevent undue economic hardship to the employ-
7 er. In any proceeding in which the applicability of this subdivision is
8 in issue, the burden of proof shall be upon the employer. If any ques-
9 tion shall arise whether a particular position or class of positions is
10 excepted from this subdivision by this paragraph, such question may be
11 referred in writing by any party claimed to be aggrieved, in the case of
12 any position of employment by the state or any of its political subdivi-
13 sions, except by any school district, to the civil service commission,
14 in the case of any position of employment by any school district, to the
15 commissioner of education, who shall determine such question and in the
16 case of any other employer, a party claiming to be aggrieved may file a
17 complaint with the division pursuant to this article. Any such determi-
18 nation by the civil service commission shall be reviewable in the manner
19 provided by article seventy-eight of the civil practice law and rules
20 and any such determination by the commissioner of education shall be
21 reviewable in the manner and to the same extent as other determinations
22 of the commissioner under section three hundred ten of the education
23 law.

24 § 2. This act shall take effect immediately.