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## FAQ: New York City Issues Guidance on Avoiding Age Discrimination During the Pandemic

As New York City employees gradually return to the workplace after working remotely due to the COVID-19 pandemic, employers must navigate how to address the needs of their employee populations, including older workers. These considerations include balancing a desire to protect those who may be more vulnerable to serious illness if they contract COVID-19 against the need to avoid unlawful age discrimination. Davis & Gilbert Labor & Employment Attorneys [Shira Franco](#) and [Nick Joseph](#) address key takeaways from New York City's new guidance on preventing age discrimination during the pandemic.

The New York City Commission on Human Rights (Commission) recently released two new guidance documents that review the Commission's recommendations for preventing age discrimination, address various age and disability discrimination questions as they relate to COVID-19 and caution against certain age-based practices during the pandemic.

The Commission's [Legal Enforcement Guidance on Employment Discrimination on the Basis of Age](#) (General Guidance) provides a general overview of the Commission's legal framework on age discrimination.

This includes:

- >> Discussion of the broad protections under the New York City Human Rights Law (NYCHRL);
- >> Legal standards for establishing an age discrimination claim;
- >> Remedies available to victims of age discrimination; and
- >> How age discrimination can unlawfully factor into various aspects of the employment relationship, such as job postings, hiring, the working environment and termination decisions.

The Commission's [COVID-19 Supplement to the General Guidance](#) (COVID-19 Guidance) addresses age discrimination specifically as it relates to the pandemic. In light of the fact that the [CDC](#) has advised that individuals, including but not limited to those over 65 years old, are at heightened risk of severe illness from COVID-19 as they age, the Commission sought to answer several frequently asked questions from employers.

### What Employers Can Do Right Now

Review the Commission's guidance on best practices for avoiding age discrimination.

Consult legal counsel to review policies and practices for reasonable accommodations of employees who return to the office.

- 1. Q: Are employers generally permitted to treat employees differently based on age because of COVID-19?**

**A: NO.** The Commission explicitly instructs employers that NYC law prohibits policies that treat workers differently based on age, even when intended to be benevolent and protect those at higher risk from COVID-19.
- 2. Q: Can employers treat employees differently because of age-based assumptions regarding their ability to work remotely?**

**A: NO.** The COVID-19 Guidance states that employers cannot justify discriminatory actions, including layoffs or rehiring, by relying on stereotypes or assumptions that older workers, for example, are not “tech savvy enough” to successfully work remotely.
- 3. Q: Are employers required to provide reasonable accommodations to employees based on age?**

**A: NO.** The COVID-19 Guidance explains that an employer has no obligation to reasonably accommodate an employee who is at higher risk due only to their age. This is consistent with recent U.S. Equal Employment Opportunity Commission (EEOC) [guidance](#), which notes that under federal law, the Age Discrimination in Employment Act (ADEA) does not include a right to reasonable accommodation for older workers simply due to their age. The Commission does remind employers of their obligation to provide reasonable accommodations to employees of all ages with an underlying health condition (*i.e.*, a disability) that puts them at higher risk of serious illness from COVID-19, and that if an employer permits other workers to work from home (such as those with childcare responsibilities or employees with higher-risk household members), it should offer telework as an option to older workers as well.
- 4. Q: Are employers allowed to provide accommodations based on age?**

**A: NO.** The COVID-19 Guidance explains that if an employer provides accommodations to employees beyond those required by law, it must treat all workers the same regardless of age; older workers may not be given “preferential treatment.” For example, this means that a New York City employer may not implement a policy permitting older workers to work remotely while requiring younger workers to return to the workplace.

The Commission’s guidance, however, diverges from federal law. This conflict stems from the fact that the ADEA only protects employees aged 40 and older, whereas the NYCHRL protects employees of all ages and prohibits policies that favor older workers over younger workers. The EEOC, unlike the Commission, has given employers freedom to provide



more flexibility to workers over 65, even if it results in younger workers ages 40-64 being treated less favorably in comparison based on age.

The COVID-19 Guidance also clarifies that employers similarly may not *require* older workers to work remotely because of their age, nor may they make assumptions about older workers' interest, willingness or capacity to work due to the health risks associated with COVID-19.

**5. Q: Are employers permitted to conduct screening and/or testing of employees to ensure a workplace safe from COVID-19?**

**A: YES.** The Commission clarified that to protect the health and safety of the workplace, employers may require employees to provide evidence of their ability to safely return to the workplace after recovering from COVID-19, and to confirm that they are not currently contagious. Employers may require that employees “undergo tests such as temperature checks or diagnostic tests to confirm whether employees pose a direct threat to workplace health and safety due to infection, even though such examinations would ordinarily be prohibited in the absence of the COVID-19 pandemic.” The Commission emphasized that such tests must be administered in a non-discriminatory manner with regard to age or any other protected characteristic.

## For More Information

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Please contact the attorneys listed below or the D&G attorney with whom you have regular contact.

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