



NEW YORK
CITY BAR

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REPORT ON LEGISLATION

WOMEN'S EQUALITY ACT

THIS BILL IS APPROVED WITH RECOMMENDATIONS

The New York City Bar Association supports passage of the New York Women's Equality Act, with certain limited recommendations outlined below. The Act promotes the ability of New York women to participate fully and equally in society, and can serve as a model for other states to follow at a time when sex discrimination is prevalent throughout the U.S. This report is submitted on behalf of the City Bar by its Committee on Sex and Law (the "Committee").¹

PART A - PROVIDING WAGE EQUITY AND TRANSPARENCY

Part A of the Act requires that employers provide equal pay to similarly positioned employees doing work that requires equal skill, effort and responsibility. Under the Act, a wage differential may only be excused where the employer can show that the discrepancy is caused by something other than sex and is related to job performance and consistent with business necessity. Lawful variations may be based on seniority or merit systems or factors like education or experience. Women subject to unlawful pay differentials will have a private right of action, with the ability to win 300% in back wages. Further, the Act prohibits employers from retaliating against employees who inquire about or disclose wage information. To help employers comply with the Act, the Department of Labor and the Division of Human Rights will provide trainings and assist in developing policies and procedures to address discrimination and harassment in the workplace.

This Part of the Act is long overdue. According to the National Partnership for Women and Families, New York women still earn 84% of what New York men are paid.² The Act will finally close the pay gap and end insidious wage variations based on sex by providing workers with the right to transparency, so that a victim of pay discrimination will have the necessary information needed to bring a successful claim for meaningful damages. By holding employers accountable for engaging in pay discrimination, the Act will level the playing field for New York women and ensure they finally receive wages based on their skill and performance, not their gender.

¹ The Committee is composed of attorneys from government agencies, private law firms, and nonprofit organizations, and studies how sex and gender affect the formulation and operation of law and policy.

² National Partnership for Women & Families, *New York Women and the Wage Gap*, (Apr. 2013), available at: http://www.nationalpartnership.org/site/DocServer/Wage_Gap_ny.pdf (last visited June 12, 2013).

PART B - STRENGTHENING SEXUAL HARASSMENT LAWS

Part B amends the New York State Human Rights Law (the "HRL")³ so that no employer within New York State may subject an employee to sexual harassment. Currently, Section 292(5) of the HRL defines an "employer" as having four or more employees. Therefore, the protections in Section 296(1) against workplace discrimination apply only to some employers. The Act will amend Section 292(5) so that all employers will be subject to the HRL prohibitions against sexual harassment, regardless of their number of employees.

The Act will expand and strengthen the HRL by tearing down a significant barrier to sexual harassment complaints. Since over 60% of New York State employers have fewer than four employees,⁴ the current definition of an "employer" in Section 292(5) exempts most New York State workplaces from the Human Rights Law's protections. This runs contrary to the law's purpose of ensuring that "every individual in this state is afforded an equal opportunity to enjoy a full and productive life. . . ."⁵ Sexual harassment is a persistent and insidious form of sex discrimination that restricts the employment opportunities of countless women. The Act will move New York toward a future where all workplaces are free from sexual harassment.

Recommendation

The proposed amendment would be improved by including a definition of "sexual harassment," as this term is not defined in the HRL. An effective definition would recognize that "sexual harassment" is harassment based on sex, thereby prohibiting demeaning, aggressive and other harassing behavior aimed at women employees without requiring them to prove that the behavior is sexual in nature or motivation.

PART C - PROVIDING ATTORNEY'S FEES IN CASES OF EMPLOYMENT OR CREDIT DISCRIMINATION

Part C of the Act amends the HRL to allow for an award of reasonable attorney's fees to the prevailing party in employment or credit discrimination cases where sex was a basis of the discrimination. Part C also amends the HRL to allow for an award of reasonable attorney's fees in all cases involving housing-related credit discrimination. These amendments will expand the protections of both Section 297(10), which currently allows an award of attorney's fees only in cases of housing discrimination, and Section 296-a(7), which provides for compensatory damages and other relief (but not attorney's fees) in cases of credit discrimination.⁶

³ N.Y. Exec. Law § 290 et seq.

⁴ Press Release, New York State Governor's Office, Governor Cuomo Introduces Women's Equality Act Legislation (June 4, 2013), available at <http://www.governor.ny.gov/press/06042013Womens-Equality-Act-Legislation> (last visited June 12, 2013).

⁵ N.Y. Exec. Law § 290(3).

⁶ The amendments will not allow a prevailing defendant or respondent to recover reasonable attorney's fees absent a motion showing that the action or proceeding was frivolous. In addition, the New York State Division of Human Rights may not receive or be liable for an award of attorney's fees to the prevailing party.

The Act will help level the playing field between women and discriminatory employers and creditors by making it feasible for women to obtain competent counsel. By omitting recovery of reasonable attorney's fees, the current statutory scheme provides too little deterrent to discriminatory conduct and imposes substantial burdens on victims (who must pay for private counsel or cope with administrative delays). In many cases, women may not be able to afford private counsel or such assistance will not be cost-effective because the costs of contentious litigation will far outweigh the amount of any potential recovery.

Recommendations

The Committee is troubled that attorney's fees would be limited to cases of sex discrimination claims and not other forms of discrimination. In fact, the amendments would be more effective at promoting women's equality if they were not limited to sex discrimination, but allowed recovery of reasonable attorney's fees regardless of the form of discrimination. Discrimination does not always fall neatly into one category, and women may experience discrimination on account of both their sex and other unlawful factors. Limiting the amendments to sex discrimination ignores the complexity of discrimination and will create new obstacles, such as arguments that a plaintiff is only entitled to a portion of her attorney's fees because her claims involved sex and other forms of discrimination.⁷ Furthermore, allowing recovery of attorney's fees regardless of the type of discrimination would bring the HRL in line with comparable federal and local laws,⁸ and would do more to deter discrimination.

Finally, the amendments would be improved by referring to the New York State Division of Human Rights as the "division," not as the "department."⁹

PART D - PROHIBITING EMPLOYMENT DISCRIMINATION BASED ON FAMILIAL STATUS

Part D of the Act would amend New York State's Executive Law to prohibit discrimination in the workplace based on "familial status," which is already defined in the law and includes any person who is pregnant or has a child or is in the process of securing legal custody of any individual who is not yet 18 years of age.¹⁰

⁷ The Act may intend to address such a scenario by stating that "where sex is a basis of discrimination" (rather than "the basis for discrimination"), attorney's fees may be awarded to the prevailing party. However, this wording does not specify that plaintiff can recover her full attorney's fees in cases involving multiple forms of discrimination.

⁸ See, e.g., 15 U.S.C. §§ 1691 & 1691e(d); 42 U.S.C. §§ 2000e-2 & 2000e-5(k); N.Y.C. Admin. Code § 8-502(f); Westchester County, N.Y., Laws § 700.11.

⁹ The proposed amendment to Section 296-a(7) reads that "In no case shall attorney's fees be awarded to the department, nor shall the department be liable. . . ." As explained in Section 293, "There is hereby created in the executive department a division of human rights hereinafter in this article called the division." Thus, corresponding language in Section 297(10) states, "In no case shall attorney's fees be awarded to the division, nor shall the division be liable. . . ."

¹⁰ N.Y. Exec. Law § 292 (26).

The City Bar has long supported the concept of protecting parents from workplace discrimination. The HRL already bans discrimination in housing¹¹ on the basis of family status, but the law does not prohibit similar discrimination in employment. Protecting employees from family status discrimination is particularly important to female workers, as women often still bear the greater share of family responsibilities. New York should join Washington, D.C. and Alaska which already prohibit such discrimination against parents in the workplace.

Moreover, since "family status" would simply be added to the existing legal framework governing discrimination cases, employers would still have available to them all of the existing defenses to demonstrate that their actions were not discriminatory but were based on bona fide reasons. In addition, employers would not be required to accommodate parents' busy schedules. Rather, an employer would be prohibited from subjecting an employee to discriminatory treatment because he or she has children.

PART E - PREVENTING HOUSING DISCRIMINATION

Part E of the Act adds two new protected categories to the HRL, N.Y. Exec. L. § 296, regarding housing discrimination: domestic violence victims and discrimination based on lawful source of income. For both categories, discrimination is prohibited in the sale, rental or lease of public or private property, both residential and commercial. The law also extends to: (1) print advertisements or publications related to the property; (2) actions by real estate agents; and (3) companies and in the furnishing of facilities or services in connection with the sale, rental or lease of a property. Part E extends the law's current protections to these two new categories.

Part E also includes a few exceptions. Among other things, the amendments concerning domestic violence status do not prohibit an owner, lessee, sublessee, assignee, or managing agent of any housing accommodation from making an inquiry or obtaining and retaining information about an individual's domestic violence status solely for the purpose of providing or preserving residency for that victim of domestic violence, providing any other assistance to a victim of domestic violence in order to assist rather than hinder the individual from obtaining or retaining housing, or responding to an inquiry or request by an applicant, tenant or leaseholder who is a victim of domestic violence. With regard to lawful source of income discrimination, the bill includes, among other exceptions, an exception for housing that contains 5 or fewer housing units where the municipality has a local law covering such practices and exempting housing of 5 or fewer units. It expressly states that nothing in the Act should be construed to (1) prevent owners, landlords and agents from obtaining a credit report on individuals seeking housing, or (2) limit the rights of owners, landlords and agents to refuse to extend housing to individuals who fail to meet reasonable financial standards.

Domestic Violence Victims

It is well documented that domestic violence victims lose jobs and housing due to discrimination. Landlords often fear that the victim's presence in the housing complex will attract further violence by the abuser and risk harm to third parties. Yet housing provides economic security that is critical to allowing victims of domestic violence and their children to

¹¹ N.Y. Exec. Law § 296(2-a).

leave dangerous situations in a safe manner. Recognizing this, several states and localities (including New York City and Westchester County) have already enacted laws protecting victims of such violence from housing discrimination. Significantly, protection against housing discrimination would also fill a gap in the recently reauthorized federal Violence Against Women Act, which protects domestic violence and stalking victims from discrimination in access to public and subsidized (Section 8) housing, and which provides a defense to eviction, but does not address private housing. For these reasons, the City Bar supports inclusion of domestic violence status in the New York State HRL housing discrimination provision.

Recommendations

We have some concerns regarding § 5(h) (permission to obtain and provide information related to domestic violence status). This provision was absent from earlier versions of bills seeking to include domestic violence status in the HRL. Although we support the overall goals of the entire Part E provision, the provision that allows a landlord to obtain information about an individual's domestic violence status is not sufficiently limited or clear. In particular, we are concerned that the bill opens up the opportunity for landlords to inquire into an applicant's history of domestic violence, which landlords could use when calculating whether to offer housing. The bill also does not go far enough to insure the safety and confidentiality of that information.

Secondly, the definition of "victim of domestic violence" should mirror the definition in Social Services Law section 459-a, as was the case in earlier versions of similar bills. As written, the definition in Part E is under-inclusive. There are many acts that are not encompassed within that definition but would nevertheless be considered domestic violence.

Lawful Source of Income

As the cost of housing continues to rise, individuals with limited or fixed incomes are constantly faced with the challenge of finding safe, affordable housing. They are often denied access to housing or evicted from housing on the basis of lawful sources of income, in particular where that income comes from public sources such as Section 8 vouchers. Such discrimination by landlords reduces the already limited availability of housing for some of the most vulnerable members of New York's population, particularly people who are elderly and/or disabled. Such discrimination also makes it difficult for individuals attempting to transition from public assistance to self-sustaining employment, and for low-income working families struggling to find decent, affordable housing. New York State should join its own cities and counties - New York City, Buffalo, Nassau County, West Seneca and Hamburg - and several other states such as California, Connecticut, Minnesota, New Jersey, North Dakota, Oklahoma, Oregon, Utah, Vermont, and Wisconsin, in prohibiting housing discrimination based on lawful source of income. The City Bar supports enactment of the provision regarding inclusion of lawful source of income in the New York State HRL regarding housing discrimination, as written.

PART F - STRENGTHENING ORDERS OF PROTECTION

Part F of the Act amends the Family Court Act, Criminal Procedure Law and Domestic Procedure Law by adding sections related to the translation of orders of protection. Where an

order of protection is issued pursuant to certain sections of the Family Court Act, Criminal Procedure Law and Domestic Relations Law, and an interpreter has been appointed by the court to assist in proceedings before the court, the interpreter must be directed to translate, on the record, the essential terms and conditions of the order. The translation will not affect the validity or enforceability of the order. Where compliance with the translation requirement is not practicable within a reasonable period of time, the lack of an on-the-record translation will not bar the issuance of the order.

By requiring the translation of orders of protection, the Act empowers victims of domestic violence by making them better aware of their rights under an order, the conduct that is barred by an order, and the means by which an order may be enforced. An order of protection is only as useful and functional as its enforceability; if an individual is not able to recognize the relief to which she is entitled under an order, the valuable provisions of the order may not be invoked, and the prohibited conduct may continue unabated.

Part F also includes provisions to strengthen orders of protection in the following key respects. Orders of protection and temporary orders of protection would need to contain a notice advising that the order will stay in effect even if the protected party has had contact or communication with the party against whom the order is issued. The notice would also advise the parties to contact the court to modify or terminate the order, and it would make clear that the protected party cannot be held to have violated the order and cannot be arrested for violating the order. These measures are necessary in order to clarify and make known to all parties the purposes of the order of protection – to protect and not penalize the victim.

In sum, Part F strengthens the value and force of orders of protection, thereby enhancing the protections afforded to victims of domestic violence under New York law.

PART G - EASING THE PROCESS OF OBTAINING ORDERS OF PROTECTION

Part G of the Act further protects victims of domestic violence by strengthening order of protection laws and making the process less onerous. Specifically, the proposed legislation amends the Family Court Act and Judiciary Law to establish a pilot program for filing of petitions for temporary orders of protection electronically and allowing victims the option to provide testimony via audio-visual means.

Giving survivors of domestic violence the option to seek a temporary protection order through electronic means can help decrease incidents of domestic violence. The Committee supports the institution of such a pilot project. However, great care must be taken to ensure these electronic filing programs protect the safety of domestic violence victims. The Act takes into consideration the safety of survivors and includes a provision (3 (ii)) certifying that the information in on-line petitions will remain unavailable to the public; yet it must guarantee the system remains secure and confidential to avoid causing harm. The more widely accessible the information is in the database - information such as where the survivor is living - the more likely the abuser or someone who knows the abuser will obtain this information. A related concern is that the privacy and confidentiality of the electronic filing system will impact survivors' willingness to come forward. In addition to being concerned about revealing information in their

petition that could jeopardize their safety, they also must feel confident that the inherently personal information in the petition will remain confidential.

Further, by allowing for testimony by audio-visual means, the second section of Part G of the Act ensures that no survivor of domestic violence is deterred from filing an order of protection out of the fear and anxiety of confronting an abuser in court. Giving survivors the option to stay away from their abusers while testifying also empowers them, as they have the option to circumvent a situation that may be unsafe and that could influence their testimony. This proposed part of the Act is also in line with international recommendations for violence against women legislation. In 2008, a United Nations expert group prepared a report entitled *Good Practices in Legislation on Violence Against Women*, which included a provision allowing complainants/survivors to testify via video so as not to have to confront the abuser.

Recommendation

While the Act's proposed electronic filing system bypasses some of the hurdles to obtaining orders of protection, the Act does not go the next step in implementing a system that uses technology to ensure access to orders of protection once they are granted. Due to a lack of standard mechanisms for distribution and computer entry delays, victims are often left unaware of the existence of an order or its terms during the most heightened period of danger. Existing technology should be coordinated to ensure access to orders of protection.

PART H – STRENGTHENING SEX TRAFFICKING LAWS

Part H of the Act would amend New York's current anti-trafficking law by introducing and amending several key criminal penalties. The purpose of this Part is to increase criminal penalties for trafficking, remove the requirement that prosecutors establish coercion when the victims are minors, create an affirmative defense in prostitution prosecutions where the defendant's participation was a result of having been a victim of sex trafficking, and improve the delivery of services to trafficking victims.

The City Bar has a long-standing commitment to strengthen human trafficking laws in order to promote the rights of survivors of both labor and sexual servitude. New York passed a very strong anti-trafficking law in 2007 that has been viewed as a model for other states. Following the passage of this law, the City Bar urged that key omissions from the law be considered in future legislation, such as adding an independent private right of action for trafficking victims, protecting victims of sex trafficking from being prosecuted for prostitution, and raising the penalty for labor trafficking. The City Bar additionally has a specific interest in human trafficking laws as the Immigrant Women and Children Project (a program of the City Bar Justice Center, the pro bono affiliate of the City Bar) has been representing victims of trafficking for more than a decade.

This Committee supports the provisions in Part H that place a greater emphasis on services for trafficking victims. We support the provision that non-law enforcement persons, such as social and legal service providers, are authorized to make referrals to the State Office of Temporary and Disability Assistance for victim services. We also urge passage of the provision that creates an affirmative defense in prostitution prosecutions where the defendant's

participation was a result of having been a victim of sex trafficking. Trafficking victims are frequently arrested and convicted for crimes their traffickers forced them to commit. We also support the alignment of New York State law with federal legislation on protecting minors under 18 years old as victims of trafficking without the need to prove force, fraud or coercion.

Finally, this Committee supports raising the penalties of labor trafficking to a B felony, but would like to call attention to the reality that labor trafficking can be a violent crime as well.

Recommendations

First, we note that a separate anti-trafficking bill, A.7474, creates a private right of action for all trafficking survivors to seek compensation, which is consistent with federal law. The bill also provides a right to counsel for trafficking victims bringing CPL 440.10 motions to vacate prior prostitution convictions from their criminal records, a measure the City Bar supports. While we are not commenting on support for A.7474 in its entirety, such language regarding a private right of action and right to counsel should be considered for inclusion in Part H of the Act.

Second, we note that Part H also expands the application of sex offender registration to new crimes, including aggravated patronizing a minor for prostitution. While expansion of sex offender registration can be an effective tool to target a small and dangerous class of violent sex offenders, the expansion as contemplated by Part H raises overbreadth and due process concerns. Further, the City Bar has concerns that sex offender registration in New York is based on a risk assessment tool that is outdated and biased against young offenders. Sex offender registration expansion would also come at a heavy cost to the State, which would then be responsible for monitoring this expanded class of individuals. On balance, we recommend that the provisions expanding the pool of sex offender registrants be tabled until further study can be undertaken.

PART I - PROVIDING REASONABLE ACCOMODATIONS FOR PREGNANT WOMEN

Part I of the Act would amend New York State's Executive Law §§ 292; 296 to explicitly require employers to provide reasonable accommodations to the known "pregnancy-related conditions" of an employee. "Pregnancy-related conditions" is defined, under the Act, to include medical conditions related to pregnancy or childbirth. The definition of "reasonable accommodations" would also be amended to include pregnancy-related conditions.

The City Bar has previously supported legislation similar to this provision of the Act. The failure of courts to interpret the Pregnancy Discrimination Act ("PDA") to require reasonable accommodations for pregnant workers, such as temporary lifting restrictions or more frequent bathroom breaks, has led to a gap in the law that most acutely affects our state's low-wage workers. The New York State Human Rights Law has been similarly construed to exclude pregnant workers from employers' reasonable accommodations obligations. By addressing this gap in the law, the Act will help pregnant workers keep their jobs by requiring employers to make reasonable accommodations for pregnancy. The Act will improve economic security and equal opportunity for pregnant workers without unduly burdening employers.

Pregnancy discrimination continues to harm New York women thirty-five years after the federal PDA was passed. Currently, pregnant women are often pushed onto unpaid leave or terminated when short-term modifications at work would allow them to stay healthy and on the job. This provision would provide critical protections for pregnant workers across the state.

PART J - CODIFICATION OF *ROE V. WADE*

Part J of the Act will take abortion out of the criminal code and make it a matter of Public Health Law. A woman will be able to legally access abortion services where the fetus is not viable or whenever a licensed physician determines that the procedure is necessary to protect her life or health. While still permitting health care providers to refrain from providing abortions due to religious or moral beliefs, the Act will bar any criminal prosecutions against physicians who choose to perform abortions in compliance with the law.¹²

New York legalized abortion three years before *Roe v. Wade*.¹³ Unfortunately, though, that law has not changed since 1970 and desperately needs an update. The Act will finally align New York abortion law with the protections granted by *Roe* and reaffirmed in *Casey*.¹⁴ Because New York currently regulates abortion in the criminal code, doctors may be deterred from providing necessary care where they fear potential prosecution. Because there is no exception for a woman facing devastating health risks later in her pregnancy, a woman in such a position may be forced to leave New York to get the care she needs. A woman who cannot afford to do so is out of options. Part J of the Act will fix this. As reproductive rights continue to face increasing nationwide attacks, this is a necessary step to ensure that New York women and families will continue to have access to safe, appropriate reproductive healthcare services.

CONCLUSION

In closing, while the City Bar respectfully urges the consideration of our recommendations, we support the passage of the New York Women's Equality Act in its entirety.

Pamela B. Zimmerman
Chair, Sex and Law Committee

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¹² The Committee notes that, if enacted into law, Part J of the Act would not supersede or override the current federal law that bans so-called "partial birth abortion" procedures (18 U.S.C. § 1531).

¹³ 410 U.S. 113 (1973).

¹⁴ Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).