



**NEW YORK
CITY BAR**

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REPORT ON LEGISLATION

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Providing Reasonable Accommodations for Pregnant Women

EXECUTIVE SUMMARY

The City Bar **SUPPORTS** the above bills and urges their enactment into law this year.

Last January, Governor Cuomo announced a series of initiatives in his State of the State address, which were later introduced in the Assembly as an omnibus ten-part bill referred to as the Women's Equality Act (the Act). Although the Act passed the Assembly, it did not pass in the Senate. However, there is still time to enact into law this year several bills that have long eluded resolution in the Legislature and that will immediately and positively impact the lives of New York women in so many ways – in the workplace, the home, the courtroom, and the public arena. The City Bar therefore supports the enactment of the seven bills discussed below.

BACKGROUND

In the waning days of the 2013 legislative session, the Assembly passed the ten-part Act in its entirety, as one bill. The City Bar supported the omnibus version of the Act and we applaud the Assembly for passing it. The Senate, however, took a different approach: it divided the Act into ten separate bills and passed nine of them, excluding the bill that would have provided important updates to New York's abortion law. In order for any of those nine bills to become law, they must be passed by the Assembly as separate bills and signed by the Governor before the end of the year.

The Act made sense as an omnibus compromise bill, but since the Senate did not pass it as such, the Assembly should now examine the bills as stand-alone bills. Indeed, many of the Act's

provisions had their genesis as stand-alone bills in the Assembly. And, assuming that the Senate will not return to Albany before the end of the year to pass the abortion provision (which we think is a safe assumption), we urge the Assembly to consider passing those stand-alone bills that would make good law.

It is worth stating at the outset that we do not support the Senate's decision to avoid a vote on the Act's abortion provision. The City Bar has been a longstanding supporter of the reproductive rights of women and we believe that an update to New York's abortion law is long overdue. Although New York legalized abortion three years before *Roe v. Wade*, the law has not changed since 1970; it remains in the criminal code and falls short of the protections provided by *Roe* and its progeny. As reproductive rights continue to face increasing nationwide attacks, it is more important than ever to update the law and ensure that New York women and families have access to safe, appropriate reproductive healthcare services throughout their pregnancies. We will continue to advocate for passage of a comprehensive reproductive rights amendment to the law. We do not believe, however, that this goal is incompatible with acting on the present opportunity to enact laws that will help women and girls in other ways.

S.5872 (A.8070 - PART A) - PROVIDING WAGE EQUITY AND TRANSPARENCY

S.5872 requires that employers provide equal pay to similarly positioned employees doing work that requires equal skill, effort and responsibility. Under the bill, 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. The bill prohibits employers from retaliating against employees who inquire about or disclose wage information. To help employers comply with the bill, 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.

Enactment of this bill is overdue. New York women still earn 84% of what New York men are paid.¹ This bill 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 bill will level the playing field for New York women and ensure they finally receive wages based on their skill and performance, not their gender.

S.5873 (A.8070 - PART B) - STRENGTHENING SEXUAL HARASSMENT LAWS

S.5873 amends the New York State Human Rights Law (the "HRL")² so that no employer within New York State may subject an employee to sexual harassment. Currently, Section 292(5)

¹ 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).

² N.Y. Exec. Law § 290 *et seq.*

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. This bill would 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 bill expands and strengthens 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,³ 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. . . ."⁴ Sexual harassment is a persistent and insidious form of sex discrimination that restricts the employment opportunities of countless women. Passage of this bill will move New York toward a future where all workplaces are free from sexual harassment.

S.5875 (A.8070 - PART D) - PROHIBITING EMPLOYMENT DISCRIMINATION BASED ON FAMILIAL STATUS

S.5875 will amend the 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.⁵ The City Bar has long supported the concept of protecting parents from workplace discrimination. The HRL already bans discrimination in housing⁶ 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.

While this is a significant additional protection, the bill does not at all change the framework of civil rights law in New York. Since "family status" would simply be added to the existing legal framework governing discrimination cases, employers will 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 will not be required to accommodate parents' busy schedules. Rather, an employer will be prohibited from subjecting an employee to discriminatory treatment because he or she has children.

³ 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).

⁴ N.Y. Exec. Law § 290(3).

⁵ N.Y. Exec. Law § 292 (26).

⁶ N.Y. Exec. Law § 296(2-a).

S.5876 (A.8070 - PART E) - PREVENTING HOUSING DISCRIMINATION

S.5876 amends Real Property Law § 227(d) to prohibit discrimination in housing based on domestic violence status and amends Real Property Actions and Proceedings Law § 744 to prohibit evictions based on domestic violence status. “Domestic violence victim” and “domestic violence victim status” are defined to mean a person who is or has been - or a parent accompanied by a minor child who is or has been - in a situation in which such person or child is a victim of an act that would constitute a violent felony offense as enumerated in Penal Law § 70.02, or a family offense as enumerated in Family Court Act § 812(1), and such act is alleged to have been committed by a member of the same family or household, as defined in Family Court Act § 812(1).

The bill provides that no owner, manager or agent of a building used for dwelling purposes shall, because of a person’s domestic violence victim status refuse to rent a residential unit to any such person or family when, but for such status, the rental would not have been refused; discriminate in the terms, conditions, or privileges or any such rental because of a person’s domestic violence victim status; or print or circulate any statement, advertisement or publication which expresses any limitation, specification or discrimination regarding such status.⁷ A violation of this provision is a misdemeanor, punishable by a fine of not less than \$1,000 and not more than \$2,000. It is a defense that an owner, manager or agent refused to rent a residential unit on any other lawful ground.

The bill also permits a private right of action where such discrimination has occurred. A claimant may receive compensatory and punitive damages (not to exceed \$2,000 for each offense), and declaratory and injunctive relief. Reasonable attorneys’ fees may be awarded to a prevailing party; however, a prevailing defendant must make a motion for fees and show that the action or proceeding brought was not frivolous. An owner, manager or agent cannot be found civilly liable to other tenants, guests, invitees or licensees arising from reasonable and good faith efforts to comply with these requirements.

Nothing in the bill: (1) limits the ability of an owner, manager or agent to apply reasonable standards not based on or derived from domestic violence victim status in determining the eligibility of a person or family seeking to rent a residential unit; (2) prohibits municipalities from retaining or promulgating local laws that impose additional or enhanced protections prohibiting discrimination against victims of domestic violence; or (3) prohibits an owner, manager or agent from providing rental preferences for victims of domestic violence, providing any other assistance to victims of domestic violence in obtaining or retaining housing, or responding to any inquiry or request by an applicant or tenant who is a victim of domestic violence. The bill does not apply to buildings that are owner occupied and have two or fewer residential units.

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 leave

⁷ The bills amends RPAPL § 744 to provide that a tenant shall not be removed from possession of a residential unit because of such person’s domestic violence victim status; that it shall be a defense to an eviction proceeding that a landlord seeks the eviction because of a person’s domestic violence victim status; and that a landlord may rebut such defense by showing that the eviction is sought because of any other lawful ground.

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 this bill.

Recommendation: 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 this part is under-inclusive. There are many acts that are not encompassed within that definition but would nevertheless be considered domestic violence. This definitional change could be encompassed in a future amendment.

S.5877 (A.8070 - PART F) - STRENGTHENING ORDERS OF PROTECTION

S.5877 amends the Family Court Act, Criminal Procedure Law and Domestic Procedure Law to include provisions that will strengthen orders of protection in two key respects. First, if this bill is enacted, the law will clearly and consistently state that “the protected party in whose favor the order of protection or temporary order of protection is issued may not be held to violate an order issued in his or her favor nor may such protected party be arrested for violating such order.” Second, if enacted all orders of protection and temporary orders of protection will need to contain a notice advising that the order will stay in effect even if the protected party has, or consents to have, contact or communication with the party against whom the order is issued. The notice will also advise the parties that the order of protection can only be modified or terminated by court order, and it will 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, the City Bar supports this bill because it strengthens the value and force of orders of protection, thereby enhancing the protections afforded to victims of domestic violence under New York law.

S.5878 (A.8070 - PART G) - EASING THE PROCESS OF OBTAINING ORDERS OF PROTECTION

S.5878 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. We support 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 bill takes into consideration the safety of survivors and includes a provision 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 bill 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 bill 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.

S.5880 (A.8070 - PART I) - PROVIDING REASONABLE ACCOMODATIONS FOR PREGNANT WOMEN

S.5880 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 bill, 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 bill. 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 bill will help pregnant workers keep their jobs by requiring employers to make reasonable accommodations for pregnancy. It 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.

September 2013