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WRITTEN TESTIMONY OF THE SEX AND LAW COMMITTEE

THE NEW YORK CITY COMMISSION ON HUMAN RIGHTS HEARING

**APPLICATION OF HUMAN RIGHTS LAW TO PREGNANCY,
CHILDBIRTH AND RELATED MEDICAL CONDITIONS
(CHAPTER 2 OF TITLE 47 SECTIONS § 2-01; 2-07; § 2-08)**

NOVEMBER 12, 2020

The Sex and Law Committee of the New York City Bar Association (“City Bar”) appreciates the opportunity to provide testimony regarding protecting individuals with respect to pregnancy, childbirth and related medical conditions and sexual and reproductive health decisions in New York City. Our Committee represents a broad cross-section of the legal community, including civil rights attorneys, prosecutors, public defense attorneys, and attorneys who work and practice in a wide range of areas, including violence against women, reproductive rights, gender discrimination, poverty, matrimonial and family law, employment law, and same-sex marriage. Our Committee has a longstanding commitment to fighting for gender equity and civil rights related to pregnancy and sexual health decisions and outcomes, and we are well positioned to comment on these proposed regulations.

The City Bar commends The New York City Commission on Human Rights (the “Commission”) for dedicating efforts towards improving protections for individuals with respect to pregnancy, childbirth, and related medical conditions in the New York City Human Rights Law. Discrimination on the basis of pregnancy, childbirth, or related medical conditions is among the most invidious and prolific forms of discrimination, and it is critical we secure robust anti-discrimination laws and statutory protections for members of our workforce affected by it. The many overt and covert forms of discrimination based on pregnancy, childbirth or related medical conditions impact workers not just during pregnancy, but also pre-conception and in the postpartum days, months, and years. On a broader scale, they negatively impact the entire workforce. In the times of COVID-19, with increased health risks for these aforesaid employees and the dynamic nature of the remote office, these issues are more pertinent than ever.

As one of the first cities to pass Pregnancy Accommodation laws,¹ New York City must continue to exemplify leadership through laws that guarantee comprehensive protection for its employees with regard to pregnancy and related outcomes. It is in this spirit that our committee urges you to consider addressing the following additional issues:

¹ See New York City Local Law Int. No. 974-A (2013).

- We ask the Commission to ensure that medical documentation not be required by an employer for a pregnancy related accommodation in any circumstance.
- We ask you to ensure that cooperative dialogue be an individualized process and that temporary excusals from work be recognized as a form of accommodation.
- We urge the inclusion of anti-retaliation language.
- We ask you to reexamine language around lactation accommodation to ensure clear and timely notice of an employee’s rights to express milk.
- We urge you to include examples representative of a broader range of workplace experiences, including gender-nonconforming employers/ees, remote work, and discreet forms of workplace harassment.

I. MEDICAL DOCUMENTATION MUST NOT BE REQUIRED BY AN EMPLOYER FOR A PREGNANCY RELATED ACCOMMODATION

An employee should not be required to provide medical documentation for an accommodation related to pregnancy. Under the proposed rule, an employer can ask an employee for medical documentation for an accommodation as long as the need is not deemed obvious, apparent, or relating to a pregnancy, childbirth or a related medical condition that is “non-complicated.”² The proposed rule as written fails to define these terms, leaving it to the discretion of employers to interpret the rule according to their own standards. Essentially, this language negates the protections against medical note requirements that this Commission has previously recognized as a human rights infringement and has sought to protect against. Furthermore, this standard puts employees already experiencing emotional and physical distress, due to a challenging pregnancy, childbirth or related issue, in the position of either having to explain painful and personal circumstances to an employer, or to request a note from a medical professional each time an accommodation is needed. Oftentimes, accommodation notes contain highly sensitive and confidential medical information that an employee may not wish to divulge and to which an employer should not be privy.

II. COOPERATIVE DIALOGUE MUST BE AN INDIVIDUALIZED PROCESS AND TEMPORARY EXCUSALS OF WORK CAN BE A PART OF AN ACCOMMODATION

Our Committee generally supports the language regarding a Cooperative Dialogue under the Proposed Rule. However, under § 2-07(f)(4)(b) of the Proposed Rule, an employee should not be forced or coerced into using an accommodation that they do not want or need. For example, if an employee does not want to express milk in a designated lactation room, that employee should not be required to use the room. Additionally, if an employee needs a temporary excusal because they cannot perform the essential functions of their job, then excusing an essential function for a period of time should be recognized as an accommodation.

² Chapter 2 of Title 47 of the Official Compilation of the Rules of the City of New York § 2-07 (“Proposed Rule”) 10(f)(6).

III. LANGUAGE PREVENTING RETALIATION BY AN EMPLOYER AGAINST AN EMPLOYEE IN THE TERMS, CONDITIONS OR PRIVILEGES OF THE EMPLOYEE’S EMPLOYMENT IS A CRUCIAL PROTECTION.

Currently, the Proposed Rule does not contain an anti-retaliation provision protecting employees against such discrimination from their employers. Many pregnant, nursing, or postpartum employees are retaliated against for needing minor accommodations to ensure a healthy pregnancy, childbirth and postpartum period. These employees are retaliated against for merely exercising their rights under the law. For example, many employees, after requesting reasonable accommodation, are passed over for promotions, raises, denied annual discretionary bonuses, subject to negative performance reviews, placed on different work teams, have their office relocated, or are excluded from assignments involving travel, client meetings and networking. Of greatest concern are absence control policies or “no-fault” attendance policies, which provide “points” to an employee each time they are late and which can add up and lead to a penalty. Giving someone a point for a lawfully protected absence should not be tolerated. In fact, many employees avoid exercising their rights to accommodation for even minor and basic requests, like a schedule change due to a doctor appointment, fearful that any such request would convey the message that their pregnancy is interfering with work. Accordingly, it is critical to include a non-retaliation clause in order to protect against this insidious form of discrimination.

IV. AN EMPLOYEE’S RIGHT TO EXPRESS MILK WITH OR WITHOUT A LACTATION ROOM MUST BE PROVIDED FOR IN A CLEAR AND TIMELY MANNER

While an employer’s provision of an accessible, private, sanitary space for expressing milk is imperative to ensure employees are not discriminated against, as provided under § 2-07(f)(1)(i-ii), it is equally important to ensure that a lactating employee is not shamed or forced to utilize the facility should they choose not to do so. The right to express milk without having to use the employer’s designated lactation accommodation space is recognized by New York State, and it is critical the Commission does as well.³ Furthermore, we emphasize that an employer’s lactation policy must be readily available and shared with employees in a timely manner. For example, in order to provide adequate notice for decision-making and to facilitate cooperative dialogue between employers and employees, we urge the Commission to require employers to provide employees with their lactation policy at the beginning of parental leave, instead of upon the employee’s return to work from leave.⁴

We also see the need to expand employer lactation accommodation spaces to include vacant, overflow, or available offices, flex or break rooms, or the construction of lactation pods where the size of the employer’s physical business is limited. The use of a bathroom or restroom

³ New York Consolidated Laws, Labor Law - LAB § 206-c. Right of nursing mothers to express breast milk.

⁴ § 2-07(e)(ii) of the Proposed Rule currently reads: “employers should also give the policy to employees when they return from parental leave.”

as the designated lactation accommodation should not be an option as recognized by New York State law.⁵

Additionally, in the dynamic workplace environment due to COVID-19, it is critical that lactation accommodation is clearly provided for in the virtual and remote workplace. For example, if an employee is on a remote video conference for an extended period of time, that employee must be given reasonable time to express milk or nurse a child throughout the duration of the video conference.

V. IT IS CRITICAL TO PROVIDE EXAMPLES OF INCONSPICUOUS WORKPLACE HARASSMENT, AS WELL AS EXAMPLES OF ACCOMMODATIONS FOR NONBINARY AND GENDER NON-CONFORMING EMPLOYEES

Harassment and retaliation regarding pregnancy and related outcomes affect employees of all genders in a broad range of scenarios, ranging from the obvious to the inconspicuous. It is crucial that the Commission represents such diversity of experience in the examples provided along with the Proposed Rule or in the guidance document. In some scenarios, discriminatory treatment and harassment are as straightforward as an employee's termination after announcing their pregnancy or an employee's receiving comments by an employer about their weight gain. However, more often than not, a seemingly more innocuous path leads to the same damaging result. For example, many employees, after announcing their pregnancy, begin to receive negative performance reviews, are excluded from social functions, and notice a change in the type or amount of work they are assigned. Furthermore, many times pregnant employees receive unprompted comments regarding their body or questions about their pregnancy, including asking how many months along a pregnant person is based on unwanted visual observations alone. Less obvious examples should be provided with the proposed amendment in order to ensure such commonplace experiences are exposed and protected against.

Concrete examples of non-binary and gender non-conforming pregnant and lactating individuals are also important to provide along with any legislation to ensure that employers understand the breadth of protections under the rule.

VI. CONCLUSION

The Sex and Law Committee supports the passage of Chapter 2 of title 47 Sections 2-01; 2-07; 2-08 to ensure the most robust protections for employees, and urges the Commission to make the foregoing additions and clarifications. Accordingly, we urge the Commission to add language to the rule that will ensure the right to receive reasonable accommodations without medical documentation, without invasive or unwanted employer-led conversations, without retaliation, and to provide for clear and timely notice on lactation accommodation rights. Additionally, we urge the Commission to include examples in the rule that include gender non-conforming employees,

⁵ All employers in New York are required to support all breastfeeding employees (not just hourly employees, as covered by the FLSA) with time and a space (other than a bathroom) to pump at work for up to three years after the child's birth. (The FLSA requirements apply only to the first year after the baby is born.) N.Y. Labor Law § 206-c.

subtle instances of harassment, and scenarios applicable to online-based work spaces, and to include language that provides equally robust protections in both physical and online workspaces.

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*⁶ Ms. Diaz-Tello is employed by If/When/How: Lawyering for Reproductive Justice and will be providing testimony at this hearing on their behalf. She did not participate in the drafting of this testimony.