COMMISSION ON GENDER EQUITY

HUMAN RIGHTS

Raymond Windmiller
Executive Officer
Executive Secretariat
U.S. Equal Employment Opportunity Commission
131 M Street NE
Washington, DC 20507

Submitted via Federal eRulemaking Portal

***RE: City Of New York Comments on* Regulations to Implement the Pregnant Workers Fairness Act (RIN number 3046–AB30)**

The City of New York ("NYC" or "the City"), including the Commission on Human Rights ("CCHR"), the Department of Health and Mental Hygiene ("NYC Health Department"), the Commission on Gender Equity, and the Mayor's Office of Equity submit the following comments in response to the EEOC Notice of Proposed Rulemaking.

NYC's Long-standing Anti-discrimination Laws & Policies Protecting Pregnant People and Parents

First, NYC is grateful for the passage of the federal Pregnant Workers Fairness Act ("PWFA") and commends the EEOC for its quick issuance of these proposed guidelines. NYC stands at the forefront of protecting the rights of pregnant, lactating, and parenting people, and the City is a beacon for reproductive choice, providing critical health services and resources to pregnant people and parents. In addition to affirmatively promoting equity for all, NYC's anti-discrimination law, the NYC Human Rights Law ("NYCHRL"), prohibits discrimination in the workplace against pregnant people and individuals based on sexual and reproductive health decisions.[1] The Law also requires employers to engage in a cooperative dialogue with and provide reasonable accommodations to people on the basis of pregnancy, childbirth, and related medical conditions.[2] What's more, the NYCHRL guarantees that lactating parents are provided

[1] N.Y.C. Admin. Code § 8-107(1)-(2).
[2] N.Y.C. Admin. Code § 8-107(22).

with adequate lactation rooms, and the Law's protections apply to private actors and government agencies, including a wide variety of workplaces and industries.

Additionally, NYC demonstrates its commitment to protecting and supporting pregnant people and parents through a wide array of laws, policies, and programs. For example, in 2016, the City launched its Standards for Respectful Care at Birth to inform, educate, and support birth parents.[3] Further, through the City's New Family Home Visits Initiative, new families can receive support through Doula Care, the Newborn Home Visiting Program, and the NYC Nurse-Family Partnership.[4] NYC also provides low- to no-cost sexual health services at clinics across the City, including medication abortion services, and NYC Health + Hospitals recently became the first public hospital system in the nation to offer telehealth abortion medication services.[5]
For nearly a decade, the NYCHRL has required employers[6] to provide reasonable accommodations on the basis of an employee's

> pregnancy, childbirth, or related medical condition that will allow the employee to perform the essential requisites of the job, provided that such employee's pregnancy, childbirth, or related medical condition is known or should have been known by the employer.[7]

These protections are reflected in subsequent CCHR rules and guidance.[8] Separately, the NYCHRL specifically requires lactation accommodations for employees to express milk in the workplace, including the requirement to provide an adequate and clean lactation room, and it requires employers to have a written lactation policy.[9]

Due to NYC's long-standing protections for pregnant workers, the City has much experience implementing protections similar to the PWFA. Since 2015, CCHR has received and resolved hundreds of reports of discrimination based on pregnancy, with the vast majority of claims arising in employment. Based on our experience, the proposed rule reflects valuable and clear guidance and examples of how employers can meet the PWFA's obligations and what employees are entitled to under the new law. Moreover, the EEOC includes strong examples of reasonable accommodations and illustrative scenarios to guide employers and employees in their understanding of new rights and obligations at the federal level.

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[3] *See* New York City Standards for Respectful Care at Birth, *available at* https://www.nyc.gov/assets/doh/downloads/pdf/ms/respectful-care-birth-brochure.pdf (last visited on Oct. 5, 2023).
[4] *See* New Family Home Visits Initiative, *available at* https://www.nyc.gov/site/doh/health/health-topics/new-family-home-visits.page (last visited on Oct. 5, 2023).
[5] *See* Sexual Health Clinics, *available at* https://www.nyc.gov/site/doh/services/sexual-health-clinics.page (last visited Oct. 5, 2023). *See also* Mayor Adams Makes Abortion Care Available Via Telehealth To New Yorkers Through NYC Health + Hospitals, Press Release (Oct. 2, 2023), https://www.nyc.gov/office-of-the-mayor/news/723-23/mayor-adams-makes-abortion-care-available-via-telehealth-new-yorkers-nyc-health-#/0.
[6] The NYC Human Rights Law applies to employers with four or more workers and employers with one or more domestic workers, and, in the case of gender-based harassment, employers of all sizes. N.Y.C. Admin. Code § 8-107. The NYCHRL's employment protections apply broadly, and cover independent contractors, interns, and freelancers. N.Y.C. Admin. Code § 8-107(23).
[7] N.Y.C. Admin. Code § 8-107(22).
[8] *See* 47 R.C.N.Y. § 2-09; NYC Commission on Human Rights Legal Enforcement Guidance on Discrimination on the Basis of Pregnancy, Childbirth, Related Medical Conditions, Lactation Accommodations, and Sexual or Reproductive Health Decisions (2021), *available at* https://www.nyc.gov/site/cchr/law/pregnancy-legal-guidance.page.
[9] *See* N.Y.C. Admin. Code § 8-107(22); NYC Local Law Nos. 185 & 186 (2018).

Based on NYC's decades-long experience with implementing laws and policies that protect pregnant and lactating people in the City's diverse workplaces, we submit these comments to offer suggestions that we believe will clarify and strengthen the rule.

Duration and Timeliness of Accommodations. The NYCHRL does not impose time constraints on the duration of lactation accommodations or accommodations related to pregnancy, childbirth, or related medical conditions.[10] This reflects the reality that the necessary length of every accommodation will vary from person to person. Therefore, NYC recommends that the EEOC's regulations effectuating the PWFA acknowledge that the duration of reasonable accommodations are meant to be individualized and should not be tethered to a specific time constraint. Additionally, requests for reasonable accommodations under the NYCHRL are treated as time sensitive given the temporal nature of requests related to pregnancy and pregnancy-related conditions. As set forth above, the needs and limitations of each employee may vary throughout their pregnancy, and the need for employers to provide these accommodations in a timely manner is critical. Therefore, NYC applauds the EEOC's acknowledgement that employer delay in responding to accommodation requests may violate the PWFA, and recommends that the EEOC require the same time sensitivity throughout the entire reasonable accommodation process, including with respect to providing accommodations under the PWFA. This principle is supported by federal case law. *See Lyman v. City of New York*, No. 01-civ-3789, 2003 WL 22171518, at *6 (S.D.N.Y. Sept. 19, 2003) ("An 'unreasonable delay in providing an accommodation may provide evidence of discrimination.'") (internal citations omitted).

Pregnancy definition. Importantly, the EEOC rule adopts an inclusive definition of "pregnancy, childbirth, and related medical conditions," which encompasses, among other things, the use of birth control, menstruation, undergoing infertility and fertility treatments, having endometriosis, a stillbirth, an abortion, and various mental health conditions. We appreciate the PWFA's clear requirement that employers provide their workers with reasonable accommodations for known limitations related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, unless the accommodation will cause an undue hardship on the operation of the business of the covered entity. 42 U.S.C. § 2000gg–1. To ensure clarity, we encourage the EEOC to provide in 1636.3(b) that the definition of "pregnancy" covers *symptoms of* pregnancy, including but not limited to nausea, morning sickness, dehydration, increased appetite, swelling of extremities, and increased body temperature.[11]

We also support EEOC's adoption of a definition of "pregnancy, childbirth, and related medical conditions" that references medication and procedural abortion, including the recovery thereof. Abortion is healthcare and an essential part of full spectrum clinical care for pregnant people. Due to pregnancy complications that can include placental abruption, bleeding from placenta previa, pre-eclampsia or eclampsia, and cardiac or renal conditions, abortion may be the only measure to preserve a pregnant person's health or life.[12]

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[10] *See* N.Y.C. Admin. Code § 8-107(22).
[11] *See* 47 R.C.N.Y. § 2-01 ("'Pregnancy' refers to being pregnant, and symptoms of pregnancy, including, without limitation, nausea, morning sickness, dehydration, increased appetite, swelling of extremities, and increased body temperature.)
[12] *See* Facts Are Important: Abortion is Healthcare, *available at* https://www.acog.org/advocacy/facts-are-important/abortion-is-healthcare (last visited Oct. 5, 2023).

More importantly, people who receive a wanted abortion are more likely to have an intended pregnancy within the next five years compared to those who are denied a wanted abortion.[13] This underscores the importance of abortion care to ensure future healthy pregnancies. Safe, legal, abortion is a cornerstone of public health, and NYC affirms pregnant peoples' right to choose the care that is right for them and to be able to receive workplace accommodations that may be necessary as a result of this healthcare.

Supporting documentation requirements. We commend the EEOC's acknowledgment in 1636.3(l) that, in many instances, it is not appropriate for an employer to request documentation for a reasonable accommodation related to pregnancy, childbirth, or a related medical condition.[14] However, the proposed language of 1636.3(l) may allow so much latitude for determining when it is "reasonable under the circumstances" to request supporting documentation that the provision contravenes the purpose of the PWFA. Indeed, as the EEOC highlights, obtaining supporting documentation is impracticable for many workers entitled to reasonable accommodations under the law. 88 Fed. Reg. 54736 & nn. 128 & 129 (Aug. 11, 2023). To alleviate any unnecessary burden on individuals who need accommodations, NYC recommends that the EEOC clarify that it is generally unnecessary and prohibited to require supporting documentation concerning reasonable accommodation requests for pregnancy, childbirth, or related medical conditions. We also recommend that the EEOC enumerate with specificity the narrow circumstances where it may be reasonable for employers to request supporting documentation, such as for a leave of absence (other than the period of recovery following childbirth) where the employer typically requests verification from other employees requesting leave-related accommodations unrelated to pregnancy, childbirth, or a related medical condition.[15]

In addition, we recommend that the EEOC modify the explanation of what constitutes "reasonable documentation" under 1636.3(l)(2) by removing the allowance for employers to require documentation that "describe[s] or confirm[s] the physical or mental condition." In the limited circumstances where it is appropriate for an employer to request supporting documentation in the reasonable accommodation process, the documentation need only describe the limitation, confirm that the limitation is related to, affected by, or arising out of pregnancy, childbirth, or related medical condition, and that a change or adjustment at work is needed. The PWFA should not entitle employers to detailed medical information that may concern an employee's reproductive choices. For example, it is neither required nor appropriate for an employer to know that an employee's limitations stem from an abortion procedure, miscarriage, or high-risk pregnancy.

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[13] Upadhyay, Aztlan-James *et al.,* Intended pregnancy after receiving vs. being denied a wanted abortion,. Contraception. Vol 99: 1 (Jan. 2019), at 42-47, *available at* https://www.contraceptionjournal.org/article/S0010-7824(18)30433-5/fulltext.

[14] This issue has arisen in NYC's enforcement of our pregnancy accommodation protections. For example, in July 2020, the CCHR settled a NYC pregnancy accommodation case with Chipotle Mexican Grill, Inc. where Chipotle refused to provide a pregnant employee the modest reasonable accommodation of being excused from heavy lifting because she did not provide medical documentation. Under the NYCHRL, it was unlawful for Chipotle to require the unnecessary medical documentation and fail to provide a reasonable accommodation. As part of the settlement, Chipotle paid the employee back pay, emotional distress damages, attorney fees, and civil penalties, and, now, it must train managers, monitor reasonable accommodation requests, and provide employees information about their rights.

[15] 47 R.C.N.Y. § 2-09(g); NYC Commission on Human Rights Legal Enforcement Guidance on Discrimination on the Basis of Pregnancy, Childbirth, Related Medical Conditions, Lactation Accommodations, and Sexual or Reproductive Health Decisions, 10 (2021), *available at* https://www.nyc.gov/site/cchr/law/pregnancy-legal-guidance.page (last visited Oct. 5, 2023).

Undue hardship. We support the EEOC's inclusion of specific accommodations that will virtually never constitute an undue hardship for employers in 1636.3(j)(4), which are labeled therein as "predictable assessments." The following accommodations should be added to the list of "predictable assessments" in 1636.3(j)(4) because these minor modifications will very rarely, if ever, present an undue hardship under the PWFA standard:

- adjustments to uniform requirements or dress codes;
- longer bathroom breaks;
- allowing an individual to sit or eat at their workstation or other locations where eating or drinking is typically prohibited;
- moving a workstation;
- minor physical modifications to a workstation, including the addition of a fan or seat; or
- periodic rest[16]

Regarding the undue hardship standard under the PWFA, we recommend that EEOC modify 1636.3(j)(5), which currently states that an employer cannot establish undue hardship "based on a mere assumption or speculation that other employees might seek a reasonable accommodation, or even the same reasonable accommodation, in the future." Although we support the intent of placing parameters on when employers can claim undue hardship under the PWFA, the current language could be interpreted to mean that, if an employer had *actual knowledge* that other employees may seek a reasonable accommodation, it would be a basis to assert an undue hardship. That result is counter to the requirement of 1636.3(j)(4) that employers conduct an individualized, case-by-case, assessment of whether a requested accommodation constitutes an undue hardship. Thus, we recommend modifying the rule's language to avoid implying that an employer's concern that other employees may request a similar accommodation would permit an undue hardship defense under the PWFA. This is the case whether the concern is speculative or has materialized.

Process for requesting reasonable accommodations. We commend the EEOC for including a detailed explanation of the interactive process that employers must undertake when an employee requests an accommodation under the PWFA.

a. Cooperative dialogue regarding the need for an accommodation

Under the NYCHRL, employers are required to engage in a cooperative dialogue, which is

> the process by which an employer and a person entitled to an accommodation, or who may be entitled to an accommodation under the NYCHRL, engage in good faith in a written or oral dialogue concerning the person's needs; potential accommodations that may address their needs, including alternatives to a requested accommodation; and any difficulties that such potential accommodations may pose for the employer.[17]

[16] 47 R.C.N.Y. § 2-09(e)(1); NYC Commission on Human Rights Legal Enforcement Guidance on Discrimination on the Basis of Pregnancy, Childbirth, Related Medical Conditions, Lactation Accommodations, and Sexual or Reproductive Health Decisions, 10 (2021), *available at* https://www.nyc.gov/site/cchr/law/pregnancy-legal-guidance.page (last visited October 2, 2023).
[17] N.Y.C. Admin. Code § 8-102.

An employer's obligation to undertake a cooperative dialogue under the NYCHRL is triggered where an employer "knew or should have known" of the employee's pregnancy, childbirth, or related medical condition, regardless of whether an employee has proactively made any sort of request.[18] Absent a specific employee request, an employer still has an affirmative obligation to initiate a cooperative dialogue if the employer: (1) has knowledge that an employee's performance at work has been affected or that their behavior at work could lead to an adverse employment action; and (2) has a reasonable basis to believe that the issue is related to pregnancy, childbirth, or related medical condition.[19]

This contrasts with the PWFA, which places the onus on the employee to communicate their need for an accommodation. Given that many employees may not know they have such right under the PWFA, we recommend that the EEOC modify 1636.3(d) to simply require the employee to convey to the employer that they have a limitation before the employer must engage in the interactive process and explore reasonable accommodations. Such a change will promote more equitable workplaces, removing the burden solely from an employee to formally request an adjustment at work or make their need for an accommodation known expressly. For similar reasons, the final rule should include a more expansive list of both (a) who may constitute a representative of the employee, and (b) who at the covered entity should be the recipient of an employee's request. NYC also emphasizes that confidentiality and privacy are required by those receiving the employee's accommodation request on behalf of the employer.

b. Individualized assessment

A vital component of the NYCHRL's cooperative dialogue is the requirement for an individualized assessment of a reasonable accommodation request on the basis of pregnancy, childbirth, or a related condition.[20] We commend the EEOC for including similar language in the proposed rules, *see* 1636.3(j)(4). To ensure each request is reviewed based on individual circumstances, we recommend that the EEOC adjust the language concerning the leave accommodations that may be available to other employees in 1636.3(i)(3)(iii): "[t]he ability to choose whether to use paid leave (accrued, short-term disability or another employer benefit) or unpaid leave to the extent that the covered entity allows employees using leave not related to pregnancy, childbirth, or related medical conditions to choose between the use of paid leave (accrued, short-term disability, or another employer benefit) and unpaid leave." The assessment of the appropriate type of leave should be primarily driven by the individual employee's limitations and needs rather than treatment of other workers.[21]

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[18] N.Y.C. Admin. Code § 8-107(22); 47 R.C.N.Y. § 2- 09(e).

[19] Under 47 R.C.N.Y. § 2- 09(f), "[t]he employer should be cautious in initiating the cooperative dialogue in a way to open the conversation and invite the employee to feel comfortable in making a request, such as asking if there is anything going on with the employee, or reminding the employee of the various types of support available, including accommodations." 47 R.C.N.Y. § 2-09(f)(1) further clarifies this nuance, in stating "[a]n employer's obligation to engage in the cooperative dialogue when they "should know" about an employee's pregnancy, childbirth, or related medical condition is not a permissible basis for an employer to act on speculation based on stereotypes or assumptions about pregnancy. The obligation to initiate a cooperative dialogue can be met simply by reminding the employee of the employer's accommodations policy."

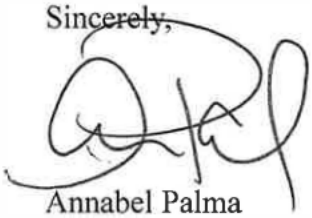
[20] *See* 47 R.C.N.Y. § 2-09(f)(5).

[21] We appreciate the EEOC's clear communication of the PWFA's directive that, although employees may request leave as a reasonable accommodation, employers cannot force employees to take leave if another reasonable accommodation can be provided absence an undue hardship. 42 U.S.C. 2000gg–1(4); 1636.4(d). Under the NYCHRL, an unpaid leave of absence may only be offered as a temporary accommodation when no other accommodation can be made. 47 R.C.N.Y. § 2-09(e)(2); NYC Commission on Human Rights Legal Enforcement Guidance on Discrimination on the Basis of Pregnancy, Childbirth, Related Medical Conditions, Lactation Accommodations, and Sexual or Reproductive Health Decisions, 11 (2021), *available at*

Employer policies. The EEOC seeks comment on ordinary workplace policies or practices that may penalize employees for utilizing accommodations under the PWFA. We recommend that the EEOC acknowledge that employers, which are using "no-fault" or "absence control" attendance policies, may be violating the PWFA. We encourage the EEOC to acknowledge that there are a wide range of policies that appear neutral but could violate the PWFA. For example, a policy that limits all employees to three fifteen-minute breaks without any exceptions could violate the PWFA if the policy does not give employees who need to express breastmilk enough time to do so.[22]

NYC is committed to protecting the rights of pregnant people at work and beyond. We appreciate the opportunity to comment on the proposed regulation and to serve as resources in the drafting of the rules, and the implementation of the PWFA.

Sincerely,



Annabel Palma
Commissioner NYC Commission on Human Rights

Sideya Sherman
Commissioner NYC Mayor's Office of Equity

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https://www.nyc.gov/site/cchr/law/pregnancy-legal-guidance.page (last visited Oct. 5, 2023). This issue arose in a December 2019 case that was resolved by the CCHR. In that case, a health maintenance organization violated the NYCHRL by forcing a pregnant employee to go on a leave of absence rather than provide her a reasonable accommodation to be excused from physically demanding job tasks, such as heavy lifting and standing for long periods of time. When she attempted to return to work, the employer told her that there were no positions available, while at the same time, they were hiring other applicants for positions Complainant was qualified for. As a result, the employer paid damages to the employee, and the individual respondents were required to attend trainings and perform community service.

[22] *See id.* at 6; 47 R.C.N.Y. § 2-09(c)(1).