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Office of the Chair
New York City Commission on Human Rights
22 Reade Street
New York, NY 10007

Re: Proposed Rules on Discrimination Based on Pregnancy, Childbirth, or Related Medical Conditions

We thank Commissioner Malalis and the New York City Commission on Human Rights ("CCHR") for convening this hearing on the proposed rule to clarify the scope of protections with respect to pregnancy, childbirth, and related medical conditions and sexual and reproductive health decisions in the New York City Human Rights Law. Under Commissioner Malalis's leadership, the Commission on Human Rights has shown unparalleled dedication to enforcing the City Human Rights Law to ensure that all New Yorkers, especially the most marginalized, are treated with equality, dignity, and respect under the law.

A Better Balance is a national non-profit legal organization that uses the power of the law to advance justice for workers, so they can care for themselves and their loved ones without jeopardizing their economic security. One of our key organizational priorities is to advance the rights of pregnant, breastfeeding, and parenting workers. For nearly a decade, we have led the pregnancy accommodation movement, fighting to ensure pregnant workers have a clear right to temporary workplace accommodations— the same right in place for workers with disabilities—to avoid the impossible choice between their paycheck and a healthy pregnancy.[1] We have also lifted up the experiences of women we hear from directly whose employers refuse to grant them modest accommodations, such as carrying a water bottle on the retail floor, light duty, or additional bathroom breaks to stay healthy and on the job.

A Better Balance's call to action sparked a concerted legislative movement to create a uniform pregnancy accommodations standard. In New York City, we drafted and shepherded to passage the NYC Pregnant Workers Fairness Act, which marked its fifth anniversary last year. Dozens of states have since followed the City's lead.[2]

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[1] Dina Bakst, *Pregnant, and Pushed Out of a Job*, N.Y. TIMES, Jan. 30, 2012, available at http//www.nytimes.com/2012/01/31/opinion/pregnant-and-pushed-out-of-a-job.html.
[2] A Better Balance, "Pregnancy Accommodation Laws in States & Cities," available at https://www.abetterbalance.org/resources/fact-sheet-state-and-local-pregnant-worker-fairness-laws/.

After the law passed, we worked closely with the Commission to ensure New Yorkers understood, and could assert, their rights under the law. In 2016, with input from A Better Balance, the Commission issued Pregnancy Discrimination Legal Enforcement Guidance (the "Guidance") to clarify employers' obligations and employees' rights under the law.[3] The guidance was, and remains, some of the strongest and clearest guidance on pregnancy accommodation law in the country and has proven to be a model of clarity for employers and workers alike, who have become accustomed to its framework. Indeed, the Guidance's impact extends well beyond the City's borders: In 2019, for instance, the Connecticut Commission on Human Rights and Opportunities issued legal enforcement guidance modeled largely after the Commission's Guidance.[4]

We are grateful for the opportunity to comment on the proposed rule. There are many aspects of the proposed rule that will help the callers and clients our organization serves and their employers.

We are deeply concerned, however, by the opacity and impracticability of significant portions of the proposed rule, which we fear will impede workers' ability to obtain the accommodations they need to continue working safely. The proposed rule's discussion of medical documentation requirements, the cooperative dialogue, notice, and retaliation are especially confusing and impractical. Accordingly, we urge the Commission to amend the rule to:

1. Adopt the medical documentation standard in the Commission's Guidance.
2. Clarify the cooperative dialogue standard in numerous ways.
3. Strengthen the notice requirement.
4. Add an anti-retaliation section.
5. Re-organize and strengthen the lactation accommodations section.
6. Restructure the organization of the rule.
7. Define "Employee" and "Covered Entity."
8. Expressly prohibit pregnancy- and lactation-related harassment.
9. Bolster the disparate treatment and disparate impact sections.
10. Clarify certain examples of accommodations.
11. Bolster and clarify the section explaining how to establish discrimination on the basis of failure to provide an accommodation.

We detail our concerns and recommendations below. We look forward to working with the Commission to strengthen and improve the proposed rule.

I. The Proposed Rule's Framework Concerning Medical Documentation Is Impracticable. The Commission Should Instead Adopt the Standard in Its 2016 Guidance.

We urge the Commission to revise Sections 2-07(f)(6) and (f)(7) of the proposed rule, which concern medical documentation requirements.

[3] N.Y.C. Comm'n on Human Rights, "Legal Enforcement Guidance on Discrimination on the Basis of Pregnancy," available at https://www1.nyc.gov/assets/cchr/downloads/pdf/publications/Pregnancy_InterpretiveGuide_2016.pdf.
[4] Conn. Comm'n on Human Rights & Opp., "Legal Enforcement Guidance: Pregnancy, Childbirth, or Related Conditions at Work," available at https://portal.ct.gov/-/media/CHRO/20190412RevisedProposedPregnancyGuidancepdf.pdf.

Section 2-07(f)(6) of the proposed rule states that "When an employer requires an employee to provide medical documentation of the need for an accommodation to address an *obvious need* of pregnancy, childbirth, or a related medical condition, it shall be presumed to be *harassment*. A need for accommodation because of pregnancy, childbirth or a related medical condition is deemed to be *obvious* when the need is *apparent* or relates to a need common to an *uncomplicated* pregnancy, childbirth or related medical condition."[5] The proposed rule provides no other guidance on when an employer may or may not require medical documentation.

CONCERNS:

A Better Balance maintains that pregnant workers should not need to provide medical documentation in order to receive accommodations. Often, employers will use the requirement to provide a medical note as a way to delay providing a very simple or reasonable accommodation, knowing that it may be very difficult for a worker to take time to visit their health care provider. This tactic—which disproportionately impacts low-wage workers—only stands to further compromise women's health. In addition, as we have seen up close at A Better Balance, vague and poorly written doctors' notes are also used as a tool to push out a worker rather than engage with them in a good faith interactive process.

That said, should the Commission find that a medical documentation requirement is warranted, we must ensure this requirement is workable for both employers and employees. The Commission's 2016 Guidance is a good example of such a model. The proposed rule, however, is not.

The novel "harassment" standard created by the proposed rule deviates significantly from the now-familiar framework articulated in the Guidance, presenting serious practical challenges for employers and employees alike and creating unnecessary barriers to employees' ability to access the accommodations they need.

First, the new standard requires a determination of whether a need for accommodation is "obvious" or "apparent" (a vague and ambiguous criterion) or "common" to an "uncomplicated" pregnancy—an inquiry better suited to a trained medical professional than a small business owner or line manager.

Second, even if an employer were able to determine that a request for medical documentation was permissible under the new standard, the proposed rule nowhere states what medical information an employer may require or request of an employee. For instance, may an employer require an employee to disclose the name of her condition and other personal medical information? Or may an employer only require disclosure of the limitation(s) giving rise to the need for accommodation? In its current form, the rule leaves workers exposed to invasive, inappropriate, and unnecessary inquiries into their medical conditions.

Third, the proposed rule apparently permits employers to require medical documentation in order to obtain run-of-the-mill or minor accommodations, thereby erecting substantial barriers to pregnant employees' ability to continue working. Because of the very nature of pregnancy, pregnant

[5] Emphasis added.

employees typically need accommodations urgently and only temporarily (weeks or months). Such accommodations, like more frequent break times to use the restroom or the right to carry a water bottle, are almost always low- or no-cost. Doctors' appointments, by contrast, are often difficult to schedule on short notice, time-consuming, and expensive. (Some healthcare providers even bill patients for completion of the medical certification itself, separate from the cost of an appointment.) At A Better Balance, we often hear from low-wage workers who struggle to obtain advance approval of time-off, and who are fearful—and routinely punished—for taking even a few hours off work.

Even when employees are able to obtain notes from their doctors, employers often reject such notes as being too vague and require employees to begin again the process of obtaining a note. Every day our organization assists workers who have been forced to obtain second or third doctor's notes—all while continuing to work without the accommodations necessary to safeguard their health. Faced with the (non)choice between jeopardizing their pregnancies and losing a paycheck, some workers drop out of the workforce, at the very moment they need a steady stream of income most.

Still other employees find that a poorly worded note—drafted by a healthcare provider unfamiliar with the intricacies of the law—is weaponized against them, pushing them out onto unpaid leave when they could, with reasonable accommodation, continue working. In short, medical documentation requirements regularly frustrate workers' ability to obtain the accommodations they need to continue working and are contrary to the goals of the New York City Human Rights Law ("NYCHRL").

Finally, the proposed rule is silent as to how its novel harassment standard will interact with existing laws that require medical certifications for time-off and leaves of absence. For instance, will an employer who requests medical documentation for a pregnancy-related absence under the New York City Earned Safe and Sick Time Act ("ESSTA") be liable for harassment under the rule?

RECOMMENDATIONS:

Given the substantial confusion and impracticability raised by the proposed rule, we respectfully urge the Commission to revise its approach.

1. **We urge the Commission to adopt the more familiar, practical, and workable medical documentation framework articulated in the Guidance**. The Guidance has provided clarity on the law for over four years, during which time employers and workers have become accustomed to its clear schema concerning medical documentation requirements. The Guidance provides:

> An employer may not require an employee to provide medical confirmation of pregnancy, childbirth, or related medical condition. An employer may only request medical documentation from an employee when: (1) an employee is requesting time away from work for medical appointments, other than the presumptive six to eight week period following childbirth for recovery from childbirth, and may do so only if the employer requests verification from other employees requesting leave-related accommodations for reasons other than pregnancy, childbirth, or related medical condition; or (2) an employee is requesting to work from home, either on an intermittent

basis or a longer-term basis. If an employer believes that the provided documentation is insufficient, the employer must request additional documentation, or, upon the consent of the employee, speak with the health care provider who provided the documentation before denying the request based on insufficient documentation. An employer must always allow an employee to submit sufficient written verification should an employee not want their employer speaking with their medical provider.

Outside of the circumstances identified above, an employer may not require medical documentation under the NYCHRL for any other accommodation based on pregnancy, childbirth, or related medical condition.

See Guidance § (III)(B)(1)(d). We strongly recommend that the Commission codify this well-known, clear, and commonsense approach

2. **If the Commission is unwilling to codify the Guidance's approach, we suggest an alternative, whereby the rule would (a) enumerate the accommodations for which an employer shall not request medical documentation, and (b) make clear that, where an employer is permitted to request medical documentation, the employer must provide a reasonable accommodation, absent undue hardship, while the employee endeavors to obtain the requested documentation.**

We propose the following language:

> Under no circumstances shall an employer request medical documentation of the need for the following accommodations: minor or temporary modifications to work schedules; adjustments to uniform requirements or dress codes; additional or longer food, drink, bathroom, or rest breaks; being permitted to sit or eat at their work station; moving a work station to permit movement or stretching of extremities, or to be closer to a bathroom; limits on lifting; minor physical modifications to a work station, including the addition of a fan or seat; periodic rest; assistance with manual labor; light duty or desk duty assignments; temporary transfers to less strenuous or hazardous work; and time-off to attend prenatal and postnatal appointments.[6]
>
> For all other accommodations, an employer may request medical documentation. During the time period in which an employee is making good faith efforts to obtain documentation, however, the employer shall provide the reasonable accommodation(s), absent undue hardship. An employer shall not take adverse action against an employee related to their need for accommodation while the employee is engaging in good faith efforts to obtain documentation.

[6] Under the City's own paid sick time law, ESSTA, an employer may require a doctor's note only if an employee is absent for more than three consecutive days. *See* 6 R.C.N.Y. § 7-206(a). A worker attending a prenatal or postnatal appointment will need several hours of time-off at most—far short of the time period for which an employer could require medical documentation under the sick time law. Accordingly, so as to synchronize the City's sick time and pregnant workers' fairness laws, the Commission should state in the rule that employers shall not require medical documentation for attendance at prenatal and postnatal appointments.

Such an approach will ensure employers understand their obligations and safeguard employees' ability to protect their health while complying with permissible medical documentation requirements.

3. **We also urge the Commission to delete the following language from Section 2-07(f)(7) of the proposed rule: "unless the employer would also require documentation to confirm an employee's ability to return to work from medical leave for disabilities other than those related to pregnancy, childbirth, or a related medical condition."**

This new language is antithetical to the language in the Guidance, which explicitly states that "employers must reinstate workers returning from leave related to childbirth to their original job or to an equivalent position with equivalent pay and comparable seniority, retirement benefits, and other fringe benefits." Guidance § (III)(B)(4)(b). The addition of this new language to the rule would enshrine in the NYCHRL a historic skepticism of pregnant and parenting women—that they do not know what is best for their bodies. And, for the very same reasons medical documentation requirements impede workers' ability to access timely accommodations, permitting employers to require a return-to-work certification would create unnecessary and dangerous barriers blocking pregnant workers from returning to the workplace.

II. The Proposed Rule's Discussion of the Cooperative Dialogue Is Vague and Should Be Sharpened to Make Employers' and Employees' Obligations Clear.

The cooperative dialogue is at the heart of the NYCHRL. It ensures that employer and employee engage in good faith conversation about the employee's individualized limitations and needs, so that they may work together to identify a workable accommodation. However, the proposed rule fails to fully explicate the cooperative dialogue, omitting several key components of the process.

CONCERNS:

First, unlike the Guidance, the proposed rule fails to expressly state that the cooperative dialogue requires an individualized process. The proposed rule also misses an opportunity to expound on the Guidance and explain what an individualized process specifically requires and disallows. We offer recommendations below that will remedy this concerning omission.

Second, the proposed rule also presents an opportunity to clarify the Guidance's assertion that an employer may conclude a cooperative dialogue when "no accommodation exists that will allow the employee to perform the essential requisites of the job." Guidance § (III)(B)(1)(c). Neither the Guidance nor the Rule make clear that temporary excusal of essential requisites is a form of reasonable accommodation, absent undue hardship. That addition is crucial.

Third, the Guidance states that "An employer's failure to engage in a cooperative dialogue with an employee prior to denying a request for accommodation may be tantamount to a failure to accommodate." Guidance § (III)(B)(2). Troublingly, the proposed rule omits this assertion. The rule should make clear that failure to engage in a cooperative dialogue is an independent violation of the NYCHRL.

Fourth, both the Guidance and proposed rule adopt the "knew or should have known" standard regarding initiating the cooperative dialogue. *See* Guidance § (III)(B); Proposed Rule § 2-07(f). We believe this standard is problematic because it could lead employers to make improper assumptions about pregnant workers' needs or to rely on stereotypes. Accordingly, we urge the Commission to revise the language of that standard.

Fifth, the organizational structure of Section 2-07(f) of the proposed rule is confusing. The Commission's Guidance clearly explains how to (a) initiate a cooperative dialogue; (b) engage in a cooperative dialogue; and (c) conclude a cooperative dialogue, followed by the repercussions for failing to engage in a cooperative dialogue. *See* Guidance § (III)(B)(1)-(2). By contrast, the proposed rule injects various subsections on non-related topics (such as Section 2-07(f)(1) on lactation accommodations and accompanying examples) within the cooperative dialogue section. Punctuating the cooperative dialogue section with unrelated substance, albeit important substance, will make it very difficult for a worker or employer to understand how to initiate, engage in, and conclude a cooperative dialogue. Attached, as Appendix A, are suggestions for how to re-structure this and other sections. We believe this revised structure will lend crucial clarity to the rule.

Finally, the proposed rule fails to provide hypothetical examples demonstrating how the cooperative dialogue may proceed in practice. We believe hypotheticals are a critical addition to the rule.

RECOMMENDATIONS:

1. **State that the cooperative dialogue must be an individualized process and what that requires.**

We urge the Commission to state that the cooperative dialogue must be an individualized process and explain what this individualized process requires.

Too often, our organization hears from workers whose employers substitute their own judgment of what an employee needs, often based on stereotypes about what pregnant workers want, can or cannot do, or should or should not do. The Guidance makes clear that "The purpose of a cooperative dialogue is to ensure that employers understand the individualized needs of their employees and have the opportunity to explore the various ways in which they can meet those needs. Without this type of dialogue, employees and employers may not realize the full universe of available accommodations." Guidance § (III)(B)(1)(b).

Furthermore, the Guidance states, "A cooperative dialogue involves an employer communicating in good faith with the employee in an open and expeditious manner, particularly given the time-sensitive nature of these requests. The employer may not challenge the validity of the request, but should focus on understanding the need for the request and how the request can be accommodated, without making assumptions about what requests are reasonable or unreasonable. The dialogue may be in person, by phone, or via electronic means." *Id.*

We urge the Commission to explicitly state in the rule that an employer: (a) must engage in good faith based on the individual needs of a person requesting the accommodation; (b) must not force an employee to accept an accommodation the employee does not want or no longer needs; (c) must not

challenge the validity of the employee's request for accommodation; (d) must not make assumptions about what requests for accommodation are reasonable or unreasonable; (e) must reengage in the cooperative dialogue as an employee's condition changes over time; and (f) cannot assess points or take disciplinary action under an absence control or "no fault" attendance policy prior to engaging in the cooperative dialogue about the need for accommodation.

We propose the following language appear at the conclusion of Section 2-07(f)(2) of the proposed rule:

> Employers must take into account the individualized needs of their employees and explore the various ways in which they can meet those needs. An employer must engage in the cooperative dialogue with an employee in good faith and may not challenge the validity of an employee's request for accommodation. The employer must focus on understanding the need for the request and how the request can be accommodated, without making assumptions about what requests are reasonable or unreasonable. It is unlawful to force employees, or applicants, to accept reasonable accommodations they do not seek or no longer need. It is also unlawful to force employees to take leaves of absence if other reasonable accommodations can be provided instead. As an employee's condition changes over time, an employee may make new requests for accommodations. Each time an employee makes a new request, the employer must engage in a cooperative dialogue with the employee. An employer has not engaged in good faith if, prior to engaging in a written or oral dialogue concerning the person's accommodation needs, the employer counts protected absences against the person or takes disciplinary action under an absence control or "no fault" attendance policy.

Moreover, Section 2-07(f)(4) of the proposed rule states that the cooperative dialogue may end when the "employer reasonably concludes that …. all available accommodations will cause an undue hardship to the employer." This language leaves room for an employer to leave out certain categories of accommodations by deeming them "unavailable" to pregnant workers. Our organization often hears from pregnant workers who have been barred from entire categories of accommodations. For instance, we have heard from workers denied transfer to certain categories of positions—not because they are unqualified for or unable to perform those positions, but simply because such positions are arbitrarily reserved for on-the-job injuries.

We urge the Commission to state explicitly that an employer: (a) must not exclude a pregnant employee from entire categories of accommodations; (b) must not establish categorical exclusions of "comparable" or "available" positions; and (c) must not use automated systems that in effect block or delay the cooperative dialogue, irrespective of the employer's intent (i.e., regardless of "whether the employer tried to block or delay the cooperative dialogue").

We propose adding the following language at the conclusion of Section 2-07(f)(4) of the proposed rule:

> It is unlawful for an employer to maintain a policy, in writing or in practice, or utilize a system or procedure, that categorically excludes workers in need of accommodations based on pregnancy, childbirth, or related medical conditions from certain types of accommodations. Accommodation requests must be assessed on an individualized basis.

2. **Explain that temporary excusal of essential requisites is a reasonable accommodation.**

Section 2-07(f)(4) of the proposed rule states that "A cooperative dialogue should continue until one of the following occurs… (B) no accommodation exists that will allow the employee to perform the essential requisites of the job."

We urge the Commission to add a provision to the rule stating that temporary excusal from essential requisites, such as a temporary job transfer, is a form of reasonable accommodation. Just as an employee is entitled to temporary excusal of essential functions as a reasonable accommodation under the Americans with Disabilities Act ("ADA"),[7] a pregnant worker may need temporarily to perform other tasks before returning to her position. For example, a police officer may require light duty for several weeks; absent undue hardship, such an accommodation should be granted. As a champion of the rights of pregnant workers, the City should lead the way, not fall behind what ADA precedent already requires.

Accordingly, we propose the Commission add the following language to Section 2-07(f)(4)(B), following the statement that a cooperative dialogue should continue until an employer concludes "no accommodation exists that will allow the employee to perform the essential requisites of the job":

> In raising the essential requisites defense, an employer must also show that a temporary excusal of essential requisites as a reasonable accommodation poses an undue hardship, that there are no comparable positions available for which the employee is qualified that would accommodate the employee, and that a lesser position or an unpaid leave of absence is either not acceptable to the employee or would pose an undue hardship. An employer shall not adopt categorical exclusions of "comparable positions" that pregnant employees are not permitted to fill.

3. **State that failure to engage in the cooperative dialogue is an independent violation of the NYCHRL.**

The NYCHRL provides, "It shall be an unlawful discriminatory practice . . . to refuse or otherwise fail to engage in a cooperative dialogue." 8 N.Y.C. Admin. Code, ch. 1 § 8-107(28)(a). The Guidance states "An employer's failure to engage in a cooperative dialogue with an employee prior to denying a request for accommodation may be tantamount to a failure to accommodate." Guidance § (III)(B)(2). By contrast, Section 2-07(f) of the proposed rule states, in relevant part, solely that "Employers Must Engage in a Cooperative Dialogue."

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[7] For example, in the ADA context, courts have found workers are entitled to reasonable accommodations if they only need a finite leave of absence or a transfer that would allow them to perform the essential functions of the job "in the near future." *See Robert v. Bd. of Cty. Comm'rs of Brown Cty., Kans.,* 691 F.3d 1211, 1218 (10th Cir. 2012) (For a leave of absence to be considered a reasonable accommodation, the employee must provide "an estimated date when she can resume her essential duties" and must assure an employer that an employee can perform the essential functions of her position in the "near future."); *see also Conoshenti v. Public Serv. Elec. & Gas Co.*, 364 F.3d 135, 151 (3d Cir. 2004); *Myers v. Hose*, 50 F.3e 278, 283 (4th Cir. 1995) ("[R]easonable accommodation is by its terms most logically construed as that which presently, *or in the immediate future*, enables the employee to perform the essential functions of the job in question.") (emphasis added).

Because the statute makes clear that a failure to engage in a cooperative dialogue *is* itself a discriminatory practice, we urge the Commission to make clear that an employer's refusal or failure to engage in the cooperative dialogue for accommodations related to pregnancy, childbirth, or related medical conditions is an independent violation of the NYCHRL.[8]

We propose the Commission add the following language:

> An employer's refusal or failure to engage in a cooperative dialogue with an employee prior to denying a request for accommodation is tantamount to a failure to accommodate and an independent violation of the NYCHRL.

4. Change the "knew or should have known" standard to avoid encouraging employers to make assumptions about employees.

Section 2-07(f) provides, "When an employer knows or should have known that an employee needs an accommodation due to pregnancy, childbirth, or a related medical condition, an employer must engage in a cooperative dialogue with the employee."

We suggest the "knew or should have known" standard be revised to a "learned, either directly or through the employee's representative" standard. The constructive knowledge standard is vague and encourages employers to make comments and decisions, often rooted in assumption, stereotype, and speculation, about their employees' bodies and behavior. The "learned, either directly or through the employee's representative" standard, by contrast, is clear and encourages employers to take action only when they have learned first- or second-hand that an employee may be in need of an accommodation

5. Re-structure the cooperative dialogue section.

In order to signal to employers and employees the vital importance of the cooperative dialogue, we strongly recommend that the Commission: (a) combine the discussion of the cooperative dialogue in Sections 2-07(f) and 2-07(f)(2)–(4) into a single section, and (b) elevate this single section to appear prior to the discussion of lactation accommodations. Appendix A proposes an alternate organization of the rule.

6. Add hypothetical examples of how the cooperative dialogue might proceed.

In order to help employers and employees understand their obligation to engage in the cooperative dialogue, we suggest adding a new subsection under Section 2-07(f), entitled "Examples of the Cooperative Dialogue." This subsection should provide hypothetical examples of how the cooperative dialogue might proceed in practice. Specifically, we suggest the rule incorporate some or all of the helpful hypotheticals found in Section (III)(B)(4)(f) of the Guidance.

[8] *See, e.g.,* N.Y.C. Comm'n on Human Rights, "2019 Settlement Highlights," available at https://www1.nyc.gov/site/cchr/enforcement/2019-settlements.page (noting that the Commission negotiated a conciliation agreement where employer failed to engage in a cooperative dialogue).

III. The Proposed Rule's Notice Requirements Will Leave Workers Without Ready Access to Their Rights.

The proposed rule provides:

> An employer must provide employees with written notice of their right to be free from discrimination based on pregnancy, childbirth, or related medical condition. The employer may comply with this requirement by: (i) conspicuously posting the notice in its place of business in an area accessible to employees, which may include on a company intranet; or (ii) providing the notice to new employees at the start of employment and to all other employees who have not otherwise received notice. Employers may use the notice of rights available on the Commission website to satisfy their obligation to provide notice.

See Proposed Rule § 2-07(d).

CONCERN:

Workers who do not know the law cannot assert their rights at work. We hear regularly from pregnant workers, including in New York City, whose employers have failed to inform them of their rights to accommodations.[9] As a result, even if they are aware that their employer may not discriminate against them, they do not realize their employer also has an affirmative obligation to accommodate them. Still other workers tell us that their employers provide notice *exclusively* at their physical worksites, thereby impeding their ability to learn their rights in the privacy of their own home, without a supervisor looking over their shoulder. Indeed, mobile workers and independent contractors, who never or rarely report to company headquarters, recount never receiving notice at all. These problems predated the coronavirus pandemic, but lockdowns, furloughs, and quarantines—which have kept workers out of their physical worksites—have only underscored the problem.

RECOMMENDATION:

Accordingly, we urge the proposed rule be revised to state that: (a) notice must be fully accessible to workers, including in remote locations, at all times, both on the job and off the job; (b) notice must be provided upon employment *and also* available throughout employment; and (c) failure to provide notice is an independent violation of the NYCHRL. In addition, the rule should state that (d) employers must provide notice of the right to reasonable accommodation—not merely, as the proposed rule currently states, the right to be free from discrimination. *See* Proposed Rule § 2-07(d) ("An employer must provide employees with written notice of their right to be free from discrimination[.]").

Specifically, we propose Section 2-07(d) of the rule state:

[9] *See, e.g.,* Bakst, Gedmark, & Dinan, "Misled and Misinformed: How Some U.S. Employers Use 'No Fault' Attendance Policies to Trample on Workers' Rights (And Get Away With It)," June 2020, available at https://www.abetterbalance.org/wp-content/uploads/2020/06/Misled_and_Misinformed_A_Better_Balance-1-1.pdf.

An employer must provide employees with written notice of their right to be free from discrimination based on pregnancy, childbirth, or related medical condition, as well as their right to reasonable accommodation for pregnancy, childbirth, or related medical conditions. An employer must provide the notice to new employees at the start of their employment. In addition, the notice must be available to employees throughout employment at all times, both on the job and off the job, such as through an electronic employee handbook or a printed take-home pamphlet. Employers may use the notice of rights available on the Commission website to satisfy their obligation to provide notice. Failure to provide notice is an independent violation of the NYCHRL.

IV. The Proposed Rule's Omission of the Prohibition on Retaliation against Workers Who Need, Request, or Use Pregnancy-Related Accommodations Is Harmful.

CONCERN:

Section 8-107(7) of the NYCHRL provides, in relevant part, "It shall be an unlawful discriminatory practice . . . to retaliate or discriminate in any manner against any person." The Guidance also includes a section on retaliation, stating, "The act of requesting a reasonable accommodation based on pregnancy, childbirth, or related medical condition, or engaging in a cooperative dialogue with an employer based on such request, is protected activity under the NYCHRL. An adverse employment action based on such activity is therefore retaliation under the NYCHRL." Guidance § (III)(E).

By contrast, the proposed rule and existing regulations nowhere mention individuals' right to be free from retaliation, a troubling omission. One of the most frequent questions we receive from workers is whether the law protects them if they request accommodations or complain about denial of accommodations. The proposed rule misses a critical opportunity to empower workers to assert their rights by failing to expound on the statute's anti-retaliation provision and provide examples applicable to this context.

RECOMMENDATION:

Accordingly, we strongly urge a new section of the rule be added that states:

> It is unlawful for any covered entity to retaliate against a person because that person needed, requested, or used an accommodation related to pregnancy, childbirth, or a related medical condition, including time-off and leave. It is also unlawful to interfere with, restrain, deny the exercise of, or deny the attempt to exercise, a right to accommodations, including time-off and leave.
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> Retaliation need not result in an ultimate action with respect to employment, housing, or a public accommodation or in a materially adverse change in the terms and conditions of employment, housing, or a public accommodation, as long as the retaliation is reasonably likely to deter a person from engaging in protected activity. For example, (i) assigning attendance "points" for, (ii) docking unpaid time-off as a result of, or (iii) otherwise failing to

excuse absences arising from an employee's medical needs related to pregnancy, childbirth, or related medical conditions (e.g., under a "no-fault" attendance policy) constitutes unlawful retaliation. It is unlawful to punish an employee for lawful absences.

V. The Proposed Rule's Discussion of Lactation Accommodations Is Convoluted and Anemic.

CONCERNS & RECOMMENDATIONS:

The proposed rule discusses employer's lactation accommodations in three separate and non-consecutive sections. *See* Proposed Rule §§ 2-07(e)(1); (e)(2)(ii), (iv); (f)(1). In order to make the rule more accessible to employees and employers alike, who may not know to look to multiple portions of the rule to learn their rights and obligations, we urge the Commission to consolidate the discussion of lactation accommodations into a single section, as represented in the enclosed outline in Appendix A.

In addition, we urge the Commission to affirmatively state the following in the final rule, with respect to (A) time, (B) space, (C) compensation, and (D) notice related to lactation:

A. Time
   - State that "There is no cap on the number of breaks an employee can take to pump and that travel time to the lactation space must be provided."
   - State that "An employer may not limit the amount of time that an employee can use to express breast milk."

B. Space
   - In Section 2-07(e)(1)(i), clarify the employer's obligation when an employee's work is mobile.
   - In Section 2-07(e)(1)(i)(B), clarify that employer cannot require multiple employees to pump in same lactation space at same time.
   - In Section 2-07(e)(1)(i)(C), add examples of what an employer should do if no lactation room or multipurpose space, incorporating examples from the Commission's Lactation Accommodations Frequently Asked Questions.[10]
   - In Section 2-07(e)(1)(i)(E), clarify that an employee who wishes to pump at their usual workspace "shall" be allowed to do so, "regardless of whether a coworker, client, or customer expresses discomfort."

C. Compensation
   - State that "Where an employer already provides compensated breaks, an employee who uses that break time to express milk must be compensated in the same way that other employees are compensated for break time."
   - State that "An employee not completely relieved from work while pumping must be compensated."

[10] N.Y.C. Comm'n on Human Rights, "Frequently Asked Questions: Lactation Accommodations and Model Policy N.Y.C. Administrative Code § 8-107(22)," available at https://www1.nyc.gov/site/cchr/law/lactation-faqs.page.

D. Notice and Lactation Policy

- In Section 2-07(e)(1)(ii), clarify that the lactation policy shall include information on other lactation accommodations, including break time.
- In Section 2-07(e)(1)(ii), state that employers must "both respond to and implement a request for a lactation room, break time, and other accommodations" as quickly as possible. Clarify that certain lactation accommodations must be met in fewer than five (5) days, especially given that any delay can affect milk supply.
- In Section 2-07(e)(2)(ii), affirmatively state that "the discomfort of a coworker, client, or customer does not constitute an undue hardship."
- In Section 2-07(f)(1)(i), after "pose an undue hardship," add "and must continue to engage in cooperative dialogue to explore alternative accommodations."
- In Section 2-07(f)(1)(ii), after "a modified uniform or temporary job duties," add "or light duty."

VI. The Proposed Rule's Structure Is Convoluted and Difficult to Follow.

CONCERN:

The current organization of the proposed rule is complex and difficult to follow, and we strongly urge the Commission to revise the structure of the rule to be more user-friendly and accessible for workers and employers unfamiliar with the details of the law.

RECOMMENDATION:

In Appendix A, we propose a revised outline of the rule, in which we attempt to parallel the clarity and organization of the Commission's excellent Guidance. For instance, we suggest that the hypothetical examples of accommodations in Sections 2-07(e)(2) and (f)(8) be consolidated into a single section. Likewise, we suggest consolidating the discussion of lactation accommodations in Sections 2-07(e)(1), (e)(2), and (f)(1) into a single section.

VII. "Employee" and "Covered Entity" Must Be Defined.

We recommend the rule state affirmatively that the term "employee" includes independent contractors, freelancers, temporary workers, and interns.

Likewise, we recommend that Section 2-01 of the proposed rule include the definition of "covered entity." *See* 8 N.Y.C. Admin. Code, ch. 1, § 8-102 (defining "covered entity" as "a person required to comply with any provision of section 8-107 of the NYCHRL").

VIII. The Rule's Omission of a Prohibition against Pregnancy- and Lactation-Related Harassment Is Concerning.

CONCERN:

We applaud the Commission for including a helpful example of gender-based harassment related to lactation. *See* Proposed Rule § 2-07(a)(vi). We strongly recommend, however, that the Commission expressly state that pregnancy- and lactation-related harassment is unlawful gender-based harassment.

RECOMMENDATION:

Specifically, we suggest incorporating the Guidance's discussion of pregnancy-related harassment into Section 2-07(a) of the proposed rule:

> Gender-based harassment related to pregnancy is a form of discrimination, and may consist of a single incident or repeated acts or behavior. Unlawful harassment exists when the behavior creates an environment or culture of sex stereotyping, degradation, humiliation, bias, or objectification. Under the NYCHRL, gender-based harassment related to pregnancy covers a broad range of conduct that causes an individual to be treated less well because of their pregnancy. While the severity or pervasiveness of the harassment is relevant to damages, the existence of differential treatment based on pregnancy is sufficient under the NYCHRL to state a claim of harassment. Harassment may include comments about a pregnant individual's weight or appearance, their age in relation to their pregnancy, their commitment to their job, or their ability to focus.

Guidance § (III)(A)(1).

IX. Additional Issue: Bolster Disparate Treatment and Disparate Impact Sections.

The proposed rule's examples of disparate treatment and disparate impact are excellent. We suggest several changes to improve clarity, define terms, and make these sections accessible to laypeople unfamiliar with the legal concepts of disparate treatment and impact. Specifically, we propose affirmatively stating that:

- Disparate treatment is unlawful "regardless of whether that treatment is intentional or unintentional."
- "An individual may demonstrate disparate treatment through direct evidence of discrimination or indirect evidence that gives rise to an inference of discrimination."
- Disparate treatment "includes but is not limited to" adverse treatment based on assumptions and stereotypes.
- Disparate treatment based on "capacity or likelihood to become pregnant in the future" is also unlawful.

- Disparate impact is a neutral practice that, "regardless of intent, disproportionately impacts individuals based on pregnancy, childbirth, or a related medical condition."

Finally, we propose adding an example of disparate impact in a non-workplace context, to mirror the helpful examples of disparate treatment in the areas of housing and public accommodations that the proposed rule provides.

X. Additional Issue: Clarify Examples of Accommodations.

Section 2-07(f)(5) of the proposed rule helpfully provides:

> Some minor accommodations for pregnancy, childbirth, or a related medical condition will rarely pose an undue hardship on an employer, including, without limitation: (i) minor or temporary modifications to work schedules; (ii) adjustments to uniform requirements or dress codes; (iii) additional water or snack breaks; (iv) allowing an individual to eat at their work station; (v) extra bathroom breaks or additional breaks to rest; and (vi) minor physical modifications to a work station, including the addition of a fan or a seat.

For clarity, we suggest the following revisions:

- Change "water or snack breaks" to "food or drink breaks."
- Create a Section 2-07(f)(6) to highlight other, less minor accommodations, including desk duty, light duty, transfer to alternate position, leave after childbirth and loss/termination of pregnancy, and accommodations for fertility treatments.
- State that "An employer's first obligation is to accommodate an employee so that they may remain in their current position. When that is not possible, an employer may consider whether the employee could be reassigned to a vacant position with equivalent pay, status, and benefits. Only when a comparable position is unavailable, may an employer then explore alternative positions that are not comparable. As a last resort, when no other accommodation can be made, an unpaid leave of absence may be offered as a temporary accommodation."

XI. Additional Issue: The Proposed Rule's Discussion of Failure to Accommodate in Section 2-07(e) Should Be Bolstered and Clarified.

Finally, we suggest the Commission amend Section 2-07(e) of the proposed rule to hew more closely to the Guidance's clearer discussion of how to establish discrimination on the basis of failure to accommodate. *See* Guidance § (III)(B). Specifically, we propose the Commission replace Section 2-07(e) with the following language:

> An employer must provide reasonable accommodations for an employee's pregnancy, childbirth, or a related medical condition.

> To establish discrimination on the basis of an employer's failure to provide a reasonable accommodation, the aggrieved individual must show: (i) they are pregnant, have recently experienced childbirth, or have a medical condition related to pregnancy or childbirth; (ii) they requested a reasonable accommodation due to pregnancy, childbirth, or related medical condition, or the employer learned, either directly or through an employee's representative that they were in need of an accommodation due to pregnancy, childbirth, or related medical condition; and (iii) the employer failed to provide a reasonable accommodation. The employer must also engage in a cooperative dialogue with the individual in need of an accommodation by having a good faith dialogue, either orally or in writing, about their accommodation needs and must conclude with a final written determination. It is a violation of the NYCHRL should the employer fail to meet these requirements.

We thank you for your consideration of our concerns and recommendations. We look forward to working with the Commission to strengthen the rule and provide much-needed clarity to employers and employees of their responsibilities and rights.

Sincerely,

Sarah Brafman	Dana Bolger	Dina Bakst
Senior Policy Counsel	Equal Justice Works Fellow	Co-Founder & Co-President
A Better Balance	A Better Balance	A Better Balance

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Planned Parenthood of Greater New York

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Testimony of Planned Parenthood of Greater New York
Before The New York City Commission on Human Rights on Expanding Scope of Discrimination

November 12th, 2020

Good afternoon, my name is Elise Benusa and I am the Policy Intern at Planned Parenthood of Greater New York. I would like to thank the New York City Commission on Human Rights (CCHR) for holding this important oversight hearing to clarify protections with respect to pregnancy, childbirth, and related medical conditions; sexual and reproductive health decisions; and accommodations for employees who need to express breast milk while at work.

For more than 100 years, Planned Parenthood has transformed access to reproductive and sexual healthcare, empowering millions of New Yorkers to make informed health decisions. Our mission of providing quality, confidential and inclusive health care to all has made Planned Parenthood of Greater New York (PPGNY) a trusted provider in communities across New York. For many, Planned Parenthood of Greater New York serves as a primary provider of care and for some, their only provider. The health and educational services provided+ at PPGNY health centers play a crucial role in health care access, and supporting families and communities.

Planned Parenthood of Greater New York proudly stands behind CCHR's proposed rule to expand the definition of discrimination in order to protect individuals' sexual and reproductive health and decision making. The discrimination and stigmatization experienced by those who are pregnant, perceived pregnant or making decisions about their own sexual and reproductive health creates barriers to stable employment, housing and health care access. This proposed rule protects an individual's right to work while pregnant or perceived pregnant. It acknowledges special accommodations for those in postpartum and defines what harassment looks like towards this population.

For too long pregnant workers in New York City have been asked to put the duties of their job above the safety of their pregnancy and postpartum care. Employees have been denied access to lactation rooms and longer breaks. Workers have been discriminated against for their sexual and reproductive health decisions. These practices have disproportionately affected women and have widened the wage gap between men and women. According to an analysis by the University of Massachusetts Amherst each child a woman has will drop her hourly wage by 4% while increasing her male counterpart by 6%. [1]

According to a study by the Journal of Applied Psychology, pregnancy discrimination is linked to increased levels of postpartum depressive symptoms for mothers such as depression and/or

[1] Kitroeff, N.,Silver-Greenberg, J. (2019). Pregnancy Discrimination Is Rampant Inside America's Biggest Companies. New York Times. Retrieved from https://www.nytimes.com/interactive/2018/06/15/business/pregnancy-discrimination.html

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anxiety. Discrimination while pregnant is also linked to lower birth weights, lower gestational ages and increased number of doctor visits for babies that are born.[2]

People's choices about their bodies and their decisions about family planning are deeply personal. This rule would protect people's privacy surrounding these choices. The scope of this rule protects individuals from discrimination from employers, business owners and landlords. This rule would expand discrimination to include actions like: employers denying access to alternative tasks while healing from medical procedures or postpartum, denying a customer access to certain products such as coffee or entrance into certain spaces such as night clubs, or denying housing to a tenant based on actual or perceived pregnancy.

Businesses must be held accountable to following these rules and ensuring employees are aware of their rights. This rule emphasizes the importance of employer communication, especially around accommodations for those needing lactation rooms. Some employers have raised concerns about these rules and their capacity to fulfil the requirements and their requests for exceptions should be vetted and not granted lightly. The responsibility should be on the employer to implement these requirements and ensure their employees feel safe. As we know, implementation for these rules are paramount.

It is imperative that implementation of this rule is encouraged throughout the city. There have been anti-pregnancy discrimination laws in various forms since the 1970s. This hearing is a testament to the lack of protection pregnant people have had thus far. Sexual and Reproductive Rights are Human Rights and should be treated accordingly.

PPGNY will continue to advocate and support rules that protect people's reproductive and sexual health. We will continue to fight for those most vulnerable to discrimination and harassment. This rule will establish a precedent and allow more individuals to be protected from discrimination in the public and private sector. PPGNY appreciates the Commission's commitment to ensuring equal treatment under the law. We look forward to continuing to work with the Commission and we are hopeful that collectively, we can make our city a healthier and safer place for all.

Thank you.

[2] Robinson, B. (2020). Pregnancy Discrimination In The Workplace Affects Mothers and Baby Health. Forbes. Retrieved from https://www.forbes.com/sites/bryanrobinson/2020/07/11/pregnancy-discrimination-in-the-workplace-affects-mother-and-baby-health/#260bb438cac6

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Planned Parenthood of Greater New York (PPGNY) is a leading provider, educator, and advocate of sexual and reproductive health care in New York State. PPGNY offers a wide range of services at its 30 locations across 65% of NYS - including gynecological care; birth control; cancer screenings; pregnancy testing; STI testing and treatment; HIV prevention, testing, and counseling; transgender hormone therapy; and vasectomy. PPGNY is also proud to provide abortion services to anyone who needs compassionate, non-judgmental care. PPGNY is a trusted source of medically-accurate, evidence-based information that allows people to make informed decisions about their health and future. As a voice for reproductive freedom, PPGNY supports legislation and policies that ensure all New Yorkers have access to the full range of reproductive health services and education.

GENDER EQUALITY LAW CENTER

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November 11, 2020

Zoey Chenitz, Senior Policy Counsel
New York City Commission on Human Rights
22 Reade Street
New York, New York 10007

Re: Proposed Rule Changes on discrimination based on pregnancy, childbirth or related medical conditions

Dear Senior Policy Counsel Chenitz:

The Gender Equality Law Center ("GELC") submits the following comments with regard to proposed rule changes to Title 47 of the Rules of the City of New York in order to further clarify the New York City Human Rights Laws pertaining to discrimination on the basis of pregnancy, childbirth or related conditions.

Background

GELC is a public interest law and policy not for profit based in Brooklyn, New York. GELC's mission is to break down barriers created by social, political and legal discrimination related to gender-based discrimination, including sexual orientation, gender identity and gender orientation. Almost all of GELC's work focuses on the intersection between gender bias and race or national origin discrimination. While GELC's policy work has a national impact, most of its direct service work and legal representation is targeted to New York City cases. One of GELC's most important areas of work is targeted to combatting workplace pregnancy and caregiver discrimination. As such, GELC regularly advises, counsels and litigates on behalf of pregnant workers and parents returning from parental leave in the New York City area, most of whom are low-wage workers.

Based on this work, GELC submits the following comments:

Section 2-01 of Title 47: Definition clarifying "Cooperative Dialogue"

GELC applauds the Commission's desire to incorporate the definition of "Cooperative dialogue," as set forth in the NYC Commission's Legal Enforcement Guidance on Discrimination on the Basis of Pregnancy (2016) ("Guidance") into the proposed Rules of the City of New York ("Rules"). As spelled out in the Guidance, the detailed steps an employer is recommended to undertake in order to conduct a broad and fully fleshed out exploration of what accommodations can be provided to pregnant workers should be codified in the Proposed Rules as a mandatory requirement. Moreover, GELC believes that it is important that employers be required to document in writing the exchange of proposed accommodations. This is particularly important to ensure that there is a record of what occurred through this dialogue. Clearly the employer is in the best position to create this documentation. As set forth in the Commission's Guidance, at a minimum the final outcome of the "Cooperative dialogue" should be documented. See Guidance § II.

In addition, GELC is concerned about the use of the word "difficulties" in this definitional section. As the Commission is well aware, the City Law requires employers to provide reasonable accommodation to pregnant workers unless they can demonstrate that such accommodation would cause an "undue hardship" to the employer. That term is defined in § 8-102 of the City Law and includes a multi-part analysis of the factors that an employer may analyze to determine whether any proposed accommodation can be lawfully rejected. Use of the word "difficulties" here suggests a lower bar for an employer's defense to providing a reasonable accommodation and risks causing confusion about the applicable standard for proving the defense, which is "undue hardship." The Guidance specifically uses the term "undue hardship," when referring to the standard applicable to whether or not an employer may deny a proposed accommodation after conducting the "Cooperative dialogue" and we recommend the Commission adopt a similar approach here. See also proposed Rule § 2-07 (f) (2) (using the word "difficulties" in reference to the "Cooperative dialogue" process). In order to clarify the employer's obligation to engage in the cooperative dialogue and provide reasonable accommodations, GELC recommends that the standard for documenting the employer's challenges to implementing a proposed reasonable accommodation focus on the ultimate outcome of whether or not such proposed accommodation would create an "undue hardship" as defined under § 8-102 of the City Law.

GELC also recommends that the Commission define the term "undue hardship" in § 2-07 since the term is used frequently throughout the proposed Rules and is essential to understanding an employer's obligations to provide reasonable accommodations. Both the City Law and Guidance define this term, and the same definition should be incorporated into the proposed Rules. Like the definition in § 8-102 of the City Law, the Rules should emphasize that the burden of proving undue hardship is on the employer.

Section 2 of Title 47:

§ 2-07 Prohibition on Discrimination Based on Pregnancy, Childbirth and related Medical Conditions, and Requirement for Employers to Accommodate Lactation Needs

(a) Disparate Treatment Based on Pregnancy, Childbirth or Related Medical Conditions**:** (text omitted)

(1) Examples of Violations

(iii) An employer jokes about a pregnant individual's weight gain, and responds to the individual complaints about the jokes by stating that pregnancy is making the individual overly sensitive and emotional

GELC agrees that (iii) above is a good example of a violation of the City Law and understands that this example was taken directly from the Guidance. However, the word and after the phrase "the employer jokes about a pregnant individual's weight gain" suggests that comments or "jokes" about the pregnant worker's weight gain would not be enough to prove discrimination on the basis of the worker's pregnancy; that is that the employer would also have to make a further comment about the pregnant worker being overly sensitive and emotional. GELC does not read the law to require this heightened burden of proof and we suspect neither does the Commission. Jokes about a pregnant worker's weight gain alone—without more—may be evidence enough of bias against a pregnant worker to trigger a violation of the law. Although other factors such as whether or not the pregnant worker found the jokes truly amusing rather than insulting may come into play, "jokes about weight gain" are typically not received well or with humor by the pregnant worker. Certainly, such jokes should not require more to prove a violation of the law.

GELC therefore suggests that if the Rules propose and incorporate examples of conduct that would violate the law that examples should include language referencing "offensive jokes and comments made by the employer or co-worker on the basis of their pregnancy, childbirth or related medical condition."

(d) Requirement for Employers to Provide Written Notice About Employees Right to be Free from Discrimination Based on Pregnancy, Childbirth or Related Medical Condition

The proposed Rule above does not address the issue of providing notice to pregnant workers about their right to request a reasonable accommodation, although Subsection (f)(3) references such policies as a factor in determining whether a cooperative dialogue was carried out between employer and worker in "good faith." Notice of non-

discrimination on the basis of pregnancy, childbirth or related conditions is insufficient if it does not explicitly provide notice about the right of a worker to request a reasonable accommodation. Moreover, such notice needs to include a specific anti-retaliation provision so as to be explicit in setting forth the rights and responsibilities of workers and employers to engage in a cooperative dialogue so that workers can feel protected in coming forward and seeking such accommodations.

Every day GELC hears stories from pregnant workers who were never informed about their right to request a reasonable accommodation. Still others—in fact the vast majority of GELC's callers to its confidential legal hotline as well as referrals from other advocates—complain about retaliation after seeking such accommodations, in some instances minor and in others ultimately causing the worker to lose their job. For this reason, it is critical that the required employer notice include details about the right of a worker to request accommodation, the process to be used, and a strong anti-retaliation provision.

In addition, while proposed Rule § 2-07 (d) references a sample notice poster on the Commission's website, which specifically refers to and describes the concept of reasonable accommodation, a worker who does not check the Commission's website would not be on notice of the law requiring employers to provide reasonable accommodation to pregnant workers. Moreover, to be effective as a legal right for workers, and to adequately put employers on notice of this obligation, employers must be required to inform their workers about the right to request a reasonable accommodation when pregnant. Anything less would undercut the effectiveness and enforcement of this very important provision under the City Law. Other than checking the sample worker notice poster, employers would not even know they had to inform their workers about the right to request a reasonable accommodation.

GELC strongly recommends that the notice provision in the Rules specifically include a mandate that employers provide notice to their workers about their right to request and receive reasonable accommodations while pregnant. Anything less than a mandatory requirement that such information be provided to an employer's workforce in writing would both jeopardize the rights of pregnant workers and undermine the very purpose of this City Law. Notice of the rights of pregnant workers to be accommodated is critical to the effectiveness of the law. Neither the law nor the rules currently cover this requirement specifically.

Moreover, the Commission should also insert a requirement that employers post notices explaining the cooperative dialogue process. This is a critical part of the interaction between pregnant worker and employer. Without knowledge about this process workers will be at a distinct disadvantage and, as GELC commonly sees among pregnant workers that reach out to the organization, will deprive such workers of the opportunity to engage in a meaningful process with their employers to determine whether or not reasonable

accommodations can be provided; notably, most minor job modifications will not cause an employer any hardship, much less undue hardship. Too much is at stake for pregnant workers to require anything less.

While the sample poster on the Commission's website (referred to in subsection (d)) is offered to employers in Spanish as well as English, there is no codified requirement, similar to the one under the Stop Sexual Harassment in NYC, that employers provide such notices in two languages at a minimum, that is in both English and Spanish. This needs to be changed. GELC regularly advises and represents numerous pregnant workers who speak Spanish only about their legal rights to obtain reasonable accommodation on the job—almost all of whom had no idea such a right existed. It should go without saying that without knowledge about legal rights workers cannot enforce them and that the best point in time to learn about these rights is when they are needed—not after the fact when the worker is seeking legal counsel. For every worker who speaks with a GELC staff member or another advocacy organization and learns about their right to request an accommodation while pregnant, multitudes more will not even be aware they have such a right if this information is not provided to workers in both English and Spanish, at a minimum.

Finally, GELC strongly recommends that the notice requirement include a reference to the Commission's website where workers can access the existing Guidance and obtain information about their legal rights in a variety of languages in addition to English and Spanish.

(e) Failure to Provide Reasonable Accommodations in Employment Based on Pregnancy, Childbirth, or a Related Medical Condition (Text Omitted)

This section correctly notes that an employer need not provide the specific accommodation a worker requests if the employer responds to a worker's request for an accommodation by proposing an alternative measure that also meets the worker's needs. GELC urges the Commission not to stop there, but to make clear that not all accommodations are equal and those that allow a worker to continue working in their current position should be prioritized over other types of accommodations. In particular, the Rules should follow § III (B)(4)(a) of the Guidance and make clear that "an employer's first obligation is to accommodate an employee so that they may remain in their current position." Guidance § III (B)(4)(a). We urge the Commission to emphasize that reassignment to another position—or as a last resort, unpaid leave—should only be considered if other accommodations are inadequate to enable the worker to continue working in their current position (if desired).

(f) Employers Must Engage in a cooperative Dialogue When They Know or Should Know that an Employee Requires an Accommodation Because of Pregnancy (Text Omitted)

GELC believes that it is sound policy to incorporate into the proposed Rules an affirmative obligation for an employer to offer a reasonable accommodation to a worker who they believe may need such an accommodation, based on their work performance or other reasons. It is also sound policy to caution employers against unnecessarily intruding into the private lives of workers by asking questions before a worker is ready to reveal they are pregnant. Nonetheless, this can be a tricky balance for workers who may be afraid for legitimate reasons to disclose they are pregnant. To allow the employer to fulfill their affirmative obligation under the law while creating a protected space for a worker to agree to reveal they are pregnant, GELC believes it is vitally important that, at the time an employer approaches a worker who they believe may need a reasonable accommodation related to their pregnancy, they be required to point to a policy that specifically states that the City Law provides for the provision of a reasonable accommodation and that this process should be conducted through the cooperative dialogue. It is GELC's view that only if workers feel protected in asking for a reasonable accommodation (particularly if an employer is asking them because their work performance is, or is perceived to be, less than adequate in some way) that they will be forthcoming in their request for an accommodation.

(6) When an employer requires an employee to provide medical documentation of the need for an accommodation to address and obvious need because of pregnancy, childbirth, or a related medical condition (Text Omitted)

GELC supports § 2-07 (f)(6) – (8) of the proposed Rules regarding when employers may not request medical documentation from workers seeking an accommodation, particularly the provision stating that requiring documentation for obvious needs shall be "presumed harassment." In GELC's experience, employers are more likely to comply with rules that are clear and unambiguous. The Commission should amend the proposed Rule to provide more detailed guidelines that clarify when employers may and may not request medical documentation from workers seeking accommodations.

The 2016 Guidance explains that employers may ask for medical documentation when a worker requests "time away from work, including for medical appointments, other than the presumptive six to eight week period following childbirth for recovery from childbirth" if such documentation is also required from other workers requesting leave or "to work from home, either on an intermittent basis or a longer-term basis." Guidance § III (B)(1)(d). The Guidance also notes that medical documentation may be required for workers wishing to take Family and Medical Leave Act (FMLA) leave. Id. at n.17. Ensuring that employers understand these distinctions is crucial to ensuring that they respond appropriately when workers seek reasonable accommodations. We urge the

Commission to incorporate similar provisions into the Rules to explain when it is permissible to request medical documentation and to clarify employers' obligations in addition to when such requests are prohibited.

Furthermore, while GELC supports the provision stating that requiring medical documentation for obvious conditions will be presumed harassment, we suggest that the Commission create education and/or training resources for employers to ensure that they understand the scope of this prohibition. Many employers—particularly smaller employers without large human resources departments—may not be familiar with the full range of needs that are "common to a noncomplicated pregnancy, childbirth or related medical condition" as discussed in § 2-07 (f)(6) of the proposed Rules. Since requesting documentation for these needs will be presumed harassment, it is imperative that the Commission provide informational resources to employers in order to educate them about needs that are "obvious" or commonly experienced during an uncomplicated pregnancy and childbirth. It is also important that the fear of being accused of harassing a pregnant worker does not dissuade a good-faith dialogue between worker and employer to find a suitable accommodation that will not create an undue hardship for the employer. The result of any communication between worker and employer should be pointed at removing barriers that limit opportunities for pregnant workers to remain employed as long as possible before giving birth.

GELC also supports the Rules' requirement that employers provide reasonable accommodations related to miscarriage, abortion, and fertility treatments. However, we urge the Commission to emphasize that employers may only request medical documentation when accommodation requests involve time away from work. For instance, workers may be hesitant for a variety of personal, medical and social and/or religious reasons to disclose the need for a reasonable accommodation because they need a schedule change to undergo infertility treatment or an extra day off to recover from an abortion or miscarriage or minor accommodations at work. The Rules should make clear that employers must keep all such requests confidential to in order to protect workers' privacy and to ensure that workers are not dissuaded from seeking accommodations because they will have to disclose sensitive medical information to their employer.

Additional recommendations: anti-retaliation

As mentioned above, retaliation is one of the most common problems experienced by GELC's clients. The most common scenario GELC sees callers to its hotline facing is retaliation by employers after workers request reasonable accommodations, particularly if the request involves time off from work. Anti-retaliation provisions of any law are the cornerstone of protecting workers' rights and the City Law and regulations implementing it are no exception. Anti-retaliation provisions also provide greater security for workers to come forward and ask for such accommodations. Such protections need to be set forth in writing to workers seeking such accommodations in the workplace.

We urge the Commission to make clear in the Rules that requesting accommodations for pregnancy, childbirth or related medical conditions is a protected activity under the City Law. Although the City Law itself contains anti-retaliation provisions, they are essential to ensuring meaningful protection for workers seeking reasonable accommodations and should therefore be included prominently in all rules and guidance issued by the Commission. As recommended above, mandatory notice to workers regarding their right to be free from discrimination and to request accommodation should also inform them of these anti-retaliation provisions.

Thank you in advance for your consideration of these comments.

Respectfully submitted,

GENDER EQUALITY LAW CENTER

/s/ Allegra L. Fishel
Allegra L. Fishel
Founder and Executive Director

/s/ Madeleine Morawski
Madeleine Morawski
Public Interest Fellow

NEW YORK CITY DEPARTMENT OF
HEALTH AND MENTAL HYGIENE
Dave A. Chokshi, MD, MSc
Commissioner

RE: NYCCHR Proposed Rule re: Pregnancy, Childbirth, and Related Medical Conditions

DOHMH feedback on language included in the proposed rule:

Section 2-07. (e) (1) (i) (C) If there is no dedicated lactation room and no multi-purpose room available because it poses an undue hardship, the employer must engage in a cooperative dialogue with the employee and discuss options to ensure employees are able to express breast milk at work. An employee and employer may determine during the cooperative dialogue that as an accommodation of last resort, an employee may use a restroom to express milk.

DOHMH Comment: we recommend removing the final, highlighted sentence of this paragraph. It is a slippery slope. NYS buildings have lactation areas within their very large bathrooms that have seating areas, but the exit is the same. Same door knobs, sinks etc. Not everyone performs hygienic practices in the restroom, and babies are susceptible populations to infections such as Shigellosis (https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3223236/)

Suggestions for creative ways to accommodate employees should be shared (see page 10): http://www.breastfeedingpartners.org/images/pdf/ForEmployersFINAL.pdf

Section 2-07. (e) (1) (i) (E) If an employee wishes to pump at their usual workspace and it does not impose undue hardship, then the employer should allow this as an alternative to the lactation room.

DOHMH Comment: In certain workplaces, employers should exercise caution regarding where employees are allowed to pump. In the food service industry, due to potential cross-contamination between pumping equipment, hands, food, and food equipment, pumping should not be allowed in food preparation areas. Harmful bacteria found in dry and fresh foods, such as Cronobacter, may cause serious illness in infants. Similarly, employers in certain professions should prohibit employees from expressing milk in areas where their pumping equipment or breast milk may become contaminated with infectious agents, toxins or harmful chemicals.

Section 2-07. (e) (6) When an employer requires an employee to provide medical documentation of the need for an accommodation to address an obvious need because of pregnancy, childbirth, or a related medical condition, it shall be presumed to be harassment. A need for accommodation because of pregnancy, childbirth or a related medical condition is deemed to be obvious when the need is apparent or relates to a need common to a noncomplicated pregnancy, childbirth or related medical condition.

DOHMH Comment: It is not always clear what is "an obvious need due to pregnancy, childbirth, or a related medical condition." That is the purpose of requiring a clear medical note. For example, it is not always "an obvious need" to work from home during the last two weeks of a pregnancy. This is common request. However, without a medical note, it is not possible to make a determination regarding such an accommodation request. Also, stating that it "shall be presumed to be harassment" for an employer to require a medical note in these cases is a too strong and could negatively impact the ability to engage in a cooperative dialogue with covered employees.

Examples of violations:

(i) A policy that permits light duty assignments only for on-the-job injuries fails to provide pregnant employees such light duty assignments as a reasonable accommodation.

DOHMH Comment: It is not clear what is meant by the term "light duty assignment". Also, if that term in meant to suggest assignments that are physically less taxing, it is not always possible to assign such work to employees. Suggest that the above example be amended to include the following language: "wherever possible".

(vii) An employer denies an accommodation to a pregnant Muslim employee to work through their lunch hour during Ramadan because the employer does not think the employee should fast while pregnant. (The employer's conduct is also discrimination for failing to accommodate the employee's religious observance pursuant to § 8-107(3) of the Administrative Code.)

DOHMH Comment: An employer who grants an employee's request to work through their lunch hour may be left with an hour of coverage at the end of the day that it cannot fill. Therefore, denying such a request for that reason alone would not amount to discrimination. The employer also may not be found to have engaged in religious discrimination if it offered the employee a reasonable alternative accommodation. Suggest that this example clarify options employees and employers may have with respect to this type of request.

National Advocates for Pregnant Women

N A P W

November 12, 2020

Office of the Chair
New York City Commission on Human Rights
22 Reade Street
New York, New York 10007
policy@cchr.nyc.gov

RE: Comment on Proposed Rules

To the Office of the Chair:

National Advocates for Pregnant Women offers the following comments on the Commission's Proposed Rules on Discrimination Based on Pregnancy informed by our decades of experience with laws and policies focused on pregnant people. Our most salient observation in general is that pregnant people are regularly discriminated against as a result of pregnancy, childbirth, related conditions (including lactation), and their sexual and reproductive health decisions.[1] As a result of pervasive discrimination, these Rules are necessary to clarify the myriad ways unlawful discrimination manifests.

As the Special Rapporteur on violence against women reported to the United Nations in July 2019, "… violence against women in childbirth is so normalized that it is not (yet) considered violence against women."[2] One of the most egregious examples we have recorded of this normalized discrimination took place at Northwell Health's Staten Island University Hospital (SIUH). This Hospital maintained a policy called "Managing Maternal Refusals of Treatment Beneficial for the Fetus" that set out the circumstances in which medical procedures could be performed on nonconsenting pregnant patients and when this extraordinary violation of patient

[1] *See* Jeanne Flavin and Lynn M. Paltrow. Arrests of and Forced Interventions on Pregnant Women in the United States, 1973–2005: Implications for Women's Legal Status and Public Health. Journal of Health Politics, Policy and Law, Vol. 38, No. 2, April 2013 (documenting one form of discrimination pregnant people face, arrests and forced interventions, in media reports and court records). This research is being updated for 2005-present and early data suggests that the trend identified in this report continues.

[2] Dubravka Šimonović, Report of the U.N. Special Rapporteur on Violence Against Women: Its Causes and Consequences on a Human Rights-Based Approach to Mistreatment and Violence Against Women in Reproductive Health Services with a Focus on Childbirth and Obstetric Violence, United Nations General Assembly, July 11, 2019.

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rights could occur without even seeking court approval for doing so. Doctors at SIUH relied on this policy to perform major surgery on Ms. Dray without her consent and without a court order.[3] Her doctor was unambiguous in his notes in Ms. Dray's medical chart, writing "The woman has decisional capacity. I have decided to override her refusal to have a c-section. Her physician Dr. Gorelick and hospital attorney Mr. Fried are in agreement."[4]

The law of the State of New York is unequivocal and has been since 1914 when the New York Court of Appeals held that "Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault for which he is liable in damages."[5] There is no exception to this principle for pregnant people. Yet, time and again pregnancy has been the excuse for denying civil and human rights.

This is why the proposed rules at 2-07(b) with regard to "Policies that Facially Discriminate Against People Based on Pregnancy, Childbirth, or Related Medical Conditions" are so important. It is necessary to make it plain that "A covered entity cannot use its concerns about maternal or fetal safety as a reason for discrimination," because it is precisely those concerns that were used in Ms. Dray's case and that are consistently used in many others to disguise, justify and excuse what is unlawful discrimination.

Northwell's SIUH Managing Maternal Refusal's policy explicitly authorizes discrimination. Moreover, despite a finding by the New York State Department of Health that this policy violated the Patient Bill of Rights, Northwell's SIUH maintains their commitment to discrimination against pregnant patients as necessary for the good of the fetus. They claim that not being able to override pregnant patient refusals "would deprive those viable, unborn fetuses of their right to live."[6] This is a false claim because there is no basis for perpetrating a human rights violation against one person, even if it would bring about a benefit to someone else.[7] Indeed, no newborn, infant, or child has the right to require another person, including a parent, to undergo surgery or even minor medical interventions for their benefit.[8] But it is also a false claim because a fetus does not have a right to overcome the natural constraints to life that mammalian

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[3] A copy of the policy is attached to this letter.

[4] A copy of this notation in her chart is attached to this letter.

[5] Schloendorff v. Society of New York Hospital, 105 N.E. 92 (1914).

[6] Brief for Defendants-Respondents, filed July 2020 in *Dray v. Staten Island Univ. Hosp*., No. 2019-12617, 57 (2d Dept. 2019).

[7] Supra note 2 and 5. *See also In re Fetus Brown*, 689 N.E.2d 397 (Ill. App. 1997), *In re Baby Boy Doe*, 632 N.E.2d 326, 393 (Ill. App. Ct. 1994*), Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990), *In re A.C.*, 573 A.2d 1235 (1990), *McFall v. Shimp*, 10 Pa. D. & C.3d 90 (Pa. Com. Pl., July 26, 1978), *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251(1891).

[8] *See Stallman v. Youngquist*, 531 N.E.2d 355, 360 (Sup. Ct. Ill. 1988) ("A legal right of a fetus to begin life with a sound mind and body assertable against a mother would make a pregnant woman the guarantor of the mind and body of her child at birth. A legal duty to guarantee the mental and physical health of another has never before been recognized in law.")

gestation and birth presents. There is no place on earth where a fetus is guaranteed any birth outcome, not because of laws or individual choices, but because of biology.[9]

Furthermore, pregnancy discrimination, especially in a form that constitutes medical mistreatment or punishment undermines legitimate state interest in protecting public health.[10] Maternal, fetal and child health are best advanced by protecting the health and rights of pregnant people, not by circumscribing them. For this reason, NAPW strongly urges adoption of the Commission's Proposed Rule.

Sincerely,

Indra Lusero
Staff Attorney
National Advocates for Pregnant Women

[9] It is estimated that miscarriage occurs in 15-20% of pregnancies. Raj Rai & Lesley Regan, Recurrent Miscarriage, 368 Lancet 601, 601 (2006). Stillbirths occur in about 1% of pregnancies. Ruth C. Fretts, Etiology and Prevention of Stillbirth, 193 American Journal of Obstetrics & Gynecology 1923, 1924 (March 2005). *See also* Sarah DiGregorio, Early: An Intimate History of Premature Birth and What It Teaches Us About Being Human (2020).

[10] See Amicus Brief for Birth Rights Bar Association and the Birth Place Lab, filed November 2020 in *Dray v. Staten Island Univ. Hosp.*, No. 2019-12617, 57 (2d Dept. 2019) and Amicus Brief for VBAC Facts and Evidence Based Birth, filed November 2020 in *Dray v. Staten Island Univ. Hosp*., No. 2019-12617, 57 (2d Dept. 2019).

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STATEN ISLAND UNIVERSITY HOSPITAL

ADMINISTRATIVE POLICIES AND PROCEDURES MANUAL

SUBJECT: Managing Maternal Refusals of Treatment Beneficial for the Fetus	**MANUAL CODE:** ADM III A 14.0
EFFECTIVE DATE: May 2008 Page 1 of 4	**SUPERSEDES:** NEW

GENERAL STATEMENT OF PURPOSE:

To provide guidelines for dealing with refusals by a pregnant woman (and/or her husband, the father of the child, or her legal surrogate) of medical treatment in the hospital judged to offer a reasonable possibility of significant benefit to her viable fetus.

GENERAL PRINCIPLES:

1. Both the fetus and the pregnant woman are patients of the Physicians and Staff; therefore, the best interests of both must be served to the fullest extent possible.

2. Every reasonable effort shall be made to respect the rights and wishes of the woman, but also to protect the welfare of the fetus.

3. Because of the physiologic dependence of the fetus on the pregnant woman, the burden of consequences of her actions on the fetus should be taken into account by her doctors and staff.

4. In some circumstances, the significance of the potential benefits to the fetus of medically indicated treatment may justify using the means necessary to override a maternal refusal of the treatment.

5. Every reasonable effort should be made to reduce any additional burdens or risks for the pregnant woman that may result from overriding her refusal of treatment beneficial to her fetus.

PROCEDURES:

1. If a pregnant patient refuses treatment in the hospital that is recommended by the Attending Physician(s) as medically indicated for her fetus, the Attending shall make the following evaluation of the situation:

   a. That there is reasonable certainty that the fetus is at risk of serious harm without the treatment.

   b. That the risks to the woman of the treatment are relatively small.

   c. That there is no viable alternative treatment which may reasonably be expected to protect the fetus from the risk.

STATEN ISLAND UNIVERSITY HOSPITAL

ADMINISTRATIVE POLICIES AND PROCEDURES MANUAL

SUBJECT: Managing Maternal Refusals of Treatment Beneficial for the Fetus	MANUAL CODE: ADM III A 14.0
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d. That there is a high probability that the intervention may prevent or substantially reduce the risk to the fetus.

e. That the fetus is reasonably judged to be viable based on gestational age of >23 weeks and absence of lethal untreatable anomalies.

f. That the probable benefits of the treatment to the fetus significantly outweigh the possible risks to the woman.

2. If the Attending Physician judges that all the conditions in #1 are met, he/she should proceed as follows:

a. The Attending Obstetrician and the Neonatalogist on-call must ensure that the patient is fully informed of the specific risks that her refusal may create for her fetus and for herself.

b. Arrangements must be made, if feasible, to provide her with counseling and other supportive services that may help her understand and cope with the situation.

c. The Attending Physician and other caregivers should make reasonable efforts to persuade the pregnant woman to change her mind and accept treatment that is beneficial for her fetus.

3. If the woman continues to refuse consent, the Attending Physician must determine whether the patient has the decisional capacity to refuse the treatment, and document his/her findings in the chart.

a. If the Attending Physician judges that the woman lacks capacity, he/she must arrange for a consult on the patient's capacity by an Attending Psychiatrist, as time permits.

b. If there is not enough time to arrange for the consult from the Attending Psychiatrist without significant additional risk to the fetus, the Attending Physician shall proceed to Step #7 Emergent Need (below).

c. If the woman is judged to lack decisional capacity, the Attending Physician shall seek informed consent from the woman's legal surrogate.

STATEN ISLAND UNIVERSITY HOSPITAL

ADMINISTRATIVE POLICIES AND PROCEDURES MANUAL

SUBJECT: Managing Maternal Refusals of Treatment Beneficial for the Fetus	MANUAL CODE: ADM III A 14.0
EFFECTIVE DATE: May 2008 Page 3 of 4	SUPERSEDES: NEW

4. If the woman with capacity or her legal surrogate continues to refuse the treatment, the Attending Physician shall notify the Director of Maternal Fetal Medicine or the Maternal Fetal Medicine Attending on-call.

5. If the Director of Maternal Fetal Medicine (or designee) agrees that all the conditions in # 1 are met, he/she *or* his/her designee shall notify the representative of the Office of Legal Affairs immediately.

6. The Director of Maternal Fetal Medicine and the representative of The Office of Legal Affairs and the Attending Physician may decide together what measures are appropriate and necessary to override the refusal and provide the treatment in order to protect the medical welfare of the fetus. When time permits, every effort should be made to obtain a court order.

7. EMERGENT NEED:

   If the Attending Physician judges that there is emergent need to treat the fetus, and reasonably determines that waiting for the consultation with the Director of Maternal Fetal Medicine and the Office of Legal Affairs could pose significant additional risk to the fetus, the Attending Physician may choose to take the measures necessary to override the refusal and protect the medical welfare of the fetus without further delay.

8. DOCUMENTATION:

   The attending should document the following in the maternal record:

   a. Fetal condition and risks/benefits of intervention for mother and fetus

   b. That counseling has been performed and by whom

   c. Whether mother has decisional capacity and if not, by whose determination

   d. Urgency of situation with emphasis on whether there is time to consult psychiatry and/or obtain court order

   e. Measures that will be taken

STATEN ISLAND UNIVERSITY HOSPITAL

ADMINISTRATIVE POLICIES AND PROCEDURES MANUAL

SUBJECT: Managing Maternal Refusals of Treatment Beneficial for the Fetus	MANUAL CODE: ADM III A 14.0
EFFECTIVE DATE: May 2008 Page 4 of 4	SUPERSEDES: NEW

9. If another Attending Physician, House Officer or Nurse believes that the conditions in #1 are met, he or she may notify the Director of Maternal Fetal Medicine. as per the SIUH Escalation Policy.

10. CONSCIENTIOUS EXEMPTION:

If an Attending Physician or House Officer or Nurse or other clinical staff has a strong moral or religious objection to administering non-consensual treatment to the woman in order to protect the welfare of the fetus in accordance with this policy, he or she may be excused from participating, provided that a medically appropriate transfer of care can be arranged.

POLICY REVIEW/HISTORY

Reviewed / Revised by: Staten Island University Hospital Administrative Control Person: 1/2008
Approved by Staten Island University Hospital Medical Executive Committee: Effective: 2/2008

SIGNATURES:

Reviewed by:	Title:	Date:
_____	President/CEO	_____ Month/Year
_____	Executive Vice President/COO and Chief Nurse Executive	_____ Month/Year
_____	Executive Vice-President	_____ Month/Year
_____	Chief Medical Officer	_____ Month/Year
_____	Sr. Vice President and General Counsel	_____ Month/Year
_____	Chairman, Obstetrics and Gynecology	_____ Month/Year
_____	Chairperson, Perinatal Bioethics Committee	_____ Month/Year

STATEN ISLAND UNIVERSITY HOSPITAL
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Staten Island, NY 10305-3496

DRAY, RINAT 032Y
MR# [redacted] DOB: [redacted] F
GORELIK, LEONID MD Adm: 7/26/11
(646) 675-7751
Acct# [redacted]

PROGRESS NOTES

DATE	TIME	
7-26-11	230 PM	MFM Director Asked to speak to patient by Dr Gorelik at 1:30PM because she refused a C-section. The fetus is at risks for serious harm with the C-section. The risk to the patient is small. There is no viable alternative to C-section. There is a high probability that C-section will prevent or substantially reduce the risk to the fetus. The fetus is >23 weeks gestation and does not have a lethal untreatable anomaly. The probable net benefits of C-section significantly outweigh the possible risk to the woman. The woman has decisional capacity. I have advised to provide her refusal to have a C-section. Her physician Dr Gorelik and hospital attorney Ms Fries are in agreement. PRINTED BY: CSANTELMO DATE: 07/27/2011 THIS IS A COPY

JotForm rev. (04/0

November 12, 2020

Office of the Chair
New York City Commission on Human Rights
22 Reade Street
New York, New York 10007
Via Email
policy@cchr.nyc.gov

Re: Proposed Rules on Discrimination Based on Pregnancy, Childbirth, or Related Medical Conditions

Dear Chair and Commissioner Malalis and New York City Commission on Human Rights,

Girls for Gender Equity (GGE) is writing to comment on the proposed amendments to Title 47 of the Rules of the City of New York. Thank you for the concerted effort to clarify the scope of protections with respect to pregnancy, childbirth, and related medical conditions and sexual and reproductive health decisions in the New York City Human Rights Law. As a youth-serving organization, we are excited at the prospect of new, strong amendments particularly to support pregnant and parenting young people.

We write primarily with two recommendations:

(1) Broaden examples of violations to address additional public accommodations scenarios; and
(2) Broaden § 2-08 and the definition of "sexual or reproductive health decisions" to include the full scope of health decisions to include neutral language or the absence of seeking services.

Overview of Our Concerns

In 2015, GGE, in partnership with the National Women's Law Center, held a listening session in New York City on the needs of young women of color. Participants identified "stigmatizing pregnant and parenting students" as one key issue, and during the session, one young person shared, "Once I became pregnant, my academic advisor stopped wanting to meet with me."[1] As potential policy solutions, the focus group

[1] National Women's Law Center & Girls for Gender Equity (2015). Listening Session on the Needs of Young Women of Color | New York City. Retrieved from

recommended that (a) sexual health education should not stigmatize teen parenthood and should resist devaluing the experience and accomplishments of those who either have or are young parents, and (b) training staff so that they don't discriminate against pregnant and parenting students.

In a later 2017 survey of 1,000 girls conducted by the National Women's Law Center, pregnant or parenting girls overwhelmingly reported feeling that other students, teachers, or administrators did not want them in their schools.[2] For these reasons, we are offering comments to ensure pregnant and parenting young people and students are included in cooperative dialogues around their accommodation needs. For example, pregnant and parenting young peoples' ability to comply with directives or service plans are often a decisive factor in whether they are able to continue their education.

Recommendation #1 – Broaden Scenarios of Example Violations

In our experience attending to issues of school pushout, and as supported by focus-group-driven research,[3] we understand that many pregnant and parenting students encounter multiple preventable barriers to school engagement:

- An environment of discouragement, stigma related to pregnancy, bullying, outright hostility, and indirect or direct pressure to leave school;
- Citations for lateness or absences that should have been excused as pregnancy related, including absence policies that feel uniquely punitive;
- Lack of a support system or presence of trusted and caring school staff;
- Lack of needed accommodations, ranging from the enforcement of unreasonable dress codes, refused or unreliable access to elevators, strict rules around bathroom access, limitations on cell phone usage related to communicating pregnancy-related needs, or requiring students to sit at desks that are too small or cause discomfort;
- Incomplete or unclear explanations of all available student options, including emphasis on pushing pregnant or parenting students into alternative schools or programs; and

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https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2016/05/NWLC_GirlsforGenderEquity_Report_Final.pdf

[2] National Women's Law Center. (2017). Let Her Learn: Stopping School Pushout for Girls Who Are Pregnant or Parenting. Retrieved from https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2017/04/Final_nwlc_Gates_PregParenting.pdf

[3] Education Law Center. (2019, June). Clearing the Path: Creating School Success for Pregnant and Parenting Students and Their Children. *See also,* National Women's Law Center. (2017) Let Her Learn: Stopping School Pushout for Girls Who Are Pregnant or Parenting. Retrieved from, *https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2017/04/Final_nwlc_Gates_PregParenting.pdf*.

- Subsequent experiences with negative feelings, such as feeling badly, feeling upset about how they were treated, and symptoms of depression and post-traumatic stress disorder.

It is essential that pregnant and parenting students not only have access to public accommodations such as education, but also understand protections under Human Rights Law that intend to support their engagement in school. To that end, we recommend that example scenarios – "examples of violations" – be broadened to address discrimination in the school-setting.

We offer the above collection of anecdotes as a starting place. As another example, the New York City Department of Education Regulation of the Chancellor A-740: Pregnant and Parenting Students and Reproductive Health Privacy, was amended earlier this year, and now clarifies protections in access to lactation spaces: "Students needing to express breast milk should be excused from class for that purpose and provided with assignments, classwork, and additional support…" We see an "example violation" in this text, where staff at a public accommodation tells a person needing to express breast milk to use the restroom, even though providing a legally-mandated lactation room would not pose an undue hardship. We strongly encourage the Commission to include examples of unlawful discrimination in public accommodations in the finalized rule to be most includive of scenarios relevant to young people.

Recommendation #2 – Broaden § 2-08 and the Definition of "Sexual or Reproductive Health Decisions"

We are collectively grappling with patronizing ideas of what and what kinds of reproductive health care is appropriate. Given the power dynamics at play in adult interactions with young people and the risk of coercive referrals to health services, we are recommending that the definition of "sexual or reproductive health decisions" be less limiting for young people, including for young people utilizing nontraditional health services or alternative birth workers. In our experience, and as supported by relevant case studies, students who are pregnant or parenting often come under increased scrutiny by school staff and are held to an unreasonable standard.[4] These pressures can have a tremendous negative effect on students. Broadening this definition would potentially protect against harassing communication or coercive referrals to services.

[4] National Women's Law Center. (2017). *Op. Cit.*

To this end, we recommend "sexual or reproductive health decisions" (page 3) refer not only to any decision to receive services, phrased in the affirmative, but also any decisions to not receive services.

We would then also recommend § 2-08 Prohibition on Discrimination Based on Sexual or Reproductive Health Decisions (page 11) include not only "because of their decision to receive services related to sexual or reproductive helath," phrased in the affirmative, but also any decision to not receive services.

Short of ensuring cultural competence and inclusive understandings of pregnancy and parenting across New York City, we make this recommendation to be more inclusive of a diversity of decision-making related to pregnancy, childhood, or related recovery or conditions.

Conclusion

Amendments to Title 47 and this public comment process present a unique opportunity to engage in meaningful citywide dialogue regarding how we keep pregnant and parenting young people supported and thriving. GGE looks forward to collaborating with the Commission on next steps toward creating safe and affirming environments in employment, housing, and public accommodations.

Again, thank you for this opportunity to engage in the process, and we look forward to the work ahead.

Sincerely,

Charlotte Pope
Director of Policy
Girls for Gender Equity
cpope@ggenyc.org

Fw: Proposed Rules on Discrimination Based on Pregnancy

Policy (CCHR) <Policy@cchr.nyc.gov>
Thu 11/12/2020 8:15
To: Bianca Scott <Bvscott@cchr.nyc.gov>

From: [redacted]
Sent: Thursday, November 12, 2020 6:30 AM
To: Policy (CCHR) <Policy@cchr.nyc.gov>
Subject: Proposed Rules on Discrimination Based on Pregnancy

Hi,

I am writing to support the proposed rules on discrimination based on pregnancy, and in particular the section that states "A covered entity cannot use its concerns about maternal or fetal safety as a reason for discrimination." I would like to submit this statement anonymously.

This rule is necessary because pregnant patients are mistreated on the basis of fetal safety as if the presence of a fetus allows providers to make exceptions to standards or provide substandard care. For example, I witnessed this type of discrimination recently. I am a fellow in obstetric anesthesiology, our job is to ensure that pregnant patients do not feel pain during obstetric procedures, but I recently saw this standard excepted during an emergency cesarean surgery where the patient was cut into without substantial anesthesia and could feel the incision on her skin and on her uterus. When I walked into the operating room I heard her screaming out in pain. Despite her screams the obstetrician continued to proceed with the procedure. When I got to the other side of the drape, I was devastated to see another Black woman. She immediately locked eyes with me and reached out to me. She grabbed my hand as tight as she could. Her nails sharply digging into my hand as if to leave a visceral imprint in me, an impetus to act. So this is me acting. This rule is one of many strategies that can be employed to help protect birthing people from obstetric violence.

Sincerely,

[redacted]
Department of Anesthesiology
Mount Sinai West
[redacted]

[redacted]

THE LEGAL AID SOCIETY CIVIL

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November 12, 2020

Testimony of The Legal Aid Society in Support of Proposed Rules to Establish Certain Definitions and Clarify the Scope of Protections Related to Pregnancy, Childbirth, and Related Medical Conditions, and Sexual and Reproductive Health Decisions

Presented before the New York City Commission on Human Rights

Submitted by Abigail Cook-Mack

Thank you for the Opportunity to present this testimony.

The Legal Aid Society is the oldest and largest not-for-profit public interest law firm in the United States, working on more than 300,000 individual legal matters annually for low-income New Yorkers with civil, criminal, and juvenile rights problems in addition to law reform representation that benefits all two million low-income children and adults in New York City. The Society delivers a full range of comprehensive legal services to low-income families and individuals in the City. Our Civil Practice has local neighborhood offices in all five boroughs, along with centralized city-wide law reform, employment law, immigration law, health law, and homeless rights practices.

Through our Employment Law Unit, we provide legal services to over 2,000 low-wage workers each year to ensure these workers receive fair wages, fair treatment, decent working conditions, and the benefits to which they are entitled if they lose their jobs. Most of these cases involve workplace discrimination, as well as wage and hour violations, family and medical leave issues, and unemployment insurance denials.

The Proposed Rules Will Have a Great Impact

The Society applauds the Commission for proposing amended rules to establish definitions and clarify protections for New Yorkers with respect to pregnancy, childbirth, and related medical conditions, sexual and reproductive health decisions, and accommodations for employees who need to express breast milk while at work. The New York City Human Rights Law (NYCHRL) provides among the most expansive protections against discrimination in the nation. These amendments serve to strengthen those protections, making clear what is expected of employers and employees and laying out the procedures that govern how employers must treat employees who are making important and life-altering decisions about their reproductive health and choices.

Among other important clarifications, the amended rules will ensure that pregnant employees who require accommodations are able to access them. All too often, clients come to the Society because their employers have refused them accommodations, suggesting that the worker's pregnancy-related conditions do not amount to disabilities and are therefore insufficient to merit an accommodation. The amended rules make clear that the pregnancy-related condition requiring accommodation need not amount to a disability and will eliminate the need pregnant workers often feel to contort themselves to establish that their pregnancy-related conditions amount to disabilities under the law. They further clarify that the most basic of accommodations – minor or

temporary work modifications, adjustments to uniform requirements, additional water or snack breaks, extra bathroom breaks, minor modifications to work-stations, are not accommodations that should require significant back and forth. Rather, those accommodations should be granted freely, without the onerous requirements that employers often impose on employees seeking such accommodations.

The amended rules will also help women avoid a major pitfall of seeking reasonable accommodations that sometimes leads employers to terminate employment or force women out on unpaid leave before they are ready: doctor's notes. Although well-meaning, doctor's notes often contain blanket statements that are not specifically tailored to their pregnant patients. The Society has, for example, seen many cases where a doctor notified employers that the pregnant worker must be assigned light duty and should not be permitted to lift heavy items. While this may certainly be true for some pregnancies, it is not true for all. In such circumstances, even the most well-meaning doctor's notes can have the adverse effect of giving employers ammunition to claim that the required accommodations pose an undue burden. By providing clarity that medical documentation is not required for obvious needs of pregnancy, the Commission obviates the need to provide doctor's notes that can ultimately undermine a woman's ability to remain in the workforce throughout pregnancy.

The Society also commends the Commission for establishing clear guidelines governing how those employees who desire to continue breastfeeding their children must be treated by employers. The emotional and physical toll that can result when an employer does not take adequate steps to permit a woman to express breastmilk can be severe. Of particular importance are those guidelines establishing how employers must handle the needs of workers who do not work in traditional office settings, as many of the Society's clients fall within this category. We have to make sure employers are educated and understand their obligations to post a notice in the workplace, to enter into a cooperative dialogue and to think "outside the box" about solutions in non-traditional workplaces. All too often employers abdicate responsibility in such cases, neglecting to take an active role in helping our clients troubleshoot ways to safely and privately express breastmilk while working in positions that operate outside of an office. In one such case, our client was forced to stop breastfeeding after her employer told her she was welcome to express milk but refused to engage in a cooperative dialogue about how and where she could do so. No employee should be forced to choose between breastfeeding their children and keeping a job. These rules will help ensure that employees do not have to make such agonizing decisions.

Conclusion

The Legal Aid Society thanks the Commission for proposing these amendments. When workers are grappling with the challenges of working while making significant decisions about their reproductive health or while trying to become pregnant, being pregnant, or having just given birth, the last thing they need is further confusion surrounding their rights. These amendments will provide critical clarification about the scope of the law and the protections it offers.

Respectfully Submitted:

/s/ *Abigail Cook-Mack*

Abigail Cook-Mack

The City University of New York

CUNY SCHOOL OF LAW

Law in the Service of Human Needs

New York City Commission on Human Rights
Public Hearing on Proposed Public Rules on Discrimination Based on Pregnancy, Childbirth, or Related Medical Condition
November 12, 2020

Written Testimony of the Human Rights & Gender Justice Clinic
Main Street Legal Services
City University of New York School of Law

Dear Commissioner Carmelyn Malalis and members of the Commission on Civil and Human Rights,

Thank you for holding the opportunity to comment on the proposed rules. My name is Rashika Rakibullah and I am an intern with the Human Rights and Gender Justice Clinic ("HRGJ") at the CUNY School of Law. In 2019, CUNY Law School was honored to host the Commission's public hearing on pregnancy and caregiver discrimination, and HRGJ contributed to the Commission's follow up report. HRGJ works to promote human rights and gender justice and frequently provides testimony about reproductive justice and sexual and reproductive health issues.

As you know, the hearing and subsequent report highlighted how many workers continue to experience discrimination despite New York City's strong protections against pregnancy and caregiver discrimination. We are heartened that the commission is amending its rules to clarify the scope of protections with respect to pregnancy, childbirth and related medical conditions and to reflect amendments to the Human Rights Law concerning lactation accommodation and non-discrimination based on sexual and reproductive health decisions. The clarifications and the examples detailed throughout the amended rules will help employers better understand the scope of their non-discrimination obligations.

The rules will also help employees obtain accommodations by explaining the cooperative dialogue process and setting forth employers' specific lactation accommodation requirements, including a lactation room and written policy.

While today's hearing focuses on the Commission's proposed rules, we have three additional recommendations from the report:

- First, implementing a system to fast-track or prioritize pregnancy discrimination complaints because of their time-sensitive nature;
- Second, adding more resources to support the Commission's mediation program to resolve pregnancy discrimination disputes in a timely fashion, including increasing the number of available mediators who handle pregnancy discrimination claims; and
- Third, proactively investigating discrimination in low-wage labor sectors, such as restaurants and domestic work, as well as industries with predominantly male workforces.

The report outlined several legislative changes outside the Commission's purview that would positively impact caregivers and pregnant people. We encourage the Commission to continue working with the city and state to meet the needs of this community, including by:

- Extending protections under the Human Rights Law to all workers regardless of employer size, rather than only employers with four or more workers;
- Amending the Human Rights Law to require caregiver accommodations; and
- Expanding the Domestic Workers Bill of Rights to provide more financial assistance to domestic workers who are pregnant, raising young children, or working as caregivers.

At the hearing, several stakeholders raised serious concern about race and gender discrimination and mistreatment suffered by pregnant people in medical settings. We encourage the Commission to work with city hospitals and public health agencies, such as the Department of Health and Mental Hygiene, to shift the culture within medical institutions and ensure that people receiving pregnancy and postpartum care feel adequately supported and that patients are not mistreated or discriminated against because of their race, national origin, citizenship status or gender.

We believe that every New Yorker should be able to work safely in our city free from discrimination based on pregnancy, childbirth and related medical conditions, or sexual and reproductive health decisions. We greatly appreciate the Commission's diligence and hard work in promulgating these proposed rules. New York City has always been a leader in ensuring the rights of all its residents - by going even further and fully considering our additional recommendations, the Commission can ensure that New York remains a leader in this sphere.

Sincerely,

Rashika Rakibullah
J.D. Candidate, May 2021
City University of New York School of Law

November 19, 2020

Zoey Chenitz, Senior Policy Counsel
Office of the Chair
New York City Commission on Human Rights
22 Reade Street
New York, NY 10007

Dear Ms. Chenitz,

The New York Civil Liberties Union (NYCLU) and the American Civil Liberties Union (ACLU) submit these comments strongly supporting the New York City Commission on Human Rights' Proposed Rules on Discrimination Based on Pregnancy, Childbirth, or Related Medical Conditions.[1]

The NYCLU, the New York state affiliate of the ACLU, is a not-for-profit, nonpartisan organization with eight offices across the state and over 180,000 members and supporters statewide. The NYCLU's mission is to defend and promote the fundamental principles, rights, and values embodied in the Bill of Rights, the U.S. Constitution, and the New York Constitution, including the right to be free from discrimination based on pregnancy.

The ACLU is a national, nonpartisan public interest organization with more than four million members, dedicated to protecting the constitutional and civil rights of individuals. Through its Women's Rights Project, co-founded in 1972 by Ruth Bader Ginsburg, the ACLU has long been a leader in the legal battles to ensure the full equality of women and pregnant people. Throughout its history, the Women's Rights Project has participated, either as amicus or direct counsel, in most of the nation's landmark pregnancy discrimination cases before the Supreme Court, and both the Women's Rights Project and the NYCLU have successfully litigated numerous such claims in state and federal courts.

Notwithstanding the enactment of the federal law against discrimination more than four decades ago, pregnancy discrimination remains distressingly common. These comments will highlight some of the rules' key provisions and recommend a few areas where the rules

[1] These comments have been amended to offer additional feedback on the proposed rules' medical documentation requirement and to recommend the addition of anti-retaliation provisions.

could be strengthened. They will proceed in two sections, focusing first on § 2-07 of the proposed rules, the Prohibition on Discrimination Based on Pregnancy, Childbirth, and Related Medical Conditions, and Requirements for Employers to Accommodate Lactation Needs, and then on § 2-08, the Prohibition on Discrimination Based on Sexual or Reproductive Health Decisions.

§ 2-07, Prohibition on Discrimination Based on Pregnancy, Childbirth, and Related Medical Conditions, and Requirements for Employers to Accommodate Lactation Needs

Despite longstanding federal law prohibiting pregnancy discrimination, it remains disturbingly common, both in New York[2] and across the country.[3] In the employment

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[2] For example, our client, Julie Desantis-Mayer had been working as a full-time driver at UPS in Long Island for nine years when she learned she was pregnant in 2012. Because she worked strenuous shifts that involved lifting heavy packages and could run for as long as 14 hours, in order to have a healthier pregnancy, Desantis-Mayer asked UPS to temporarily reassign her to a modified duty position, like the secretarial work she had been assigned previously when she had been injured on the job. But UPS refused. Her supervisor told her it would set a bad precedent to make accommodations for pregnant workers, even though the company routinely accommodated others with temporary impairments who were not pregnant. Instead, Desantis-Mayer was forced to leave her job for the duration of her pregnancy, giving up her salary and benefits. Julie Desantis-Mayer, *UPS Pushed Me Out Of The Workplace When I Got Pregnant*, AMERICAN CIVIL LIBERTIES UNION, Jan. 16, 2019, https://www.aclu.org/blog/lgbt-rights/ups-pushed-me-out-workplace-when-i-got-pregnant. It cost her $60,000. *ACLU Files Complaint After Company Gives L.I. Woman Unpaid Leave Due to Pregnancy*, CBS NEWS, Jan. 17, 2013, https://newyork.cbslocal.com/2013/01/17/long-island-woman-files-complaint-after-being-forced-from-job-over-pregnancy/. Sandra Lochren, another of our clients, had dreamed of being a police officer since she was a child, and one of her proudest achievements was to make that goal a reality. But when she became pregnant in 2000 while working for the Suffolk County Police Department and asked to be temporarily removed from patrol duty, the Department denied her request. Instead, she continued to be assigned to a patrol car, while officers who had been injured on the job or who were merely working overtime were assigned desk work. Lochren's repeated requests for light duty as her pregnancy progressed were denied, and she was forced to take leave instead, using up her accrued paid sick and vacation time—time that she had been saving for maternity leave after her child was born—so that she would have a paycheck. When she ran out of that accrued leave time before her due date had arrived, her leave became unpaid. The loss of salary was so burdensome that Lochren and her husband, also a Suffolk County officer, had to sell their home. The emotional toll was so great that Lochren went into early labor and delivered her child one month early. Although there were not many women working for the Suffolk County Police Department, five more women came forward to recount similar hardships of being forced off the job when they were pregnant. Second Amended Complaint, *Lochren v. County of Suffolk*, No. 01 Civ. 3925, 2008 WL 2039458 (E.D.N.Y. 2002), *available at* https://www.nyclu.org/en/cases/lochren-v-county-suffolk-challenging-discriminatory-policy-affecting-pregnant-police-officers.

[3] *E.g. Why We Need the Pregnant Workers Fairness Act: Stories of Real Women*, NAT'L P'SHIP FOR WOMEN & FAMILIES, https://www.nationalpartnership.org/our-work/resources/economic-

context alone, one study estimated that over a quarter million pregnant women a year do not get the job modifications they need to continue working safely.[4] Workers should not have to choose between their health and their careers, and no one should experience discrimination based on pregnancy, childbirth, or related medical conditions.

Fortunately, New York state prohibits discrimination based on familial status, which includes pregnancy,[5] in employment, training programs, and housing,[6] and New York City prohibits discrimination based on gender, which includes actual or perceived pregnancy, childbirth, or related medical conditions, in employment, housing, and public accommodations.[7]

In the employment context, the Pregnancy Discrimination Act, passed in 1978, mandates that pregnant workers "be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work."[8] In *Young v. United Parcel Service, Inc.*, the Supreme Court affirmed that this language applies with equal force to pregnant workers needing some form of accommodation where the employer provides such accommodations to non-pregnant employees.[9] While we had hoped that *Young* would improve employers' responses to pregnant workers' need for accommodations, the unfortunate reality is that many employers continue to deny accommodations—and, even more unfortunate, courts continue to approve these denials, primarily where a pregnant employee is unable to provide numerous examples of specific co-workers who have received more favorable treatment. The ACLU has recently been counsel or amicus in three different appeals seeking to overturn such rulings,[10] which we consider mis-readings of federal law.

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justice/pregnancy-discrimination/why-we-need-the-pwfa-stories-of-real-women.pdf (last visited Nov. 10, 2020).

[4] NAT'L P'SHIP FOR WOMEN & FAMILIES, LISTENING TO MOTHERS: THE EXPERIENCES OF EXPECTING AND NEW MOTHERS IN THE WORKPLACE 3 (2014).

[5] N.Y. Exec. Law § 292 (McKinney).

[6] N.Y. Exec. Law § 296 (McKinney).

[7] N.Y.C. COMM'N ON HUMAN RIGHTS, APPLICATION OF HUMAN RIGHTS LAW TO PREGNANCY, CHILDBIRTH, AND RELATED MEDICAL CONDITIONS, at 2 (2020).

[8] Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (1978).

[9] *Young v. United Parcel Serv., Inc.*, 575 U.S. __, __, 135 S. Ct. 1338, 1357 (2015).

[10] Only one of these appeals was successful. *Compare Durham v. Rural/Metro Corp.*, 955 F.3d 1279 (11th Cir. 2020) (reversing grant of summary judgment to employer as to emergency medical technician's Pregnancy Discrimination Act disparate treatment claim for failure to accommodate where employer granted accommodations to co-workers with on-the-job injuries) *with Legg v. Ulster Cty.*, No. 17-2861, 2020 WL 6325850, at *4 (2d Cir. Oct. 29, 2020) (upholding dismissal of disparate impact claims where plaintiff had failed to show that other pregnant officers would be similarly restricted in their ability to work, even though she had shown that all pregnant officers would have been denied accommodations under light duty policy limited to OJIs) *and Luke v. CPlace Forest Park SNF, LLC*, 747 F. App'x 978 (5th Cir. 2019), *cert. denied*, 140 S. Ct. 454, 205 L. Ed. 2d 271 (2019) (upholding grant of summary judgment to employer as to Pregnancy Discrimination Act disparate treatment claim stemming from employer's failure to accommodate certified nursing assistant's lifting restriction where evidence showed employer accommodated other employees).

The enactment of "pregnant worker fairness laws" in New York State and New York City—in 2015 and 2013, respectively—were welcome advances that helped clarify employers' obligation to accommodate their pregnant employees' temporary physical needs. No longer would pregnant workers in New York have to beg to be deemed comparable to their non-pregnant peers. Instead, both laws recognized that accommodation is, in the vast majority of cases, not only feasible, but the right thing to do. Both laws have gone a long way toward assuring that New Yorkers are better equipped to vindicate their rights to keep earning a living while pregnant and/or breastfeeding.

When the Commission issued its New York City Guidance on Discrimination on the Basis of Pregnancy, New York City workers—and their employers—were handed an invaluable roadmap toward making the City's pregnancy law deliver maximum protection. With codification of the Guidance's directives, New York City will secure its place as a nationwide leader in ensuring the civil rights of pregnant and parenting workers.

The Rules' Strengths and Recommendations

The proposed rules codify numerous important protections; we wish to highlight several of them. We also offer recommendations for ensuring that the rules have their intended effect.

Most importantly, the rules treat pregnancy accommodations as a category of their own, distinct from other types of accommodations. By making clear that an "employee's right to receive a reasonable accommodation . . . does not depend on whether the medical condition amounts to a disability under the City Human Rights Law,"[11] the rules eschew the provision of the federal pregnancy discrimination law that frames pregnancy as a comparative right and that has engendered so much confusion among employers and the courts. By establishing accommodation for pregnancy as an affirmative right—and obligation—rather than a comparative one, the rules articulate a crucial protection for pregnant workers. Moreover, by centering pregnancy accommodations on their own terms, the rules recognize our long history of excluding women from the workplace based on the capacity to become pregnant and acknowledge what is actually necessary to advance gender equity in the workplace. The proposed rules could further underscore the unique nature of pregnancy accommodations—and the fact that employers must do more than simply treat pregnant workers as well, or as poorly, as workers with similar ability or inability to work—by importing the Guidance's edict that employers provide "reasonable" accommodations for all pregnant workers, "regardless of whether and to what degree other employees are accommodated."[12]

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[11] N.Y.C. COMM'N ON HUMAN RIGHTS, APPLICATION OF HUMAN RIGHTS LAW TO PREGNANCY, CHILDBIRTH, AND RELATED MEDICAL CONDITIONS, at 6 (2020).
[12] N.Y.C. COMM'N ON HUMAN RIGHTS, LEGAL ENFORCEMENT GUIDANCE ON DISCRIMINATION ON THE BASIS OF PREGNANCY: LOCAL LAW NO. 78 (2013); N.Y.C. ADMIN. CODE §8-107(22), at 5 (2016).

In addition, the rules' expansive definitions of "pregnancy"[13] and "related medical condition"[14] help to ensure that as many as possible benefit from the rules' protections. In order to make sure the rules achieve their inclusive intent, the Commission should add capacity to become pregnant, menopause, and menstruation to the illustrative list included in the definition of "related medical condition."

It is also helpful that the rules provide a list of accommodations to offer clarity on what kinds of accommodations are considered reasonable.[15] Furthermore, the rules create a presumption that certain accommodations "will rarely pose an undue hardship on an employer."[16] And, while we appreciate the rules' intent to streamline the process for seeking reasonable accommodations by prohibiting an employer from requesting "medical documentation of the need for an accommodation to address an obvious need because of pregnancy, childbirth, or related medical condition,"[17] we are concerned that such an approach relies on employers to determine "when the need is apparent or relates to a need common to a noncomplicated pregnancy, childbirth or related medical condition."[18] This is a determination that many employers are not qualified to make and may lead to invasive questioning of and hurdles for employees whom employers unilaterally deem not to meet this criterion. A better solution would be to adopt the Guidance's approach and proscribe a medical documentation requirement, except in very limited circumstances.[19] Failing that, at a minimum, the Commission must frame such requests through the broader lens of disparate treatment, rather than labeling them "harassment."[20] Such framing avoids any potential conflict with First Amendment-protected speech. If retained, the clause in question should be rephrased to read, "When an employer requires an employee to provide medical documentation of the need for an accommodation to address an obvious need because of pregnancy, childbirth, or a related medical condition, it shall be presumed to be prohibited disparate treatment."

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[13] N.Y.C. COMM'N ON HUMAN RIGHTS, APPLICATION OF HUMAN RIGHTS LAW TO PREGNANCY, CHILDBIRTH, AND RELATED MEDICAL CONDITIONS, at 3 (2020) ("'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.").
[14] *Id*. ("'Related medical condition' refers to any medical condition that is related to or caused by pregnancy or childbirth or the state of seeking to become pregnant, including, without limitation, infertility, gestational diabetes, pregnancy-induced hypertension, hyperemesis, preeclampsia, depression, miscarriage, lactation, and recovery from childbirth, miscarriage, and termination of pregnancy.").
[15] *Id*. at 10 – 11.
[16] *Id*. at 10.
[17] *Id*.
[18] *Id*.
[19] N.Y.C. COMM'N ON HUMAN RIGHTS, LEGAL ENFORCEMENT GUIDANCE ON DISCRIMINATION ON THE BASIS OF PREGNANCY: LOCAL LAW NO. 78 (2013); N.Y.C. ADMIN. CODE §8-107(22), at 6 (2016).
[20] N.Y.C. COMM'N ON HUMAN RIGHTS, APPLICATION OF HUMAN RIGHTS LAW TO PREGNANCY, CHILDBIRTH, AND RELATED MEDICAL CONDITIONS, at 10 (2020).

We appreciate that the rules place the burden on the employer to either provide the accommodation or to demonstrate that all possible accommodations would impose an undue hardship on the employer.[21] To provide clarity for both employers and employees, the rules should either define "undue hardship" or cross-reference to the Guidance's thorough explanation of the term.[22]

We are pleased to see the Commission decrease its reliance on "essential requisites of the job" language; the term occurs only once in the proposed rules in the section requiring a cooperative dialogue to continue until, among other options, "no accommodation exists that will allow the employee to perform the essential requisites of the job."[23] Unfortunately, the rules provide no clarity as to what "essential requisites of the job" means. The rules include, as an example of a violation, a "policy that permits light duty assignments only for on-the-job injuries [and] fails to provide pregnant employees such light duty assignments as a reasonable accommodation,"[24] suggesting that an employee requiring light duty is nonetheless considered able to perform the "essential requisites of the job." The Commission's prior Guidance also made clear that "an employer must also show that there are no comparable positions available for which the employee is qualified that would accommodate the employee, and that a lesser position . . . is either not acceptable to the employee or would pose an undue hardship,"[25] indicating that a pregnant worker who requires a temporary transfer is similarly able to perform the "essential requisites of the job." The Commission should make these understandings explicit in the final rules lest the "essential requisites of the job" language sow confusion and undermine the rules' important protections.

In addition, the Commission innovated the "cooperative dialogue" between employer and employee—one of the most significant provisions that was later codified into the City law.[26] Although the cooperative dialogue continues to play a role in the proposed rules, we recommend the cooperative dialogue be more prominently included and described. For example, the rules specify that the "employer need not provide the specific accommodation sought by the employee so long as the employer proposes reasonable alternatives that meet the specific needs of the individual or that specifically address the condition at issue."[27] The Commission has an opportunity in this section to make clear that these proposals should occur in the context of a cooperative dialogue. Similarly, while the rules maintain the

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[21] *Id*. at 5.
[22] *See* N.Y.C. COMM'N ON HUMAN RIGHTS, LEGAL ENFORCEMENT GUIDANCE ON DISCRIMINATION ON THE BASIS OF PREGNANCY: LOCAL LAW NO. 78 (2013); N.Y.C. ADMIN. CODE §8-107(22), at 7 (2016).
[23] N.Y.C. COMM'N ON HUMAN RIGHTS, APPLICATION OF HUMAN RIGHTS LAW TO PREGNANCY, CHILDBIRTH, AND RELATED MEDICAL CONDITIONS, at 9 (2020).
[24] *Id.* at 5.
[25] N.Y.C. COMM'N ON HUMAN RIGHTS, LEGAL ENFORCEMENT GUIDANCE ON DISCRIMINATION ON THE BASIS OF PREGNANCY: LOCAL LAW NO. 78 (2013); N.Y.C. ADMIN. CODE §8-107(22), at 7 (2016).
[26] N.Y.C. ADMIN. CODE §8-107(28) (2018).
[27] N.Y.C. COMM'N ON HUMAN RIGHTS, APPLICATION OF HUMAN RIGHTS LAW TO PREGNANCY, CHILDBIRTH, AND RELATED MEDICAL CONDITIONS, at 5 (2020).

affirmative requirement that the employer initiate a cooperative dialogue[28] and that a cooperative dialogue be in "good faith,"[29] the Commission's Guidance contains numerous additional protections for the cooperative dialogue that should be incorporated here. For example, the dialogue must involve not only "communicating in good faith with the employee," but also communicating "in an open and expeditious manner"[30] and exploring "the full universe of available accommodations."[31] Any attempt on the part of the employer to intimidate or deter the employee, or to obstruct or delay the dialogue, would be considered a violation of good faith.[32] Similarly, the Guidance insists that, as an employee's condition changes, the employee may make new requests for accommodations,[33] as well as decline accommodations when they are not needed or desired and terminate particular accommodations when the need for them changes, with each new request prompting a new cooperative dialogue.[34] The cooperative dialogue is crucial for ensuring that requests for accommodations remain dynamic, flexible, and responsive to employees' needs, and the Commission should import the Guidance's many protections for the cooperative dialogue into its formal rules.

The rules contain a number of other critical provisions that should be preserved. They forbid paternalistic policies that purport to justify sex-based discrimination based on "concerns about maternal or fetal safety"[35]—for example, refusing to serve pregnant individuals coffee or raw fish[36] or preventing pregnant workers from being promoted or hired into positions that involve exposure to dangerous chemicals.[37]

Still, there are other examples of pregnancy discrimination that would be particularly helpful to include, such as those related to health care settings—where both health care institutions and courts would benefit from the Commission's counsel. For example, pregnant people are often coerced into unwanted interventions during childbirth,[38] and in some cases doctors override patients' explicit refusals of medical care. In fact, this type of obstetric violence is so common that Staten Island Hospital had a policy that permitted the "overriding of a pregnant patient's refusal to undergo treatment recommended for the fetus by the attending physician" by any "means necessary." This policy is currently at the center

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[28] *Id*. at 8.
[29] *Id*. at 2.
[30] N.Y.C. COMM'N ON HUMAN RIGHTS, LEGAL ENFORCEMENT GUIDANCE ON DISCRIMINATION ON THE BASIS OF PREGNANCY: LOCAL LAW NO. 78 (2013); N.Y.C. ADMIN. CODE §8-107(22), at 5 (2016).
[31] *Id*.
[32] *Id*. at 6.
[33] *Id*. at 6.
[34] *Id*. at 10.
[35] N.Y.C. COMM'N ON HUMAN RIGHTS, APPLICATION OF HUMAN RIGHTS LAW TO PREGNANCY, CHILDBIRTH, AND RELATED MEDICAL CONDITIONS, at 4 (2020).
[36] *Id*.
[37] *Id*.
[38] *E.g.* Maria T.R. Borges, *A Violent Birth: Reframing Coerced Procedures During Childbirth as Obstetric Violence*, 67 DUKE L. J. 827 – 62 (2018).

of ongoing litigation, and in the most recent decision, the New York Supreme Court opined that "the policy's interference in a pregnant woman's refusal decision only applies under circumstances such that the distinctions it makes are not solely based on a woman's pregnant condition, but rather, take into account concern for the fetus, and thus, the policy does not constitute discrimination based solely on sex or gender under the City and State Human Rights Laws."[39] Both Staten Island Hospital's policy and the Court's decision—which we consider a mis-reading of State and City law—are based on precisely the type of paternalistic "concerns about maternal or fetal safety"[40] that the Commission identifies and proscribes as primary animating factors behind policies that discriminate against people because they are pregnant. What is more, medical coercion and obstetric violence can lead to severe negative health outcomes, particularly for Black and Brown communities. In New York City, Black women face a maternal mortality rate twelve times higher than their white counterparts.[41] For these reasons, we urge the Commission to make clear within these rules that medical coercion and the practice of overriding competent pregnant people's medical decision-making are facially discriminatory.

We appreciate the health care example the Commission already includes in the proposed rules, making clear that a hospital's "blanket rule prohibiting any pregnant person from participating in drug detoxification programs"[42] is facially discriminatory. Similar to both this issue and forced medical treatment, the Commission should add an example prohibiting as disparate treatment the practice of targeting pregnant people in hospital settings for drug testing. Such drug testing, which disproportionately impacts Black and Latinx families, leads to separation of newborns from nursing parents and deters pregnant people from seeking health care.

Helpfully, the proposed rules acknowledge that pregnancy does not always fall along the gender binary and that some transgender men, nonbinary, gender-queer, and gender-nonconforming individuals may fall into the category of pregnant people.

The rules contain a number of helpful protections for lactation in the workplace, including the detailed specifications for what constitutes an acceptable lactation space, the incorporation of the undue hardship standard and duty to engage in the cooperative dialogue to discuss alternatives, and the examples of alternative solutions in cases of undue hardship.[43]

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[39] *Dray v. Staten Island Hospital*, No. 500510/14 (N.Y. Sup. Ct. Oct. 2019).
[40] N.Y.C. COMM'N ON HUMAN RIGHTS, APPLICATION OF HUMAN RIGHTS LAW TO PREGNANCY, CHILDBIRTH, AND RELATED MEDICAL CONDITIONS, at 4 (2020).
[41] *Black Mothers Keep Dying After Giving Birth. Shalon Irving's Story Explains Why*, ALL THINGS CONSIDERED, NPR, Dec. 7, 2017, https://www.npr.org/2017/12/07/568948782/black-mothers-keep-dying-after-giving-birth-shalon-irvings-story-explains-why.
[42] N.Y.C. COMM'N ON HUMAN RIGHTS, APPLICATION OF HUMAN RIGHTS LAW TO PREGNANCY, CHILDBIRTH, AND RELATED MEDICAL CONDITIONS, at 4 (2020).
[43] *Id*. at 6 – 7.

In addition, the lactation section could be strengthened. While it is helpful that the rules state that an employee who "wishes to pump at their usual workspace"[44] may do so if it does not pose an undue hardship, it is imperative that the Commission add the clarification it included in the prior Guidance—that employees may choose to express breast milk at their workstations "regardless of whether a coworker, client, or customer expresses discomfort."[45] The rules should also impose cleanliness requirements and other minimum requirements of security, sanitation, and privacy when a multi-purpose space or restroom is used "as an accommodation of last resort" for an employee who needs to express breast milk.[46]

Finally, the rules should be amended to add an anti-retaliation provision, ensuring that employers cannot discriminate against, threaten, retaliate against, or take adverse action against employees for exercising their rights under these rules or for reporting violations of these rules.

§ 2-08, Prohibition on Discrimination Based on Sexual or Reproductive Health Decisions

Choosing whether, when, and how to have children is a decision for individuals and families, not their employers, and no worker should ever have to worry about being demoted or fired just because their employer disagrees with their personal reproductive health care choices. Unfortunately, even in New York City, some employers have gone so far as to make their own opinions about the morality of family planning services the basis for adverse action against workers whose private health care choices do not reflect employer preferences. Fortunately, New York State and New York City have both enacted "boss bills," clarifying the prohibition on employers' adverse action on the basis of employees' or their family members' reproductive health care decisions. In a moment when sexual and reproductive health decision-making is threatened at the national level, and employers have almost unprecedented access to their employees' private lives, the Commission's proposed rules are particularly timely. They will help clarify and solidify the City law's protections. Employees have been fired after attempting to become pregnant because their employers believe in vitro fertilization or artificial insemination is immoral; expectant mothers have been forced from their jobs, or demoted less visible positions for less pay because they are unmarried; employers have discovered their employees' use of insurance coverage for a family member's contraception, tubal ligation, vasectomy, or

[44] *Id*. at 7.
[45] N.Y.C. COMM'N ON HUMAN RIGHTS, LEGAL ENFORCEMENT GUIDANCE ON DISCRIMINATION ON THE BASIS OF PREGNANCY: LOCAL LAW NO. 78 (2013); N.Y.C. ADMIN. CODE §8-107(22), at 9 (2016).
[46] *Id*. at 6.

abortion and taken adverse employment action.[47] Accessing lawful reproductive health care should never be subject to employer approval.

The Rules' Strengths and Recommendations

The proposed rules bring clarity to the City's law, emphasizing that both disparate treatment based on a person's sexual or reproductive health decisions and employment policies that facially discriminate against people based on their sexual or reproductive health decisions are proscribed.[48] Helpfully, the rules also provide numerous examples of violative behavior. This section offers a few suggestions for strengthening the rules' protections.

The rules' definition of sexual or reproductive health decisions tracks the statutory definition:

> "Sexual or reproductive health decisions" refers to any decision by an individual to receive services, which are arranged for or offered or provided to individuals relating to sexual or reproductive health, including the reproductive system and its functions. Such services include, but are not limited to, fertility-related medical procedures, sexually transmitted disease prevention, testing, and treatment, and family planning services and counseling, such as birth control drugs and supplies, emergency contraception, sterilization procedures, pregnancy testing, and abortion.[49]

The rules' examples make clear that they prohibit employment discrimination based on the refusal to receive reproductive health services—for example, citing a supervisor who routinely tells an employee who is about to have a fourth child to get a vasectomy[50] and an employer who fires an employee for refusing an HIV test[51] as examples of violations. It would be helpful to include in the definition the decision to refuse services as well as the decision to receive services.

In addition, because many of the employers who have been outspoken about their own policies that discriminate based on reproductive decision-making have centered a refusal to

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[47] While there are laws in place that protect the confidentiality of medical information, they are not failsafe; employers may become aware of health care choices that their employees have made, particularly in small workplaces.
[48] N.Y.C. COMM'N ON HUMAN RIGHTS, APPLICATION OF HUMAN RIGHTS LAW TO PREGNANCY, CHILDBIRTH, AND RELATED MEDICAL CONDITIONS, at 11 (2020).
[49] *Id*. at 3.
[50] *Id*. at 11.
[51] *Id*. at 12.

hire individuals who have abortions or use contraception, etc.,[52] the proposed rules should add an explicit example focused on the refusal to hire an individual based on their reproductive health decisions.

Furthermore, example (a)(1)(v) refers to "[m]ultiple employees" who "openly treat their coworker with disgust."[53] We recommend that the rules make clear that multiple employees need not be involved in order to rise to the level of discrimination and a violation of the law, but that a single employee's persistent and open mistreatment sufficient, provided the employer is aware of it and "does nothing to address it."[54]

Finally, this section of the rules too should be amended to add an anti-retaliation provision, ensuring that employers cannot discriminate against, threaten, retaliate against, or take adverse action against employees for exercising their rights under these rules or for reporting violations of these rules.

Conclusion

The proposed rules take important steps to reduce discrimination based on pregnancy, lactation, and reproductive health decision-making; ensure that pregnant workers have the same career opportunities as their peers; and ensure that every New Yorker has the right to make confidential family planning and reproductive health care decisions without fear of unfair scrutiny or penalty by employers.

To further meet these goals, in addition to the recommendations we make above, we urge the Commission to collect data about all employees' access to paid family leave, as well as specific data about city employees' access to paid family leave. Nationwide, just 13 percent of all private sector employees have access to paid family leave, a shameful statistic that speaks volumes about why starting a family is an economically precarious proposition for far too many. While New York State is one of the few in the country to take steps toward closing this gap by enacting paid leave legislation, gathering New York-specific data will help identify how people of different races, genders, and career paths experience paid family leave differently.

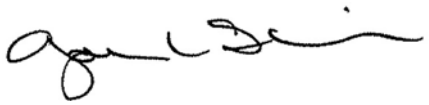
In sum, we appreciate the opportunity to submit these comments supporting the Commission's Proposed Rules on Discrimination Based on Pregnancy, Childbirth, or Related Medical Conditions. We strongly support the protections that the rules offer and urge the Commission to do everything in its power to continue to make New York City a

[52] *See CompassCare v. Cuomo*, No. 1:19-CV-1409 (N.D.N.Y. June 5, 2020) (order granting preliminary injunction in part and denying preliminary injunction in part).
[53] N.Y.C. COMM'N ON HUMAN RIGHTS, APPLICATION OF HUMAN RIGHTS LAW TO PREGNANCY, CHILDBIRTH, AND RELATED MEDICAL CONDITIONS, at 11 (2020).
[54] *Id.*

nationwide example of how best to assure that pregnant people are free from discrimination and that individuals can make the best reproductive health decisions for themselves and their families without jeopardizing their employment.

Sincerely,

Allison S. Bohm
Policy Counsel
New York Civil Liberties Union



Galen Sherwin
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if when how

Lawyering for Reproductive Justice

Testimony of If/When/How: Lawyering for Reproductive Justice to the New York City Commission on Human Rights
Proposed Amendments

If/When/How: Lawyering for Reproductive Justice is grateful to the NYC Commission on Human Rights for the opportunity to provide feedback on this important proposal to clarify the extent of the New York City Human Rights Law's protections for pregnant New Yorkers.

If/When/How is a nonprofit legal organization dedicated to ensuring that every person has the rights and resources necessary to make reproductive decisions free of coercion, violence, or punishment. As an organization whose work is rooted in the reproductive justice framework,[1] we are pleased to see the holistic approach the Commission is taking to the prevention of discrimination based on pregnancy, childbirth, or any reproductive decisions. The proposed amendments to title 47 of the Rules of the City of New York wisely reflect the importance of affirming and protecting the full spectrum of people's decisions and experiences related to pregnancy. Nobody should be discriminated against because they have had an abortion, or because they carried a pregnancy to term.

What we hope to see from the Commission is explicit affirmation of the notion that it is discrimination to keep people from making reproductive decisions in the first place.

Proposed §2-07(a) provides that "[i]t is a violation of § 8-107 of the Administrative Code for any covered entity to treat a person less well based on their actual or perceived pregnancy, childbirth, or related medical condition." The proposed language further explains that covered entities' policies that facially target

[1] *See* SisterSong Women of Color Reproductive Justice Collective, *Reproductive Justice*, https://www.sistersong.net/reproductive-justice ("SisterSong defines Reproductive Justice as the human right to maintain personal bodily autonomy, have children, not have children, and parent the children we have in safe and sustainable communities.")

individuals based on actual or perceived pregnancy are unlawful discrimination under the NYCHRL. It clarifies, consistent with the interpretive guidance to § 8-107, that concern for fetal health may not be used as a pretext for discrimination. Unfortunately, pregnancy-related health care, including care at birth, has been a site of precisely this kind of discriminatory behavior.

Discrimination in Care at Birth in New York Courts

One high-profile example of this discrimination currently pending in New York courts is the ongoing case of *Dray v. Staten Island University Hospital*.[2] According to the undisputed facts in the case record thus far, in 2011, a Brooklyn woman named Rinat Dray was forced to undergo a cesarean section over her conscious protest at Staten Island University Hospital (SIUH). Throughout her pregnancy, she had strongly expressed her desire to protect her health and future fertility by avoiding a repeat cesarean section if at all possible. However, her medical decision was overridden by a hospital policy that authorized its personnel to act against the will of pregnant patients in the third trimester if physicians believed that doing so would prevent harm to the fetus.[3] She was seriously injured in the course of the surgery, causing her lasting physical pain and emotional trauma from being operated on against her will.

SIUH's maternal override policy did not require the hospital to seek a court order or any other legal process before disregarding the fundamental right of an adult patient "to determine what shall be done with [their] own body."[4] It overlooked the fact that this is a right that is not only rooted in the common law, but in the fundamental rights protected by the U.S. Constitution.[5] The policy singled out

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[2] *Dray v. Staten Island Univ. Hosp.*, No. 500510/14 (Kings County Sup. Ct.). *See* Anemona Hartocollis, *Mother Accuses Doctors of Forcing a C-Section and Files Suit,* NY Times, May 16, 2014, *available at* https://nyti.ms/2ISpnnV; Molly Redden, *New York Hospital's Secret Policy Led to Woman Being Given C-Section Against Her Will*, The Guardian, Oct. 5, 2017, http://bit.ly/2q4tzDf.

[3] "Managing Maternal Refusal Policy" (hereinafter "maternal override policy") attached as (Exhibit A). This policy was removed as a part of plan of correction ordered by the New York State Department of Health as a result of the actions taken against Ms. Dray (attached as Exhibit B). It is unknown how many other New York City hospitals have such a policy.

[4] *See Schloendorff v Soc'y. of New York Hosp.*, 211 N.Y. 125, 129 (1914).

[5] *See, e.g., Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 289 (U.S. 1990)(O'Connor, J., concurring)("[T]he liberty guaranteed by the Due Process Clause must protect, if

pregnant patients as having lesser rights to autonomy, freedom from unwanted physical invasions, and due process before having these rights revoked, all couched in a notion that pregnant people are not considering the wellbeing of the fetus they carry when they make decisions that disagree with medical recommendations.

Had the hospital sought a court order, Ms. Dray might have had the opportunity to raise the precedent from other states examining whether a pregnant patient can be subjected to an unwanted surgical invasion to benefit a fetus. In examining this question with respect to pregnant individuals with viable or even at-term pregnancies, courts that have had the benefit of full briefing and presentation of arguments have typically ruled against the using legal or physical force to impose treatments on unwilling patients.[6] The D.C. Court of Appeals has ruled that pregnant people in the third trimester maintain their right "under the common law and constitution to accept or refuse treatment."[7] That court found that "in virtually all cases the question of what is to be done is to be decided by the patient — the pregnant woman — on behalf of herself and the fetus."[8] Similarly, the Appellate Court of Illinois declined to impose a court ordered cesarean upon a woman carrying a term pregnancy believed to be in imminent danger if she did not deliver by cesarean surgery, finding that "a woman's right to refuse invasive medical treatment [. . .] is not diminished during pregnancy."[9] That court later upheld this principle, overturning a court order for a blood transfusion physicians had sought for a pregnant Jehovah's Witness.[10]

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it protects anything, an individual's deeply personal decision to reject medical treatment. . . .")

[6] Julie Cantor, *Court-Ordered Care — A Complication of Pregnancy to Avoid,* 67 (10) Obstetrical & Gynecological Survey 607 (2012).

[7] *In re A.C.,* 573 A.2d 1235, 1238 (D.C. 1990) (posthumously vacating, *en banc*, a court order for a cesarean section that resulted in the death of both the pregnant woman and her infant)

[8] *In re A.C.* 573 A.2d at 1237

[9] *In re Baby Boy Doe*, 632 N.E.2d 326, 332 (Ill. App. Ct. 1994).

[10] *In re Fetus Brown*, 689 N.E.2d 397 (Ill. App. Ct. 1997) (overturning a court-ordered blood transfusion of a pregnant woman). Compare this to New York's lone case considering the same issue, *Matter of Jamaica Hospital*, 128 Misc.2d 1006 (Sup. Ct. Queens County 1985), in which, during an emergency hearing at the bedside of a critically ill Jehovah's Witness, the court found an 18-week fetus to be a "human being, to whom the court stands in *parens patriae*, and whom the court has an obligation to protect." *Id.* at 1008. This rule does not accord with any other New York law, and flatly contradicts earlier New York Court of Appeals precedent holding that fetuses are not legal persons. *Byrn v. New York City Health & Hospitals Corp.*, 31

This view of pregnant patients as fully decisionally capable on an equal basis with all other patients is endorsed by the American College of Obstetricians and Gynecologists' (ACOG) Committee on Ethics. In its guidance on "Refusal of Medically Recommended Treatment During Pregnancy," it warns that "[c]oercive interventions often are discriminatory and act as barriers to needed care."[11] It specifies that use of coercion, including "threats to involve the courts or child protective services, to motivate women toward a specific clinical decision" are "ethically impermissible."[12] The ACOG Ethics Committee's guidance acknowledges the "realities of prognostic uncertainty and the limitations of medical knowledge." Plainly put: doctors are sometimes wrong, and pregnant people are best situated to determine what risks they are willing to undertake based on their own needs, their family's needs, and their personal beliefs. In fact, in many of the cases in which health care providers have sought court-ordered interventions, the harm that health care providers feared never materialized.[13]

But the hospital did not even seek a court order, instead proceeding as self-appointed arbiters of Ms. Dray's rights because she was pregnant. Her pursuit of justice has dragged on for more than six and a half years. Most recently, she attempted to state claims under the New Yorks State and City Human Rights Law. But in October 2019, the Supreme Court ruled that a policy that singles out pregnant people for overrides to their health decisions does not discriminate on the basis of

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N.Y.2d 194, 203 (1972) ("the Constitution does not confer or require legal personality for the unborn.")

[11] American College of Obstetricians & Gynecologists, Committee on Ethics, *Opinion 664: Refusal of Medically Recommended Treatment During Pregnancy* (2016), *available at https://bit.ly/2IQoyvF.*

[12] *Id.*

[13] *See also Baby Boy Doe*, 632 N.E.2d 326 (Ill. App. Ct. 1994)(court refused to grant an order for an unconsented cesarean section, even when the fetus was given "close to zero" chance of surviving vaginal birth; the baby boy was eventually born healthy); *Jefferson v. Griffin Spalding County Hosp. Auth.,* 274 S.E.2d 457 (Ga. 1981) (ex parte judgement upholding an emergency order for forced cesarean based on testimony that there was a "99 percent" chance that the fetus would not survive; baby was eventually delivered safely); *In re Madyun*, 573 A.2d. 1259 (D.C. Sup. Ct. 1986) (risk of infection reason for forced surgery; no such infection found upon delivery)*, limited by In re A.C.,* 573 A.2d 1235 (D.C. 1990); Cynthia Gorney, *Whose Body is it, Anyway? The Legal Maelstrom That Rages When the Rights of the Mother and Fetus Collide*, Wash. Post, Dec. 13, 1988, at D1 (reporting that, after forced surgery, Ayesha Madyun's baby " was born with excellent lungs and no sign of infection").

sex because it is based on concern for "the rights of a viable fetus."[14] To the contrary, as the Commission well recognizes, using concerns about a fetus to subordinate the rights of a pregnant patient is the very heart of sex-based discrimination.

International Human Rights Doctrine Condemns Mistreatment in Birth

Ms. Dray is not alone in decrying what happened to her as a violation of human rights. Under international human rights law and in other countries' domestic human rights law, forcing a pregnant person to undergo an unwanted invasion for the benefit of a fetus is acknowledged as *obstetric violence*, a legally-prohibited form of violence that occurs when health providers and facilities enforce harmful gender norms.[15] The robust body of research documenting obstetric violence and disrespect and abuse in birth[16] reveals the phenomenon to be a subset of gender-based violence, which stems from gender inequality and women's historical subjugation to men.[17]

Amid increasing concern for the effects of this gender discrimination on the experiences of birthing people, the U.N. Special Rapporteur on violence against

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[14] Order, *Dray v. Staten Island Univ. Hosp.*, No. 500510/14, at 12-14 (Supreme Court, Oct. 4, 2019)(attached as Exhibit C).

[15] *See, e.g.,* Rogelio Pérez D'Gregorio, *Obstetric Violence: A New Legal Term Introduced in Venezuela*, Int. J. Gynecology & Obstetrics 111 (2010); Caitlin R. Williams et al.*, Obstetric Violence: A Latin American Legal Response to Mistreatment During Childbirth*, 125 BJOG 1208 (2018); Carlos Herrera Vacaflor, *Obstetric Violence: A New Framework for Identifying Challenges to Maternal Healthcare in Argentina*, 24 Reproductive Health Matters, 65 (2016); Michelle Sadler et al, *Moving Beyond Disrespect and abuse: Addressing the Structural Dimension of Obstetric Violence*, 24 Reproductive Health Matters 47 (2016).

[16] *See, e.g.,* Meghan A. Bohren et al. *The Mistreatment of Women during Childbirth in Health Facilities Globally: A Mixed-Methods Systematic Review*, 12(6) PLOS Medicine e1001847 (2015).

[17] Rachel Jewkes & Loveday Penn-Kekana, *Mistreatment of Women in Childbirth: Time for Action on This Important Dimension of Violence against Women*. 12(6) PLoS Med e1001849 ((2015) ("From Bohren and colleagues' systematic review, it is very easy to draw parallels between the mistreatment of women in childbirth and violence against women more broadly, and these parallels may lead us to conclude that the former should indeed be viewed as a further subset of the latter. The essential feature of violence against women is that it stems from structural gender inequality, i.e., women's subordinate position in society as compared to men")

women conducted a special investigation into obstetric violence.[18] The 2019 report synthesized international human rights law and jurisprudence, nearly a decade of research from health settings, and over 128 reports from states and state institutions, non-governmental organizations (including several from the United States), and academics.[19] It also built upon the work of the U.N. working groups and special rapporteurs,[20] as well as a 2014 statement of the World Health Organization identifying disrespect and abuse in childbirth as a public health and human rights concern.[21] The report explicitly recognized obstetric violence as a violation of the right to live a life free from violence, as well as a threat to the rights to life, health, bodily integrity, privacy, autonomy, and freedom from discrimination.[22]

The Special Rapporteur's report affirmed that obstetric violence occurs within health care settings against a backdrop of "structural inequality, discrimination and patriarchy," and is rooted in "lack of respect for women's equal status and human rights."[23] Of particular concern were the overuse of cesarean sections, and instances where fetal interests are treated as though they "override the rights of the pregnant woman," leading to failures of informed consent. The report spoke directly to experiences like Ms. Dray's: even acknowledging that cesarean sections can be a lifesaving intervention, if they are performed without consent, they "may amount to gender-based violence against women and even torture."[24] The report specifically raised concerns that mistreatment is perpetuated by lack of accountability, and recommended that governments ensure access to redress for people who have experienced obstetric violence.

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[18] Dubravka Šimonović, Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences on a Human Rights-Based Approach to Mistreatment and Violence Against Women in Reproductive Health Services with a Focus on Childbirth and Obstetric Violence, U.N. Doc. A/74/137 (July 11, 2019), *available at* https://bit.ly/2UFvGxw.
[19] *Id.* at ¶ 6.
[20] Juan E. Méndez, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. A/HRC/22/53 (Feb, 1, 2013); Eleonora Zielinska et al, Report of the Working Group on the Issue of Discrimination Against Women in Law and Practice, U.N. Doc. A/HRC/32/22 para 17 (April 8, 2016).
[21] World Health Org., *The Prevention and Elimination of Disrespect and Abuse During Facility-Based Childbirth*, WHO/RHR/14.23 (2014) *available at* https://bit.ly/3lOHwRU.
[22] *Id.* at ¶ 8.
[23] *Id.* at ¶ 9.
[24] *Id.* at ¶ 24.

And like so many systemic failings, mistreatment in birth is not experienced equally across races. The Giving Voice to Mothers study surveyed U.S. maternity patients to uncover their experiences of mistreatment such as discrimination and verbal and physical abuse. Of 2700 patients surveyed, one in six reported one or more types of mistreatment.[25] These included scolding and threats to either withhold or force treatments. Respondents of color were more likely to report experiences of mistreatment by health care providers. This is consistent with findings from around the world that birthing individuals' experiences of mistreatment may reflect entrenched biases on the basis of race or ethnicity as well as gender, with "intersecting inequalities" shaping birthing people's experiences, exacerbating power imbalances, and resulting in worse care for people of color or those living in poverty.[26]

New Yorkers Demand Respectful Care at Birth

Unfortunately, the problem of mistreatment in birth and obstetric violence is not relegated outside our nation's borders. In 2016, the New York City Department of Health and Mental Hygiene undertook a multi-year campaign in which it held community listening sessions across the City to hear about people's sexual and reproductive health concerns. A concern that was raised again and again was reports of coercion and threats by health care providers trying to force pregnant individuals to acquiesce to medical advice, including threats to use court orders or reports to ACS against patients who disagree with their physicians. These concerns led to the development of the New York City Standards for Respectful Care at Birth, a document co-created by the Department and members of the Sexual and Reproductive Justice Community Engagement Group.[27] This document lays out the fundamental rights of all birthing people, including the right to receive information about all proposed treatments, to consider alternatives, and to decline medical recommendations.

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[25] Vedam, Saraswathi et al., *The Giving Voice to Mothers Study: Inequity and Mistreatment during Pregnancy and Childbirth in the United States*. 16 Reproductive Health 77 (2019).
[26] Gita Sen, Bhavya Reddy & Aditi Iyer, *Beyond Measurement: the Drivers of Disrespect and Abuse in Obstetric Care,* 53 Reproductive Health Matters 6, 10 (2018).
[27] N.Y.C. Dep't of Health & Mental Hygiene, *New York City Standards for Respectful Care at Birth* (2018), *available at* https://www1.nyc.gov/assets/doh/downloads/pdf/ms/respectful-care-birth-brochure.pdf.

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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.

Sex and Law Committee
Farah Diaz-Tello, Co-Chair*
O. Iliana Konidaris, Co-Chair

Drafting Subcommittee
Natalie R. Birnbaum
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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.