Consumer and Worker Protection

Comments Received by the Department of Consumer and Worker Protection on

Proposed Rules related to Paid Prenatal Personal Leave

a better balance

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February 14, 2025

Comment and Testimony from A Better Balance for New York City Department of Consumer and Worker Protection

Re: Amending Rules Related to the Earned Safe and Sick Time Act, Chapter 55 Section (M) of the Laws of 2024 amended section 196-b of the New York State Labor Law to Include Paid Prenatal Leave

Dear Commissioner Mayuga,

We are pleased to submit this comment in response to the New York City Department of Consumer and Worker Protection (hereinafter "DCWP," "the agency," or "the Department") Notice of Public Hearing and Opportunity to Comment On Proposed Rules to amend the Earned Safe and Sick Time Act, Chapter 55 Section M addressing Paid Prenatal Leave. Thank you for convening this hearing and for the opportunity to provide Comment on a statutory provision that will fill crucial gaps in the rights of working New Yorkers.

A Better Balance is a national legal advocacy organization headquartered here in New York City. Our organization uses the power of the law to ensure workers can care for themselves and their loved ones, without sacrificing their economic security. Through legislative advocacy, direct legal services, strategic litigation, and public education, our legal team combats discrimination against pregnant workers and advances supportive policies like paid sick time, paid family and medical leave, fair scheduling, and reasonable accommodations for pregnant and postpartum workers.

A Better Balance has developed legal expertise on paid sick time through drafting laws in cities and states across the country, including the New York State paid sick time law passed in 2020. A Better Balance also worked with Councilmember Gale Brewer to draft the New York City Earned Safe and Sick Time Act, and helped lead the coalition that fought for its passage, supported implementation, and amended the law in recent years. We have helped draft rules and regulations in numerous other cities and states where paid sick time requirements have been enacted.

Importantly, A Better Balance runs a free and confidential legal helpline, where we hear from New Yorkers each day–many of whom are low wage, pregnant workers. Through our legal

helpline, we answer questions from pregnant workers regarding Paid Prenatal Leave, the Earned Sick and Safe Time Act, and their rights to time off to care for the health of their pregnancies. Their experiences inform our Comment and testimony.

We are pleased that the New York Paid Prenatal Leave Law gives workers the right to paid time off to receive healthcare services during and related to their pregnancies, in addition to their paid sick leave. This is an important right for the workers we serve—many of whom would be forced to compromise either their healthcare or their economic security in the absence of this additional time off. Even so, we understand that in order to fully effectuate the law, the Department must issue regulations that are robust, clear, and comprehensive so that workers can fully enjoy the protections afforded to them. We believe the Department has taken action to do just that through its proposed regulations. We offer our recommendations for how the Department may further strengthen and clarify the final rule.

I. Paid Prenatal Leave Coverage Includes Any Healthcare Services Received During Pregnancy, Related to Pregnancy, or Related to Becoming Pregnant

We call on the Department to affirm the clear wording of the statute, which allows Paid Prenatal Leave usage for all "the health care services received by an employee during their pregnancy or related to such pregnancy." N.Y. Lab. Law § 196-b(4-a). The clear meaning of this language includes any healthcare services that are either received during the pendency of the employee's pregnancy or that are otherwise related to such pregnancy, including services related to becoming pregnant. Confirming the scope of services covered by the statute will provide greater clarity regarding the law's protections. Clarity around the broad scope of the law's coverage is crucial so that workers can fully exercise their rights to Paid Prenatal Leave and employers can understand and implement policies regarding Paid Prenatal Leave.

On our helpline, we hear from pregnant workers who need time off from work to get healthcare services that would allow them to maintain their health during their pregnancies. These workers, who are disproportionately low-wage workers, often do not have sufficient sick time banked that would allow them to receive the full breadth of healthcare services they need to maintain their health. There are multiple studies showing that, during pregnancy, the need to maintain routine healthcare is vital to the health of a pregnancy.[1] One key example of this is maintaining proper dental health. Being pregnant increases the risk for oral health problems. These issues, like gum disease, can ultimately impact a pregnancy in varying ways, including by increasing the risk for preterm birth. Another example is needing time off to seek mental health treatment during

[1] March of Dimes, Resource Article: Dental Health During Pregnancy (last reviewed Feb. 2023), https://www.marchofdimes.org/find-support/topics/pregnancy/dental-health-during-pregnancy.

pregnancy. Postpartum depression is a severe mental health condition that can begin when someone is still pregnant.[2] According to the American College of Obstetrics and Gynecologists, approximately "9% of pregnant women" meet the criteria for major depressive disorders.[3] Postpartum depression rates similarly range as high as 25%.[4] Postpartum depression can cause symptoms that can impact a pregnant worker's physical health, including changes in sleep and appetite.[5] Access to routine mental health services can reduce the symptoms of postpartum depression.

As such, maintaining routine healthcare is intrinsically tied to maintaining a healthy pregnancy, even if those services are not provided by an obstetrician or midwife. In a similar vein, the statute clearly covers healthcare services related to becoming pregnant. New York State guidance explicitly states that Paid Prenatal Leave covers time off for fertility treatments. Paid, job-protected time off to obtain fertility-related care can mean the difference between starting a family and not for many workers.

On our helpline, we field calls from pregnant workers who need time off to attend these routine appointments to avoid compromising the health of their pregnancies. One pregnant worker who called our office needed surgery that was not directly related to her pregnancy, but was nevertheless vital to her health and the health of her pregnancy. Unfortunately, because this worker had already exhausted her existing banks of paid sick leave and paid time off, she was suspended for missing work. There is a direct line between this caller's pregnancy and the care she needed to access. Had she been able to use Paid Prenatal Leave in addition to her sick time, she may have had enough protected time off to have the surgery without compromising her status at work.

Another worker had a pre-existing neurological condition that was greatly exacerbated during her pregnancy. She needed to attend appointments, aside from her regularly scheduled prenatal appointments, to address the neurological condition and protect the health of her pregnancy. Because her neurological condition pre-dated her pregnancy, however, without clarification that Paid Prenatal Leave is intended to cover all healthcare services received during or related to

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[2]A Better Balance, Fact Sheet: Postpartum Depression and Workplace Rights (last updated June 30, 2023, https://www.abetterbalance.org/resources/postpartum-depression-and-workplace-rights/.
[3] Am. Coll. of Obst. & Gyn., Cmte. Op. No. 757: Screening for Perinatal Depression, 132(5) J. OBST. & GYN. e208 (Nov. 2018), https://journals.lww.com/greenjournal/Fulltext/2018/11000/ACOG_Committee_Opinion_No__757__Screening_for.42.aspx.
[4] *See* Tiffany Field, Prenatal Depression Risk Factors, Developmental Effects & Interventions: A Review, 4(1) J. PREG. CHILD HEALTH (Feb. 27, 2017), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5502770/.
[5] *See*, e.g., Am. Coll. of Obst. & Gyn. at e209; Ctrs. For Disease Control & Prev., Depression During & After Pregnancy (May 14, 2020), https://www.cdc.gov/reproductivehealth/features/maternaldepression/index.html.

pregnancy, this worker is at risk of being denied Paid Prenatal Leave to care for a condition that impacts her pregnancy.

The current language in the Proposed Rule states: "Paid prenatal personal leave shall mean leave taken for the health care services received by an employee *during or related to such pregnancy.*" **We call on the agency to further specify that this includes all healthcare a pregnant worker receives during pregnancy, including but not limited to, dental care, mental health services, and other specialist care. We also call on the agency to specify, in line with New York State's guidance, that the statute covers fertility-related care.**

In particular, we suggest that the Department expand on the proposed language in Section 701(c) to add the following (with additional language **in bold**):

- (c) As used in this subchapter, the term "paid prenatal leave" has the same meaning as "paid prenatal personal leave" as set forth in subdivision 4-a of section 196-b of the labor law**, except that it shall be defined to include all healthcare received by the employee during their pregnancy, as well as all healthcare received by the employee related to their pregnancy, including fertility-related care received prior to a pregnancy.**

This language will clarify the scope of Paid Prenatal Leave and will help avoid gaps in coverage for New Yorkers seeking to use this leave for its intended purpose.

II. We Urge the Department to Include Certified Nurse Midwives for Purposes of Reasonable Documentation

Proposed Section 7-206 would require that, if an employer requires reasonable written documentation in accordance with Section 7-206 for Paid Prenatal Leave after more than three consecutive work days, written documentation "signed by a licensed clinical social worker, licensed mental health care counselor, or other licensed health care provider . . . shall be considered reasonable documentation."

We recognize and appreciate that the intent of this language is to create an expansive list that workers may use to provide their employers with required documentation. On our helpline, we have fielded calls from workers who make good-faith attempts to comply with their employers' demands for medical documentation, only to be told that their documentation was insufficient.

For example, one worker called our helpline requesting an accommodation during her pregnancy. She was working with a certified nurse midwife, who made the recommendation and wrote her medical documentation explaining the accommodation need. Unfortunately, this

worker's employer denied the accommodation, leading the worker to quit her position. Similarly, we hear from workers who are forced to submit and then re-request more in-depth medical documentation explaining their need for time off. One worker was required to submit a total of four doctor's notes for the same exact request. Our experience fielding these calls informs our knowledge that, without explicit and clear instructions regarding what kind of medical documentation is sufficient, workers are often forced into prolonged battles to get the care they need.

New Yorkers may choose to work with certified nurse midwives to oversee their care during their pregnancies. These certified midwives are licensed and credentialed by the state of New York and are often experts in administering both family planning and prenatal care.[6] Even though the current proposed language states "other licensed healthcare providers" may provide reasonable documentation in satisfaction of the requirements, our experience counseling pregnant workers proves that, absent explicit allowances, workers are at risk of having their documentation questioned. This puts them at heightened risk for losing access to time off to access prenatal care from their preferred provider.

To better clarify that Section 7-206 allows documentation by certified nurse midwives, we recommend the Department include certified nurse midwives in the list of healthcare professionals whose documentation is considered reasonable, while keeping the language allowing reasonable documentation from other licensed healthcare professionals. We propose the following addition (with added language in **bold**):

- For a use of sick time or paid prenatal leave, written documentation signed by a licensed clinical social worker, licensed mental health counselor, **certified nurse midwife**, or other licensed health care provider indicating the need for the amount of sick time or paid prenatal leave, respectively, taken shall be considered reasonable documentation.

III. We Urge the Department to Ensure That All Workers Have Notice of Their Accrued Paid Prenatal Leave Time Banks

Section 7-207(a) requires that pay statements or other forms of written documentation inform workers of the total balance of an employee's accrued safe/sick time balance for use during a calendar year. The proposed added language states: "If applicable, it must also inform the employee of the amount of paid prenatal leave used during the relevant pay period and the total balance of paid prenatal leave available for use."

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[6] *Frequently Asked Questions for Midwivery*, N.Y. EDUC. DEP'T. OFF. OF THE PRO., https://www.op.nysed.gov/professions/midwifery/questions-answers (last visited Feb. 10, 2025).

We applaud the Department for requiring employers to disclose employees' Paid Prenatal Leave accruals on their paystub. This is an important provision, which helps workers calculate and plan for their healthcare services using this leave. It also ensures that workers and employers have a shared understanding of what types of leave each employee has available for use, and how the employer is calculating their time off. However, by starting the sentence with the phrase "[i]f applicable," the Department appears to be allowing employers to exclude information about an employee's Paid Prenatal Leave time from their paystub unless the employee has used Paid Prenatal Leave during the pay period at issue. Limiting notice to only the small handful of employees who are actively using Paid Prenatal Leave will limit workers' ability to use Paid Prenatal Leave, as well as undermine clear communication between workers and employers regarding leave and benefits.

Paystub-based notice provisions like this one are an important source of information we often use to help workers who call our helpline. By reviewing their pay stubs, we can assist workers in calculating their current sick time banks and determining whether they are eligible for benefits under other laws, including New York Paid Family Leave and New York Temporary Disability Insurance benefits.

Our experience counseling workers who call our helpline shows that, without this information on their pay statements, workers may not know that they are eligible for certain benefits, or may not know how to determine their eligibility. This prevents workers from understanding the scope of their benefits and rights to time off. In some instances, it prevents them from using the time off at all, risking a loss of their legally-entitled benefits.

We have already seen an uptick in calls from workers with questions about their rights to Paid Prenatal Leave. One worker called our helpline because she did not know how much Paid Prenatal Leave she could access to attend prenatal health care appointments during her pregnancy. If this separate bank of paid time off was already visible on her pay stubs, she could have been utilizing Paid Prenatal Leave to attend her appointments, rather than separately exhausting her bank of paid sick leave.

The language as written risks undermining workers' awareness of their right to Paid Prenatal Leave, particularly those workers who might seek to use Paid Prenatal Leave to become pregnant. If employers are not required to disclose the availability of Paid Prenatal Leave on employees' pay statements until they have already used this leave, there is a significant risk that employers will only post Paid Prenatal Leave time for workers who have already disclosed their pregnancies and are seeking treatment specifically for obstetrical appointments. This will cause a

gap in clarity and will inevitably lead to some workers, who are considering fertility treatments or in the early stages of pregnancy, to miss out on this benefit that is also intended for them.

Accordingly, we propose the Department change the final sentence of Section 7-207(a) to the following language (with proposed deletions in ~~strikethrough~~):

- "~~If applicable,~~ it must also inform the employee of the amount of paid prenatal leave used during the relevant pay period and the total balance of paid prenatal leave available for use."

IV. We Urge the Department to Adopt Language to Avoid Penalizing Workers for Utilizing Paid Prenatal Leave

The Proposed Rule specifies whether and how employers must adjust a worker's rate of pay when they utilize paid sick time, as well as clearly prohibiting employers from requiring an employee to make up hours or find a replacement employee in order to utilize Paid Prenatal Leave. We appreciate the Department addressing these critical points and recommend the Department additionally state that a worker's production or sales quota must be proportionately reduced to account for their use of Paid Prenatal Leave time.

We routinely hear from workers who are disciplined or threatened under productivity quotas, performance metrics, or attendance policies for exercising their rights to paid sick leave, paid family leave, and paid time off. In our experience counseling workers, these retaliatory policies have a significant chilling effect on workers. By granting workers a right to paid time off, but not requiring employers to adjust their expectations of a worker, the resulting impact is that workers will not utilize their rights to paid leave. Similarly, a lack of clarity about whether a worker is expected to have the same performance output means workers will inevitably be forced to "make up" the time they used while exercising their rights to Paid Prenatal Leave at a later date, either by working extra shifts or extended hours.

We counseled a worker whose large employer gave her disciplinary warnings for her absences due to pregnancy. As a result of the discipline, she was terrified to exercise her sick leave. Another worker was placed on a probationary period each time she needed to use sick leave to care for her pregnancy was ultimately threatened with termination.

We have also counseled workers who are disciplined because their employers refused to modify their productivity output expectations during periods of time when workers are out on leave. For example, we heard from a worker who, prior to using her sick leave, was a top seller at her company, often surpassing their productivity quotas. These quotas were not adjusted to account

for this worker's sick leave, meaning she did not meet the standard during the period that she was absent. Although directly related to her use of sick leave, her employer gave her a disciplinary warning for failing to meet the quota.

Employers must adjust their ordinary workplace policies or practices, including but not limited to production standards, productivity quotas, and performance metrics, to ensure these policies do not operate to penalize or threaten penalization of employees for utilizing Paid Prenatal Leave. For example, when a worker utilizes Paid Prenatal Leave that involves a pause in work, this worker should not be penalized or threatened with a penalty for failing to perform work during such a non-work period, such as through discipline for failing to meet production quotas. Absent this explicit requirement, workers could face retaliation for simply exercising their rights.

In order to reduce this risk and to provide better clarity to employers regarding their performance expectations of workers who use Paid Prenatal Leave, we recommend the Department adopt the following language (with proposed added language in **bold**):

- "**Penalizing an employee for failing to meet a production standard, productivity quota, or other performance metric solely due to their use of paid prenatal personal leave is a form of retaliation prohibited by this section.**"

V. Employers Cannot Satisfy Paid Prenatal Leave Requirements With Existing Time Off Policies

Finally, we applaud the Department for clarifying that employers may not satisfy their requirements to provide Paid Prenatal Leave to workers through existing sick leave or time off policies. We agree with the Department's interpretation of New York Labor Law § 196-b(8), as the statutory text is clear that employers may not use existing time off banks to satisfy their obligations to provide Paid Prenatal Leave to their employees.

Section 196-b(8) of the New York Labor Law states that "an employer shall not be required to provide any additional ***sick leave*** . . . if the employer has adopted a sick leave policy or time off policy that provides employees with an amount of leave which meets or exceeds the requirements . . . ."[7] When amending this same statute to include Paid Prenatal Leave, the legislature chose to affirmatively include Paid Prenatal Leave language into the provisions it sought to amend. For example, Section 196-b(4)(a), which grants twenty hours of Paid Prenatal

[7] N.Y. Lab. Law § 196-(b(8) (emphasis added).

Leave, was added to the statute.[8] Section 196-b(1)(c)(2) was similarly amended to allow employers to provide additional sick leave "or paid prenatal personal leave" in excess of statutory requirements.[9] Other provisions were likewise amended to explicitly incorporate Paid Prenatal Leave, in addition to sick leave.

The same cannot be said for Section 196-b(8).[10] The provision is unambiguous in its application, which covers only paid sick leave, not Paid Prenatal Leave. Unlike the other aforementioned provisions, Section 196-b(8) was left unaltered, with no statutory reference to Paid Prenatal Leave. Sick leave and Paid Prenatal Leave are mentioned as separate banks of time throughout the statute. Had the drafters intended for Section 196-b(8) to cover Paid Prenatal Leave, they would have amended the statute to explicitly apply the provision to this bank of time. Absent that amended language, we agree with the Department that there is no statutory basis for allowing employers to use existing sick leave or other available forms of paid time off to satisfy their obligation to provide twenty hours of Paid Prenatal Leave.

These changes will ensure that workers are fully protected and can access their Paid Prenatal Leave. With these recommendations, we have no further reservations about the proposed rule. We applaud the Department for drafting this proposed rule. Thank you for your consideration.

Sincerely,

Samantha Hunt
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[8] N.Y. Lab. Law § 196-b(4)(a) ("In addition to the sick leave provided for in this section, on and after January first, two thousand twenty-five, every employer shall be required to provide to its employees twenty hours of paid prenatal personal leave during any fifty-two week calendar period.").
[9] N.Y. Lab. Law § 196-b(1)(c)(2).
[10] N.Y. Lab. Law § 196-b(8).

THE LEGAL AID SOCIETY CIVIL

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To: Commissioner Mayuga

From: Rebekah Cook-Mack and Elizabeth Saylor, The Employment Law Unit

Re: Proposed Amended Rules Related to the Earned Safe and Sick Time Act, Chapter 55 Section (M) of the Laws of 2024 amended section 196-b of the New York State Labor Law to Include Paid Prenatal Leave

Date: February 14, 2025

The Legal Aid Society submits this comment in response to the New York City Department of Consumer and Worker Protection (hereinafter "DCWP," "the agency," or "the Commission") Notice of Public Hearing and Opportunity to Comment on Proposed Rules to amend the Earned Safe and Sick Time Act, Chapter 55 Section M addressing Paid Prenatal Leave. Thank you for convening this hearing and for the opportunity to provide Comment on a statutory provision that will fill crucial gaps in the rights of working New Yorkers.

The 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 challenges. The Society also brings law reform cases that benefit all New Yorkers by directly benefiting the 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 citywide law reform, employment law, immigration law, consumer law, health law, and homeless rights practices.

The Society's Employment Law Unit represents low-wage workers in employment-related matters such as claims for unpaid wages; claims of discrimination, including discriminatory and retaliatory terminations; and unemployment insurance hearings. The Unit conducts litigation,

outreach, and advocacy designed to assist the most vulnerable workers in New York City, among them, low-wage workers who face arbitrary, discriminatory, and retaliatory treatment on the job.

The Employment Law Unit regularly hears from pregnant workers attempting to navigate their pregnancy and maintain their employment. It can be a complicated and challenging time. Workers and employers alike are adjusting to the new laws. It is helpful to have clear and comprehensive rules issued to provide workers with clarity about their rights.

We are pleased that the New York Paid Prenatal Law gives workers the right to paid time off to receive healthcare services during and related to pregnancy, in addition to their paid sick leave. This is an important right for the workers we serve–many of whom had been forced to compromise either their healthcare or their economic security in the absence of this additional time off. It is a welcome advance. To fully effectuate the law, the Department must issue regulations that are robust, clear, and comprehensive so that workers can fully enjoy the protections afforded to them. We believe the Department has taken action to do just that through its proposed regulations. We offer our recommendations for how the Department may further strengthen and clarify the final rule.

I. Paid Prenatal Leave Coverage Includes Any Healthcare Services Received During Pregnancy, Related to Pregnancy, or Related to Becoming Pregnant.

We call on the Department to affirm the clear wording of the statute, which allows Paid Prenatal Leave usage for all "the health care services received by an employee during their pregnancy or related to such pregnancy." N.Y. Lab. Law § 196-b(4-a). The clear meaning of this language includes any healthcare services that are either received during the pendency of the employee's pregnancy or that are otherwise related to such pregnancy, including services related to becoming pregnant. Confirming the scope of services covered by the statute will provide greater clarity regarding the law's protections. Clarity around the broad scope of the law's coverage is crucial so that workers can fully exercise their rights to paid prenatal leave and employers can understand and implement policies regarding Paid Prenatal Leave.

The current language in the Proposed Rule states: "Paid prenatal personal leave shall mean leave taken for the health care services received by an employee *during or related to such pregnancy.*" **We call on the agency to further specify that this includes all healthcare a pregnant worker receives, including but not limited to, dental care, mental health services, and other specialist care. We also call on the agency to specify, in line with New York State's guidance, that the statute covers fertility-related care.**

We suggest that the Department expand on the proposed language in Section 701(c) to add the following (with additional language **in bold**):

- (c) As used in this subchapter, the term "paid prenatal leave" has the same meaning as "paid prenatal personal leave" as set forth in subdivision 4-a of section 196-b of the labor law**, except that it shall be defined to include all healthcare received by the employee during their pregnancy, as well as all healthcare received by the employee related to their pregnancy, including fertility-related care received prior to a pregnancy.**

This language will clarify the scope of Paid Prenatal Leave and will help avoid gaps in coverage for New Yorkers seeking to use this leave for its intended purpose.

We regularly speak to pregnant workers who need time off from work to get healthcare services that would allow them to maintain their health during their pregnancies. These workers, who are disproportionately low-wage workers, often do not have the sick time banked that would allow them to receive the full breadth of healthcare services they need to maintain their health. There are multiple studies showing that, during pregnancy, the need to maintain routine healthcare is vital to the health of a pregnancy.[1] One key example of this is maintaining proper dental health. Being pregnant increases the risk for oral health problems. These issues, like gum disease, can ultimately impact a pregnancy in varying ways, including by increasing the risk for preterm birth. Another example is needing time off to seek mental health treatment during pregnancy. Postpartum depression is a severe mental health condition that can begin when someone is still pregnant.[2] According to the American College of Obstetrics and Gynecologists, approximately "9% of pregnant women" meet the criteria for major depressive disorders.[3] Postpartum depression rates similarly range as high as 25%.[4] Postpartum depression can cause symptoms that can impact a pregnant worker's physical health, including changes in sleep and appetite.[5] Access to routine mental health services can reduce the symptoms of postpartum depression.

Maintaining routine healthcare is intrinsically tied to maintaining a healthy pregnancy, even if those services are not provided by an obstetrician or midwife. In a similar vein, the statute clearly covers healthcare services related to becoming pregnant. New York State guidance explicitly states that paid prenatal leave covers time off for fertility treatments. Paid, job-protected time off

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[3] A Better Balance, Fact Sheet: Postpartum Depression and Workplace Rights (last updated June 30, 2023, https://www.abetterbalance.org/resources/postpartum-depression-and-workplace-rights/.

[4] A Better Balance, Fact Sheet: Postpartum Depression and Workplace Rights (last updated June 30, 2023, https://www.abetterbalance.org/resources/postpartum-depression-and-workplace-rights/.

[5] A Better Balance, Fact Sheet: Postpartum Depression and Workplace Rights (last updated June 30, 2023, https://www.abetterbalance.org/resources/postpartum-depression-and-workplace-rights/.

to obtain fertility-related care can mean the difference between starting a family and not for many workers. The rule should make it clear that paid prenatal leave is available for anyone participating in IVF regardless of whether they themselves will become pregnant.

II. We Urge the Department to Include Certified Nurse Midwives for Purposes of Reasonable Documentation

We recommend the Department include certified nurse midwives in the list of healthcare professionals in section 7-206 whose documentation is considered reasonable, while keeping the language allowing reasonable documentation from other licensed healthcare professionals. We propose the following addition (with added language in **bold**):

- For a use of sick time or paid prenatal leave, written documentation signed by a licensed clinical social worker, licensed mental health counselor, **certified nurse midwife**, or other licensed health care provider indicating the need for the amount of sick time or paid prenatal leave, respectively, taken shall be considered reasonable documentation.

We recognize and appreciate that the intent of this language is to create an expansive list that workers may use to provide their employers with required documentation. We have fielded calls from workers who make good faith attempts to comply with their employers' demands for medical documentation, only to be told that their documentation was insufficient.
New Yorkers may choose to work with certified nurse midwives to oversee their care during their pregnancies. These certified midwives are licensed and credentialed by the state of New York and are often experts in administering both family planning and prenatal care.[6] Even though the current proposed language states "other licensed healthcare providers" may provide reasonable documentation in satisfaction of the requirements, our experience counseling pregnant workers proves that, absent explicit allowances, workers are at risk of having their documentation questioned. This puts them at heightened risk for losing access to time off to access prenatal care from their preferred provider.

III. We Urge the Department to Ensure That All Workers Have Notice of Their Accrued Paid Prenatal Leave Time Banks

The language as written risks undermining workers' awareness of their right to Paid Prenatal Leave, particularly those workers who might seek to use Paid Prenatal Leave to become pregnant. If employers are not required to disclose the availability of Paid Prenatal Leave on employees' pay statements until they have already used this leave, there is a significant risk that

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employers will only post Paid Prenatal Leave time for workers who have already disclosed their pregnancies and are seeking treatment specifically for obstetrical appointments. This will cause a gap in clarity and will inevitably lead to some workers, who are considering fertility treatments or in the early stages of pregnancy, to miss out on this benefit that is also intended for them.

Accordingly, we propose striking the words "if applicable" and changing the final sentence of Section 7-207(a) to the following language:

- "It must also inform the employee of the amount of paid prenatal leave used during the relevant pay period and the total balance of paid prenatal leave available for use."

We applaud the Department for requiring employers to disclose employees' Paid Prenatal Leave accruals on their pay stubs. This is an important provision, which helps workers calculate and plan for their healthcare services using this leave. It also ensures that workers and employers have a shared understanding of what types of leave each employee has available for use, and how the employer is calculating their time off.

Paystub-based notice provisions like this one are an important source of information we often use to help workers. By reviewing their pay stubs, we can assist workers in calculating their current sick time banks and determining whether they are eligible for benefits under other laws, including New York Paid Family Leave and New York Temporary Disability Insurance benefits.

Our experience counseling workers shows that, without this information on their pay statements, workers may not know that they are eligible for certain benefits or may not know how to determine their eligibility. This prevents workers from understanding the scope of their benefits and rights to time off. In some instances, it prevents them from using the time off at all, risking a loss of their legally entitled benefits.

IV. We Urge the Department to Adopt Language to Avoid Penalizing Workers for Utilizing Paid Prenatal Leave

Employers must adjust their ordinary workplace policies or practices, including but not limited to production standards, productivity quotas, and performance metrics, to ensure these policies do not operate to penalize or threaten penalization of employees for utilizing paid prenatal leave. For example, when a worker utilizes paid prenatal leave that involves a pause in work, this worker should not be penalized or threatened with a penalty for failing to perform work during such a non-work period, such as through discipline for failing to meet production quotas. Absent this explicit requirement, workers could face retaliation for simply exercising their rights. Quotas and metrics should be adjusted to reflect the time off so that workers are not expected to make up for taking paid prenatal leave.

In order to reduce this risk and to provide better clarity to employers regarding their performance expectations of workers who use paid prenatal leave, we recommend the Department adopt the following language (with proposed added language in **bold**):

- "**Penalizing an employee for failing to meet a production standard, productivity quota, or other performance metric solely due to their use of paid prenatal personal leave is a form of retaliation prohibited by this section. If applicable, performance benchmarks should be adjusted to reflect leave taken so that workers' goals reflect the time off taken under this law and they are not required to make up work without additional compensation.**"

The Proposed Rule clearly specifies whether and how employers must adjust a worker's rate of pay when they utilize paid sick time, as well as clearly prohibiting employers from requiring an employee to make up hours or find a replacement employee in order to utilize Paid Prenatal Leave. We appreciate the Department addressing these critical points and recommend the Department additionally state that a worker's production or sales quota, if any, must be proportionately reduced to account for their use of Paid Prenatal Leave time.

We have routinely heard from workers who are disciplined or threatened under productivity quotas, performance metrics, or attendance policies for exercising their rights to paid sick leave, paid family leave, and paid time off. In our experience counseling workers, these retaliatory policies have a significant chilling effect on workers. By granting workers a right to paid time off, but not requiring employers to adjust their expectations of a worker, the resulting impact is that workers will not utilize their rights to paid leave. Similarly, a lack of clarity about whether a worker is expected to have the same performance output means workers will inevitably be forced to "make up" the time they used while exercising their rights to paid prenatal leave, either by working extra shifts or extended hours at a later date.

V. Summary

In summary, our proposed recommendations are:

- First, add language to Section 7-216(c) to include the following: (c) As used in this subchapter, the term "paid prenatal leave" has the same meaning as "paid prenatal personal leave" as set forth in subdivision 4-a of section 196-b of the labor law**, except that it shall be defined to include all healthcare received by the employee during their pregnancy, as well as all healthcare received by the employee related to their pregnancy, including fertility-related care received prior to a pregnancy.**
- Affirm our interpretation that Section 7-216(c) includes all healthcare services **during and related to** a pregnancy, including routine healthcare and mental healthcare services.
- Include **certified nurse midwives** into the list of licensed healthcare professional who can provide medical documentation for purposes of Section 7-206 through the following

language: “For a use of sick time or paid prenatal leave, written documentation signed by a licensed clinical social worker, licensed mental health counselor, **certified nurse midwife**, or other licensed health care provider indicating the need for the amount of sick time or paid prenatal leave, respectively, taken shall be considered reasonable documentation.

- Adjust the language in the final sentence of Section 2-707(a) to read: “It must also inform the employee of the amount of paid prenatal leave used during the relevant pay period and the total balance of paid prenatal leave available for use.”
- Adopt the following language: “**Penalizing an employee for failing to meet a production standard, productivity quota, or other performance metric solely due to their use of paid prenatal leave" is a form of retaliation prohibited by this section.**”

These changes will ensure that workers are fully protected and can access their Paid Prenatal Leave. With these recommendations, we have no further reservations about the proposed rule. We applaud the Department for drafting this proposed rule. Thank you for your consideration.

For more information or further discussion, please contact Rebekah Cook-Mack, Staff Attorney, rcook-mack@legal-aid.org, or Elizabeth Saylor, Citywide Director, Employment Law Unit, esaylor@legal-aid.org.

GENDER EQUALITY LAW CENTER

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February 13, 2025

Comment and Testimony from the Gender Equality Law Center for New York City Department of Consumer and Worker Protection

Re: Amending Rules Related to the Earned Safe and Sick Time Act, Chapter 55 Section (M) of the Laws of 2024 amended section 196-b of the New York State Labor Law to Include Paid Prenatal Leave

Dear Commissioner Mayuga,

We are pleased to submit this comment in response to the New York City Department of Consumer and Worker Protection's (hereinafter "DCWP," "the agency," or "the Commission") Notice of Public Hearing and Opportunity to Comment On Proposed Rules to amend the Earned Safe and Sick Time Act, Chapter 55 Section M addressing Paid Prenatal Leave. Thank you for convening this hearing and for the opportunity to provide written testimony on an important statutory provision that will fill crucial gaps in the rights of working New Yorkers.

The Gender Equality Law Center (GELC) is a not-for-profit public interest law and advocacy organization based in Brooklyn, New York. GELC's mission is to break down barriers created by social, political and legal discrimination related to gender. Our litigation work focuses on economic empowerment; we provide pro bono legal representation to low-wage individuals in gender-based discrimination cases. In addition to litigating on behalf of clients, GELC contributes to policy efforts to support workers and their families. This includes advocating to help pass laws, regulations and administrative rules on both the State and City level in New York.

As a core part of our practice, GELC frequently provides representation and legal advice to pregnant New Yorkers. GELC is frequently contacted through various referral sources, including our legal hotline, by individuals seeking legal advice about the rights and protections for pregnant workers. This advice most often addresses the crucial need for workers to obtain accommodations, including taking protected time off from work while pregnant, to both seek medical care or attend to limitations related to being pregnant. Too often, workers are unable to get protected time off from work, leading them to lose valuable vacation and sick time or to be

disciplined for needing time off related to their pregnancies. At its worst, such discipline can lead to pregnant workers being pushed out of the workplace for no other reason than that they needed time to care for themselves for pregnancy-related medical and other care needs.

We are thus extremely pleased that the new New York Paid Prenatal Law gives workers the right to paid and protected time off to receive healthcare services during and related to their pregnancies, in addition to any earned paid sick leave they may accrue through their jobs. This is an important right for all pregnant workers. No pregnant employee should be forced to compromise either their healthcare or their economic security in the absence of this additional time off. For the low wage workers GELC serves, such choices can lead to dire medical or economic consequences.

While we believe the Department has taken action to do expressly effectuate the law, through its proposed regulations, we respectfully offer our recommendations for how the Department may further strengthen and clarify the final rule.

I. Paid Prenatal Leave Coverage Includes Any Healthcare Services Received During Pregnancy, Related to Pregnancy, or Related to Becoming Pregnant.

We request that the Department specify in the proposed regulations the existing wording of the statute, which allows Paid Prenatal Leave usage for all "the health care services received by an employee during their pregnancy or related to such pregnancy." N.Y. Lab. Law § 196-b(4-a). The clear meaning of this language includes <u>any healthcare services</u> that are either received during the pendency of the employee's pregnancy or that are otherwise related to such pregnancy, including services related to becoming pregnant. Confirming the statutory language is critical in order for workers to fully exercise their rights to paid prenatal leave as well as to avoid any confusion on the part of employers in understanding the broad scope of the Paid Prenatal Leave.

At GELC, we often advise pregnant workers about their right to take protected time off related to their pregnancies. For lower wage workers who often do not have any or enough sick time banked, taking protected paid time off to care for themselves while pregnant may be the difference between continuing to work while pregnant and being fired for taking too much time off.

There are multiple studies showing that, during pregnancy, the need to maintain routine healthcare is vital to the health of a pregnancy.[1] One key example of this is maintaining proper dental health. Being pregnant increases the risk for oral health problems. These issues, like gum

[1] March of Dimes, Resource Article: Dental Health During Pregnancy (last reviewed Feb. 2023), https://www.marchofdimes.org/find-support/topics/pregnancy/dental-health-during-pregnancy.

disease, can ultimately impact a pregnancy in varying ways, including by increasing the risk for preterm birth. Another example is needing time off to seek mental health treatment during pregnancy. Postpartum depression is a severe mental health condition that can begin when someone is still pregnant.[2] According to the American College of Obstetrics and Gynecologists, approximately "9% of pregnant women" meet the criteria for major depressive disorders.[3] Postpartum depression rates similarly range as high as 25%.[4] Postpartum depression can cause symptoms that can impact a pregnant worker's physical health, including changes in sleep and appetite.[5] Access to routine mental health services can reduce the symptoms of postpartum depression.

As such, maintaining routine healthcare is intrinsically tied to maintaining a healthy pregnancy, even if those services are not provided by an obstetrician or midwife. In a similar vein, the statute clearly covers healthcare services related to becoming pregnant. New York State guidance explicitly states that paid prenatal leave covers time off for fertility treatments. Paid, job-protected time off to obtain fertility-related care can mean the difference between starting a family and not for many workers.

The current language in the Proposed Rule states: "Paid prenatal personal leave shall mean leave taken for the health care services received by an employee *during or related to such pregnancy.*" **We call on the agency to further specify that this includes all healthcare a pregnant worker receives, including but not limited to, dental care, mental health services, and other specialist care. We also call on the agency to specify, in line with New York State's guidance, that the statute covers fertility-related care.**

In particular, we suggest that the Department expand on the proposed language in Section 701(c) to add the following (with additional language **in bold**):

- (c) As used in this subchapter, the term "paid prenatal leave" has the same meaning as "paid prenatal personal leave" as set forth in subdivision 4-a of section 196-b of the labor law**, except that it shall be defined to include all healthcare received by the employee during their pregnancy, as well as all healthcare received by the employee related to their pregnancy, including fertility-related care received prior to a pregnancy.**

[2] A Better Balance, Fact Sheet: Postpartum Depression and Workplace Rights (last updated June 30, 2023, https://www.abetterbalance.org/resources/postpartum-depression-and-workplace-rights/.
[3] A Better Balance, Fact Sheet: Postpartum Depression and Workplace Rights (last updated June 30, 2023, https://www.abetterbalance.org/resources/postpartum-depression-and-workplace-rights/.
[4] A Better Balance, Fact Sheet: Postpartum Depression and Workplace Rights (last updated June 30, 2023, https://www.abetterbalance.org/resources/postpartum-depression-and-workplace-rights/.
[5] A Better Balance, Fact Sheet: Postpartum Depression and Workplace Rights (last updated June 30, 2023, https://www.abetterbalance.org/resources/postpartum-depression-and-workplace-rights/.

This language will clarify the scope of Paid Prenatal Leave and will help avoid gaps in coverage for New Yorkers seeking to use this leave for its intended purpose.

II. We Urge the Department to Include Certified Nurse Midwives and Physician Assistants for Purposes of Reasonable Documentation

Proposed Section 7-206 would require that, if an employer requires written documentation in order to take paid prenatal leave after more than three consecutive workdays, only written documentation "signed by a licensed clinical social worker, licensed mental health care counselor, or other licensed health care provider. . . shall be considered reasonable documentation."

We recognize and appreciate that the intent of this language is to create an expansive list that workers may use to provide their employers with required documentation. However, GELC is frequently contacted by pregnant workers who make good-faith attempts to comply with their employers' demands for medical documentation, only to be told that their documentation was insufficient.

Even though the current proposed language states "other licensed healthcare providers" many pregnant workers may be treated by physician assistants and midwives. Our experience counseling and advising pregnant workers about their legal rights proves that, absent explicit allowances, workers are at risk of having their documentation questioned. This puts them at heightened risk for losing access to time off to access prenatal care from their preferred provider.

As such to better clarify that Section 7-206, we recommend that the Department include certified nurse midwives and physician assistants in the list of healthcare professionals whose documentation is considered reasonable, while keeping the language allowing reasonable documentation from other licensed healthcare professionals. We propose the following addition (with added language in **bold**):

- For a use of sick time or paid prenatal leave, written documentation signed by a licensed clinical social worker, licensed mental health counselor, **certified nurse midwife**, or other licensed health care provider, **including licensed Physician Assistants**, indicating the need for the amount of sick time or paid prenatal leave, respectively, taken shall be considered reasonable documentation.

III. We Urge the Department to Ensure That All Workers Have Notice of Their Accrued Paid Prenatal Leave Time Banks

Section 7-207(a) requires that pay statements or other forms of written documentation inform workers of the total balance of an employee's accrued safe/sick time balance for use during a calendar year. The proposed added language states: "If applicable, it must also inform the employee of the amount of paid prenatal leave used during the relevant pay period and the total balance of paid prenatal leave available for use."

We recognize the Department's efforts in requiring employers to disclose employees' Paid Prenatal Leave accruals on their pay stubs as an important provision, which helps workers calculate and plan for their healthcare services using this leave. It also ensures that workers and employers have a shared understanding of what types of leave each employee has available for use, and how the employer is calculating their time off. However, by starting the sentence with the phrase "[i]f applicable," the Department appears to be allowing employers to exclude information about an employee's Paid Prenatal Leave time from their pay stubs unless the employee has used Paid Prenatal Leave during the pay period at issue. Limiting notice to only the small handful of employees who are actively using Paid Prenatal leave will limit workers' ability to use Paid Prenatal Leave, as well as undermine clear communication between workers and employers regarding leave and benefits.

Paystub-based notice provisions like this one are an important source of information that can and should be used to help workers understand their legal rights concerning protected time off related to their pregnant condition. By far the most common reason workers call GELC's hotline is because they are unsure or unclear or even sometimes completely unaware of rights they have by law to take protected time off from work. The clearer the information provided to workers in New York City, the greater number of workers will be who know their rights to take Paid Sick Leave time as well as their eligibility to take protected time off including New York Paid Family Leave and New York Temporary Disability Insurance benefits. There can be no doubt that a relatively small percentage of workers realize they can contact GELC or other advocacy organizations to learn about critical legal rights which can ensure they remain employed while pregnant. Mandating notice to employees in New York City about how to calculate and bank protected time off can be the difference between economic security and job loss.

The language as written risks undermining workers' awareness of their right to Paid Prenatal Leave, particularly those workers who might seek to use Paid Prenatal Leave to become pregnant (which as stated above should be specifically stated in the regulations). If employers are not required to disclose the availability of Paid Prenatal Leave on employees' pay statements until they have already used this leave, there is a significant risk that employers will only post Paid Prenatal Leave time for workers who have already disclosed their pregnancies and are seeking treatment specifically for obstetrical appointments. This will cause a gap in clarity and will inevitably lead to some workers, such as those considering fertility treatments or in the early stages of pregnancy, to miss out on this benefit that is also intended for them.

Accordingly, we propose the Department change the final sentence of Section 7-207(a) to the following language:

- "**It must also inform the employee of the amount of paid prenatal leave used during the relevant pay period and the total balance of paid prenatal leave available for use**."

IV. We Urge the Department to Adopt Language to Avoid Penalizing Workers for Utilizing Paid Prenatal Leave

The Proposed Rule clearly specifies whether and how employers must adjust a worker's rate of pay when they utilize paid sick time, as well as clearly prohibiting employers from requiring an employee to make up hours or find a replacement employee in order to utilize Paid Prenatal Leave. We appreciate the Department addressing these critical points and recommend the Department additionally state that a worker's production or sales quota must be proportionately reduced to account for their use of Paid Prenatal Leave time. However, because preventing retaliation for using protected time off is at the very heart of having paid sick leave laws that will allow and even encourage workers to take needed time off to care for themselves while pregnant, these protections should be explicitly spelled out in the final regulations.

At GELC, we routinely hear from workers who are disciplined or threatened for failing to meet productivity quotas or other performance benchmarks, or are punished for exercising their rights to paid sick leave, paid family leave, and paid time off. Such punitive conduct can impact wage increases, promotions and often lead to devaluing the worker's performance leading to demotions and terminations. In our experience counseling workers, these retaliatory policies have a significant chilling effect. By granting workers a right to paid time off, but not requiring employers to adjust their expectations of a worker, the resulting impact is that workers will not utilize their rights to paid leave. Similarly, a lack of clarity about whether a worker is expected to have the same performance output means workers will inevitably be forced to "make up" the time they used while exercising their rights to paid prenatal leave at a later date, either by working extra shifts or extended hours.

Employers must adjust their ordinary workplace policies or practices, including but not limited to production standards, productivity quotas, and performance benchmarks, to ensure these policies do not operate to penalize or threaten penalization of employees for utilizing paid prenatal leave. For example, when a worker utilizes paid prenatal leave that involves a pause in work, this worker should not be penalized or threatened with a penalty for failing to perform work during such a non-work period, such as through discipline for failing to meet production quotas. Absent this explicit requirement, workers could face retaliation for simply exercising their rights.

Similarly, promotions, bonuses and performance reviews should not be based on, or even influenced by the taking of protected prenatal time off.

In order to reduce this risk and to provide better clarity to employers regarding their performance expectations of workers who use paid prenatal leave, we recommend the Department adopt the following language (with proposed added language in **bold**):

- "**Penalizing an employee for failing to meet a production standard, productivity quota, or other performance metric solely due to their use of paid prenatal personal leave is a form of retaliation prohibited by this section.**"

V. Employers Cannot Satisfy Paid Prenatal Leave Requirements With Existing Time Off Policies

Finally, we appreciate that the Department has clarified that employers may not satisfy their requirements to provide Paid Prenatal Leave to workers through requiring the employee to use accrued time under existing sick leave or time off policies. We agree with the Department's interpretation of New York Labor Law § 196-b(8), as the statutory text is clear that employers may not use existing time off banks to satisfy their obligations to provide Paid Prenatal Leave to their employees.

Section 196-b(8) of the New York Labor Law states that "an employer shall not be required to provide any additional ***sick leave*** . . . if the employer has adopted a sick leave policy or time off policy that provides employees with an amount of leave which meets or exceeds the requirements . . . . "[6] When amending this same statute to include Paid Prenatal Leave, the legislature chose to affirmatively include Paid Prenatal Leave language into the provisions it sought to amend. For example, Section 196-b(4)(a), which grants twenty hours of Paid Prenatal Leave, was added to the statute.[7] Section 196-b(1)(c)(2) was similarly amended to allow employers to provide additional sick leave "or paid prenatal personal leave" in excess of statutory requirements.[8] Other provisions were likewise amended to explicitly incorporate Paid Prenatal Leave, in addition to sick leave.

The same cannot be said for Section 196-b(8).[9] The provision is unambiguous in its application, which covers only paid sick leave, not Paid Prenatal Leave. Unlike the other aforementioned provisions, 196-b(8) was left unaltered, with no statutory reference to Paid Prenatal Leave. Sick leave and Paid Prenatal Leave are mentioned as separate banks of time throughout the statute.

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[6] N.Y. Lab. Law § 196-(b(8) (emphasis added).

[7] N.Y. Lab. Law § 196-b(4)(a) ("In addition to the sick leave provided for in this section, on and after January first, two thousand twenty-five, every employer shall be required to provide to its employees twenty hours of paid prenatal personal leave during any fifty-two week calendar period.").

[8] N.Y. Lab. Law § 196-b(1)(c)(2).

[9] N.Y. Lab. Law § 196-b(8).

Had the drafters intended for Section 196-b(8) to cover paid prenatal leave, they would have amended the statute to explicitly apply the provision to this bank of time. Absent that amended language, we agree with the Department that there is no statutory basis for allowing employers to use existing sick leave or other available forms of paid time off to satisfy its obligations to provide twenty hours of Paid Prenatal Leave.

In summary, our proposed recommendations are as follows:

- First, add language to Section 7-216(c) to include the following: (c) As used in this subchapter, the term "paid prenatal leave" has the same meaning as "paid prenatal personal leave" as set forth in subdivision 4-a of section 196-b of the labor law**, except that it shall be defined to include all healthcare received by the employee during their pregnancy, as well as all healthcare received by the employee related to their pregnancy, including fertility-related care received prior to becoming pregnant.**

- Affirm an interpretation that Section 7-216(c) includes all healthcare services **during and related to** a pregnancy, including routine healthcare and mental healthcare services.

- Include **certified nurse midwives** and **physician's assistants** into the list of licensed healthcare professional who can provide medical documentation for purposes of Section 7-206 through the following language: "For a use of sick time or paid prenatal leave, written documentation signed by a licensed clinical social worker, licensed mental health counselor, **certified nurse midwife**, or other licensed health care provider indicating the need for the amount of sick time or paid prenatal leave, respectively, taken shall be considered reasonable documentation.

- Adjust the language in the final sentence of Section 2-707(a) to read: "It must also inform the employee of the amount of paid prenatal leave used during the relevant pay period and the total balance of paid prenatal leave available for use."

- Adopt the following language: "**Penalizing an employee for failing to meet a production standard, productivity quota, or other performance metric solely due to their use of paid prenatal leave" is a form of retaliation prohibited by this section.**"

These changes will ensure that workers are fully protected and can access their Paid Prenatal Leave. With these recommendations, we have no further reservations about the proposed rule. We applaud the Department for drafting this proposed rule. Thank you for your consideration.

Respectfully submitted,

The Gender Equality Law Center

By: Allegra L. Fishel

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From: Chilco, Sebastian
To: rulecomments (DCWP)
Cc: Fuchs, Stephen A.; Gomez-Sanchez, Daniel; Lowell, Jill; Mishra, Devjani; Nair, Sanjay; Mills-Gallan, Stephanie
Subject: [EXTERNAL] Submission of Public Comment re: Department of Consumer and Worker Protection Proposed Rule Amendment on Paid Prenatal Personal Leave
Date: Friday, February 14, 2025 2:58:40 PM

Dear New York City Department of Consumer and Worker Protection:

We are members of Littler Mendelson's Paid Leave Subgroup, a group of attorneys from across the country that focus on advising employers of all sizes on federal, state, and local paid leave requirements, such as New York City's Earned Safe and Sick Time Act ("NYC ESSTA") and New York Labor Law § 196-b. When the subgroup was formed, there were a handful of laws, mostly at the local level. Since then, however, the number of paid leave laws has increased exponentially. Accordingly, attorneys like us bring to the table a wealth of legal, and historical, knowledge and perspective when it comes to job-protected paid leave.

After reviewing the Proposed Rule Amendments, we have prepared the below comments.

Thank you for considering the following.

Stephen Fuchs (Shareholder, New York City)
Daniel Gomez-Sanchez (Shareholder, Long Island)
Jill Lowell (Shareholder, Rochester)
Devjani Mishra (Shareholder, New York City)
Sanjay Nair (Shareholder, Long Island)
Stephanie Mills-Gallan (Shareholder, Milwaukee)
Sebastian Chilco (Attorney, San Francisco)

New York Paid Prenatal Personal Leave Is Outside the Scope of NYC ESSTA

In its Statement of Basis and Purpose of Proposed Rule, DCWP acknowledges that "safe/sick time means time that is provided by an employer to an employee that can be used for the purposes described in section 20-914 of the New York City Administrative Code. . . ." Moreover, DCWP acknowledges that the "ESSTA does not explicitly require the provision of 20 additional hours of paid prenatal leave."

New York Labor Law § 196-b, like the NYC ESSTA, requires employers to provide employees leave that they can use for "sick" and "safe" time purposes. Under the NYC ESSTA this is called "safe/sick time" whereas under State law it is simply called "sick leave." Paid prenatal personal leave, however, is not "safe/sick time" or "sick leave." As subsection 4-a of New York Labor Law § 196-b makes abundantly clear, paid prenatal personal leave must be provided by employers "[i]n addition to the sick leave provided for in this section . . . ." Additionally, under New York Labor Law § 196-b, different standards can apply depending on whether an employee is using sick leave or paid prenatal personal leave, *e.g.*, the "year" for compliance purposes and the minimum increment of use.

NYC ESSTA Does Not Require Incorporation of New York Paid Prenatal Personal Leave

Per New York City Administrative Code § 20-923(c) (emphasis added):

> Where section 196-b of the labor law, or any regulation issued thereunder, sets forth a standard or requirement for minimum hour or use of **safe/sick time** that exceeds any provision in this chapter, such standard or requirement shall be incorporated by reference and shall be enforceable by the department in the manner set forth in this chapter and subject to the penalties and remedies set forth in the labor law.

And per New York City Administrative Code § 20-912:

> "Safe/sick time" shall mean time that is provided by an employer to an employee that can be used for the purposes described in section 20-914 of this chapter, whether or not compensation for that time is required pursuant to this chapter.

As indicated above (Paid Prenatal Personal Leave Is Outside the Scope of the NYC ESSTA), paid prenatal personal leave is <u>not</u> safe/sick time. New York Labor Law § 196-b, as amended to include paid prenatal personal leave, did <u>not</u> create or change a *safe/sick time* minimum hour or use standard or requirement. Instead, it created a *paid prenatal personal leave* minimum hour or use standard or requirement.

Whether to Amend NYC ESSTA to Include New York Paid Prenatal Personal Leave Is a Decision for the City Council and Mayor

Whether, when, and how to amend the NYC ESSTA is a decision for the City Council and Mayor to make, not the DCWP.

The City Council and Mayor decided to create what is now known as the NYC ESSTA. Originally,

the law allowed employees to use leave only for "sick" time purposes. Years later, the City Council and Mayor decided to amend the law to expand covered uses to include "safe" time purposes. Additionally, in response to the State enacting New York Labor Law § 196-b, they further amended the NYC ESSTA.

Whether in response to State action or because they want to, the City Council and Mayor know how to amend the NYC ESSTA. To date, they have decided *not* to amend the law to incorporate the State's paid prenatal personal leave requirements into the NYC ESSTA or establish in the NYC ESSTA paid prenatal personal leave requirements that exceed what State law requires. DCWP must respect the City Council's and Mayor's decision.

Moreover, the State did not contemplate DCWP enforcing New York PPPL law as evidenced by the fact that the State provided express authority to large municipalities to pass their own laws to provide comparable leave. "Nothing in this section shall be construed to prevent a city with a population of one million or more from enacting and enforcing local laws or ordinances which meet or exceed the standard or requirements for minimum hour and use set forth in this section, as determined by the commissioner. Any paid sick leave benefits provided by a sick leave program enforced by a municipal corporation in effect as of the effective date of this section shall not be diminished or limited as a result of the enactment of this section."

Regulations & Interpretations of New York Paid Parental Personal Leave Are the Exclusive Domain of the State Labor Department

DCWP proposes to regulate how employers must comply with New York PPPL requirements.

However, per New York Labor Law § 196-b(13):

> The [New York State] commissioner [of Labor] shall have authority to adopt regulations and issue guidance to effectuate any of the provisions of this section. Employers shall comply with regulations and guidance promulgated by the commissioner for this purpose which may include but are not limited to standards for the accrual, use, payment, and employee eligibility of sick leave.

The State expressly authorized NY DOL – not DCWP, or even the City – to adopt regulations concerning New York PPPL. The State did not say that, in the event NY DOL did not adopt regulations concerning New York PPPL, that another authority – federal, state, or local – could adopt regulations concerning New York PPPL.

Similarly, the State expressly requires employers to comply with regulations concerning New York PPPL adopted by NY DOL. The State did not require employers to comply with regulations concerning New York PPPL adopted by any other entity, such as DCWP.

Proposed Amendments Do Not Comply with State Law, Will Confuse Employers and Employees, and Create Administrative Burdens

In addition to the proposed regulations being outside DCWP's authority, they contradict New York Labor Code § 196-b and impose burdens on employers that state law does not. Below we provide a non-exhaustive list of the ways proposed local rules and existing state law do not align.

7-204 (Minimum Increments and Fixed Intervals for the Use of Safe/Sick Time and Paid Prenatal Leave)

DCWP, in 7-204(a), proposes to extend the "reasonableness" standard for the minimum increment of safe/sick time to New York PPPL. However, New York Labor Law § 196-b does not contain such a standard for the minimum increment of use for New York PPPL (or sick leave, for that matter). Moreover, in adopted regulations and FAQs the New York State Department of Labor has not stated – or even suggested – that the minimum increment of use must be "reasonable under the circumstances."

In 7-204(b), DCWP proposes to extend the "initial" and "subsequent" period framework for use of safe/sick time to New York PPPL, but New York Labor Law § 196-b contains no such framework. The minimum increment of use provision for New York City safe/sick time and New York sick leave use the singular increment – respectively, "employers may set a reasonable minimum increment. . . ." and "An employer may set a reasonable minimum increment . . . ." – whereas for New York PPPL New York Labor Law § 196-b uses the plural increments: "Paid prenatal personal leave may be taken in hourly increments." New York Labor Law § 196-b reinforces that employees always use New York PPPL in hour-long increments when it details how employees must be paid when they use New York PPPL: "Benefits for paid prenatal personal leave shall be paid in hourly installments."

To demonstrate how the minimum increment of use standards differ, consider an employee who needs to be absent for four hours and 15 minutes. Per 7-204(b), the maximum amount of New York City safe/sick time leave an employer can require an employee to use is four hours (initial period) and 30 minutes (subsequent period). Under New York Labor Law § 196-b, however, an employer can require an employee to use five hours of New York PPPL; regardless of whether an employee needs to be absent for one minute or 59 minutes, an employer can require them to use a full hour of New York PPPL.

7-206 (Documentation of Authorized Use of Safe/Sick Time and Paid Prenatal Leave)

DCWP proposes, in 7-206(f), that "an employer shall not require documentation that the use

of . . . paid prenatal leave was for a purpose authorized under . . . labor law section 196-b(4-a) if the use of such . . . paid prenatal leave lasts three or fewer consecutive work days." The implication is that an employer could require such documentation if the use of paid prenatal leave lasts for more than three consecutive work days. However, this proposal is at odds with the plain language of New York Labor Law § 196-b, which states that "[a]n employer may not require the disclosure of confidential information relating to a mental or physical illness, injury or health condition . . . as a condition of providing . . . paid prenatal personal leave," and does not include any provision for documentation in cases where the employee's use of paid prenatal leave lasts for more than three consecutive work days. *See* New York State Paid Prenatal Leave Frequently Asked Questions, *available at* https://www.ny.gov/new-york-state-paid-prenatal-leave/frequently-asked-questions (last visited February 14, 2025) (Are employees required to submit medical records or documents to their employer?).

7-207 (Notice of Safe/Sick Time Accruals and Use of Safe/Sick Time and Paid Prenatal Leave on Pay Statement)

DCWP proposes to require that employers inform employees about NY PPPL used and available to use on a paystub or other writing provided each pay period. However, New York Labor Law § 196-b contains no such requirement. *See* New York State Paid Prenatal Leave Frequently Asked Questions, *available at* https://www.ny.gov/new-york-state-paid-prenatal-leave/frequently-asked-questions (last visited February 14, 2025) (Does an employer have to identify/classify Paid Prenatal Leave differently on pay stubs or in leave accrual banks?).

The proposed requirement is also administratively burdensome. NY PPPL is available only to individuals who can become pregnant, *i.e.*, women and transgender men. Employers would, first, need to spend considerable time and energy identifying individuals who potentially might be entitled to NY PPPL and, second, spend more time and energy determining whether only those specific employees' paystubs could display NY PPPL information; the alternative is to show NY PPPL information on everyone's paystubs, which would confuse employees who are ineligible for NY PPPL. Additionally, as the 52-week period for PPPL begins the first time an employee uses NY PPPL, employers will need to devote time and energy to monitoring all potentially eligible employees' paystubs for their first such use, then manually program the start and end date of an NY PPPL "year" for each employee. Finally, even if hypothetically eligible for NY PPPL, some employees might never need to use the benefit, so always having to display NY PPPL available to use will occupy already-limited space on paystubs.

7-209 (Payment of Safe/Sick Time and Paid Prenatal Leave)

DCWP's proposal to condition payment of New York PPPL upon receipt of "reasonable written documentation" is incongruous with New York Labor Law § 196-b, which, as we note above, does not require providing a medical note or record as a precondition to receive New York

PPPL. If an employer refuses to pay New York PPPL to an employee until receipt of such documentation, it would comply with DCWP's proposed regulations but violate Section 196-b.

7-211 (Employer's Written Safe/Sick Time and Paid Prenatal Leave Policies)

DCWP proposes to require employers to maintain a written New York PPPL policy not required by New York Labor Law § 196-b. It also intends to require employers to distribute such policy upon hire, within 14 days of any change to the policy, and upon written request of an employee; again, requirements state law does not mandate. Additionally, DCWP proposes to impose specific policy terms, some of which are inconsistent with Section 196-b, as we highlight throughout these comments.

When the state wants to impose requirements concerning paid leave policies and how to notify employees about them, it knows how to do so and has done so. For example, New York Labor Law 195 contains a requirement to "notify [] employees in writing or by publicly posting [about] the employer's policy on sick leave, vacation, personal leave, holidays and hours."

7-213 (Enforcement and Penalties)

DCWP proposes enforcing New York PPPL requirements using the full suite of remedies available for unpaid wages under New York Labor Law §§ 198, 215, 218 and 219. New York Labor Law § 196-b contains no reference to enforcement and penalties, and leaves such enforcement with NY DOL. Even assuming DCWP could enforce, it should wait for enforcement guidance from NY DOL to avoid disparate enforcement standards concerning this first-in-the-nation paid leave entitlement.

7-214 (Accrual, Hours Worked, Hours Used and Carry Over)

DCWP proposes to impose requirements not mandated by New York Labor Code § 196-b. DCWP's proposed regulations mandate that employer's allow per diem employees and employees with indeterminate shifts to use New York PPPL for hours they were scheduled to work or for hours *they would have worked* absent a need to use New York PPPL. New York Labor Code § 196-b has no comparable requirement.

Additionally, DCWP's proposed regulations would require employers to utilize the employee's most recently worked "same shift" to calculate hours if the hours were not filled by another worker. Again, there is no comparable requirement in New York Labor Code § 196-b.

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101 Second Street, Suite 1000, San Francisco, CA 94105

From: jacobquinn@tutanota.com
To: rulecomments (DCWP)
Subject: [EXTERNAL] Earned Safe and Sick Time Act ("ESSTA"). Part M of Chapter 55 of the Laws of 2024 Comment
Date: Thursday, January 16, 2025 8:56:49 PM

Hi there

I support amending this rule if it provides twenty hours of paid prenatal leave for those who need it.

Best

Jacob Quinn

Online comments: 13

- **Katherine Castellanos**
  I would like to gain knowledge on this if it is effective as of 1/1/2025

  Comment added January 16, 2025 3:21pm

- **Shlomo Mor**
  Many rules and regulations that keep adding on in NYC increasing the cost of performing Construction and renovation work in NYC it makes it unworthy to stay in the construction business any longer.
  Me as many other contractors decided to quit performing any more businesses in the city of New York.
  After close to 40 years in business I decided to close my business at the end of this year.
  It is unfortunate but the cost of staying in business in the city of New York becomes unbearable.

  Comment added January 16, 2025 4:10pm

- **GERARDO FAJARDO**
  THERE IS NOT FAMALE IN THIS CORPORATION BUT A AGREE TO ALL LAW AND RULES NEED IT

  Comment added January 16, 2025 9:18pm

- **Michele Lynn Fox**
  We need paid parental leave in NYC!!

  Comment added January 17, 2025 12:24pm

- **NAEEM AKHTAR**
  Hello
  I received this email I am not sure what I have to do can you please direct me what I need to do you can reach me at 518986/1419

  Comment added January 21, 2025 6:54pm

- **Dahlia Lopez Ramsay**
  Essential accommodation for expecting mothers. You must approve any measure that extends paid leave for families expecting and raising newborns.

  Comment added January 28, 2025 4:33pm

- **WASEEM Akhtar**
  New York builder contractor Corp
  License #DCA-2019140
  Renew online

  Comment attachment
  New-York-builder-license.pdf

  Comment added February 3, 2025 12:14pm

Home Improvement Contractor License

Business Name:
NEW YORK BUILDER CONTRACTOR CORP

DBA/Trade Name:

Business Address:
3126 CONEY ISLAND AVE APT D9
BROOKLYN, NY 11235-6437

License Number: 2019140-DCA
Issued: 12/09/2022 Expires: 02/28/2025

17585-2022-RHIC

New York City Department of Consumer and Worker Protection
42 Broadway, New York, NY 10004

For complaints, contact:
311 | nyc.gov/dcwp

NYC Consumer and Worker Protection

Eric L. Adams
Mayor

Vilda Vera Mayuga
Commissioner

- **Elle Bee**

  It would be helpful to define or further explain “end-of-pregnancy care appointments”, which the law does apply to, as opposed to “post-natal or postpartum appointments”, which the law does not apply to.

  Comment added February 10, 2025 1:15pm

- **Ella Gant**

  Why is NYC proposing rules related to a STATE law? Enforcing the NY Labor Law is the provenance of the NY Dept. of Labor, NOT the DCWP, and the DCWP has no right to impose its own penalties for violation of a state law. This proposal is duplicative and unnecessary, and potentially harmful if city rules contradict the state rules. The state law ALREADY APPLIES to all NYC employers.

  The ordinance that the agency is charged with enforcing (ESSTA) does not require prenatal leave, so in essence DCWP is proposing an expansion of city law through regulation and guidance beyond the scope of the law purported to be implemented by these proposed rules. Such action is improper and an abuse of agency discretion. I hate to say it, but that kind of overreach is what inspired the MAGA movement and the creation of DOGE as well as other states’ laws that preempt and forbid local ordinances that contradict or complicate state laws.

  If NYC wants to have its own prenatal leave law, then city council should amend the ordinance and persuade the Mayor to sign such an amendment. Until that happens, DCWP should not be implementing such rules.

  I would withdraw this proposal in its entirety.

  Comment added February 12, 2025 10:57am

- **Rebekah Cook-Mack**

Please see attached.

Comment attachment
2025-Feb-14-Paid-prenatal-leave-rule-DCWP.pdf

Comment added February 14, 2025 10:49am

- **Rebekah Cook-Mack**

  Please see attached on behalf of NELA/NY.

  Comment attachment
  Prenatal-Leave-for-NELA.pdf

  Comment added February 14, 2025 12:30pm