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.

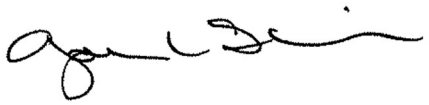
In sum, we appreciate the opportunity to submit these comments supporting the Commission's Proposed Rules on Discrimination Based on Pregnancy, Childbirth, or Related Medical Conditions. We strongly support the protections that the rules offer and urge the Commission to do everything in its power to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



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