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**Testimony before the New York City Council’s Joint Committee on Women and Civil & Human Rights**

**February 28, 2018**

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A Better Balance: The Work & Family Legal Center**

We want to start by thanking the New York City Council for introducing this crucial and timely package of legislation to combat the persistent gender-based harassment and workplace discrimination faced by women, especially women of color, in New York City and, particularly, the economic injustice this form of discrimination perpetuates for low-income working women.

Our organization, A Better Balance (ABB)—a non-profit legal advocacy organization—was founded with the goal of ensuring workers can meet the conflicting demands of their jobs and family needs, and ensuring that women and mothers can earn the fair and equal wages they deserve, without compromising their health or safety. ABB has been proud to work closely with the Council and the Commission on Human Rights to advance many of the pioneering solutions designed to combat gender-based discrimination and level the playing field for women and families.

We applaud the Council for taking such robust steps to combat gender-based harassment in the workplace. From legislation that will help the City identify the root causes of the problem, to requiring that both City and private employers provide comprehensive training to their employees, to lowering the threshold of the Human Rights Law to cover all employees who may



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face gender-based harassment, to making information about workers' rights more accessible and understandable, this group of bills will greatly strengthen New York City law.

Though this package is strong, our testimony will offer several ways the introduced legislation can be further strengthened to better protect workers in our city. Furthermore, we will highlight outstanding issues not yet addressed by this legislation. If the Council adopts these recommended changes to the current bills and introduces several additional pieces of legislation, these bills will not only strengthen New York City Law, but will also become a model for other cities and states around the country in the fight to end gender-based harassment.

We thank you for the opportunity to testify and for considering our recommendations.

### **I. Strengthening the Introduced Legislation**

We strongly recommend the Council amend three components of the existing legislation. First, we recommend that the Council enact more vigorous oversight and reporting requirements for City contractors. Furthermore, we recommend the Council include consequences for those contractors who thwart the Human Rights Law. Second, we want to ensure that the definition of gender-based harassment remains broad and that this legislation does not unwittingly narrow the definition. Third, we recommend that the Council include qualification standards for those that will conduct the mandated trainings for City and private employees.

#### **1. T2018-1468 Should Expand Reporting Requirements and Penalties for City Contractors.**

Bill #T2018-1468 states that as part of employment reports, city contractors would have to include "employment practices, policies, and procedures, including those related to preventing



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and addressing gender-based harassment.” While it is important for city contractors to report this information, this bill does not go far enough in holding contractors accountable for gender-based harassment that occurs in their workplaces.

The City should strengthen this legislation in several ways. First, contractors should be required to annually report the number of gender-based harassment complaints received, the number of violations, and the number of settlement agreements reached. The City should also be permitted to terminate the contract and debar the employer from future public contracting opportunities if the contractor has either 1) repeatedly violated the New York City Human Rights Law, or 2) included a clause within their employment contract requiring employees to submit to arbitration with respect to claims of gender-based harassment.

In November 2017, the Council passed a law prohibiting discrimination in public contracting.<sup>1</sup> The Council should pass further legislation to hold contractors accountable for violations of gender-based harassment laws. Businesses who receive our hard-earned tax dollars should not sexually harass or otherwise discriminate against women. Unfortunately, they often do. For example, we know gender-based harassment is rampant in the construction industry.<sup>2</sup> A study by the Department of Labor found that a startling 88 percent of women working in construction experienced gender-based harassment in the workplace,<sup>3</sup> a factor that contributes to

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<sup>1</sup> N.Y.C. Pub. Law 2017/223, <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=2895217&GUID=1613D9B6-3995-4194-9CBF-2DE496AF4702>.

<sup>2</sup> See Advisory Committee on Occupational Safety and Health, U.S. Dep’t of Labor, Women in the Construction Workplace: Providing Equitable Safety and Health Protection 7 (June 1999), <https://www.osha.gov/doc/acsh/haswicformal.html>.

<sup>3</sup> *Id.*

women’s low workforce participation (just 2.6% nationally) and promotion rates in that industry.<sup>4</sup> Women who leave these jobs cite harassment as a key reason,<sup>5</sup> yet billions of dollars worth of New York City public contracts go to construction services.<sup>6</sup> New York can and must do better to onboard and retain women in these higher paying jobs. Holding contractors accountable for their behavior is one key step toward this goal.

## **2. T2018-1474 Should Be Amended to Ensure the New York City Human Rights Law Definition of Gender-Based Harassment Remains Broad.**

In T2018-1474, the Council rightly calls for an extension of the statute of limitations within which an individual can file a harassment claim with the Commission on Human Rights. The bill defines a claim of harassment as one “based on unwelcome conduct that intimidates, interferes with, oppresses, threatens, humiliates or degrades a person based in whole or in part on such person’s gender.”

While this definition is assuredly well-intentioned, this definition could have the effect of narrowing the broad definition of gender-based harassment articulated in *Williams v. New York City Housing Authority*. The court in *Williams* held that under the New York City Human Rights Law, harassment is proven by showing that a person “has been treated less well because of” their gender.<sup>7</sup> In 2016, the Council affirmed the holding of *Williams* when it amended the Human Rights Law to ensure that the provisions of the law remain liberally construed and specifically

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<sup>4</sup> Fatima Goss Graves et al., National Women’s Law Center, Women in Construction: Still Breaking Ground 2 (2014), [https://www.nwlc.org/sites/default/files/pdfs/final\\_nwlc\\_womeninconstruction\\_report.pdf](https://www.nwlc.org/sites/default/files/pdfs/final_nwlc_womeninconstruction_report.pdf).

<sup>5</sup> *Id.* at 7.

<sup>6</sup> Martha Mann Alfaro et al., New York City Procurement Law: Doing Business with New York City 2 (Nov. 6, 2013), [http://www.nyc.gov/html/law/downloads/pdf/Procurement\\_Book.pdf](http://www.nyc.gov/html/law/downloads/pdf/Procurement_Book.pdf).

<sup>7</sup> *Williams v. New York City Housing Authority*, 61 A.D.3d 62, 72 (1st Dep’t 2009).



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cited *Williams* within the law as a “case that ha[s] correctly understood and analyzed the liberal construction requirement.”<sup>8</sup> In an attempt to strengthen the Human Rights Law, it is crucial that the Council not unintentionally narrow the harassment standard.

### **3. T2018-1459 and T2018-1463 Should Include Qualification Standards for Gender-Based Harassment Trainers.**

We applaud the Council’s inclusion of bills T2018-1459 and T2018-1463 requiring that both city and private employers provide gender-based harassment trainings for their employees. T2018-1463, the bill pertaining to private employers makes clear that employers may use a training module developed by the City Commission on Human Rights to satisfy the requirement. However, should an employer choose not to use the training developed by the Commission on Human Rights, the bill does not provide clear standards as to who is qualified to otherwise perform the trainings. T2018-1459, the bill related to the training of City employees, also fails to set forth qualification standards for trainers. A similar law already in effect in California requires that the trainings be “be presented by trainers or educators with knowledge and expertise in the prevention of harassment, discrimination, and retaliation.”<sup>9</sup> Both pieces of legislation should consider including similar language to make clear that trainings must be performed by those with knowledge of the law and the remedies associated with it.

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<sup>8</sup> N.Y.C. Pub. Law 2016/035, <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=2352241&GUID=DA8ADB16-C9DD-4BBF-BF42-6A571390B170&Options=ID|Text|&Search=%22human+rights+law%22>.

<sup>9</sup> Cal. Gov’t Code § 12950.1, [https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=200320040AB1825](https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=200320040AB1825).

## **II. Additional Legislation the Council Should Introduce to Combat Gender-Based Harassment**

While the Council took steps to introduce an array of crucial legislation, there are several key pieces of legislation the Council should also consider introducing. These include limiting the scope of pre-employment non-disclosure agreements, introducing industry-specific legislation to protect vulnerable workers, strengthening protections for independent contractors, making elected Council members explicitly, individually liable when the City pays out settlements on their behalf related to gender-based harassment, extending these protections to all forms of discrimination covered under the New York City Human Rights Law, and increasing the budget for the Commission on Human Rights. These additional pieces of legislation will ensure that all workers, especially the most vulnerable, are able to work in safe, healthy, and harassment-free environments.

### **1. The Council Should Limit the Scope of Pre-Employment Non-Disclosure Agreements.**

Employers often require employees to sign pre-employment non-disclosure agreements to protect company trade secrets. However, in some cases, employers also require employees to sign agreements that ban them from making statements affecting the company's "reputation" which effectively bars employees from discussing gender-based harassment complaints or other forms of discrimination.<sup>10</sup> According to the National Labor Relations Board, employees must be

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<sup>10</sup> Annie Hill, *Nondisclosure Agreements: Gender-based harassment and The Contract Of Silence*, The Gender Policy Report (Nov. 14, 2017), <http://genderpolicyreport.umn.edu/nondisclosure-agreements-sexual-harassment->

allowed to “discuss among themselves their harassment complaints” and cannot be dismissed for doing so or for engaging in concerted activity to oppose gender-based harassment.<sup>11</sup> While many of these non-disclosure agreements are unenforceable, they still deter unwitting employees from reporting and discussing gender-based harassment. The Council should introduce legislation to ensure that pre-employment non-disclosure agreements do not curtail employees’ ability to speak out and report gender-based harassment violations.

## **2. The Council Should Introduce Legislation to Protect Vulnerable Workers.**

While the Commission should work to more broadly and expeditiously enforce the current protections against gender-based harassment in the City Human Rights Law, there are also new policies that could help deter gender-based harassment in the workplace, especially women working in low-wage and male dominated industries. These women often face multiple, interconnected forms of harassment face on the job every day and must face impossible choices in order to keep earning a paycheck. For instance, our client Luisa<sup>12</sup> had to endure her supervisor’s gender-based harassment only for it then to evolve into harassment based on her pregnancy. Terminated just weeks before giving birth, Luisa suffered tremendous economic and emotional distress as a result of this discrimination. Not only did Luisa lose much-needed income, but she also lost out on opportunities to advance in the workplace. When Luisa was fired, she went to work at a different supermarket where she again started at an entry-level position, while the supervisors who discriminated against her continued to occupy their positions

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and-the-contract-of-silence/.

<sup>11</sup> *Phoenix Transit System and Amalgamated Transit Union, Local Union No. 1433, AFL-CIO*. 337 NLRB 78 (2002).

<sup>12</sup> Name changed to protect confidentiality.

of power. When low-wage working women cycle in and out of the workforce, they lose not only wages, but also seniority and other benefits of continuous employment that would promote economic stability for their families.<sup>13</sup> What began as gender-based harassment eventually led to pregnancy discrimination and the perpetuation of the gender wage gap.

Chicago and California have already taken steps to pass laws that specifically address the needs of low-wage workers. In a survey conducted in Chicago, Unite Here Local 1 found that 49 percent of housekeepers surveyed have had guest(s) expose themselves, flash them, or answer the door naked.<sup>14</sup> Nearly two-thirds of those surveyed who worked in casinos reported that a patron had groped, pinched, or grabbed them.<sup>15</sup>

Recognizing the severity of the issue, in October 2017, the Chicago City Council passed an ordinance requiring hotel employers to provide a “panic button” to any worker who works alone in rooms without other employees present.<sup>16</sup> As part of the law, employers must also maintain policies that encourage workers to report gender-based harassment, make reporting procedures clear, and allow workers to immediately stop working in dangerous settings, to be re-assigned to a different work area, and to take paid time off to sign a complaint against the offending party or testify as a witness in a legal proceeding against the offending party.<sup>17</sup> The law also has strong

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<sup>13</sup> See Dina Bakst & Phoebe Taubman, A Better Balance, *The Pregnancy Penalty: How Motherhood Drives Inequality & Poverty in New York City* 6 (2014).

<sup>14</sup> Unite Here Local 1, *Hands Off Pants On: Gender-based harassment in Chicago’s Hospitality Industry* 3 (July 2016), <https://www.handsoffpantson.org/wp-content/uploads/HandsOffReportWeb.pdf>.

<sup>15</sup> *Id.* at 7.

<sup>16</sup> Chi., Ill., Municipal Code § 4-6-180, <https://chicago.legistar.com/LegislationDetail.aspx?ID=3025158&GUID=06801462-1105-4464-84D8-CAA0C11CEECE&Options=Advanced&Search=&FullText=1>.

<sup>17</sup> *Id.*





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anti-retaliation protections, prohibiting employers from retaliating against any employee that uses the panic button, files a complaint, or takes time off to pursue legal action against the offending guest.<sup>18</sup>

While unionized hospitality workers in New York City are provided with panic buttons, New York City should follow Chicago's lead and develop a similar policy that includes anti-retaliation provisions, for all New York City hospitality workers.<sup>19</sup> In California, a worker-led movement led to the passage of a law strengthening protections for janitorial workers, including industry-specific trainings.<sup>20</sup> New York City should lead the way in devising similarly robust policies for other industries such as the construction and food service industry, where workers experience alarmingly high levels of gender-based harassment.<sup>21</sup>

### **3. The Council Should Strengthen Protections for Independent Contractors.**

A Better Balance applauds the Council's proposal to lower the employer threshold in gender-based harassment cases from four employers to all employers. However, further protections are needed for independent contractors to ensure that they are able to recover under the law under the same standard as other employees. First, the Council should amend the definition of

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<sup>18</sup> *Id.*

<sup>19</sup> Industry-Wide Agreement between New York Hotel and Motel Trades Council, AFL-CIO and Hotel Association of New York City, Inc. (July 2012),

[http://hotelworkers.org/images/uploads/NYC\\_Hotel\\_Industry\\_Wide\\_Agreement.pdf](http://hotelworkers.org/images/uploads/NYC_Hotel_Industry_Wide_Agreement.pdf).

<sup>20</sup> Cal. Lab. Code § 1429.5, <http://codes.findlaw.com/ca/labor-code/lab-sect-1429-5.html>.

<sup>21</sup> For instance, a 2014 study conducted by Restaurant Opportunities Center United and Forward Together found that the restaurant industry, which employs 11 million workers, is the single largest source of gender-based harassment in the U.S.<sup>21</sup> Many of these complaints come from tipped workers, who must subject themselves to gender-based harassment in order to make minimum wage. *See* Restaurant Opportunities Centers United, Forward Together, et al. October 7th, 2014. *The Glass Floor: Gender-based harassment in the Restaurant Industry*. New York, NY: Restaurant Opportunities Centers United. [http://rocunited.org/wp-content/uploads/2014/10/REPORT\\_The-Glass-Floor-Sexual-Harassment-in-the-Restaurant-Industry2.pdf](http://rocunited.org/wp-content/uploads/2014/10/REPORT_The-Glass-Floor-Sexual-Harassment-in-the-Restaurant-Industry2.pdf).



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independent contractor in the Human Rights Law to ensure that all forms of independent contractors are covered under the law.<sup>22</sup> Currently, the Human Rights Law defines independent contractors as “natural persons employed as independent contractors to carry out work in furtherance of an employer’s business enterprise *who are not themselves employers.*”<sup>23</sup> We recommend removing the clause “who are not themselves employers” to ensure that all workers, even those who may work independently but still do so in furtherance of a larger business entity are protected by the Human Rights Law.

Moreover, the Human Rights Law sets forth a more lenient standard of liability for employers of independent contractors, only holding employers of independent contractors liable “where such discriminatory conduct was committed in the course of such employment and the employer had actual knowledge of and acquiesced in such conduct.”<sup>24</sup> Employers of independent contractors in New York City should be subject to the same standard of liability as other employers in New York City.

Finally, as part of the online materials the Commission will create pursuant to the legislation set forth in T2018-1461, the City Commission should ensure that a special section is devoted to advising independent contractors of their rights.

**4. The Council Should Make Explicit that Elected Members of the City Council are Individually Liable for Gender-Based Harassment Violations.**

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<sup>22</sup> See N.Y.C. Admin. Code § 8-102(5).

<sup>23</sup> *Id.*

<sup>24</sup> N.Y.C. Admin. Code § 8-107(13)(c).

The New York City Human Rights Law already specifies that in certain instances employers may be held individually liable.<sup>25</sup> However, the Council should follow Congress' lead and introduce legislation making explicit that elected members of the City Council must individually reimburse the City for any tax-payer dollars that are used to settle gender-based harassment claims.<sup>26</sup>

**5. The Council Should Strengthen Protections for All Forms of Discrimination.**

While ABB applauds the Council for introducing this comprehensive package of bills to combat gender-based harassment, the New York City Human Rights Law enumerates a long list of protected statuses.<sup>27</sup> The additional protections afforded by this proposed legislation, specifically the lowering of the employee threshold and the private employer training requirement, should extend to all forms of discrimination covered under the New York City Human Rights Law.

**6. The Council Should Increase the Budget of the New York City Commission on Human Rights.**

Under Commissioner Malalis's leadership, the Commission on Human Rights has shown unprecedented dedication to enforcing the City Human Rights Law to ensure that all New Yorkers, including those with the least means, need not compromise their health, safety, or economic security and can benefit from the full protections offered by the law. These bills would require the Commission to create new online materials, training materials, an employment

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<sup>25</sup> See, e.g., N.Y.C. Admin. Code § 8-107(6).

<sup>26</sup> Congressional Accountability Act of 1995 Reform Act, H.R.4924, 114th Cong., § 115 (2018).

<sup>27</sup> See N.Y.C. Admin. Code § 8-107.



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poster, as well as author a risk-assessment reports and conduct a climate survey. Given these additional responsibilities, the Council should ensure that the Commission is provided the appropriate resources to effectuate this legislation without compromising their robust enforcement and current responsibilities.

### **CONCLUSION**

We thank the Council for their leadership in combatting gender-based harassment in the workplace and for considering these amendments and additional recommendations. A Better Balance looks forward to working with the Council to improve upon these crucial pieces of legislation.