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the work and family legal center

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June 24, 2023

Committee on Civil and Human Rights
New York City Council
250 Broadway
New York, NY 10007

Re: Oversight: Expanding NYC Human Rights Law Employment Protections Against Workforce Discrimination

Dear Chair Williams and Committee Members:

We thank you for convening this hearing, Expanding NYC Human Rights Law Employment Protections Against Discrimination, and for the opportunity to provide testimony on this critical issue.

A Better Balance is a national legal services and advocacy organization, headquartered in New York City, that uses the power of the law to advance justice for workers so they can care for themselves and their loved ones without jeopardizing their economic security. Our organization has championed efforts to pass key provisions of the City's Human Rights Law ("HRL"), including the right to reasonable accommodations for pregnant workers, the non-discrimination protections for caregivers, and the salary history ban. In addition to our policy advocacy, we run a free and confidential legal helpline, through which we have heard from thousands of New Yorkers, disproportionately low-wage workers of color, seeking information and assistance enforcing their rights under the HRL.

I. We Urge the Council to Significantly Expand Funding for the Law Enforcement Bureau of the NYC Commission on Human Rights.

In recent years, the Council has passed dozens of laws protecting workers, including the NYC Pregnant Workers Fairness Act, salary history and salary transparency requirements, and laws protecting the workplace rights of victims of domestic violence and sexual harassment. We applaud the Council for these important protections. But rights on paper are only as good as their enforcement. Many of the low-wage workers from whom we hear on our free legal helpline rely exclusively on public agency enforcement of these laws because they cannot afford to hire private attorneys, making the work of the City Commission on Human Rights ("the Commission") Law Enforcement Bureau ("LEB") essential.

Over the last several years, funding for and staffing of the Commission have fallen to unconscionable levels, with dire impacts on the ability of low-wage workers to vindicate their rights. For example, in Fiscal Year 2022, the LEB's enforcement work fell dramatically as compared to Fiscal Year 2021, in areas including pre-complaint resolutions, accessibility

modifications, complaints filed, complaints resolved, and cases referred to the Office of Administrative Trials and Hearings (OATH).[1] The value of damages recovered for complainants, as well as the value of civil penalties assessed, also dropped significantly.[2] The number of open matters and open complaints also decreased sharply in Fiscal Year 2022, as compared to Fiscal Year 2021, despite the average case resolution time increasing — indicating shrinking staff size.[3] Indeed, total personnel and spending have both decreased dramatically, with overall staff size down one-third from 2018 to 2022.[4] Workers who file a complaint with the Commission must wait an *average* of 689 days — nearly two years — for the LEB to complete its initial investigation, and often far longer for their case to be conciliated or prosecuted after they receive a determination.[5]

The need for significantly increased funding of the Commission's LEB is dire and urgent. Under current conditions, we cannot in good conscience recommend that workers file complaints with the Commission, knowing that their cases will languish for many years, when they need timely relief in order to maintain their economic security. We urge the Council to increase funding for the Commission — especially for the LEB — without delay so that workers, especially low-wage workers, can again turn to the Commission as a means to vindicate their rights under our City's civil rights laws.

II. We Urge the Council to Pass Int. 0422-2022 (Requiring Employers to Maintain Records of Reasonable Accommodation Requests), with Modifications.

We strongly support Int. 0422-2022, which would require covered entities to maintain a written record of reasonable accommodations requested under the HRL's pregnancy, disability, creed, and domestic violence accommodation provisions.[6]

Such a requirement would better incentivize employers to comply with their existing accommodation obligations, ensuring that they initiate a good faith cooperative dialogue to identify a worker's needs and accommodations to meet those needs, and document that dialogue in writing. On our helpline, we have seen the value of a robust cooperative dialogue in ensuring that pregnant and postpartum workers, and other workers entitled to accommodations, are able to get the accommodations they need to remain in the workplace and continue earning their livelihood. Too often, employers shirk their accommodation obligations, with devastating consequences for workers' health and financial security.

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[1] Annabel Palma, NYC Comm'n Hum. Rts., *Preliminary Mayor's Management Report* 78 (Jan. 2023), https://www.nyc.gov/assets/operations/downloads/pdf/pmmr2023/cchr.pdf.
[2] *Id.*
[3] *Id.*
[4] *Id.* at 79; Bill DeBlasio, *Mayor's Management Report* 102 (Sept. 2019), https://www.nyc.gov/assets/operations/downloads/pdf/mmr2019/2019_mmr.pdf.
[5] Annabel Palma, NYC Comm'n Hum. Rts., *Annual Report: Fiscal Year 2022*, 41, https://www.nyc.gov/assets/cchr/downloads/pdf/publications/CCHRAnnualReportFY2022.pdf.
[6] NYC Admin. Code § 8-107(3) (creed or religion), (15) (disability), (22) (pregnancy), (27) (domestic violence, sex offenses, or stalking).

To strengthen the impact of the legislation and better foster compliance with the spirit of the law, we recommend the bill text be modified in several respects:

- First, we recommend the legislation require employers to record, in addition to the date of the request and the outcome of the cooperative dialogue: (i) the category of the law under which the request falls (e.g., pregnancy, disability, creed, etc.); (ii) the accommodation initially requested (i.e., not merely the accommodation ultimately arrived at through the cooperative dialogue); and (iii) the name of the individual requesting accommodation.
- Second, we recommend the provision, "is confidential or privileged or the disclosure of," be deleted, so the text reads, "Nothing in this section shall be deemed to require the disclosure of information that would violate any other applicable provision of law." Striking such vague language will ensure that employers are not authorized to withhold records that are necessary for the Commission to review as part of its investigations, while also protecting workers' privacy by not requiring disclosure of information that would "violate any other applicable provision of law."
- Third, we recommend that the word "written request" be changed to simply "request" so as to trigger the employer's duty to maintain written records of any reasonable accommodation requested, regardless of whether the worker submits that request in writing. In our experience, many workers initially (or only) request accommodations verbally.
- Fourth, we recommend the text be amended so that workers, not just the Commission, have a right to access their own records.
- Finally, we recommend that the City Council adopt the model it used in the NYC Earned Sick and Safe Time Act and legislate a fixed amount of monetary damages (e.g., $500) owed to a worker every time their employer fails to record one of the worker's requests for accommodation. In our experience, the inclusion of a set amount of monetary damages incentivizes both employer compliance and private enforcement of these critical protections. The Council should add such a fixed amount of monetary damages as an available category of damages for the Commission to impose in a Decision and Order pursuant to § 8-120 of the HRL, and also as a category of damages available in civil actions brought pursuant to § 8-502 of the HRL. The Council should further consider adding similar per-violation damages to all areas of the HRL that require posting, recording, training, or the maintenance of particular policies to encourage individuals impacted by these violations to enforce these critical provisions of the HRL.

With these changes, we urge the Council to pass the proposed legislation.

III. We Urge the Council to Pass Int. 0811-2022 (Voiding No-Rehire Provisions in Settlement Agreements), with Modifications.

We strongly support Int. 0811-2022, which would void no-rehire provisions in settlement agreements for workers who have experienced unlawful discrimination. This legislation would combat a growing trend of employers weaponizing private contracts to (1) curtail democratically enacted civil rights laws and (2) dissuade workers from vindicating their rights out of fear of being barred from working in entire industries.

In our experience, employers often use no-rehire terms against low-wage workers, including in concentrated industries heavily dominated by only a small handful of employers.[7] As a result, workers who enter into such "agreements" — which are often highly coercive and one-sided — are forced to abandon professions in which they have trained, obtained certifications, and/or worked for decades.[8] One low-wage worker who contacted our helpline after experiencing egregious sexual harassment and pregnancy discrimination at work, for example, was forced to sign a no-rehire settlement clause in exchange for vindicating her rights under the HRL — leaving her no option but to leave the security services industry she had trained and worked in for many years.

Accordingly, we urge the Council to pass this vital legislation, with two modifications:

- First, to the extent the Council intends to prohibit employers from adopting clauses barring *future rehire*, but not to prohibit employers and workers from agreeing to end *current* employment relationships, we recommend the Council clarify the first sentence of sections 1(e) and 2(i) of the proposed bill text to this effect.
- Second, in both sections 1(e) and 2(i), we recommend changing "if there is a legitimate non-discriminatory or non-retaliatory reason" to "because there is a legitimate non-discriminatory or non-retaliatory reason" to ensure that only refusals to rehire that are *actually motivated by* legitimate reasons are excepted from the law's protections.

With these changes, we urge the Council to pass the proposed legislation.

IV. We Urge the Council to Pass Int. 0812-2022 (Extending the Statute of Limitations under the HRL).

We strongly support the passage of Int. 0812-2022, which would extend the statute of limitations for commencing a private cause of action under the HRL from three to six years.

Increasing the statute of limitations is essential for workers to have the time they need to pursue their legal options. The low-wage workers from whom we hear everyday on our helpline — who are often new immigrants, with limited English proficiency, without ready access to legal information about workplace laws — often do not realize immediately that their rights have been violated, fear retaliation for asserting their rights, and lack easy access to legal advice and no- or low-cost representation.[9] Others need time to find a new job and get back on their feet before

[7] *See also* Jenny R. Yang & Jane Liu, *Strengthening Accountability for Discrimination: Confronting Fundamental Power Imbalances in the Employment Relationship* 29 (Jan. 15, 2021), https://files.epi.org/pdf/218473.pdf ("Because [no-rehire and noncompete] clauses limit employment opportunities, particularly in 'one company towns' or in industries that are heavily dominated by one or two large companies, they can intimidate workers into staying at companies in which they may be facing discrimination or other workplace problems.").

[8] *Id.* (noting that "workers rarely have the power to limit the scope of no-rehire clauses").

[9] *See also* Nat'l Emp. L. Proj., *Winning Wage Justice: An Advocate's Guide to State & City Policies to Fight Wage Theft* 21 (Jan. 2011), https://www.nelp.org/wp-content/uploads/2015/03/WinningWageJustice2011.pdf ("[W]orkers, particularly in low-wage industries, often do not know their legal rights or when those rights have been violated, or hesitate to file claims for fear of retaliation."); A Better Balance, *Results from 2021 Survey of Morrisania Women, Infants & Children ("WIC") Participants* 2 (Oct. 27, 2022), https://www.abetterbalance.org/resources/results-from-2021-survey-of-morrisania-women-infants-children-wic-participants/ (noting that "nearly 1 in 3 [survey] respondents—who were currently or recently pregnant workers—disclosed that they did not know or were unsure

pursuing legal action. Adopting a six-year statute of limitations, which would harmonize the HRL with other laws such as the New York State Labor Law,[10] is essential to ensure that workers are able to meaningfully vindicate the rights the Council has afforded them.

We urge the Council to pass Int. 812.

V. We Urge the Council to Pass Int. 0864-2022 (Voiding Agreements Shortening the Statute of Limitations).

We strongly support Int. 0864-2022, which would void agreements to shorten the statute of limitations in which workers can file a complaint, claim, or civil action under the HRL. Such agreements are yet another example of the weaponization of contract law to circumvent the Council's democratic enactment of critical nondiscrimination protections. Further, these "agreements" are rarely entered into on a level playing field; in our experience, they are often unduly coercive, foisted on workers at the start of employment when they have the least information about the workplace conditions they are entering into and no meaningful opportunity to oppose (or even notice) the contract term.

Accordingly, we urge the Council to pass this vital legislation.

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We thank you for the opportunity to testify about these vital pieces of legislation and the critical need for increased funding for the Commission. Please do not hesitate to contact us with questions.

Sincerely,

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whether New York workers have a right to receive accommodations at work for pregnancy, childbirth, and related conditions" under the HRL).

[10] *See, e.g.*, N.Y. Lab. L. § 198(3).