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November 12, 2020

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCERNS:

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

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

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

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

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

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

[5] Emphasis added.

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

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

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

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

RECOMMENDATIONS:

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

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

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

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

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

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

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

We propose the following language:

Under no circumstances shall an employer request medical documentation of the need for the following accommodations: minor or temporary modifications to work schedules; adjustments to uniform requirements or dress codes; additional or longer food, drink, bathroom, or rest breaks; being permitted to sit or eat at their work station; moving a work station to permit movement or stretching of extremities, or to be closer to a bathroom; limits on lifting; minor physical modifications to a work station, including the addition of a fan or seat; periodic rest; assistance with manual labor; light duty or desk duty assignments; temporary transfers to less strenuous or hazardous work; and time-off to attend prenatal and postnatal appointments.[6]

For all other accommodations, an employer may request medical documentation. During the time period in which an employee is making good faith efforts to obtain documentation, however, the employer shall provide the reasonable accommodation(s), absent undue hardship. An employer shall not take adverse action against an employee related to their need for accommodation while the employee is engaging in good faith efforts to obtain documentation.

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

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

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

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

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

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

CONCERNS:

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

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

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

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

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

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

RECOMMENDATIONS:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

We propose the Commission add the following language:

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

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

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

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

5. Re-structure the cooperative dialogue section.

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

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

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

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

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

The proposed rule provides:

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

See Proposed Rule § 2-07(d).

CONCERN:

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

RECOMMENDATION:

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

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

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

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

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

CONCERN:

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

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

RECOMMENDATION:

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

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

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

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

CONCERNS & RECOMMENDATIONS:

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

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

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

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

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

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

D. Notice and Lactation Policy

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

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

CONCERN:

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

RECOMMENDATION:

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

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

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

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

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

CONCERN:

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

RECOMMENDATION:

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

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

Guidance § (III)(A)(1).

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

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

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

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

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

X. Additional Issue: Clarify Examples of Accommodations.

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

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

For clarity, we suggest the following revisions:

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

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

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

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

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

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

Sincerely,

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

APPENDIX A: Suggested Outline of Proposed Rule

While many aspects of the rule are helpful, we think the organization of the rule could be clearer for workers and employers alike. Below are some suggested edits to the structure and organization of the rule. The suggested changes are italicized and highlighted.

Definitions

- *Add definition of "Covered entity" and indicate that references to "employee" include independent contractors, freelancers, temporary workers, and interns.*

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

(a) Disparate Treatment Based on Pregnancy, Childbirth, or Related Medical Conditions
  (1) *Add a sub-section on pregnancy- and lactation-related harassment.*
  (2) Examples of violations
(b) Policies that Facially Discriminate Against People Based on Pregnancy, Childbirth, or Related Medical Conditions
  (1) Examples of violations
(c) Facially Neutral Policies or Practices that Have a Disparate Impact on People Based on Pregnancy, Childbirth, or Related Medical Conditions
  (1) Examples of violations
(d) Requirement for Employers to Provide Written Notice About Employees' Right to be Free from Discrimination Based on Pregnancy, Childbirth, or a Related Medical Condition
(e) Failure to Provide Reasonable Accommodations in Employment Based on Pregnancy, Childbirth, or a Related Medical Condition
  (1) *Replace Section 2-07(e)(1) with the examples of accommodations currently in Sections 2-07(e)(2) and (f)(8).*
  (2) *As indicated below, consolidate the Lactation Accommodations sections—which currently appear in Section 2-07(e)(1), Section (e)(2)(ii), (iv), and Section (f)(1)—into a new Section (h).*
  (3) *Move the section on "Minor accommodations for pregnancy, childbirth, or a related medical condition that rarely pose an undue hardship"—currently in Section 2-07(f)(5)—to a new subsection in Section 2-07(e).*
  (4) *Add to Section 2-07(e) a new subsection on other accommodations, including desk duty, light duty, transfer to alternate position, leave after childbirth and loss/termination of pregnancy, and accommodations for fertility treatments.*
(f) Employers Must Engage in a Cooperative Dialogue When Employee Requires an Accommodation Because of Pregnancy, Childbirth, or a Related Medical Condition, Including Lactation
  (1) In determining whether or not an employer has engaged in a cooperative dialogue in good faith with an employee, the Commission will consider various factors… (current Section 2-07(f)(3))
  (2) A cooperative dialogue should continue until… (current section 2-07(f)(4))

(3) *Add a new section entitled: Examples of the Cooperative Dialogue, using examples from Guidance Section (III)(B)(4)(f).*

(g) *Add a new section on: Medical Documentation.*

(h) *Create a new section entitled: Accommodations Related to Lactation/Expressing Breast Milk, which consolidates Sections 2-07(e)(1); Section (e)(2)(ii), (iv); and Section (f)(1).*

(1) *Lactation Space*

(2) *Lactation Time (including compensation)*

(3) *Other Lactation Accommodations*

(4) *Notice and Lactation Policy*

(5) *Examples of Violations*

(i) *Add a new section entitled: Retaliation Prohibited.*

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

(a) Disparate Treatment Based on a Person's Sexual or Reproductive Health Decisions.

(1) Examples of violations.

(b) Employment Policies that Facially Discriminate Against People Based on Their Sexual or Reproductive Health Decisions.

(1) Examples of violations.