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## **THE COUNCIL**

### **Committee Report of the Governmental Affairs Division**

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#### COMMITTEE ON CIVIL RIGHTS

Hon. Deborah Rose, Chair

**Monday, September 23, 2013**

**Proposed Int. No. 974-A:** By Council Members Vacca, Lander, Palma, Rose, Lappin, Arroyo, Brewer, Chin, Eugene, Ferreras, Gentile, Jackson, James, Koo, Koppell, Koslowitz, Mendez, Reyna, Rivera, Williams, Rodriguez, Mark-Viverito, Crowley, Gonzalez, Levin, Van Bramer and Ulrich

**Title:** A Local Law to amend the administrative code of the city of New York, in relation to prohibiting discrimination in employment based on pregnancy, childbirth, or a related medical condition.

## **I. Introduction**

On Monday, September 23, 2013, the Committee on Civil Rights, chaired by Council Member Deborah Rose, will vote on Proposed Introductory Bill Number 974-A (“Proposed Int. No. 974-A”), a Local Law to amend the administrative code of the city of New York, in relation to prohibiting discrimination in employment based on pregnancy, childbirth, or a related medical condition. The Committee previously held a hearing on Proposed Introductory Bill Number 974-A, a Local Law to amend the administrative code of the city of New York, in relation to prohibiting discrimination in employment based on pregnancy, childbirth, or a related condition, on June 25, 2013.

## **II. Background**

### ***A. Federal Law***

In 1978, the United States Congress passed the Pregnancy Discrimination Act (“PDA”), which amended Title VII of the Civil Rights Act of 1964 to prohibit discrimination against pregnant women in the workplace.<sup>1</sup> Under the PDA, employers with 15 or more employees<sup>2</sup> are prohibited from discriminating against persons on the basis of pregnancy, childbirth, or related medical conditions.<sup>3</sup> Such discrimination is deemed unlawful sex- or gender-based discrimination under Title VII.<sup>4</sup> In addition to protections against discrimination on the basis of pregnancy, childbirth, or a related condition, many pregnant women seek accommodations in the workplace. The PDA does not explicitly speak to the provision of such accommodations,

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<sup>1</sup> U.S. Equal Employment Opportunity Commission, *The Pregnancy Discrimination Act of 1978* (approved Oct. 31, 1978), <http://www.eeoc.gov/laws/statutes/pregnancy.cfm> (last visited June 24, 2013); U.S. Equal Employment Opportunity Commission, *Facts About Pregnancy Discrimination* (Sept. 8, 2008), <http://www.eeoc.gov/facts/fs-preg.html> (last visited June 24, 2013).

<sup>2</sup> 42 U.S.C. §2000e(b).

<sup>3</sup> 42 U.S.C. §2000e(k).

<sup>4</sup> *Id.*

however. Accordingly, some have tried to use the Americans with Disabilities Act (“ADA”) to require employers to provide such accommodations,<sup>5</sup> but such attempts have largely been unsuccessful because the ADA generally does not apply to pregnant women unless they have a pregnancy related disability.<sup>6</sup> Pregnancy and conditions resulting from pregnancy are generally not considered to be a disability under the ADA and determining whether employers are required to provide a reasonable accommodation to pregnant workers is decided on a case by case basis.<sup>7</sup>

### ***B. State and Local Law***

Pregnancy based discrimination is considered to be sex- or gender-based discrimination and is therefore unlawful under both New York State and City Law. Although there is no explicit requirement for employers to provide a reasonable accommodation to pregnant workers under State law, employers with four or more employees are explicitly prohibited from forcing a pregnant employee “to take a leave of absence, unless the employee is prevented by such pregnancy from performing the activities involved in the job or occupation in a reasonable manner.”<sup>8</sup> In New York City, the current Commission on Human Rights (“Commission”) interprets the City’s Human Rights Law as requiring employers to make reasonable accommodations for their disabled employees, including those who are pregnant.<sup>9</sup>

Since 2002, 154 pregnancy discrimination cases have been filed with the Commission.<sup>10</sup>

The Commission has obtained approximately \$500,000 in settlements and \$12,000 in fines for

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<sup>5</sup> See National Advocates for Pregnant Women, *Guide to Pregnancy Discrimination in Employment*, 2-3, <http://advocatesforpregnantwomen.org/06CFinalDraft.pdf> (last visited June 14, 2013).

<sup>6</sup> A person is deemed disabled if he or she has a physical or mental impairment that substantially limits one or more of the major life activities. *Id.* at 3; 42 U.S.C. §12102(1).

<sup>7</sup> National Advocates for Pregnant Women, *supra* note 5, at 3.

<sup>8</sup> N.Y. Exec. Law. §296(1)(g).

<sup>9</sup> Patricia L. Gatling, Commissioner, New York City Commission on Human Rights, *Letter to the Editor: Pregnancy Discrimination*, N.Y. Times, Feb. 13, 2013, [http://www.nytimes.com/2012/02/14/opinion/pregnancy-discrimination.html?\\_r=1&](http://www.nytimes.com/2012/02/14/opinion/pregnancy-discrimination.html?_r=1&) (last visited June 6, 2013).

<sup>10</sup> Information on file with Committee Staff.

pregnancy discrimination claims since 2002.<sup>11</sup> Despite existing protections, troubling reports of pregnancy discrimination in the workplace endure.

According to the National Partnership for Women and Families (“NPWF”), pregnancy-related discrimination charges made to the United States Equal Employment Opportunity Commission have increased 35 percent over the past decade, and nearly one-fifth of all discrimination charges made by women have been related to their pregnancy.<sup>12</sup> The prevalence of pregnancy discrimination is particularly troubling in light of the facts that, according to NPWF, women make up approximately 47 percent of the workforce,<sup>13</sup> and, according to the Center for American Progress, three-quarters of women entering the workforce will become pregnant at least once in their professional lives.<sup>14</sup> According to A Better Balance, an advocacy organization for working families, the lack of language requiring reasonable accommodations for pregnant workers if they so request in the current law could result in termination or suspension of employment for a woman in New York if her otherwise healthy pregnancy requires a modest accommodation, such as frequent bathroom breaks, but does not rise to the level of a disability.<sup>15</sup> Moreover, stress resulting from a failure to provide a reasonable accommodation can have an adverse effect on a woman’s maternal health.<sup>16</sup> Demographic trends also highlight the critical need for increased protections for pregnant women. According to the NPWF, women are

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<sup>11</sup> Information on file with Committee Staff.

<sup>12</sup> *Unlawful Discrimination Against Pregnant Workers and Workers with Caregiving Responsibilities*, U.S. Equal Employment Opportunity Commission (Feb. 15, 2012) (written testimony of Judith L. Lichtman, Senior Advisor, National Partnership for Women and Families), <http://www1.eeoc.gov/eeoc/meetings/2-15-12/lichtman.cfm?renderforprint=1> (last visited June 24, 2013).

<sup>13</sup> *Id.*

<sup>14</sup> Melissa Alpert and Alexandra Cawthorne, Center for American Progress, *Labor Pains: Improving Employment and Income Security for Pregnant Women and New Mothers*, 2, [http://www.americanprogress.org/issues/2009/08/pdf/labor\\_pains.pdf](http://www.americanprogress.org/issues/2009/08/pdf/labor_pains.pdf) (last visited June 24, 2013).

<sup>15</sup> A Better Balance: Fact Sheet: The Pregnant Workers Fairness Act in New York City (Oct. 2012), [http://www.abetterbalance.org/web/images/stories/City\\_PWFA\\_Fact\\_Sheet.pdf](http://www.abetterbalance.org/web/images/stories/City_PWFA_Fact_Sheet.pdf) (last visited June 24, 2013).

<sup>16</sup> *Id.*

“primary or co-breadwinners in nearly two-thirds of families.”<sup>17</sup> The need for pregnancy protections is particularly high in New York State, where unwed mothers accounted for 34.8 percent of births in the state in 2011.<sup>18</sup> In New York City, single mothers total nearly 282,000 and account for 34.2 percent of all households with children and over 82 percent of single-parent households.<sup>19</sup>

Although laws exist to prevent discrimination against pregnant women in the workplace, it appears that women may not always be able to obtain workplace accommodations that make it possible to maintain a healthy pregnancy and continue to satisfactorily perform their jobs. In order to address this problem, Introductory Bill Number 974 was introduced into the City Council on November 27, 2012. The Committee on Civil Rights held a hearing on Proposed Int. No. 974-A on June 25, 2013.

### **III. Amendments to Proposed Int. No. 974-A**

Following the June 25, 2013 hearing on Proposed Int. No. 974-A, several changes were made to address enforcement concerns raised by the Commission and to ensure that the requirements for employers set forth under this bill are consistent with other requirements for employers under the City’s Human Rights Law. Changes to the bill are as follows:

- While expressing support for the bill, the Commissioner of the Commission on Human Rights, Patricia L. Gatling, expressed concern about the posting requirements set forth in the bill heard by the Committee on June 25, 2013.<sup>20</sup> In her written

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<sup>17</sup> Judith L. Lichtman, *supra* note 15.

<sup>18</sup> Rachel M. Shattuck and Rose M. Krelder, U.S. Census Bureau, *American Community Survey Reports: Social and Economic Characteristics of Currently Unmarried Women With a Recent Birth: 2011* (issued May 2013), 7, <http://www.census.gov/prod/2013pubs/acs-21.pdf> (last visited June 24, 2013).

<sup>19</sup> [http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS\\_11\\_1YR\\_S1101&prodType=table](http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_11_1YR_S1101&prodType=table) (ACS Survey 2011)

<sup>20</sup> Written Testimony of Patricia L. Gatling, New York City Commission on Human Rights, before the Committee on Civil Rights, 2 (June 25, 2013) (on file with Committee Staff).

testimony, she stated that “there is no enforcement mechanism” for the posting requirements.<sup>21</sup> In order to address this concern, changes were made to require the Commission to provide notice to the public in a manner that is consistent with other provisions of the City’s Human Rights Law.

- A technical change was made to make it clarify that only those employers with four or more employees are covered under this bill. This is consistent with other antidiscrimination provisions found in the Human Rights Law.
- Additional technical changes were made to the discussion of reasonable accommodations to make it clear that such accommodations are to be provided so as to allow employees to meet their job requirements and so long as the employer knows or should have known about the employee’s pregnancy, childbirth, or related medical condition. This is consistent with other parts of the Human Rights Law where employers are required to provide reasonable accommodations.

#### **IV. Analysis of Proposed Int. No. 974-A**

Proposed Int. No. 974-A would amend the City’s Human Rights Law to prohibit employers from discriminating against workers who are pregnant or have a medical condition related to pregnancy or childbirth and require employers to provide a reasonable accommodation to such workers. A reasonable accommodation is any accommodation that can be made that does not cause an employer an undue hardship.<sup>22</sup> This standard is consistent with the rest of the

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<sup>21</sup> *Id.*

<sup>22</sup> The factors to be considered when determining whether an accommodation would cause an employer undue hardship include, but are not limited to, “(a) the nature and cost of the accommodation; (b) the overall financial resources of the facility or the facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility; (c) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees, the number, type, and location of its facilities; and (d) the type of operation or operations of the covered entity, including the composition,

Human Rights Law regarding reasonable accommodations in employment. This bill would also require the Commission to (i) create a written notice regarding employees' rights related to pregnancy for employers to provide to employees, and (ii) educate the public on their rights and obligations with regard to pregnant workers' right to be free from discrimination in relation to pregnancy, childbirth, or a related medical condition.

**V. Effective Date**

This local law would take effect 120 days after its enactment into law.

**VI. Penalties**

Pursuant to Proposed Int. No. 974-A, an individual who believes that he or she has been unlawfully discriminated against on the basis of pregnancy, childbirth, or a related medical condition may bring an action in court for damages, injunctive relief and other appropriate remedies,<sup>23</sup> or make a complaint to the Commission on Human Rights.<sup>24</sup> Upon a finding that an employer has engaged in an unlawful discriminatory practice, the Commission may issue an order to the employer to “cease and desist” the unlawful discriminatory practice.<sup>25</sup> In addition, the Commission could require the employer to hire a prospective employee; award back pay and front pay; or pay compensatory damages, among other things.<sup>26</sup> Failure to comply with such an order may result in a civil penalty of no more than \$50,000 and an additional civil penalty of no more than \$100 per day.<sup>27</sup> Should the Commission find that an employer engaged in an unlawful discriminatory practice, it may impose a civil penalty of \$125,000.<sup>28</sup> If the unlawful

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structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.” Admin. Code §8-102(18).

<sup>23</sup> Admin. Code §8-502.

<sup>24</sup> Admin. Code §8-109.

<sup>25</sup> Admin. Code §8-120(a).

<sup>26</sup> *Id.*

<sup>27</sup> Admin. Code §8-124.

<sup>28</sup> Admin. Code §8-126(a).

discriminatory practice resulted from the employer's "willful, wanton or malicious act," the Commission may impose a civil penalty of not more than \$250,000.<sup>29</sup> Should a person willfully violate an order of the Commission, he or she may be guilty of a misdemeanor that is punishable by imprisonment for not more than one year, or by a fine of not more than \$10,000, or by both.<sup>30</sup>

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<sup>29</sup> *Id.*

<sup>30</sup> Admin. Code §8-129.



Proposed Int. No. 974-A

By Council Members Vacca, Lander, Palma, Rose, Lappin, Arroyo, Brewer, Chin, Eugene, Ferreras, Gentile, Jackson, James, Koo, Koppell, Koslowitz, Mendez, Reyna, Rivera, Williams, Rodriguez, Mark-Viverito, Crowley, Gonzalez, Levin, Van Bramer and Ulrich

A LOCAL LAW

To amend the administrative code of the city of New York, in relation to prohibiting discrimination in employment based on pregnancy, childbirth, or a related medical condition.

Be it enacted by the Council as follows:

Section 1. Legislative findings and intent. The Council finds that pregnant women are vulnerable to discrimination in the workplace in New York City. For example, there are reports that women who request an accommodation that will allow them to maintain a healthy pregnancy, or who need a reasonable accommodation while recovering from childbirth, are being removed from their positions, placed on unpaid leave, or fired. It is the intent of the Council to combat this form of discrimination by requiring employers to provide reasonable accommodations to pregnant women and those who suffer medical conditions related to pregnancy and childbirth. Such a reasonable accommodation may include bathroom breaks, leave for a period of disability arising from childbirth, breaks to facilitate increased water intake, periodic rest for those who stand for long periods of time, and assistance with manual labor, among other things. It is not the intent of the Council to require such accommodations if their provision would cause an undue hardship in the conduct of an employer's business.

§2. Subdivision 5 of section 8-102 of chapter one of title eight of the administrative code of the city of New York, as amended by local law number 14 for the year 2013, is amended to read as follows:

5. For purposes of subdivisions one, two, three, twenty-two, subparagraph one of paragraph a of subdivision twenty-one, and paragraph e of subdivision twenty-one of section 8-107 of this chapter, the term “employer” does not include any employer with fewer than four persons in his or her employ. For purposes of this subdivision, natural persons employed as independent contractors to carry out work in furtherance of an employer’s business enterprise who are not themselves employers shall be counted as persons in the employ of such employer.

§3. Subdivision 18 of section 8-102 of chapter one of title eight of the administrative code of the city of New York, as amended by local law number 54 for the year 2011, is amended to read as follows:

18. The term “reasonable accommodation” means such accommodation that can be made that shall not cause undue hardship in the conduct of the covered entity’s business. The covered entity shall have the burden of proving undue hardship. In making a determination of undue hardship with respect to claims filed under subdivisions one, [or] two, or twenty-two of section 8-107, or section 8-107.1 of this chapter, the factors which may be considered include but shall not be limited to:

(a) the nature and cost of the accommodation;

(b) the overall financial resources of the facility or the facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

(c) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees, the number, type, and location of its facilities; and

(d) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

In making a determination of undue hardship with respect to claims for reasonable accommodation to an employee's or prospective employee's religious observance filed under subdivision three of section 8-107 of this chapter, the definition of "undue hardship" set forth in paragraph b of such subdivision shall apply.

§4. Section 8-107 of chapter one of title eight of the administrative code of the city of New York is amended by adding a new subdivision 22 to read as follows:

(22) Employment; Pregnancy, childbirth, or a related medical condition. (a) It shall be an unlawful discriminatory practice for an employer to refuse to provide a reasonable accommodation, as defined in subdivision eighteen of section 8-102 of this chapter, to the needs of an employee for her pregnancy, childbirth, or related medical condition that will allow the employee to perform the essential requisites of the job, provided that such employee's pregnancy, childbirth, or related medical condition is known or should have been known by the employer. In any case pursuant to this subdivision where the need for reasonable accommodation is placed in issue, it shall be an affirmative defense that the person aggrieved by the alleged discriminatory practice could not, with reasonable accommodation, satisfy the essential requisites of the job.

(b) Notice of rights. (i) An employer shall provide written notice in a form and manner to be determined by the commission of the right to be free from discrimination in relation to pregnancy, childbirth, and related medical conditions pursuant to this subdivision to: (1) new employees at the commencement of employment; and (2) existing employees within one hundred

twenty days after the effective date of the local law that added this subdivision. Such notice may also be conspicuously posted at an employer's place of business in an area accessible to employees. (ii) The commission shall develop courses of instruction and conduct ongoing public education efforts as necessary to inform employers, employees, employment agencies, and job applicants about their rights and responsibilities under this subdivision.

(c) This subdivision shall not be construed to affect any other provision of law relating to sex discrimination or pregnancy, or in any way to diminish the coverage of pregnancy, childbirth, or a medical condition related to pregnancy or childbirth under any other provision of this section.

§5. This local law shall take effect 120 days after it shall have become a law, except that the commissioner shall, prior to such effective date, take such actions as are necessary to implement the provisions of this law.

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