Testimony of JoAnn Kamuf Ward
Deputy Commissioner of Policy and External Affairs
New York City Commission on Human Rights
Before the Committee on Civil and Human Rights
June 26, 2023

Introduction

Good morning Chair Williams, Public Advocate Williams, and committee members. I am JoAnn Kamuf Ward, Deputy Commissioner of Policy and External Affairs at the New York City Commission on Human Rights. Joining me today for questions is Hillary Scrivani, Senior Policy Counsel. Thank you for convening today's hearing on employment discrimination. I will share a brief overview of the New York City Human Rights Law, the Commission's work, and speak about the five amendments to law that are on today's agenda — Intros. 84, 811, 812, 422, and 864.

The Human Rights Law

Our agency enforces the New York City Human Rights Law – one of the broadest and most protective civil rights laws in the country. The Law prohibits discrimination in the areas of employment, housing, and places of public accommodation. Today the Law includes twenty-seven protected categories, including age, gender, sexual orientation, gender identity, religion, disability, race, and national origin. That number will grow this fall, with the addition of height and weight as protected categories. Since the start of Fiscal Year 2022, five amendments to the Human Rights Law expanding employment protections have either taken effect or been signed into law:

- Local Law 4 of 2021, which broadens the scope of the Fair Chance Act, which prohibits employment discrimination against individuals based on criminal legal system involvement, by extending the protections to current employees and limiting the criminal history information employers can consider in making employment decisions;
- Local Law 88 of 2021, which extends Human Rights Law protections to domestic workers even if they are the sole employee in a workplace;
- Local Law 59 of 2022, which requires employers advertising jobs in New York City to include a good faith pay range in job advertisements;
- Local Law 31 of 2023, which amends the definition of "domestic violence" to include economic abuse; and
- Local Law 61 of 2023, which adds height and weight as a protected categories.

The Commission on Human Rights

To fulfill the Commission's dual mandate of enforcement and fostering intergroup relations, the Commission's two largest units are the Community Relations and Law Enforcement bureaus.

The Community Relations Bureau sits at the center of our prevention efforts, and is responsible for outreach, education, and training. This work is done through a wide array of partnerships with community groups, sibling agencies, and individual stakeholders. In FY 22, the Commission reached a record number of New Yorkers by engaging with 107,136 individuals through 1,794 conferences, workshops, and trainings. The Community Relations Bureau's outreach and

education efforts are complemented by our communications campaigns and public facing resources, which distill the provisions of the Human Rights Law.

The Law Enforcement Bureau conducts testing, launches investigations, initiates complaints, enters settlements, and takes cases to trial to address individual and structural discrimination. Individuals who believe they have experienced discrimination or harassment and want to seek redress have two paths. Anyone can report discrimination directly to, and seek resolution at the Commission, or they can file a complaint in court.[1] When a report is made to the Commission, those claims are assessed by staff in the Law Enforcement Bureau, and if the claims are within the Commission's jurisdiction, there may be a pre-complaint resolution or a complaint can be filed and investigated by the Law Enforcement Bureau. When a case is filed directly in court, the Commission is not involved, and the case moves forward in the judicial system.

Cases that are investigated by the Law Enforcement Bureau can be resolved in several ways. A conciliation agreement is a settlement agreement made between the Commission and a covered entity to resolve claims under the Human Rights Law. Settlements can include damages, civil penalties, and affirmative relief, such as policy changes. Matters that are not settled or mediated may be referred to trial at the Office of Administrative Trials and Hearings. After trial, an administrative law judge issues a Report and Recommendation, and the Commission's Office of the Chair reviews that document and issues a final Decision and Order. For cases that are filed in courts, resolution falls outside the purview of the Commission, but judicial orders or settlements are potential outcomes.

In FY 22, the largest number of inquiries received were in employment. Under the City Human Rights Law, employees in New York City have the right to a workplace free from discrimination and harassment, including gender-based harassment. Notable for today, the Human Rights Law also requires employers to provide reasonable accommodations based on four categories: (1) disability, (2) pregnancy, childbirth, and related medical conditions (including lactation); (3) religion; and (4) status as a victim of domestic violence, sexual assault, or stalking. Each of these categories are defined in the Human Rights Law.

Proposed Legislation

The Commission has long been committed to equity in the workplace. I will turn now to the proposed bills.

Intro 422 requires covered employers to maintain records of reasonable accommodation requests that are made in writing by employees. Currently, the Human Rights Law requires that if an employer learns, either directly or indirectly, that an individual requires a reasonable accommodation, the entity has an affirmative obligation to engage in a "cooperative dialogue" and provide a determination in writing. This bill would apply to all requests for workplace reasonable accommodations covered by the Human Rights Law. The Administration supports the intent of

[1] NYC Admin. Code §§ 8-109 and 8-502.

the bill to preserve documentation regarding requests and resolution, consistent with the Americans with Disabilities Act and other relevant laws.

Intro. 812 would extend the time period that employees have to file complaints in court alleging discrimination to six years. Currently, the statute of limitations for a private right of action is three years. The Administration looks forward to discussions with the Council about how to balance the interests of redressing discrimination and the interests represented in the current limitation period.

Intro. 811 would prohibit and void "no rehire" provisions in mediation and conciliation agreements between employers and the Commission, and in settlement agreements between private parties in state or federal court. The Administration supports the goal of protecting New Yorkers from unfair or retaliatory agreements that limit their future opportunities, and looks forward to discussions with Council about how to balance this goal with legitimate interests that may lead to "no rehire" provisions to resolve workplace disputes.

Intro. 864 would render unenforceable and void any and all agreements that shorten the statute of limitations for filing a case with the Commission or filing a complaint in court. The Administration supports the intent of this bill to prevent covered entities from using coercive contract terms that limit the timeframe in which potential aggrieved parties can seek redress for violations of the Human Rights Law consistent with contract law principles.

Lastly, Intro. 84 would require employers to hold an "onboarding meeting" for employees returning from parental leave to discuss the conditions and expectations of employment following the employee's return to work. Employers would be required to keep records of each meeting for 5 years. Intro 84 charges the Commission with issuing guidelines for such meetings, including the timeline, topic, relevant rights and responsibilities, goals, and duration. The Administration supports the aim of ensuring that employees returning to work from leave know what rights and protections they have, and the Law Department is reviewing the structure contemplated in this bill. Consistent with the Human Rights Law, CCHR has previously crafted guidance about legal protections for pregnant workers, and has developed a model lactation policy that support these aims for individuals seeking accommodations. CCHR also has a fact sheet on anti-discrimination protections for individuals with caregiver responsibilities which explains that individuals with caregiving responsibilities cannot be treated differently than other employees.

Individuals may take leave for a variety of reasons, and workplaces may have different obligations relating to the basis of the leave, as well as depending on their size and internal leave policies, among other factors. The Commission does not administer any parental or other leave laws or enforce employer application of parental leave. Generally, provisions of parental leave in NYC workplaces stem from federal and state laws, as well as voluntary employer policies. We look forward to learning more about the intended impact of these bills, and to working with Council, the Public Advocate, and sibling agencies to achieve the goal of ensuring all employees have awareness of workplace rights.

Conclusion

In closing, the Commission is committed to preventing and combating employment discrimination in New York City, and ensuring that individuals who experience discrimination and harassment have venues for redress. We appreciate the Council's attention and commitment to addressing this issue, and we welcome your questions.

JUMAANE D. WILLIAMS

TESTIMONY OF PUBLIC ADVOCATE JUMAANE D. WILLIAMS TO THE NEW YORK CITY COUNCIL COMMITTEE ON CIVIL AND HUMAN RIGHTS
JUNE 22, 2023

Good morning,

My name is Jumaane D. Williams, and I am the Public Advocate for the City of New York. I would like to thank Chair Williams and the members of the Committee on Civil and Human Rights for holding this very important hearing. Intro 84 would require employers to hold an onboarding meeting to discuss an employee's reintegration back into the workplace after parental leave.

Having spoken to many of my staff, who have welcomed children during their tenure in my office, and as a parent myself, I know the challenges of returning to the workplace. It is an adjustment, not only for employees and their families but for employers as well. Things shift quickly in the workplace, policies can change and lapse, public health emergencies necessitate rapid response as we saw with the pandemic and the recent air quality issues. With this bill, we want to ensure that employees and employers can come together and facilitate an easy integration back into the workforce.

It is customary for employees to write exit memos in anticipation of parental leave, for work to be reassigned but the same is not always true for their reintegration into the workplace. The policy this bill sets forth would ensure that employers are prepared to reassign previous or new workload to the employee upon their return. It also gives employees the space to discuss expectations as well as restraints and limitations throughout the transition period. Creating an inclusive and supportive workplace requires open lines of communication and this bill formalizes one such instance when that kind of communication is most needed.

Thank you.

NYC | HOSPITALITY ALLIANCE

June 26, 2023

NYC Hospitality Alliance comments to the NYC Council Committee on Civil and Human Rights on Oversight: Expanding NYC Human Rights Law Employment Protections Against Workforce Discrimination

The NYC Hospitality Alliance, a not-for-profit organization representing restaurants, bars, and nightclubs throughout the five boroughs submits these comments on Int. 84 and Int. 422.

- Int. 84 – In relation to requiring employers to hold an onboarding meeting to discuss an employee's reintegration back into the workplace after parental leave.

We understand the intent behind the proposal but express serious concerns over the seemingly endless administrative paperwork, significant administrative costs, staff training, and related government mandates placed on small businesses. This bill and similar related "human resources" legislation are overwhelming small businesses. It is incredibly challenging to keep up with these requirements, many of which are redundant – regardless of the City Council's good intent. If enacted, violations of this law will occur because small businesses generally do not have the ability to hire professional Human Resources staff to manage the paperwork and training requirements. Inevitably, small businesses do not have the bandwidth, make unintentional technical errors, and/or government will fail to conduct ongoing education to employers about this mandate and its related provisions. If the City Council still proceeds with this legislation, we suggest it is amended so the employer must inform employees that if they want a reintegration meeting, they should request one in writing within two weeks from the day they return to the workplace.

- **Int. 422 – In relation to requiring covered entities to maintain a record of requests from persons requesting a reasonable accommodation**

Employers already have a legal obligation to provide reasonable accommodations to employees and if they do not there is significant legal and financial liability under the New York City Human Rights Law (NYCHRL), New York State Human Rights law and the federal Americans with Disabilities Act. In fact, in 2017 City Council amended the NYCHRL to require that employers engage in a "cooperative dialogue" with an employee requesting a reasonable accommodation and that the employer must provide the employee with a written final determination of the accommodation that was granted or denied. Enacting this latest proposal will just create even more busy work for small businesses that do not have the capacity to keep up with the seemingly endless government mandates and administrative paperwork requirements.

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In the restaurant and nightlife industry employees and employers often routinely engage in this cooperative dialogue and document the process and provide employees with the paperwork for their own records. In fact, it behooves employers to save these records along with other personnel related documents but requiring further documentation about minutiae and retaining the documents for three years, the city would just create another law that small businesses will face liability for.

Thank you for consideration of our comments. If you have questions, you may contact our executive director Andrew Rigie at arigie@thenycalliance.org.

Respectfully submitted,

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June 26, 2023

The NYC Hospitality Alliance, a not-for-profit organization representing restaurants, bars, and nightclubs throughout the five boroughs submits the following comments on Int. 811 and Int. 812.

- **Int. 811 – In relation to voiding no-rehire provisions in settlement agreements for persons aggrieved by unlawful discriminatory practice.**

We understand the intent behind the proposal but believe that it is unnecessary and will only expose small businesses to additional risk that large businesses can better easily avoid. Settlement agreements are a two-way street. Regardless of the merit of the employee's claim (or lack thereof), in a settlement, the employee obtains a cash award without having to wait years to receive money, and the employee does not have to put their current job at risk for taking multiple days off to attend depositions and court appearances. Settlements are enticing to employers because they get a release of claims and finality, avoiding years of legal fees and costs and tying up their employees with litigation burdens such as document searches and deposition attendance. If employers cannot include a no-rehire provision in the settlement agreement, it provides a disincentive for employers to settle the claims as they cannot ensure finality – there is always a risk that the employee will seek to come back. For a small business it is more difficult to separate the employee who filed suit from the individuals about whom the employee complained all of which could lead to more protracted litigation. This is not, or less of an issue for large employers. The incentive not to settle is further exacerbated if the employer has insurance as the employer is further incentivized to let things play out and have the insurance company cover the additional costs and potential liability, rather than risk settling and then having a second suit with a second deductible that needs to be exhausted. This further harms employees who will have to wait longer to receive any monetary award. Lastly, this appears to be a solution looking for a problem. The only time a no-rehire provision comes into play is when the individual has left the organization, or the individual agrees to leave as part of a settlement. There are not very many cases when an individual files a discrimination complaint against a former employer and then seeks to rejoin that former employer. Further, the employee can seek employment with any other business and a no-rehire provision does not impact the employee's ability to earn a livelihood as there are thousands of businesses in New York City to whom the employee can apply for employment without violating the no-rehire provision.

- **Int. 812 – In relation to extending the statute of limitations for commencing a private cause of action under the city human rights law**

We oppose expanding the City Human Rights Law's statute of limitations. There is no reason to believe that aggrieved individuals have not been able to timely assert their rights under the current limitations period of three years. Expanding the limitations period to six years raises issues of equity and fairness. Indeed, many discrimination complaints concerns concrete events that occurred during the employee's lifecycle. As the events fade into the past it becomes more difficult to defend such claims for three distinct reasons. First, as time elapses, memories fade, making it more difficult to recall exactly what occurred, when, and who was present. Second, many of these discrimination cases require third-party witnesses, usually the individual's co-workers, to corroborate or refute the allegations asserted. Most individuals do not stay in one job for six years. In fact, in the hospitality industry, employee turnover regularly exceeds 100% per year. If the limitations period is extended to six years, it will make it more difficult for employers to locate former employee-witnesses that left the organization years

earlier. Thus, the employer may not be able to locate the witnesses that could refute the claims asserted, which is unfair to small businesses. Third, in many cases, the issue in the litigation was captured on video, and employers simply do not have the literal bandwidth to keep video for three years, much less six years. Therefore, a video that could refute or confirm whether a plaintiff was inappropriately touched would have been deleted long ago with an expanded litigation period. Again, this is unfair to employers. This unfairness is exacerbated by the fact that employers are strictly liable for discriminatory acts in the workplace. For all of these reasons, we oppose Int. 812.

Thank you for consideration of our comments. If you have questions please contact arigie@thenycalliance.org.

Respectfully submitted,

NYC Hospitality Alliance

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June 24, 2023

Committee on Civil and Human Rights
New York City Council
250 Broadway
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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.

* * *

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).

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New York City Council Committee on Civil and Human Rights
June 26, 2023

Testimony of Gabriela Rendón and Nina Shields, on behalf of the Gender Equality Law Center, Inc.

Re: Hearing on Expanding NYCHRL Employment Protections Against Workforce Discrimination. Int. 84, 422, 811, 812, and 864

INTRODUCTION AND BACKGROUND

My name is Gabriela Rendón. I am a Staff Attorney and Community Outreach Coordinator at the Gender Equality Law Center. Nina Shields is a New York University law student and Legal Intern at the Gender Equality Law Center.

The Gender Equality Law Center ("GELC") is a nonprofit public interest law and advocacy organization. Our mission is to advance laws and policies to combat gender-based discrimination in all areas of public and private life through a combination of litigation, legislative reform work, public policy advocacy, legal mentoring and training, and public education.

I, Gabriela, have been working at GELC for almost five years. During this period of time, I have counseled and advised hundreds of workers and students and have represented many employees in discrimination matters in federal and state court and before various administrative agencies. The emphasis in this work has been on gender-based discrimination in the workplace. I have also been in charge of creating partnerships with other nonprofits and community advocates to advance and protect the rights of individuals who face social, institutional, and legal

discrimination, on the basis of gender, sexual orientation, gender expression and gender identity, as well as educating and empowering individuals and communities through GELC's know your rights trainings and educational work.

Nina just finished her second year of law school at NYU, where she has focused on women's and LGBTQ+ rights, family law, and reproductive justice. She is a legal intern at GELC and assists with representing employees in discrimination matters, particularly gender-based discrimination.

GELC applauds Public Advocate Jumaane Williams and Council Members Carlina Rivera, James Gennaro, and Lincoln Restler for sponsoring the five bills being addressed at this hearing Int. 84, 422, 811, 812, and 864, which expand protections for workers so as to advance their rights in the workplace. We will briefly address the reasons for GELC's support on each of the following bills.

A. <u>GELC's Endorsement For Passage of Int. 84</u>

The workplace onboarding meeting mandated by this bill would supply an efficient reintegration process for employees returning from parental leave. By discussing the goals, conditions, and expectations of employment, employers and employees can address any changes or updates that occurred during the employee's leave. This would help employees understand their roles, responsibilities, and any modifications to work processes, enabling them to transition back to work in a more seamless and effective way. This onboarding meeting can also be a check in process for the returning employee to learn about rights related to being a working parent, including providing information about a parent's right to pump breast milk at work and a renewal and check in about potential need for family leave in the future. For instance, it would be preferable for the employer to explain when any unused parental leave under the New York State

Paid Leave Law or the Family Medical Leave Act can be taken and when such leaves of absence renew. Finally, at this meeting assurances should be given to the employee that their leave will not be used against them in any adverse fashion going forward and since returning to work.

For the aforementioned reasons, we endorse this legislation; however, we have some concerns about the execution of the onboarding meetings and whether they would be actually effective or more of a formality which employers are required to follow with no real impact. We have heard the many stories of our clients who have struggled to reintegrate into the workplace after parental leave. Many of them did not have any information about lactation accommodations, New York City's 's Paid Safe and Sick Leave – to use accrued safe and sick leave for the care and treatment of themselves or a family member, or about reasonable accommodations for childbirth-related medical needs. Others had no idea that they would be eligible for additional leave time after the passage of additional time, or that their jobs duties could not change or that they could not be evaluated on their job performance based on their absence from the workplace while on parental leave. Finally, many returning parents were unaware that they were still eligible for accrued vacation time even after taking New York State Paid Family Leave. Because of this lack of knowledge, returning employees did not make requests to which they were entitled because they were unaware of them, or because they were afraid of making a request, thinking that they may be fired or seen as a difficult employee. Consequently, their return to work was overwhelming, difficult, and stressful.

For such reasons, we strongly urge the City Council and the Commission on Human Rights to consider the following recommendations, especially while drafting the guidelines regarding the specifics of the proposed onboarding meetings. The onboarding meeting should include:

- Know-your-rights information about time and location for pumping under Local Law 185 and Local Law 186 as well as the federal PUMP Act.
- Know-your-rights information about reasonable accommodations for childbirth-related medical needs such as postpartum depression or mastitis.
- Know-your-rights information about job protection under the New York State Paid Family Leave policy.
- A discussion of possible telework and flexible work hours, and planning for work travel if needed.
- A discussion about the employee's accrued Personal Time Off ("PTO") and overall benefits.
- A discussion of both the employer's and employee's general expectations relating to the return from parental leave.
- A clear statement made by the employer that the employee will not be penalized in evaluations, bonuses, advancement, etc. because they took parental leave.
- Provide a copy to the employee of the subjects/topics discussed in the meeting.
- A discussion about a "follow-up" meeting to address or decide some of the requests or issues raised during the first onboarding meeting.

B. <u>GELC's Endorsement For Passage of Int. 422</u>

This bill requires covered entities to keep a record of written requests for reasonable accommodations for at least three years. Ideally, this would help prevent misunderstandings or disputes regarding the nature of the accommodation requested and provide a level of protection for employees against potential discrimination or failure to provide reasonable accommodations.

If an employer denies an accommodation request, or fails to provide an appropriate accommodation, the employee can use the documented record as evidence to support their claim in potential legal proceedings. We want to note that while the bill provides that the records must be accessible by the Commission upon reasonable notice, it does not specify if the person who requested the accommodation would be able to access the records. We believe that the employee should be able to receive a copy of these records so that all parties have the same information. It is beneficial for employees to have access to their accommodations request so they can understand their employer's decision, or their basis for the denial of their request, or correct any mistakes or inconsistencies.

In our experience, callers who contact GELC through our legal hotline and other referral sources have reached us to help them resolve denial of accommodations disputes between them and their employer. Oftentimes we have found the reason for the denial has been a discriminatory one. In one particular case, a pregnant employee was denied a reasonable accommodation to come to work one hour later because she was having severe morning sickness, while other pregnant employees who had requested the same accommodation were accommodated without any problem. After unsuccessfully trying to solve the denial of the accommodation with her employer by herself, this worker realized that her request was denied only because she was undocumented.

In cases like this, the record-keeping requirement provides a level of protection for employees against discrimination. If an employer denies an accommodation request or fails to provide an appropriate accommodation, the employee can use the documented record as evidence to support their claim in a potential legal case. An employer would rarely state a discriminatory reason for denying an accommodation, but the records could help ensure that employees are treated fairly and consistently, regardless of their status, the supervisor making the decision, or changes

in personnel or company management. Moreover, retaining records of accommodation requests for at least three years would provide consistency and continuity in the handling of future requests. For instance, if an employee has previously made a similar request, the employer can refer to the records to understand how similar requests were addressed in the past and use them as sample or guideline to decide the present request.

We support the passage of Int. 422 and strongly suggest amending the bill to provide for accessibility by the requesting party.

C. GELC's Endorsement For Passage of Int. 811

No-rehire provisions in settlement or severance agreements can function as a form of retaliation, effectively punishing workers who have filed complaints or taken legal action against their employer for discrimination. At GELC, the scenario where a company wants to include a no-rehire provision, in a settlement agreement for an employment discrimination dispute, is almost universal. This has discouraged workers from pursuing or continuing a legal action due to the potential impact on their future employment prospects. By voiding these provisions, the bill helps protect workers from retaliatory measures and ensures that they are not penalized for asserting their rights.

No-rehire provisions can be so extensive, especially at large corporations, that workers end up with significantly fewer options for future work opportunities for the rest of their careers. The voiding of these provisions under Int. 811 would generally help avoid this issue and protect employees who have been discriminated against. However, for small employers, where it is less likely the employee would ever want to return to the company, the total voiding of any no-rehire provision may be unnecessary and counterproductive. These provisions can be important in

settlement negotiations, and removing that possibility may block parties from settling. To address this issue with small employers, the bill could allow no-rehire provisions with some limitations in time and scope. For instance, allow a no-rehire provision limited to the worker's current employer, or any entities that at the time of the settlement are related to such employer. This could prevent the unfair situation where an employee is banned from working at other companies that later are acquired by, or merged with, their original employer.

D. GELC's Endorsement For Passage of Int. 812

The current statute of limitations for commencing a private cause of action by persons aggrieved by unlawful discriminatory practices, acts of discriminatory harassment, or violence under the New York City Human Rights law is three years. For some individuals, that period is not long enough. Many workers who are subject to discrimination do not know their rights until it is too late to bring an action under the current law. We have seen this happen many, many times especially to undocumented and non-English speaker workers.

Three years also may not be enough time for some individuals who experience trauma as a result of discrimination. Discrimination and harassment can have long-lasting effects on victims, both personally and professionally. In the vast majority of our clients, the impact of such harm did not become apparent immediately, and it took them several years to identify and recognize the extent of the damage experienced. By extending the statute of limitations, this bill accounts for the potential delayed effects of discrimination, providing individuals with an extended timeframe to initiate legal action and seek appropriate redress.

We believe that extending the statute of limitations provides individuals with a longer window of opportunity to file a private cause of action, ensuring that they have sufficient time to

pursue legal remedies. For these reasons, we support the passage of Int. 812, which extends the statute of limitations from three years to six years.

E. GELC's Endorsement For Passage of Int. 864

The statute of limitations for commencing a discrimination case under the city human rights law, especially if extended to six years, is an important protection for victims of discrimination that allows them more time to pursue legal actions than the federal Title VII (300 days) or the New York State Human Rights law (one year for agency filings, three years to file in court) do. It prevents employers from imposing arbitrary restrictions that limit the ability of workers to seek redress for unlawful practices and harassment.

Workers often face power imbalances in their relationships with employers, which makes it challenging to assert their rights or challenge discriminatory practices. Forbidding agreements that shorten the time period for filing claims helps level the playing field and rebalance power dynamics. It ensures that workers have a fair opportunity to pursue legal action and seek justice without being unduly disadvantaged by contractual terms that limit their ability to challenge unlawful practices.

In several cases, we have reviewed agreements in which the worker signed a document that contained a provision that was not favorable to them, such as a forced arbitration clause to resolve disputes between the worker and employer, with shortened statutes of limitation. For instance, the arbitration clause required the employee to file a complaint in a time period considerably shorter than their right to file with the EEOC (300 days), New York State Human Division of Human Rights (one year), New York City Commission on Human Rights (between one and three years depending on the cause of action) and in federal or state court (three years).

The employee did not read the agreement, did not understand the agreement, or did not know that they were signing such agreement because it was inconspicuously included in a lengthy and complicated employment application. Eventually the employee realized that they signed such an agreement and that their options to seek redress for discrimination, harassment, or any other unlawful practice were limited. For these reasons, agreements that shorten the time period for filing claims for discrimination under the city human rights law are concerning. Workers may agree to them in order to secure a job, or because they are not even aware that they could bring a claim against their employer if they are discriminated against. By forbidding such agreements, the bill safeguards workers against intimidation or pressure by employers who may attempt to limit their options or force premature resolutions.

Therefore, we support the passage of Int. 864, which forbids such agreements, rendering them unenforceable and void.

CONCLUSION

With the above proposed changes to these bills, and with the hope that guidelines about implementation of these bills will be promulgated by the NYC Commission on Human Rights, GELC would be pleased to support these bills.

We thank the Council for its time and respectfully request the passage of Intro. Nos. 84, 422, 811, 812, and 864.

Long COVID Justice NYC

Testimony

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

Long COVID Justice NYC ("LCJ-NYC"), a group of New Yorkers living with Long COVID and associated disease (LCAD) seeking to improve and expand policies and programs through advocacy, media efforts, education and cultural events, would like to thank the Committee on Civil and Human Rights for examining how the City can expand workforce protections against workforce discrimination. We note that this topic is incredibly timely, as the ongoing COVID pandemic increases the number of New Yorkers who urgently need the disability protections of the Human Rights Law ("HRL") as a result of either becoming newly disabled by Long COVID or requiring additional accommodations as a result of a COVID infection to remain in or return to the workforce.

Background

Long COVID (or post-acute sequelae of SARS-CoV-2) is an illness that can develop in children,adults, and seniors after a probable or confirmed case of COVID-19, lasting months or years. It can occur following infection of SARS-CoV-2 regardless of severity of acute presentation, including in people who were asymptomatic, and in those who have been vaccinated.

According to the most recent Household Pulse Survey[1] conducted by the National Center for Health Statistics in conjunction with the Census Bureau, almost 15% of all adults in New York State have experienced Long COVID, including over 25% of all adults who have ever had COVID. Over 4% of all adults in New York (almost 700,000 people) are currently experiencing activity limitation as a result of Long COVID, and 1.3% of all adults in New York have significant activity limitation (almost 210,000 people). The Brookings Institute has calculated that up to 4 million Americans are unable to work due to Long COVID, and has hypothesized that Long COVID could be the cause of 15% of national job vacancies.[2] In New York City, the NYC Department of Mental Health and Hygiene estimated in June 2022 that approximately 30% of all New Yorkers who have ever had COVID also have Long COVID.[3] The New York State Insurance Fund reported in spring 2023 that "Long COVID has harmed the work force", noting that approximately 71% of workers compensation claimants with Long COVID were unable to work for more than 6 months or required ongoing medical treatment.[4]

Requests

With all of this in mind, LCJ-NYC urges City Council to take action to protect people with Long COVID and associated diseases (also known as "longhaulers") from workforce discrimination and support their participation in the workforce in the following manner:

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[1] https://www.cdc.gov/nchs/covid19/pulse/long-covid.htm

[2] https://www.brookings.edu/research/new-data-shows-long-covid-is-keeping-as-many-as-4-million-people-out-of-work/

[3] https://www1.nyc.gov/assets/doh/downloads/pdf/covid/providers/letter-long-covid.pdf

[4] https://www.nytimes.com/2023/01/24/health/long-covid-work.html

1. Utilize its legislative authority to amend the HRL to permit indefinite part-time work as a reasonable accommodation. As the Committee is no doubt aware, generally speaking, courts have not required that employers provide part-time work as a reasonable accommodation unless it is a temporary arrangement to facilitate the return to full-time work. As a result, longhaulers and other disabled people are cast out of the workforce or pushed into less-appropriate part-time jobs, often without much-needed benefits.[5] As discussed in greater detail in Professor Jeannette Cox's article "Work Hours and Disability Justice",[6] encouraging fair part-time jobs is a workforce justice issue that would benefit all.
2. Utilize its legislative authority to amend the HRL to limit employers' ability to falsely claim that remote work as a reasonable accommodation places an undue burden on employers, especially in light of the expansion of remote work over the past three and a half years.
3. Undertake a review of whether the associational protections under the HRL should be interpreted and/or expanded to, for example, require employers provide reasonable accommodations like remote work to associates of persons with actual or perceived disabilities.
4. Encourage the NYC Commission on Human Rights ("CCHR") to update its COVID-19-related page[7] to address the intersection of Long COVID and workforce discrimination and disseminate a press release and fact sheet on the same. This update should include, for example, that Long COVID can be recognized as a disability under the Americans with Disabilities Act.[8]
5. Encourage the City, as an employer, to approve reasonable accommodation requests for City employees with Long COVID, including requests for remote work, in order to allow these longhaulers to provide for their families and continue to serve a City in the midst of a retention crisis. For example, work by disabled people rose 13% during the past three and a half years, largely due to availability of remote work.

Lastly, LCJ-NYC notes that we support all four bills before the Committee, in particular Int. 422, and would suggest that Int. 84 be used as a roadmap for instituting a similar reintegration program for persons returning from disability leave.

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[5] https://www.epi.org/publication/part-time-pay-penalty/

[6] https://www.law.georgetown.edu/georgetown-law-journal/wp-content/uploads/sites/26/2022/11/Cox-Work-Hours-and-Disability-Justice.pdf

[7] https://www.nyc.gov/site/cchr/media/covid19.page

[8] See, e.g., https://www.hhs.gov/civil-rights/for-providers/civil-rights-covid19/guidance-long-covid-disability/index.html.

June 26, 2023

Testimony on Expanding NYC Human Rights Law Employment Protections Against Workforce Discrimination

Submitted by Dorea "Kyra" Batté, Legal Momentum, The Women's Legal Defense and Education Fund

Good afternoon and thank you for convening this critical hearing that examines expanding NYC Human Rights Law employment protections against workforce discrimination. My name is Dorea "Kyra" Batté and I am a Staff Attorney at Legal Momentum, The Women's Legal Defense and Education Fund. For over five decades, Legal Momentum has been at the forefront of using the law to advance gender equality for women in the workplace.

I am testifying today in support of Int 0811-2022, which would eliminate a longstanding retaliatory practice in settlement agreements used by employers that effectively penalize employees who challenge workplace discrimination. We also support Int 0422-2022, Int 0812-2022, and Int 0864-2022, which collectively advance workplace protections, particularly for women and people of color.

Int 0811-2022: Voiding no-rehire provisions in settlement agreements for persons aggrieved by unlawful discriminatory practices.

We support Int. 0811, which would eliminate a longstanding retaliatory practice in settlement agreements. Representing women in gender discrimination actions, we have seen first-hand the leverage that employers hold in settlement agreements, the hardships that women encounter in challenging discrimination, and the re-victimization they face when confronted with punitive settlement terms.

For example, Legal Momentum represented a client who challenged workplace sexual harassment and was forced to leave her non-profit job in a small, unique field because her employer refused to dismiss the volunteer who was responsible for the harassment. Seeking to move on with her life and faced with the high burden of litigation, she settled the case and was strong-armed into accepting a "no-rehire" provision on claims from the employer that they never settle a case without one. Faced with an impossible choice, she accepted, but the decision exacerbated the significant emotional harm she experienced from the sexual harassment and the long process she endured trying to address it. And while we were successful in narrowing the scope of the clause, it nonetheless served to limit her career options going forward, particularly as an employee with unique expertise in a small field with limited opportunities.

As seen from the perspective of our clients, these clauses allow employers to penalize victims of workplace discrimination, compounding the economic hardship they have already endured by limiting their future employment opportunities while further insulating the employer for engaging in unlawful discrimination. Allowing these clauses creates perverse incentives and problematic outcomes. As we saw in our case, it was our client and not the sexual harasser who was pushed out of her employment and it was our client and not the sexual harasser who was then asked not to return. These kinds of outcomes cannot be allowed to persist.

Legal Momentum strongly encourages the Council to enact this bill. By invalidating the use of "no-rehire" clauses in settlement agreements, this bill would eliminate a longstanding practice used by employers that effectively penalize employees who challenge discrimination in a way that compounds the injury and harm faced by complainants over time. Further, we applaud the expansiveness of this bill by not only covering the employer, but also any parent company, subsidiary, division, or affiliate and requiring that existing no-rehire provisions would expire after five years.

However, we do recommend omitting the language that employers would be permitted to terminate or refuse to rehire for non-discriminatory or non-retaliatory reasons. The language potentially serves as a scapegoat for employers to mask a refusal to rehire or an employee's termination. This brings an employee back to the position of potential litigation of filing a claim that the employer's actions were indeed discriminatory or retaliatory and places the onus on an employee to take legal action that is often impossible to unearth and costly to litigate.

Int 0422-2022: Requiring covered entities to maintain a record of requests from persons requesting a reasonable accommodation.

Legal Momentum supports Int. 0422 that requires covered entities to maintain a written record of requests for reasonable accommodations, to maintain those records for a minimum period of three years following the initial request, and to make those records available to the New York City Commission on Human Rights upon reasonable notice.

From our experience representing women seeking reasonable accommodations in the workplace based on factors such as pregnancy or domestic violence, we have seen employers skirt legal obligations. This bill would assist with the adjudication of discrimination claims brought in front of the Commission, providing an avenue to hold employers accountable and helping alleviate the burden on complainants to prove when, how, and what reasonable accommodations were requested.

Under the predominant workplace culture, employers' knee-jerk reaction is to deny a request for a reasonable accommodation without sincerely considering the feasibility of the request or practical alternatives. Many employees generally have little to no internal information about available options for a reasonable accommodation and have little leverage to push back when a reasonable accommodation is flatly denied or when they are put on perpetual hold.

Through our Helpline, we regularly speak with and assist women across varying industries who have strong performance records at work and are pushed out of their jobs once they reveal they are pregnant or once they request necessary pregnancy accommodations. For example, one of our clients was told by her medical provider that she could no longer lift more than twenty pounds because of her high-risk pregnancy. She was only in her second trimester. When she relayed this restriction to her employer, she was told that they could not accommodate her lifting restriction but she could go on unpaid leave and return after her pregnancy. When she followed up with a request for a temporary transfer to another

position that did not require heavy lifting, she was eventually told that she had been put on "a list" and was forced to go on unpaid leave while she waited. Months went by before another position was identified, one which would require her to give up her union benefits with no assurance that she could return to her original unionized position. In short, while preparing for a family, she had to stop working, lost pay, and was forced to choose between maintaining a salary and maintaining a better future job with union protections.

Beyond pregnancy, our clients face a host of challenges when seeking reasonable accommodations they are entitled to. Another Legal Momentum client was discriminated by her employer on the basis of her status as a domestic violence victim. For over six years, our client worked the night shift as a full-time employee at a New York City hospital. Ultimately, when her spouse made imminent threats to her life with a deadly weapon, our client was forced to flee with her two children to a domestic violence shelter, where she no longer had childcare assistance and was subject to a 9 p.m. curfew. Immediately after moving into the shelter, she requested a daytime shift as a reasonable accommodation so she could comply with her shelter's 9 p.m. curfew and manage childcare for her two young children. After delaying consideration of her request, the hospital denied our client's request for a shift-change and instructed her to submit a request for unpaid leave to address her situation. Ultimately, our client's employer nevertheless pretextually terminated her.

Int 0812-2022: Extending the statute of limitations for commencing a private cause of action under the city human rights law.

We support Int. 0812. We agree that extending the statute of limitations from three years to six years to file a civil action by persons aggrieved by unlawful discriminatory practices or acts of discriminatory harassment or violence under the city human rights law is beneficial as we have come across many individuals who are not emotionally ready and need additional time to file suit, need to prioritize their financial obligations and find new employment, or are merely unaware of their rights. For example, many inquiries from our Helpline run up against or run past the statute of limitations to bring suit because individuals were unaware that their rights were violated until they saw major media coverage on stories similar to the discrimination that they faced. This is particularly true for lower-wage workers, who face numerous barriers to accessing existing legal rights.

Int 0864-2022: Forbidding agreements to shorten the period in which claims and complaints of unlawful discriminatory practices, harassment or violence may be filed and in which civil actions may be commenced.

Legal Momentum also supports Int. 0864, which deems unenforceable and void any provision of any agreement that purports to shorten the period in which individuals may file a claim or bring suit. These provisions provide a problematic contractual loophole that undermines core anti-discrimination protections under our laws and poses a particular risk to the most vulnerable workers, who may have to sign away these core protections in order to secure employment.

I want to close by recognizing New York City's commitment to addressing discrimination in the workplace. These bills would help employees overcome longstanding barriers to workforce discrimination. Thank you for the opportunity to share our thoughts and for your attention on this issue. We hope you will continue to rely on us a resource going forward. Thank you.

WRITTEN TESTIMONY ON

Oversight – Expanding NYC Human Rights Law Employment Protections Against Workforce Discrimination

PRESENTED TO:

THE NEW YORK CITY COUNCIL COMMITTEE ON CIVIL AND HUMAN RIGHTS

PRESENTED BY:

BERNADETTE JENTSCH, SUPERVISING ATTORNEY
WORKPLACE JUSTICE PROJECT
MOBILIZATION FOR JUSTICE, INC.

HEARING DATE:

JUNE 26, 2023
2:00 PM

MFJ submits this written testimony to the New York City Council Committee on Civil and Human Rights on expanding NYC Human Rights law employment protections against workforce discrimination.

MFJ's mission is to achieve justice for all. MFJ prioritizes the needs of people who are low-income, disenfranchised, or have disabilities as they struggle to overcome the effects of social injustice and systemic racism. We provide the highest-quality free, direct civil legal assistance, conduct community education and build partnerships, engage in policy advocacy, and bring impact litigation. We assist more than 14,000 New Yorkers each year, benefiting over 24,000. MFJ's Workplace Justice Project advocates on behalf of low-income and immigrant workers, including individuals with a prior criminal record, who are most vulnerable to exploitation, on employment issues ranging from unpaid wages to discrimination. Systemic racism—which refers to established systems, structures, or expectations that are rooted in white supremacy and intended to exert and maintain power—disadvantages and results in the unequal treatment of people of color. Over the centuries, systemic racism has disparately impacted marginalized New Yorkers, especially in the area of employment.

First and foremost, we urge the City Council to increase the budget of the New York City Commission on Human Rights (CCHR) so it can function and meaningfully enforce the discrimination laws under its jurisdiction and work to dismantle systemic racism. We currently represent a Black client who faced race and gender discrimination in the workplace, whose case we originally filed in 2015 with CCHR. The Law Enforcement Bureau (LEB) took five years to investigate this case before ultimately issuing a Notice of Probable Cause in 2020. The case was never scheduled for a trial before the Office of Administrative Trials and Hearings. The parties came to an agreement on their own by the end of 2021, which was subsequently delayed because the LEB insisted on drafting a conciliation agreement and requiring that the employer pay civil penalties. Despite the parties agreeing on the terms of the agreement and signing the agreement by the end of May 2023, it took another month for CCHR to fully execute the agreement to trigger the payment of backpay to our client—who suffered the discrimination 9 years ago now—and civil penalties to the City.

In another case, the CCHR referred an unrepresented older worker with a disability to our office for representation in mediation. The worker had previously filed a complaint with CCHR just a few months earlier against the same employer and then filed a retaliation complaint for denying his reasonable accommodation request and for his subsequent job termination due to his disability. The worker's goal was to return to his job with the reasonable accommodation he requested. But after a year-and-a-half delay from CCHR, the case was never scheduled for mediation, and will never be, because the worker passed away while the case languished.

These are appalling examples of an overburdened agency that is simply unacceptable. In Dr. Martin Luther King's Letter from Birmingham Jail, he writes "justice too long delayed is justice denied." Based on our experience with CCHR, we cannot, in good conscience, recommend that workers file complaints there to enforce their rights under the law at this time.

Second, we support the legislation listed on the agenda for this hearing and discuss each in turn below.

Paid family leave is administered by the New York State Workers Compensation Board, which might be in a better position, rather than CCHR to provide guidelines and compliance for Int. No. 0084-2022, which requires employers to hold an onboarding meeting to discuss an employee's reintegration back into the workplace after parental leave.

Int. No. 0422-2022, requiring covered entities to maintain a record of requests from persons requesting reasonable accommodation, would be helpful when both parties engage in the interactive and cooperative dialogue process.

Int. No. 0811-2022, voiding no-rehire provisions in settlement agreements for persons aggrieved by unlawful discriminatory practices, would be helpful in ensuring that job opportunities for workers are not limited in any way.

Int. No. 0812-2022, extending the statute of limitations for commencing a private cause of action under the city human rights law, gives aggrieved workers more time to find representation to bring their discrimination claims, especially if they have limited English proficiency.

Int. No. 0864-2022, forbidding agreement to shorten the period in which claims and complaints of unlawful discriminatory practices, harassment or violence may be filed and in which civil actions may be commenced, would ensure that the current protections of the Human Rights law are not undermined.

MFJ urges the Council, as a matter of racial justice, to adequately fund the CCHR so it can fulfill its mission and to pass Int. No. 0422-2022, Int. No. 0811-2022, Int. No. 0812-2022, and Int. No. 0864-2022.

For any questions about this testimony, please feel free to contact Bernadette Jentsch at bjentsch@mfjlegal.org or 212-417-3772.

NELA/NY

ADVOCATES FOR EMPLOYEE RIGHTS
NATIONAL EMPLOYMENT LAWYERS ASSOCIATION

Testimony of Anne L. Clark, on behalf of NELA/NY

In Support of Int. 864

Good afternoon. Thank you for the opportunity to testify at this afternoon's hearing.

I am Anne Clark, the Managing Partner of Vladeck, Raskin & Clark PC, where I have been representing employees for thirty years. I am also a member of the Legislative Committee of the National Employment Lawyers Association, New York affiliate.

I am here to support Int. 864, an important bill to prevent employers from circumventing New York City's robust laws against discrimination. As part of a carefully constructed law to advance those strong public policies, the New York City Human Rights Law provides aggrieved people three years to file in court (N.Y.C. Admin. Code § 8-502(d)), three years to file a claim of gender-based harassment with the City Commission on Human Rights (N.Y.C. Admin Code. § 8-109(e)), and one year to file all other claims with the City Commission (N.Y.C. Admin. Code § 8-109(e)). The Council is currently considering extending the period to file in court to six years (Int. 812).

However, some employers require employees to sign contracts of adhesion that significantly shorten those limitation periods. Several large employers mandate a limitations period of only six months. It would be bad enough if these contracts of adhesion merely made it more difficult for employees to vindicate their rights. But many of these employers include the provisions in employment *applications*. Even sophisticated employees are unlikely to recall having signed such a provision when they encounter discrimination on the job at a later point. Thus they, and their lawyers, believe they have a much longer time to file claims and are likely to miss the shortened deadline entirely. In essence, the employers are trying to write themselves out of the civil rights laws.

The public policies recognized by the City Council should bar enforcement of these contractual limitations for claims under the New York City Human Rights Law, N.Y.C. Admin. Code § 8-101 et seq. Unfortunately, courts have not stepped in to stop employers from re-writing the civil rights laws, which is why this bill is so important. The first case in which a New York

intermediate appellate court allowed a shortened statute of limitations under the City Human Rights Law is Hunt v. Raymour & Flanigan, 963 N.Y.S.2d 722, 724 (2d Dept. 2013). The court in Hunt, however, relied exclusively on breach of contract cases,[1] and did not address the public policies underlying the civil rights statues. Other courts then relied on Hunt to permit these clauses, without considering important public policies. See, e.g., Ortegas v. G4S Secure Solutions (USA), Inc., 65 N.Y.S.3d 693 (1st Dept. 2017).

The City Human Rights Law embodies polices that go well beyond the interests of private parties to a contract. The New York City Council found and declared "that prejudice, intolerance, bigotry, and discrimination, bias-related violence or harassment and disorder occasioned thereby threaten the rights and proper privileges of its inhabitants and menace the institution and foundation of a free democratic state." N.Y.C. Admin. Code § 8-101.

In contrast to New York courts, the New Jersey Supreme Court has ruled such provisions unenforceable, for reasons that support passage of Int. 864. See Rodriguez v. Raymours Furniture Co., Inc., 225 N.J. 343 (2016). The public policy underlying the New Jersey Law Against Discrimination ("LAD") is the same as the policies at the heart of the City Human Rights Law. Both statutes have language that battling discrimination is a concern for all citizens and a free democratic state. Id. Both statutes also "cast a wide net in crafting what is included among" violations. Id. at 356; N.Y.C. Admin. Code § 8-107.

Both statutes also have an election of remedies, with the option of filing in court or with the City's administrative agency, with a shorter limitations period for the administrative filing for claims other than gender-based harassment. Rodriguez, 225 N.J. at 358; N.Y.C. Admin. Code §§ 8-109(e), 8-502. Both statutes also permit an employee to initially file with an administrative agency but then dismiss the agency filing for administrative convenience and file in court. Rodriguez, 225 N.J. at 358; N.Y.C. Admin. Code § 8-112. The New Jersey Supreme Court found important public policies vindicated by allowing employees the opportunity to first seek informal resolution with the agency, with the option of litigation, and that encouraging agency filings permits the agency to perform its broad law enforcement mandate, representing the public that is injured by discrimination. Rodriguez, 225 N.J. at 359-60.

The New Jersey Supreme Court found that state policy overrode the freedom to contract for reasons that apply with equal force to the City Human Rights Law. The Court found that the shortened statute of limitations undermined the integrated nature of the statutory avenues and election of remedies. Id. at 361-62.

There are important practical reasons why the City Council previously decided that three years is the right period of time for employees to have to vindicate their rights in court and is now considering a six-year period. Employees may not realize at first that they have been discriminated against. If they do, they may not know how to find an attorney or otherwise pursue an action. Employees may be dealing first with trying to find a new job or heal from the trauma they have experienced. They may be dealing with a disability or pregnancy or domestic violence situation that is part of the discriminatory conduct. For similar reasons, the City Council determined that

[1] Jamaica Hosp. Med. Ctr. v. Carrier Corp., 772 N.Y.S.2d 592 (2d Dept. 2004); John J. Kassner & Co. v. City of New York, 46 N.Y.2d 544, 550-51 (1979).

one or three years was the appropriate amount of time for individuals to file with the City Commission. As those who file with the City Commission are more likely to lack the resources to retain counsel and may be less knowledgeable about their rights, having sufficient time to file is even more crucial.

The existing three year period, and proposed six year period, also serve another important function. As hard as it can be to file in court within six months of being fired, a dismissal is often the culmination of a history of discriminatory acts. Employees may be repeatedly passed over for promotion or be demoted, for example, and decide that they do not want to rock the boat, that keeping their job is too important to risk speaking up, much less filing a lawsuit against their current employer. If employees in such situations are then fired, and decide to take action, a years-long statute of limitations will allow claims for the other discriminatory acts that preceded the employment termination.

Even after an employee finds an attorney, there are benefits to having ample time before having to file in court. It is in both parties' interest if a matter can be resolved informally, without litigation, but those discussions take time. If there is sufficient time, the employer can investigate the claims that are being asserted and may decide to settle with that employee and take steps to discipline employees who violated the law and improve its internal policies and procedures. The full time limit under the City Human Rights Law also ensures that the employee's attorney can conduct her own investigation before filing in court.

Most importantly, as the New Jersey Supreme Court recognized, a shortened statute of limitations "effectively eliminates claims." Id. at 363. Most employees come to an attorney not realizing they signed a waiver of the usual statute of limitations, which, if upheld, could lead to the dismissal of otherwise meritorious claims. Id. Unless the attorney had dealt with that specific employer before, even an experienced attorney would think there is ample time to file in court. In contrast, most breach of contract claims involve a business filing a lawsuit based on the provisions of the contract that contains the shortened limitations period, putting the plaintiff on notice.

Moreover, a dispute involving a commercial contract does not implicate the important public policies of the City Human Rights Law, which is to be "construed liberally for the accomplishment of [its] uniquely broad and remedial purposes," and for which "[e]xceptions to and exemptions from" the Law are to be "construed narrowly in order to maximize deterrence of discriminatory conduct." (N.Y.C. Admin Code. § 8-130).

I speak from experience about the dangers of these provisions. In early 2020, an employee who had been fired came to me with an age discrimination claim, after he had spent a few months pursuing an internal appeal through the employer's procedures. He is sophisticated and educated. He, not surprisingly, had no recollection that the online application he had submitted contained language agreeing to limit the statute of limitations to file in court to only six months. I had not litigated with this employer before, so assumed that we were subject to the usual statutes of limitations and acted accordingly. We filed in court just over a year after our client was fired, after exhausting the administrative requirements for a federal claim. Later, the employer argued that because of the language in the online application, his claims, including his City Human Rights Law claim, should be dismissed. The court found that the employer waited too long to raise the

issue and ruled against it. However, our client came very close to having valid claims dismissed for reasons having nothing to do with the merits.

In conclusion, it is essential that the City Council pass Int. 864, not only to allow employees and their attorneys ample time to prepare for filing in court or with an agency, but to prevent these employers from leaving employees with no avenue at all for pursuing valid claims.

My name is Miriam Clark. I'm a partner in the law firm of Ritz Clark & Ben-Asher, LLP where I represent employees. I am also a former president of NELA/NY and Chair of NELA/ NY's Legislative Committee. The National Employment Lawyers Association (NELA) is a national organization of attorneys dedicated to the vindication of employees' rights. NELA/NY, incorporated as a bar association under the laws of New York State, is NELA's New York State affiliate and consists of about 350 members statewide.

I make this testimony in support of Intro 811, which would ban employers from forcing survivors of employment discrimination to enter into what we call "do not darken my door" clauses. These clauses bar employees from ever applying to work for, or work for, their former employers again – or any remotely related entities. As a result of these clauses, many survivors settle their cases and then find themselves barred from employment in large swaths of the job market. Most of the time, these clauses have no expiration date, so an employee who signs such an agreement early in her career is still bound by it twenty, thirty, forty years later.

As an example, my first encounter with one of these clauses came in connection with an employee who settled a claim with a large New York City bank. The employer wanted her to promise never ever to apply to work at that bank again, or at its successors and affiliates. Since then, we have watched New York City banks has been swallowed up by other banks, in turn by other banks. Had my client signed that agreement, at this point she might have been locked out of a significant portion of her field.

These clauses operate essentially to punish those who dare to speak out against unlawful discrimination and harassment by rendering them as pariahs in their own fields, and as warnings to other employees who might dare to bring claims.

Employers sometimes argue that these clauses are necessary to deter survivors from re-applying and then bringing retaliation claims if their applications are denied. Employers who do not engage in unlawful retaliation base their hiring decisions on legitimate grounds, and do not need to rely on lifetime no-rehire clauses to protect them from the potentially questionable future actions of their own HR departments.

Finally, as a matter of public policy, we often hear that we want to encourage employers and employees to settle their claims, rather than engage in expensive and mutually-damaging litigation. Unfortunately, employers who demand do not rehire clauses in settlement agreements are engaging in the opposite behavior. If we truly believe in encouraging employees to settle these claims, we should ban the no-rehire clauses that deter settlement and pose an extreme, career-long penalty, on those who do.

No rehire clauses are unlawful in the states of Vermont[1], Oregon[2] and California[3], and a bill banning them recently passed the NYS Senate, but died in the NYS Assembly[4]. These clauses are also disfavored by federal courts evaluating cases under the Fair Labor Standards Act,

[1] 46 ACT 183, H.707, § 1(h), 2017-2018 Gen. Assemb., Reg. Sess. (Vt. 2018).
[2] 45 S.B. 726, 80th Leg., 2019 Reg. Sess. (Or. 2019); S.B. 479, 80th Leg., 2019 Reg. Sess. (Or. 2019).
[3] A.B. 749, 2019-2020 Reg. Sess. (Cal. 2019); amended AB 2143 (2020)
[4] S14/A306 (2023)

rejecting them as "highly restrictive" and in "strong tension with the remedial purposes of the FLSA."[5]

We urge the New York City Council to pass Int 811 and end the unnecessary punishment of those who settle employment discrimination claims.

[5]*See e.g. Gomez v. Shine Servs. LLC*, 2021 U.S. Dist. LEXIS 71355, *10-11 (S.D.N.Y., Apr. 13, 2021), and cases cited therein.

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June 26, 2023

Via Online Submission

Re: Hearing of the Committee on Civil and Human Rights
Testimony in Support of Int 0811-2022, Regarding No-Rehire Clauses

Dear Members of the Committee on Civil and Human Rights:

Sanford Heisler Sharp, LLP commends the New York City Council for considering several bills this legislative session that will improve the protections afforded by the Human Rights Law (HRL). We submit this testimony primary to note our support for Int 0811-2022, which would ban no-rehire clauses in settlements. While the substance of this testimony will focus on the evils of no-rehire clauses, we also note our support of other bills under consideration, including Int 0812-2022, which would extend the statute of limitations for HRL claims to six years; and Int 0864-2022, which would prohibit employers from contracting around the HRL's statute of limitations.

Sanford Heisler Sharp, LLP is a public interest law firm with offices in New York, California, Tennessee, Maryland, and Washington D.C. The firm represents plaintiffs in civil rights, employment, sexual violence, and whistleblower matters. As one of the largest worker-side employment law firms in the country, we can directly attest to the important benefits the aforementioned bills would have for workers in New York City.

In what follows, we provide a more in-depth explanation of our support for a ban on no-rehire provisions.

The City Council Should Ban No-Rehire Provisions.

No-rehire provisions are pervasive and insidious practice in employment discrimination settlements. In essence, the employer demands, as a condition for settling a discrimination claim, that the employee never work for them again. The employee can never again apply for a position with the employer, and if she does, the employer can automatically reject her application. These provisions may last indefinitely, acting as a permanent ban on the employee returning to the employer for the rest of the employee's life.

Ordinarily, "[a] claim of refusal to rehire an individual following the filing of an employment discrimination charge may be a basis for a claim of retaliation." *Weissman v. Dawn Joy Fashions, Inc*., 214 F.3d 224, 234 (2d Cir. 2000). Yet, courts have generally exempted no-rehire clauses from this rule. Seeking to close this loophole, several jurisdictions have taken steps to prohibit or limit no-rehire clauses, including California and Oregon. *See* Cal. Civ. Proc. Code § 1002.5; Or. Rev. Stat. Ann. § 659A.370.

Employers often claim that they need no-rehire clauses to protect themselves from future claims of retaliation.[1] If they reject claimants for new positions, employers argue, they will be liable for retaliation no matter how good their reasons are for rejecting the claimants in question. The no-rehire provision therefore protects them from specious seriatim claims—or so the argument goes.

But that argument crumbles under scrutiny. As an initial matter, when employers make this argument, they reveal that what they really want is a kind of prospective waiver of retaliation claims. Courts have long found such prospective waivers to be against public policy because they offer employers carte blanche to discriminate or retaliate in the future. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 (1974) ("[W]e think it clear that there can be no prospective waiver of an employee's rights under Title VII.").

Moreover, it is simply untrue that claimants would automatically have retaliation claims if their employers rejected them for future job openings. The claimants would still have to establish the elements of a retaliation claim by a preponderance of the evidence; and the employers could defend themselves with legitimate reasons for their decisions. *See e.g. Hannah v. Wal-Mart Stores, Inc.*, No. 3:12-CV-01361 (VAB), 2016 WL 3101997, at *2 (D. Conn. June 2, 2016) (granting summary judgment to employer on retaliatory failure to rehire claims). Accordingly, current law already provides the employer ample protection. No-rehire provisions gratuitously insulate them from the consequences of their actions—while permanently banishing workers simply because they have raised claims of discrimination.

Accordingly, as advocates for workers and plaintiffs in civil rights cases, Sanford Heisler Sharp, LLP strongly supports Int 0811-2022. We encourage the City Council to take the important step of banning no-rehire clauses.

Sincerely,

/s/ David Tracey

David Tracey

Partner and Public Interest Litigation Practice Group Co-Chair
Sanford Heisler Sharp, LLP

[1] *See e.g.* SHRM, *Vermont Bans 'No Rehire' Clauses*, Aug. 7, 2018 *available at* https://www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/vermont-bans-no-rehire-clauses.aspx#:~:text=Vermont%20is%20the%20first%20state,went%20into%20effect%20last%20month (citing this rationale).

Erica Vladimer, Co-Founder: Sexual Harassment Working Group
Hearing Testimony: Committee on Civil and Human Rights
Monday, June 26, 2023

Good afternoon Chairperson Williams, Committee members, and City Council members. My name is Erica Vladimer, and on behalf of the Sexual Harassment Working Group, I urge you to vote for bills 811 and 812, both sponsored by Councilmember Gennaro, to be moved out of committee to be voted on by the whole body of the City Council.

The Sexual Harassment Working Group (SHWG) is workers collective of former city and state legislative staffers who experienced harassment, discrimination, abuse, and retaliation at the hands of elected and appointed officials. Since the spring of 2018, we've worked together — in our unpaid, volunteer time — to strengthen workplace protections against all forms of harassment and discrimination, predominantly through the enactment of stronger state legislation. Over the past five years, we've secured the first state joint legislative public hearing on sexual harassment in nearly 30 years and successfully passed eight pieces of legislation, including just a few weeks ago. I am damn proud of our change thus far; much of what we advocate for takes a certain level of political courage and acknowledgment of past institutional harms that many elected officials aren't willing to embody. But one key factor has helped in our work: the precedents set by the City of New York.

There's this saying: As New York goes, so goes the nation. But my work, particularly with the SHWG, has shown that it should be "as goes New York City, so goes New York State, and then so goes the nation." For example, I am confident that a different bill carried by the SHWG passed in 2019 — amending the archaic "severe or pervasive" threshold for harassment and discrimination cases — in large part because New York City had amended this standard locally a decade before then. The bills before you today — Intros 811 and 812 — stem from NYS bills that have languished in the legislature for years. But every day, workers in our city face harassment and discrimination in their workplaces. While we continue fighting to make every employment place safe, you all have the opportunity to help those who experience harm find the justice they deserve. And who knows, maybe the state will follow.

Summary of Bills:

Intro. 811 voids no-rehire provisions in harassment and discrimination settlement agreements

No re-hire clauses prevent a worker who experienced harassment or discrimination from ever applying or working for the defendant employer again; they were initially created to protect employers from retaliation claims and are widely used. But in practice, a no-rehire clause is just additional victim-punishing and debilitation on the victim's future career. No-rehire clauses apply to employers of all sizes, including multinational corporations. They also extend to entities that the employer purchases through mergers and acquisitions and, thus, can act like

noncompete clauses for employees that want to build a career in a specific industry. A worker should not have to choose between moving on with their life with a settlement and being able to work in a position where they're qualified and in an industry they want to work in. Enacting this bill would be in line with California and Vermont.

Intro 812 extends the statute of limitations from 3 to 6 years for lawsuits under the city human rights law.

We know that processing trauma and choosing to move forward formally and publicly can take much longer than three years. A three-year substantive time frame for a lawsuit isn't trauma-informed; many workers may be traumatized by their harms or experiences and need privacy or even time to understand that what they experienced *was* an illegal harm. Other workers may be unwilling to pursue their own lawsuit or not believe it's worth it until subsequent victims come forward. Still, other workers may fear not being believed, losing their job, being denied advancement, or being blacklisted in their industry. This bill considers the need to process trauma by extending the time a victim can file a suit.

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Appearance Card

I intend to appear and speak on Int. No. _____ Res. No. _____

☐ in favor ☐ in opposition

Date: 6/26/23

(PLEASE PRINT)

Name: Hillary Scrivani, Senior policy counsel

Address: 22 Reade St., 2nd Floor

I represent: NYC Commission on Human Rights

Address: _____

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Date: June 26, 2023

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Name: Dorca "Kyra" Batté

Address: 32 Broadway, Suite 1801, New York, NY 10004

I represent: Legal Momentum, The Women's Legal Defense and Education Fund

Address: _____

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Date: 6-26-23

(PLEASE PRINT)

Name: Anne L. Clark

Address: 565 5th Ave, NYC 10017

I represent: NELA/NY

Address: _____

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Name: JOANN KAUF WARD, Deputy

Address: 22 Reade St

I represent: NYC COMMISSION on HR

Address: _____

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I intend to appear and speak on Int. No. 84, 422, 911, 812, 864 Res. No. _____

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Date: _____

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Name: Gabriela Rendon

Address: [redacted] Brooklyn NY 11238

I represent: Gender Equality Law Center

Address: 157 13th St. Brooklyn NY 11215

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Date: 6/26/2023

(PLEASE PRINT)

Name: Nina Shields

Address: [redacted] W 44th St [redacted]

I represent: Gender Equality Law Center

Address: 157 13th St. Brooklyn NY 11215

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I intend to appear and speak on Int. No. 811 → 812 Res. No. _____

☐ in favor ☐ in opposition

Date: 6/26/23

(PLEASE PRINT)

Name: Erica Vladimer

Address: [redacted] 2nd Ave

I represent: Sexual Harassment Working Group

Address: N/A

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Date: 6/27/23

(PLEASE PRINT)

Name: Tovya Kornbluh

Address: Private Self

I represent: _____

Address: _____

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