NYC Commission on Human Rights Legal Enforcement Guidance on Discrimination on the Basis of Pregnancy: Local Law No. 78 (2013); N.Y.C. Admin. Code § 8-107(22)

The New York City Human Rights Law ("NYCHRL") prohibits discrimination in employment, public accommodations, and housing. It also prohibits discriminatory harassment and bias-based profiling by law enforcement. The NYCHRL, pursuant to the 2005 Civil Rights Restoration Act, must be construed "independently from similar or identical provisions of New York state or federal statutes," such that "similarly worded provisions of federal and state civil rights laws [are] a floor below which the City's Human Rights law cannot fall, rather than a ceiling above which the local law cannot rise."[1] In addition, exemptions to the NYCHRL must be construed "narrowly in order to maximize deterrence of discriminatory conduct."[2]

The New York City Commission on Human Rights (the "Commission") is the City agency charged with enforcing the NYCHRL. Individuals interested in vindicating their rights under the NYCHRL can choose to file a complaint with the Commission's Law Enforcement Bureau within one (1) year of the discriminatory act or file a complaint in court within three (3) years of the discriminatory act.

The NYCHRL prohibits unlawful discrimination in employment, public accommodations, and housing, on the basis of pregnancy or perceived pregnancy, through its prohibitions on discrimination based on gender. It also requires employers to reasonably accommodate the "needs of an employee for her pregnancy, childbirth, or related medical condition that will allow the employee to perform the essential requisites of the job, provided that such employee's pregnancy, childbirth, or related medical condition is known or should have been known by the employer."[3] This document serves as the Commission's legal enforcement guidance on the NYCHRL's protections as they apply to discrimination and reasonable accommodations based on pregnancy, childbirth, or related medical condition. This document is not intended to serve as an exhaustive list of all forms of pregnancy-related discrimination claims under the NYCHRL.

I Legislative Intent

Pregnancy discrimination under the NYCHRL is discrimination based on gender.[4] Prior to 2014, however, people who needed accommodations in the workplace relating to pregnancy or for medical conditions related to pregnancy or childbirth had to show that their conditions amounted to a temporary disability. As a result, people with routine pregnancies were regularly denied even the most minor accommodations and forced to work under conditions that compromised their pregnancies. Realizing that the law, as it was often interpreted, excluded individuals with routine pregnancies from requesting and receiving accommodations, on October 2, 2013, the City enacted Local Law 78, the Pregnant Workers Fairness Act, to affirmatively require employers to reasonably accommodate "the needs of an employee for her pregnancy, childbirth, or related medical condition," without necessitating that the employee's limitation qualifies as a disability to be protected.[5]

1 Local Law No. 85 § 1 (2005); *see* N.Y.C. Admin. Code § 8-130(a) ("The provisions of this title shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York state civil and human rights laws, including those laws with provisions worded comparably to provisions of this title, have been so construed.")

2 Local Law No. 35 (2016); N.Y.C. Admin. Code § 8-130(b).

3 Local Law No. 78 (2013); N.Y.C. Admin. Code § 8-107(22)(a).

4 *See Wilcox v. Cornell Univ.*, 986 F. Supp. 2d 281, 285 (S.D.N.Y. 2013) (noting that "[u]nder Title VII, the NYSHRL, and the NYCHRL, discrimination on the basis of a woman's pregnancy – including because of any related medical conditions – constitutes discrimination on the basis of sex.") (internal quotations and citations omitted).

5 N.Y.C. Admin. Code § 8-107(22)(a).

The legislative history of the Pregnant Workers Fairness Act reflects the growing recognition that expanded protections for employees related to pregnancy, childbirth, and related medical conditions are increasingly necessary. Given the often time-sensitive nature of accommodations needed for pregnancy, childbirth, and related medical conditions, and the relatively short duration of the need, reasonable accommodations related to pregnancy, childbirth, and related medical conditions are intended to be liberally granted so that employees may continue working without compromising their health or safety. With an overwhelming majority of women working late into their pregnancies and an increasing number of families relying on the income of working women as primary breadwinners,[6] protecting an individual's right to maintain stable employment while raising a family is increasingly important to the overall health and well-being of families and children.

II Definitions

These definitions are intended to help people understand the following guidance as well as their rights and responsibilities under the NYCHRL.

Pregnancy:

being pregnant, and symptoms of pregnancy, including, without limitation, nausea, morning sickness, dehydration, increased appetite, swelling of extremities, and increased body temperature.

Childbirth:

labor or childbirth, whether or not it results in a live birth.

Cooperative Dialogue:

the process by which an employer engages with an employee in an open problem-solving conversation based on the employee's request for an accommodation or the belief that an employee might benefit from an accommodation. A cooperative dialogue involves consideration of a proposed accommodation or alternative accommodation for an employee's pregnancy, childbirth, or related medical condition while allowing them to perform the essential requisites of the job without creating an undue hardship on the employer.

Related Medical Condition:

the state of seeking to become pregnant; any medical condition that is related to or caused by pregnancy or childbirth, including, but not limited to, infertility, gestational diabetes, pregnancy-induced hypertension, preeclampsia, post-partum depression, miscarriage, lactation; and recovery from childbirth, miscarriage, and termination of pregnancy.

III Violations of the NYCHRL'S Prohibitions on Pregnancy Discrimination

A. Disparate Treatment

Pregnancy discrimination is a form of gender-based discrimination under the NYCHRL and is prohibited in employment, housing, and public accommodations. Treating an individual less well than others because of their pregnancy, or perceived pregnancy, is discrimination and a violation of the NYCHRL. To establish disparate treatment under the NYCHRL, an individual must show that the treatment or adverse action was at least *in part* motivated by discriminatory animus. An individual may demonstrate this through direct evidence of discrimination or indirect evidence that gives rise to an inference of discrimination. Once an individual puts forward indirect evidence of discrimination, the burden shifts to

6 A Better Balance & National Women's Law Center, "It Shouldn't Be a Heavy Lift: Fair Treatment for Pregnant Workers," at 1, 3 (2013), http://www.abetterbalance.org/web/images/stories/ItShouldntBeAHeavyLift.pdf (last visited May 4, 2016).

the covered entity to demonstrate a non-discriminatory justification for the alleged conduct. If the covered entity is able to do so, the burden shifts back to the aggrieved individual to show either that the proffered non-discriminatory motive was pretextual, false, or misleading, or that direct or circumstantial evidence indicates that discrimination motivated the conduct at least in part.

1. Treating Individuals Less Well Because of Their Pregnancy

While adverse treatment may be overt, such as refusing to accept a rental application for an apartment because the applicant is pregnant or firing an employee because they are pregnant, discriminatory conduct on the basis of pregnancy often manifests itself in more subtle and patronizing ways. Such subtle forms of discrimination are actionable under the NYCHRL because they subject pregnant workers to lesser treatment. Whether intentional or unintentional, these actions push pregnant individuals out of the job market, disrupt earnings, hamper economic advancement, and violate the NYCHRL.

Gender-based harassment related to pregnancy is a form of discrimination, and may consist of a single incident[7] or repeated acts or behavior. Unlawful harassment exists when the behavior creates an environment or culture of sex stereotyping, degradation, humiliation, bias, or objectification. Under the NYCHRL, gender-based harassment related to pregnancy covers a broad range of conduct that causes an individual to be treated less well because of their pregnancy. While the severity or pervasiveness of the harassment is relevant to damages, the existence of differential treatment based on pregnancy is sufficient under the NYCHRL to state a claim of harassment. Harassment may include comments about a pregnant individual's weight or appearance, their age in relation to their pregnancy, their commitment to their job, or their ability to focus.

Examples of Violations

- An employer who does not hire someone otherwise qualified because they are pregnant.
- A landlord who refuses to accept a housing application from a person based in part on their pregnancy.
- An employer who does not permit an individual to continue to accrue vacation and sick time while on leave to recover from childbirth despite allowing other employees to continue to accrue vacation and sick time while on temporary disability leave.
- An employer who jokes about a pregnant individiual's weight gain, and who repeatedly responds to that individual's complaints about the jokes by stating that being pregnant is making the individual overly sensitive and emotional.

2. Policies that Single Out Pregnant Individuals

Any policy that singles out pregnant individuals is unlawful disparate treatment under the NYCHRL unless the covered entity can demonstrate a legitimate non-discriminatory justification for the distinction. Discriminatory policies may be directed at individuals who are currently pregnant, or those believed capable of or likely to become pregnant in the future. Unlawful policies include those that categorically exclude pregnant workers or workers who are capable of becoming pregnant from specific job categories or positions, deny entrance to pregnant individuals to certain public accommodations, or refuse to serve certain food or drinks to pregnant individuals or individuals perceived to be pregnant. While covered entities may attempt to justify certain categorical exclusions based on maternal or fetal safety, using safety as a pretext for discrimination or as a way to reinforce traditional gender norms or stereotypes is unlawful.

7 *See Cardenas v. Automatic Meter Reading Corp.*, OATH 1240/13, Dec. & Order., 2015 WL 7260567, at *8 (Oct. 28, 2015) (citing *Williams v. New York City Hous. Auth.*, 872 N.Y.S.2d 27, 41 n.30 (App. Div. 2009)).

Examples of Violations

- An employer refuses to hire pregnant individuals for specific positions or consider them for certain promotions because the positions involve working with hazardous chemicals.
- A restaurant policy that prohibits staff from serving pregnant individuals raw fish or alcohol.
- A blanket exclusion of pregnant individuals from hospital inpatient drug detoxification programs.
- An employer requires pregnant employees to take unpaid leave at a certain month in their pregnancy.
- An employer's policy that requires medical clearance from pregnant workers to perform certain job duties when medical clearance is not required for other employees.

3. Actions Rooted in Stereotypes or Assumptions Regarding Pregnancy

Judgments and stereotypes about how pregnant individuals should behave, their physical capabilities, and what is or is not healthy for a fetus are pervasive in our society and cannot be used as pretext for unlawful discriminatory decisions in employment, housing, and public accommodations. Adverse treatment of pregnant individuals based on assumptions and stereotypes about the capacity, reliability, or dedication of pregnant workers is similarly unlawful under the NYCHRL. Assumptions about a pregnant worker's commitment to their job or career, for example, are often rooted in traditional gender norms around mothering and women in the workforce, and may not be used to justify disparate treatment.

Examples of Violations

- An employer decides not to offer a promotion to a pregnant employee who is otherwise qualified based on the assumption that they will likely decide not to return to work after childbirth.
- An employer elects not to assign a pregnant employee to a new project after learning they are pregnant because he is concerned that the worker will be distracted by the pregnancy.
- A bouncer denies a pregnant individual entrance to a bar based on the belief that pregnant individuals should not be going to bars and/or drinking alcohol.

B. Failure to Provide Reasonable Accommodations in Employment Based on Pregnancy, Childbirth, or a Related Medical Condition

The NYCHRL requires an employer to provide reasonable accommodations for an employee's pregnancy, childbirth, or a related medical condition that will allow the employee to perform the essential requisites of the job, so long as the employer knew or should have known of the employee's pregnancy, childbirth, or related medical condition.[8] Reasonable accommodation is defined as such accommodation that can be made that shall not cause undue hardship "in the conduct of the covered entity's business."[9] While reasonable accommodations for individuals with disabilities under the NYCHRL have historically included medical conditions related to pregnancy or childbirth, the enactment of the Pregnant Workers Fairness Act obviated the need to request accommodations in employment through the disability framework. Employees can now request accommodations from employers based on pregnancy, childbirth, or related medical condition regardless of whether their medical condition amounts to a disability.[10]

8 This provision applies only in the context of employment. *See* N.Y.C. Admin. Code § 8-107(22).

9 *See* N.Y.C. Admin. Code § 8-102(18) (individuals may still request reasonable accommodations in employment, public accommodations, and housing based on disability under Section 8-107 of the NYCHRL).

10 An employee may also be entitled to reasonable accommodations based on disability if the pregnancy, childbirth, or related medical condition qualifies as a disability under the NYCHRL or other laws.

Under federal law, the Pregnancy Discrimination Act of 1978 requires equal treatment for all workers "similar in their ability or inability to work."[11] Going well beyond federal protections, the NYCHRL protects the rights of pregnant individuals by requiring employers to make reasonable accommodations for pregnancy, childbirth, or related medical condition regardless of whether and to what degree other employees are accommodated.[12] Minor or temporary modifications to work schedules, requests for temporary shift reassignments, additional breaks or requests to sit during shifts, and temporary unpaid leave, regardless of whether they are offered to other employees, must be granted absent evidence that such accommodations will pose an undue hardship for the employer or that they will prohibit an employee from satisfying the essential requisites of the employee's position.[13]

To establish discrimination on the basis of an employer's failure to provide a reasonable accommodation, the aggrieved individual must show: (1) they are pregnant, have recently experienced childbirth, or have a medical condition related to pregnancy or childbirth; (2) they requested a reasonable accommodation due to pregnancy, childbirth, or related medical condition, or the employer knew or should have known that they were in need of an accommodation due to pregnancy, childbirth, or related medical condition; and (3) the employer failed to provide a reasonable accommodation.

1. Process for Requesting or Offering Reasonable Accommodations

a. Initiating a Cooperative Dialogue

When an employer learns, either directly or indirectly, that an employee requires an accommodation due to pregnancy, childbirth, or related medical condition, an employer must engage in a cooperative dialogue with the employee. Where an employee has not requested an accommodation, the employer has an affirmative obligation to initiate a cooperative dialogue when the employer: (1) has knowledge that an employee's performance at work has been affected or that their behavior at work could lead to an adverse employment action; and (2) has a reasonable basis to believe that the issue is related to pregnancy, childbirth, or related medical condition. If an employer approaches an employee to initiate a cooperative dialogue and the employee does not reveal that they are pregnant in that conversation, the employee does not waive their opportunity to reveal their pregnancy and initiate a cooperative dialogue with their employer at a later time.

In order to avoid situations in which employers are not sure whether employees are aware of their right to request reasonable accommodations and engage in a cooperative dialogue, the NYCHRL requires employers to provide a notice of rights to all new employees detailing their rights to be free from discrimination based on pregnancy, childbirth, or related medical condition. Such notice may also be conspicuously posted at an employer's place of business in an area accessible to employees.[14]

b. Engaging in a Cooperative Dialogue

The purpose of a cooperative dialogue is to ensure that employers understand the individualized needs of their employees and have the opportunity to explore the various ways in which they can meet those needs. Without this type of dialogue, employees and employers may not realize the full universe of available accommodations. The employer need not provide the specific accommodation sought by the employee so long as they propose reasonable alternatives that meet the specific needs of the employee or that specifically address the limitation at issue.

A cooperative dialogue involves an employer communicating in good faith with the employee in an open and expeditious manner, particularly given the time-sensitive nature of these requests. The employer may not challenge the validity of the request, but should focus on understanding the need for the

11 42 U.S.C. § 2000e(k).

12 N.Y.C. Admin. Code § 8-107(22).

13 *See* discussion of accommodations *infra* p. 8. *See* discussion on essential requisites of the job *infra* p. 7.

14 N.Y.C. Admin. Code § 8-107(22)(b); *see infra* p. 11-12.

request and how the request can be accommodated, without making assumptions about what requests are reasonable or unreasonable. The dialogue may be in person, by phone, or via electronic means.

In evaluating whether or not an employer has engaged in a cooperative dialogue in good faith with an employee, the Commission will consider various factors, including, without limitation: (1) whether the employer has a written policy for employees about how to request accommodations based on pregnancy, childbirth, or related medical condition; (2) whether the employer responded to the request in a timely manner in light of the urgency of the request; (3) whether the employer attempted to explore the existence and feasibility of alternative accommodations or alternative positions; and (4) whether the employer attempted to obstruct or delay the cooperative dialogue or in any way intimidate or deter the employee from requesting the accommodation.

c. Concluding a Cooperative Dialogue

A cooperative dialogue is ongoing until one of the following occurs: (1) a reasonable accommodation is reached; or (2) the employer reasonably arrives at the conclusion that (i) there is no accommodation available that will not cause an undue hardship to the employer, or (ii) that no accommodation exists that will allow the employee to perform the essential requisites of the job. Once a conclusion is reached, either to offer an accommodation, or that no accommodation can be made, an employer should promptly notify the employee in writing of the determination.

Where an accommodation proposed by an employee is immediately agreed to by an employer, the cooperative dialogue will have been successfully completed. Under such circumstances, the cooperative dialogue will consist solely of the employee making the request and the employer granting the accommodation.

As an employee's condition changes over time, an employee may make new requests for accommodations. Each time an employee makes a new request, the employer must engage in a cooperative dialogue with the employee.

d. Requesting Medical Documentation

An employer may not require an employee to provide medical confirmation of pregnancy, childbirth, or related medical condition. An employer may *only* request medical documentation from an employee when: (1) an employee is requesting time away from work, including for medical appointments, *other than* the presumptive six to eight week period[15] following childbirth for recovery from childbirth,[16] and may do so only if the employer requests verification from other employees requesting leave-related accommodations for reasons other than pregnancy, childbirth, or related medical condition; or (2) an employee is requesting to work from home, either on an intermittent basis or a longer-term basis. If an employer believes that the provided documentation is insufficient, the employer must request additional documentation, or, upon the consent of the employee, speak with the health care provider who provided the documentation before denying the request based on insufficient documentation. An employer must always allow an employee to submit sufficient written verification should an employee not want their employer speaking with their medical provider.

Outside of the circumstances identified above, an employer may not require medical documentation under the NYCHRL for any other accommodation based on pregnancy, childbirth, or related medical condition.[17]

15 In accordance with the New York State Insurance Fund, the Commission considers six weeks a presumptive recovery period after vaginal delivery and eight weeks a presumptive recovery period after a caesarian section. *See* New York State Insurance Fund, "Claims FAQs, How are pregnancy-related disability claims processed," http://ww3.nysif.com/DisabilityBenefits/ClaimantServices/ClaimsFAQs.aspx#seventeen (last visited April 27, 2016).

16 An employer may request medical documentation confirming that an employee underwent a caesarian section. *See infra* p. 8.

17 An employee who is covered by the Family Medical Leave Act of 1993 ("FMLA") may be required to provide medical documentation for leave taken pursuant to federal law, dependent on the circumstances of the leave request and whether the employer is bound by FMLA. *See* 29 U.S.C. § 2601 *et seq*.

2. Failure to Engage in a Cooperative Dialogue

An employer's failure to engage in a cooperative dialogue with an employee prior to denying a request for accommodation may be tantamount to a failure to accommodate. Without engaging in a cooperative dialogue, an employer will not be able to completely assess the individual needs of the employee. An employer who fails to provide a reasonable accommodation to an employee for their pregnancy, childbirth, or related medical condition without engaging in a cooperative dialogue will not be able to demonstrate that they explored all available options that could have met the employee's needs and that no reasonable accommodation was available.

3. Employer Defenses

a. Undue Hardship

In determining what constitutes an undue hardship, the NYCHRL specifies the following factors to be considered:

> (1) the nature and cost of the accommodation; (2) the overall financial resources of the facility or the faculties [sic] involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility; (3) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees, the number, type, and location of its facilities; and (4) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.[18]

b. Essential Requisites of the Job

An employer may raise the affirmative defense that, even with a reasonable accommodation, the employee would not be able to satisfy the essential requisites of their job.[19] This means that even when the accommodation does not create an undue hardship for the employer, if it would not enable the employee to perform the basic duties and responsibilities required of the position, the employer may deny the accommodation. In raising this defense, an employer must also show that there are no comparable positions available for which the employee is qualified that would accommodate the employee, and that a lesser position or an unpaid leave of absence is either not acceptable to the employee or would pose an undue hardship.[20]

c. Burden of Proof

Should an employer believe, after a cooperative dialogue with the employee, that no accommodation can be made without posing an undue hardship or that even with the accommodation the employee could not meet the essential requisites of the job, the burden will be on the employer to demonstrate these defenses by a preponderance of the evidence.

4. Types of Accommodations Based on Pregnancy, Childbirth, or Related Medical Condition

a. Minor Accommodations, Schedule Modifications, and Alternative Positions or Assignments

Such accommodations based on pregnancy, childbirth, or related medical condition will rarely pose an undue hardship on an employer. While many pregnant employees, or employees who have recently

18 N.Y.C. Admin. Code § 8-102(18).

19 *Id.* at § 8-107(22)(a).

20 *See infra* p. 8 for a discussion on when an employer may offer an alternative position or unpaid leave as a reasonable accommodation.

experienced childbirth or related medical condition, will be able to work without any need for modification, some may require modest and/or temporary accommodations to allow them to feel well and continue to work while maintaining a healthy pregnancy or recovery. Such accommodations include, without limitation:

- minor changes in work schedules;
- adjustments to uniform requirements or dress codes;
- additional water or snack breaks;
- allowing an individual to eat at their work station;
- extra bathroom breaks or additional breaks to rest; and
- physical modifications to a work station, including the addition of a fan or a seat.

Schedule modifications, job restructuring, and reassignment to a vacant position may also qualify as a reasonable accommodation which will allow an employee to continue working despite a limitation based on pregnancy, childbirth, or a related medical condition. Examples of such accommodations include, without limitation:

- adjustment of start or end time;
- reduced or modified work schedule;
- desk duty or light duty; and
- transfer to an alternative position.

In considering such accommodations, an employer's first obligation is to accommodate an employee so that they may remain in their current position. When that is not possible, an employer may then consider whether the employee could be reassigned to a vacant position. In considering alternative positions, an employer may consider the qualifications necessary for the position and whether the pay, status, and benefits are equivalent to the employee's current position. When a comparable position is unavailable, an employer may then explore alternative positions that are not comparable. As a last resort, when no other accommodation can be made, an unpaid leave of absence may be offered as a temporary accommodation.

b. Leave Related to Childbirth

Leave requests to recover from childbirth must be granted absent an undue hardship. Should the leave request present an undue hardship, the employer must consider whether another accommodation, such as a shortened leave time, a reduced or modified work schedule, or working from home, would alleviate the hardship. An employer may only request medical documentation for leave requests beyond six weeks for a vaginal delivery and eight weeks for a caesarian section.[21]

Once an accommodation of leave has been granted, employers must reinstate workers returning from leave related to childbirth to their original job or to an equivalent position with equivalent pay and comparable seniority, retirement benefits, and other fringe benefits.

c. Accommodations Related to Lactation/Expressing Breast Milk

Lactation is a medical condition related to childbirth and therefore must be accommodated absent an undue hardship. Employers must provide reasonable time for an employee to express breast milk and may not limit the amount of time that an individual can use to express milk unless the employer can demonstrate that the time needed presents an undue hardship to the employer. In addition, absent undue hardship, an employer must provide a clean, sanitary, and private space, other than a bathroom, that is shielded from view and free from public intrusion from coworkers, along with a refrigerator to store breast

21 *See supra* p. 6, n.16.

milk in the workplace. A lactation space must be conveniently located and reasonably near the employee's work station. An employee who wishes to express milk at their usual work station shall be permitted to do this so long as it does not create an undue hardship for the employer, regardless of whether a coworker, client, or customer expresses discomfort. Where an employer already provides compensated breaks, an employee who uses that break time to express milk must be compensated in the same way that other employees are compensated for break time.[22]

d. Accommodations Related to Abortions and Miscarriages

Miscarriages and abortions are directly related to pregnancy and childbirth and can impact an individual's physical and emotional health. Individuals who have experienced a miscarriage or terminated a pregnancy are entitled to reasonable accommodations from their employers. An individual who has miscarried or terminated a pregnancy may, for example, require a period of unpaid leave to recover or a more flexible schedule for a period of time to account for additional appointments related to the procedure or experience. If the request involves time away from work, an employer may request documentation from a medical or other service provider.

e. Accommodations Related to Fertility Treatments

Fertility treatment directly relates to the state of seeking to become pregnant and therefore employers must provide accommodations for such treatment. Individuals undergoing fertility treatment may need unpaid leave to allow them to attend appointments or a modified or flexible work schedule. If the request involves time away from work to attend appointments, employers may require medical documents of appointments related to fertility. Employers must accommodate these requests absent an undue hardship.

f. Examples

- A pregnant employee requests to be put on light duty during her pregnancy because she is worried that lifting packages over twenty pounds may compromise her pregnancy. In making this request, the employee is initiating the cooperative dialogue. She informs her employer that she is pregnant and does not wish to lift packages over twenty pounds, which is a task she is frequently required to do. The employer concludes the cooperative dialogue by offering the accommodation of putting the employee on light duty for the remainder of the employee's pregnancy, which the employee accepts. The employer provides the employee with written notice that the accommodation has been granted.

- An employer notices that an employee has been leaving work early and not finishing tasks as quickly as usual. The employer heard a rumor that the employee is pregnant. The employer approaches the employee and initiates a cooperative dialogue. The employer says, specifically, "I have noticed you are struggling to finish your tasks as quickly as usual, is there something I can do to help?" The employee says no. The problem persists, and the employer again approaches the employee and offers assistance, but also notifies the employee that the tasks need to be completed more quickly and something needs to change. The employer tells the employee that he will check in again in a week or so, and reiterates that he will work to accommodate or otherwise support the employee if there is anything going on. The employer never mentions pregnancy specifically because he does not know with any certainty that the employee is pregnant. During the next follow-up conversation, the employer tells the employee that the employee will be written up if the behavior does not improve and again asks if the employee needs assistance and offers to set up a meeting to discuss the issue. The employee declines, and after another week, the employer issues a disciplinary notice.

22 The Fair Labor Standards Act and New York State Labor Law also require employers to provide certain accommodations for employees to express breast milk. *See* U.S. Dep't of Labor, Wage and Hour Div., "Fact Sheet #73: Break Time for Nursing Mothers under the FLSA," https://www.dol.gov/whd/regs/compliance/whdfs73.pdf (last visited May 5, 2016); N.Y. Lab. L. § 206-c.

The employer attempted to engage the employee in a cooperative dialogue because he believed the employee may have needed accommodations based on pregnancy. Despite repeated attempts to engage the employee in a cooperative dialogue, the employee was not responsive. Under these circumstances, the employer was justified in taking disciplinary action.

- All employees must participate in a mandatory meeting every Thursday morning. An employer notices that one employee has been consistently missing the weekly meetings or joining late. The employer approaches the employee, admonishes her, and says if this happens again, she will be written up. The employee is eight weeks pregnant and has been missing the meetings because she has not been feeling well; however, due to the early stages of her pregnancy, she does not share this information with her boss. Two weeks later, after continued lateness, the employee is disciplined. The employee would have been entitled to a reasonable accommodation if she had requested one or if her employer had been on notice of her pregnancy. However, because the employer had no reason to know that the employee was pregnant, the employer was under no obligation to initiate a cooperative dialogue.

- An employee who does data entry at a small company initiates a cooperative dialogue with her employer by asking the employer if she can take unpaid leave every Friday morning to attend medical appointments related to her pregnancy. The employee is the only person who does the data entry at the office. Although the employee's absence would not create an undue hardship for the employer as the immediate impact on the business would be minimal, the employer is concerned about the long-term cumulative effect of getting behind on the data entry. The employer suggests as an alternative that the employee make up the hours that she needs for the appointment on another day, so that she can attend her appointments but still get the work done. The employee accepts the alternative change in schedule. The employer, through a cooperative dialogue, was able to offer an alternative accommodation that met the employee's need for time off to attend appointments. The employer provides written notice to the employee that the cooperative dialogue has concluded and the proposed accommodation accepted.

- An employer notices that an individual who is employed as a bus driver has been uncharacteristically behind schedule for the last few weeks. The employer is concerned and approaches the employee to ask what is going on. The employee confides in the employer that she is pregnant and, due to extreme nausea, the employee has to frequently pull over and exit the bus. The employer initiates a cooperative dialogue with the employee by offering to sit down with her and think about whether there are ways to accommodate her during this time. During a cooperative dialogue, the employer and the employee are unable to find an accommodation that would enable the employee to continuously drive the bus and also manage her nausea. The employer considers whether there are any comparable alternative jobs available that would accommodate the employee's needs. However, the only non-driving positions are at the dispatch center, and they are currently filled. As a last resort, the employer offers the employee unpaid leave until the nausea subsides. The employee accepts and the employer provides notice of the agreed-upon accommodation. The employer offers to notify the employee if and when an alternative position becomes available. After a month, a position opens up at the dispatch center, and the employer notifies the employee that she could be moved temporarily to this position. The employee is no longer feeling nauseous, declines the accommodation, and requests to return to her prior position without an accommodation. The employee is reinstated to her prior position. The employer met his obligation to engage in a cooperative dialogue by considering alternative positions, offering interim unpaid leave, and reaching out to the employee when a vacant position became available.

- An employee has recently returned from leave related to recovery from childbirth. The employee intends to express milk throughout the day, but is concerned about taking unpaid break time. The lactation room is a ten-minute walk from her work station and she is concerned about the additional time she would need to take to get to the lactation room in addition to the time to

express milk. The employee reaches out to her employer to see if there is space for a lactation room closer to her work station. The employer is unable to identify a closer location for a lactation room. The employer, however, offers to construct a partition between the employee's work station and the rest of the office to offer her privacy at her own desk if she would like to express milk there which would enable the employee to express milk without taking a break. The employee accepts the offered accommodation and the employer provides notice to the employee that they have concluded the cooperative dialogue and reached an acceptable accommodation. By engaging in the cooperative dialogue, the employer was able to consider an accommodation that the employee had not realized was available.

- An employee notifies an employer that she is five months pregnant and would like to work from home for the remainder of her pregnancy due to her lengthy commute and lower back pain, which is exacerbated by sitting in her car for long periods of time. No employee in her position has ever worked from home before. The employer requests that the employee obtain documentation from a medical provider confirming the need for the accommodation. The following week, the employee produces a note from her doctor saying that she cannot commute for the remainder of her pregnancy due to extreme lower back pain associated with her pregnancy. The employer sits down with the employee and has a conversation about the various tasks and functions the employee performs on a daily basis and determines what the employee will need to be able to access from home in order to do the work. The employer offers the employee the option of working from home for two weeks to determine if the employee will be able to adequately do the job from home. The employer confirms the accommodation in writing. After two weeks, the employer determines that the arrangement is workable because the employee is able to attend meetings remotely and generate the same work product she did in the office. After six weeks, the employee notifies the employer that her lower back pain has subsided and she no longer needs the accommodation. The employer requests a doctor's note confirming that the employee may return to work. Upon receiving the required medical confirmation, the employee returns to the office the following week.

- An employee has exhibited poor performance for a period of nine months. During that time, the employer has issued two warnings that failure to improve her performance may result in termination. The employee now tells the employer that she is three months pregnant. The employer provides the employee with the employer's policy on requesting accommodations based on pregnancy and states, "Please let me know if there is anything we can do to help you improve your performance." The employee does not request an accommodation and her performance does not improve. The employer has no reason to believe that the pattern of poor performance relates to the pregnancy, particularly given that the poor performance predated the pregnancy. After providing the employee with a final warning, the employer terminates the employee for poor performance.

C. Failure to Post or Provide Notice Regarding Pregnancy Protections

The NYCHRL requires that employers provide all employees with written notice of their right to be free from discrimination in relation to pregnancy, childbirth, and related medical conditions.[23] Notice is effectuated by providing notice to all new employees at the commencement of employment. Employers may also post the notice in their place of business in an area accessible to all employees.[24] Failure to comply with the notice requirement violates the NYCHRL. Employers may use the Commission's Pregnancy and Employment Rights poster – available on the Commission's website – to provide notice to their employees.

23 N.Y.C. Admin. Code § 8-107(22)(b).

24 *Id.* at §§ 8-107(22)(b)(i)(1), (2).

D. Policies or Practices that Have a Disparate Impact on Pregnant Workers

In the context of employment, housing, and public accommodations, when a neutral policy or practice, regardless of intent, has a disparate impact on individuals who are pregnant or perceived to be pregnant, the policy or practice violates the NYCHRL.[25] Facially neutral policies or practices can include, without limitation, light duty policies, hiring practices, and housing restrictions. To establish a claim for disparate impact, an individual or the Commission must demonstrate that a covered entity has a policy or practice, or a group of policies or practices, that in effect exclude or disproportionately impact individuals based on pregnancy.

For example, a policy that permits workers to be moved to light duty for on the job injuries only would likely have a disparate impact on pregnant workers and constitute a violation of the NYCHRL unless the covered entity can show that the alleged policy or practice bears "a significant relationship to a significant business objective of the covered entity or does not contribute to the disparate impact."[26]

E. Retaliation

A covered entity may not retaliate against an individual because they: (1) oppose a discriminatory practice prohibited by the NYCHRL; (2) make a charge or file a complaint with the Commission, the employer, or any other agency; or (3) testify, assist, or participate in an investigation, proceeding, or hearing related to an unlawful practice under NYCHRL.[27] In order to establish a *prima facie* claim for retaliation, an individual must show: (1) that the individual engaged in protected activity; (2) the employer was aware of the activity; (3) that the individual suffered an adverse employment action; and (4) there was a causal connection between the protected activity and the adverse employment action.[28]

In the context of employment, the act of requesting a reasonable accommodation based on pregnancy, childbirth, or related medical condition, or engaging in a cooperative dialogue with an employer based on such request, is protected activity under the NYCHRL. An adverse employment action based on such activity is therefore retaliation under the NYCHRL. The purpose of the retaliation provision is to enable individuals to speak out against discrimination and to freely exercise their rights under the NYCHRL. Freedom from retaliation helps ensure that individuals needing accommodations will request them, and promotes a culture where people are less afraid to exercise their rights. A worker needing an accommodation based on pregnancy, childbirth, or related medical condition must be able to seek assistance and engage in the cooperative dialogue with employers without fear of adverse consequences for making the request.

IV BEST PRACTICES

Employers should develop a written policy to provide information to employees on the cooperative dialogue process as it relates to accommodations for pregnancy, childbirth, or a related medical condition. The policy should include information about how employees may request accommodations and what a cooperative dialogue looks like. Such policies should be distributed to all employees. In addition, any time an employee notifies an employer about their pregnancy, the employer should provide that employee with a copy of the policy and remind them of the availability of accommodations.

25 *Id.* at § 8-107(17).

26 *Id.* at § 8-107(17)(a)(2).

27 *Id.* at § 8-107(7).

28 *Id.*

Employers should also document all efforts to initiate, engage in, and conclude the cooperative dialogue with an employee. Employers should keep a log for each employee in which they document the following information:

- When and under what circumstances the cooperative dialogue was initiated;
- What information, if any, was provided to the employer throughout the cooperative dialogue;
- The employee's stated or observed limitation;
- The types of accommodations that were requested by the employee or suggested by the employer during the cooperative dialogue;
- The dates of each subsequent conversation relating to the accommodation between the employer and the employee;
- Whether or not an accommodation was ultimately identified and, if not, justification, for denying an accommodation;
- A copy of the notice provided to the employee that the cooperative dialogue had ended.

Employers may be required to share this information with the Commission in the course of an investigation. Prompt responses to Commission requests for information or documents may help avoid a Commission-initiated investigation into employment practices.

Employers should make all efforts to keep communications regarding requests for reasonable accommodations and all circumstances surrounding an employee's pregnancy, childbirth, or related medical condition confidential.