COMMISSION ON HUMAN RIGHTS

Notice of Adoption

NOTICE IS HEREBY GIVEN, pursuant to the authority vested in the New York City Commission on Human Rights ("Commission") by section 905(e)(9) of the New York City Charter and in accordance with the requirements of Section 1043 of the Charter, that the Commission has adopted new rules governing to establish certain definitions and clarify the scope of protections with respect to pregnancy, childbirth, and related medical conditions and sexual and reproductive health decisions.

The required public hearing was held on November 12, 2020.

Statement of Basis and Purpose of Rule

The New York City Commission on Human Rights (the "Commission") amends its rules to establish certain definitions and clarify protections with respect to pregnancy, childbirth, and related medical conditions; sexual and reproductive health decisions; and accommodations for employees who need to express breast milk while at work. The New York City Human Rights Law ("City Human Rights Law") prohibits unlawful discrimination in employment, housing, and public accommodations on the basis of gender, which includes discrimination on the basis of actual or perceived pregnancy, childbirth, or related medical conditions. In addition, the City Human Rights Law, as amended by Local Law 78 of 2013, requires employers to provide reasonable accommodations to employees based on pregnancy, childbirth, or related medical conditions, and to notify new employees of their right to be free from discrimination in the workplace based on pregnancy, childbirth, or related medical conditions. Pursuant to Local Laws 185 and 186 of 2018, the City Human Rights Law also requires employers to provide a lactation room and develop a written policy on lactation accommodations for employees. In 2019, Local Law 20 added additional protections to the City Human Rights Law to prohibit employment discrimination and discriminatory harassment based on a person's sexual and reproductive health decisions.

These rules amend title 47 of the Rules of the City of New York to establish certain definitions and explain covered entities' obligations under the City Human Rights Law.

The Commission's authority for these rules is found in sections 905(e)(9) and 1043 of the New York City Charter.

New material is underlined.

[Deleted material is in brackets.]

"Shall" and "must" denote mandatory requirements and may be used interchangeably in the rules of this department, unless otherwise specified or unless the context clearly indicates otherwise.

Section 1. Section 2-01 of title 47 of the Official Compilation of the Rules of the City of New York is amended to add new definitions in alphabetical order to read as follows:

Cooperative dialogue. "Cooperative dialogue" refers to the process by which a covered entity and a person entitled to an accommodation, or who may be entitled to an accommodation under the law, engage in good faith in a written or oral dialogue concerning the person's accommodation needs; potential accommodations that may address the person's accommodation needs, including alternatives to a requested accommodation; and the difficulties that such potential accommodations may pose for the covered entity.

Childbirth. "Childbirth" refers to labor or childbirth, whether or not it results in a live birth.

Lactation room. "Lactation room" refers to a sanitary place, other than a restroom, that can be used to express breast milk shielded from view and free from intrusion and that includes at minimum an electrical outlet, a chair, a surface on which to place a breast pump and other personal items, and nearby access to running water.

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

Related medical condition. "Related medical condition" refers to any medical condition that is related to or caused by pregnancy or childbirth or the state of seeking to become pregnant, including, without limitation, infertility, gestational diabetes, pregnancy-induced hypertension, hyperemesis, preeclampsia, depression, miscarriage, lactation, and recovery from childbirth, miscarriage, and termination of pregnancy.

Sexual or reproductive health decisions. "Sexual or reproductive health decisions" refers to any decision by an individual to receive or not to receive services, which are arranged for or offered or provided to individuals relating to sexual or reproductive health, including the reproductive system and its functions. Such services include, but are not limited to, fertility-related medical procedures, sexually transmitted disease prevention, testing, and treatment, and family planning services and counseling, such as birth control drugs and supplies, emergency contraception, sterilization procedures, pregnancy testing, and abortion.

§ 2. Chapter 2 of title 47 of the Official Compilation of the Rules of the City of New York is amended by adding a new section 2-07 to read as follows:

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

(a) *Disparate Treatment Based on Pregnancy, Childbirth, or Related Medical Conditions*. It is a violation of § 8-107 of the Administrative Code for any covered entity to treat a person less well based on their actual or perceived pregnancy, childbirth, or related medical condition. Disparate treatment includes adverse treatment of pregnant individuals based on assumptions and stereotypes about the ability, reliability, or professional commitment of pregnant employees. Assumptions about how pregnant individuals should behave, their physical

capabilities, and what is or is not healthy for a fetus cannot be used as pretext for unlawful discrimination.

(1) *Examples of violations.*

(i) An employer refuses to hire someone otherwise qualified for a job because the applicant is pregnant and the employer assumes they will likely miss too much work after childbirth.

(ii) A landlord refuses a housing application from a person based in part on their pregnancy.

(iii) A hospital repeatedly drug tests pregnant people without their consent but does not test nonpregnant patients without their consent.

(iv) An employer makes offensive jokes and comments on the basis of an individual's pregnancy, such as talking about weight gain or stating that pregnancy is making the individual overly sensitive.

(v) A hotel worker refuses to let a pregnant guest use the hotel hot tub.

(vi) A restaurant manager tells a patron to leave the restaurant because the patron is breastfeeding their child and exposing their breast.

(vii) A manager fails to intervene after overhearing several employees call their coworker a "cow" after the coworker uses the office lactation room.

(viii) A bouncer refuses to let a pregnant person into a bar because the bouncer believes pregnant people should not go to bars.

(ix) An employer decides not to assign an employee to a new project after learning they are pregnant because the employer is concerned that the worker will be distracted by the pregnancy.

(x) A student at school is bullied for being pregnant. They tell one of their teachers about the bullying, and the teacher does nothing.

(xi) Because of their pregnancy, an employee begins receiving negative performance reviews and fewer work assignments.

(b) *Policies that Facially Discriminate Against People Based on Pregnancy, Childbirth, or Related Medical Conditions*. A covered entity's policy that targets individuals for disparate treatment based on their actual or perceived pregnancy, childbirth, or related medical condition is unlawful under the NYCHRL. A covered entity cannot use its concerns about maternal or fetal safety as a reason for discrimination.

(1) *Examples of violations*.

(i) An employer has a policy of refusing to hire pregnant individuals for, or place current employees in, specific positions because the positions involve working with hazardous chemicals.

(ii) A restaurant policy prohibits staff from serving pregnant people raw fish or coffee.

(iii) A hospital has a blanket rule prohibiting any pregnant person from participating in drug detoxification programs.

(iv) An employer requires all pregnant employees to take leave at a certain month in their pregnancy.

(v) An employer's policy requires medical clearance from pregnant employees to perform certain job duties when medical clearance is not required for other employees.

(vi) A hospital policy allows medical providers to override the informed consent of a patient with capacity to provide consent only when the patient is pregnant.

(vii) An employer has a policy of not hiring female job applicants of childbearing age out of fear that they may be or will become pregnant.

(c) *Facially Neutral Policies or Practices that Have a Disparate Impact on People Based on Pregnancy, Childbirth, or Related Medical Conditions*. A covered entity's neutral policy or practice may have a disparate impact on individuals who are pregnant or perceived to be pregnant. An entity may be liable for disparate impact discrimination if it fails to plead and prove that: (1) the policy or practice or a group of policies or practices bears a significant relationship to a significant business objective of the covered entity; or (2) does not contribute to the disparate impact. An entity may also be liable for disparate impact discrimination if there is substantial evidence that an alternative policy or practice with less disparate impact is available to the covered entity and the covered entity fails to prove that such alternative policy or practice would not serve the covered entity as well.

(1) *Examples of violations*.

(i) A policy that permits light duty assignments only for on-the-job injuries fails to provide pregnant employees such light duty assignments as a reasonable accommodation.

(ii) An employer with a policy that limits all employees to three 15-minute breaks without any exceptions does not give employees who need to express breast milk enough time to express their milk.

(d) *Requirement for Employers to Provide Written Notice About Employees' Right to be Free from Discrimination Based on Pregnancy, Childbirth, or a Related Medical Condition*. An employer must provide employees with written notice of their right to be free from

discrimination based on pregnancy, childbirth, or related medical condition. The employer may comply with this requirement by: (1) conspicuously posting the notice in its place of business in an area accessible to employees, which may include on a company intranet; or (2) providing the notice to new employees at the start of employment and to all other employees who have not otherwise received notice. Employers may use the notice of rights available on the Commission website to satisfy their obligation to provide notice. The notice should be available to employees at all times during their employment.

(e) *Failure to Provide Reasonable Accommodations in Employment Based on Pregnancy, Childbirth, or a Related Medical Condition*. It is a violation of the law for an employer to fail to provide a reasonable accommodation for an employee's pregnancy, childbirth, or a related medical condition, if the employer knew or should have known of the employee's pregnancy, childbirth, or related medical condition, and providing the accommodation would not create an undue hardship. Requested accommodations are reasonable unless the employer meets the burden of showing they pose an undue hardship. The employer need not provide the specific accommodation sought by the employee so long as the employer proposes reasonable alternatives that meet the specific needs of the individual or that specifically address the condition at issue.

An employee's right to receive a reasonable accommodation based on pregnancy, childbirth, or a related medical condition does not depend on whether the medical condition amounts to a disability under the City Human Rights Law.

(1) Some accommodations for pregnancy, childbirth, or a related medical condition that generally will not pose an undue hardship on an employer, include, without limitation: minor or temporary modifications to work schedules; adjustments to uniform requirements or dress codes; additional food, drink, bathroom, or rest breaks; being permitted to sit or eat at locations where eating and drinking is not typically allowed; moving a work station to permit movement or stretching of extremities, or to be closer to the bathroom; limits on lifting; minor physical modifications to a work station, including the addition of a fan or a seat; periodic rest; assistance with manual labor; light duty or desk duty assignments; temporary transfers to less strenuous or hazardous work; and other such accommodations consistent with the spirit of the above examples.

(2) An employer's first obligation is to provide a reasonable accommodation to an employee so that they may remain in their current position. When that is not possible because of an undue hardship, an employer may consider whether the employee could be reassigned to a vacant position with equivalent pay, status, and benefits. Only when a comparable position is unavailable, may an employer then explore alternative positions that are not comparable. As a last resort, when no other accommodation can be made, a paid or unpaid leave of absence may be offered as a temporary accommodation. A temporary modification of duties, reassignment to another position, or period of leave that the employer is able to provide as a reasonable accommodation for pregnancy, childbirth, or a related medical condition shall not be treated as evidence that the employee cannot return to performing the essential requisites of their job when their need for a reasonable accommodation has ended. An

employer shall not adopt categorical exclusions of comparable positions that pregnant employees are not permitted to fill.

(3) *Examples*.

(i) An employer refuses to grant requests for temporary shift assignments to a pregnant employee even though doing so would not pose an undue hardship. This violates the City Human Rights Law.

(ii) A store refuses to provide a stool to a pregnant employee who works as a cashier and needs to take breaks from standing as an accommodation, even though providing the stool does not pose an undue hardship on the store. This violates the City Human Rights Law.

(iii) An employer denies an accommodation to a pregnant Muslim employee to work through their lunch hour during Ramadan because the employer does not think the employee should fast while pregnant. (The employer's conduct is also discrimination for failing to accommodate the employee's religious observance pursuant to § 8-107(3) of the Administrative Code.)

(iv) An employee who terminated a pregnancy requested several days off for the procedure and recovery. The employer reasonably accommodates the employee by allowing them to use available leave time.

(v) A post-partum employee who needs physical therapy to address a complication of childbirth may be reasonably accommodated by letting them adjust their lunch hour so that they may attend treatment appointments.

(f) *Employers Must Engage in a Cooperative Dialogue When They Know or Should Know that an Employee Requires an Accommodation Because of Pregnancy, Childbirth, or a Related Medical Condition, Including Lactation*. When an employer knows or should know that an employee needs an accommodation due to pregnancy, childbirth, or a related medical condition, an employer must engage in a cooperative dialogue with the employee. Where an employee has not requested an accommodation, the employer has an affirmative obligation to initiate a cooperative dialogue if 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. The employer should be cautious in initiating the cooperative dialogue in a way to open the conversation and invite the employee to feel comfortable in making a request, such as asking if there is anything going on with the employee, or reminding the employee of the various types of support available, including accommodations. If an employer approaches an employee to initiate a cooperative dialogue and the employee does not reveal that they are pregnant or have a related medical condition in that conversation, the employee does not waive their opportunity to reveal their pregnancy or related medical condition and initiate a cooperative dialogue with their employer at a later time.

(1) An employer's obligation to engage in the cooperative dialogue when they "should know" about an employee's pregnancy, childbirth, or related medical condition is not a permissible basis for an employer to act on speculation based on stereotypes or assumptions about pregnancy. The obligation to initiate a cooperative dialogue can be met simply by reminding the employee of the employer's accommodations policy.

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

(3) A cooperative dialogue should continue until one of the following occurs: (i) an agreement on a reasonable accommodation is reached; or (ii) the employer reasonably concludes that (A) all potential accommodations will cause an undue hardship to the employer, or (B) no accommodation exists that will allow the employee to perform the essential requisites of the job. Once the employer reaches a conclusion, either to offer an accommodation or decides it cannot make an accommodation, the employer must promptly notify the employee of the determination in writing.

(4) An employer must provide employees who need lactation accommodations with a lactation room, as defined in § 8-102 of the Administrative Code, and reasonable time to express breast milk pursuant to §§ 8-107(22)(b) and 8-107(22)(c) of the Administrative Code. If an employer is unable to provide one or more of the required components of a lactation room because of an undue hardship, the employer must engage in a cooperative dialogue with the employee to determine alternative accommodations that meet the employee's needs for each component that cannot be provided. Section 8-107(22) does not excuse employers from their obligation to provide additional reasonable accommodations beyond those explicitly enumerated in the definition of lactation room in § 8-102 and § 8-107(22) of the Administrative Code, as further discussed below in § 2-07(h)(3).

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

(g) *Medical Documentation*.

(1) Under no circumstances shall an employer request unnecessary medical documentation of the need for minor accommodations, including, without limitation:

minor or temporary modifications to work schedules; adjustments to uniform requirements or dress codes; additional or longer food, drink, bathroom, or rest breaks; being permitted to sit or eat at locations where eating and drinking is not typically allowed; moving a work station to permit movement or stretching of extremities, or to be closer to a bathroom; limits on lifting; minor physical modifications to a work station, including the addition of a fan or seat; periodic rest; assistance with manual labor; light duty or desk duty assignments; temporary transfers to less strenuous or hazardous work; and other accommodations consistent with the spirit of the above examples.

(2) For other accommodations, including but not limited to time away from the worksite to attend medical appointments, working from home, or a leave of absence, an employer may request medical documentation. During the time period in which an employee is making good faith efforts to obtain documentation, however, the employer shall provide reasonable accommodation(s), absent undue hardship. An employer shall not take adverse action against an employee related to their need for accommodation while the employee is engaging in good faith efforts to obtain documentation.

(3) *Examples*.

(i) An employee experiences a miscarriage and requests time off for recovery, providing a medical note to their employer. The employer refuses, though doing so would not pose an undue hardship.

(ii) A pregnant employee tasked with lifting boxes in a supermarket requests lighter duty. The employer reasonably accommodates them with a temporary assignment to a position at the bakery counter. A medical note is not necessary to evaluate the accommodation request, and so the employer cannot ask the employee to provide a medical note for this accommodation.

(iii) An employee who is undergoing infertility treatment requests time off to attend medical appointments related to the treatment. While an employer must reasonably accommodate these requests, the employer may also request medical documentation to confirm that the time off is for a medical-related condition.

(iv) An employee's doctor advises them to stay on bed rest due to a medical condition related to pregnancy. The employee asks their employer for permission to work remotely and provides a medical note confirming the need to work from home. The employer allows the employee to work remotely while on bed rest.

(h) *Accommodations Related to Lactation/Expressing Breast Milk.* An employer must provide the following for any employee needing an accommodation to express breast milk unless the employer can show that doing so would pose an undue hardship: a lactation room in close

proximity to the employee's work area; a refrigerator suitable for breast milk in close proximity to the employee's work area; and access to running water nearby the lactation room.

(1) Lactation room.

(i) If there is a room that is exclusively used for lactation, the employer must ensure that the room is shielded from view and that the door of the room has a lock. If the door cannot have a lock, a "Do Not Disturb" sign or other appropriate signage should be placed on the door or entrance of the space.

(ii) If there is no dedicated lactation room, the employer must make a multi-purpose space available for lactation unless doing so poses an undue hardship. If the multi-purpose room designated as a lactation room is also used for another purpose, it must only be used as a lactation room while an employee is using the room to express breast milk. The employer must communicate to other employees, through appropriate signage or other means of communication that when the room is being used as a lactation room the room may only be used for expressing breast milk during that time. The employer should also ensure that individuals expressing breast milk in the multi-purpose space can express milk without intrusion.

(iii) If there is no dedicated lactation room and no multi-purpose room available because it poses an undue hardship, the employer must engage in a cooperative dialogue with the employee and discuss options to ensure employees are able to express breast milk at work.

(2) Lactation time. The employer must give employees a reasonable amount of break time to express breast milk pursuant to section 206-c of the labor law. An employer may not limit the amount of time that an employee uses to express breast milk. There is no cap on the number of breaks an employee can take and the travel time to the lactation space must be provided.

(3) Other lactation accommodations.

(i) If an employer is unable to provide one or more of the required components of a lactation room because of an undue hardship, the employer must engage in a cooperative dialogue with the employee to determine alternative accommodations that meet the employee's needs for each component that cannot be provided.

(ii) Employers may need to provide additional or different lactation accommodations in order to meet additional or different needs of an employee beyond those indicated in the statutorily required lactation accommodation in §§ 8-107(22)(b) and 8-107(22)(c) of the Administrative Code.

(iii) Employees may need lactation accommodations, in addition to a lactation room and reasonable time to express breast milk, which may include, but are not limited to, a modified uniform or temporary modified job duties.

(iv) If an employee wishes to pump at their usual workspace and it does not impose an undue hardship, then the employer shall allow this as an alternative to the lactation room. Discomfort expressed by a coworker, client, or customer generally does not rise to the level of undue hardship.

(v) If the nature of the employee's job is mobile such that they do not have daily access to the employer's lactation room, the employer must ensure that the employee is aware of their right to express breast milk at work. The employer must also engage in a cooperative dialogue with the employee to determine how to accommodate the employee's need to express milk, such as ensuring the employee has adequate equipment, space, and time for pumping while mobile.

(vi) Examples of alternative lactation accommodations.

A. An employer cannot provide a lactation room with an electrical outlet. Instead, an employer may offer to provide an extension cord or other alternative power source for the designated lactation room.

B. Due to the mobile nature of the employee's work, an employer cannot provide a lactation room for its employee. Instead, the employer gives the employee portable privacy screens, agrees to allow the employee to pump in the employer-provided vehicle between site visits, and provides sanitizing wipes and a cooler to store breast milk.

C. An employer's office space does not have infrastructure to provide a lactation room nearby running water. An employer may offer sanitizing wipes and towels in the lactation room, and instruct its employees where the closest source of running water is, such as an office kitchen or bathroom.

D. An employee's work uniform interferes with their ability to express breast milk during pumping breaks. As a reasonable accommodation, their employer provides a modified uniform.

E. An employee has been using their employer's lactation room for their pumping needs since recently returning from pregnancy leave. However, the employee has noticed that their work on some projects is disrupted by the time it takes to go to and come back from the lactation room. The employee requests a privacy screen from the employer so that they can pump from their desk. There is no undue hardship on the employer, and the employer provides the privacy screen for the employee to use while pumping.

(4) Notice and lactation policy.

(i) An employer must develop and implement a written policy stating that employees have a right to request a lactation accommodation and explaining the process for making such request. The process must: (A) specify how an employee may submit a request for a lactation room; (B) require that the employer respond to a request for a lactation room as quickly as possible, but, under no circumstances, no later than five business days; (C) provide a procedure to follow when two or more employees need to use the lactation room at the same time; (D) explain that the employer shall provide reasonable break time for an employee to express breast milk pursuant to section 206-c of the labor law; and (E) state that if providing any aspects of the lactation room required by law would create an undue hardship for the employer, the employer shall engage in a cooperative dialogue with the employee.

(ii) Employers must distribute the policy to all employees at the start of their employment. Employers should also give the policy to employees when they return from parental leave. Employers may comply with this requirement by customizing one of the model policies available on the Commission's website.

(5) Examples of violations.

(i) An employer prohibits employees who need to express breast milk from pumping at their normal work stations, even if the employees prefer to pump at their work stations and it does not pose an undue hardship on the employer.

(ii) An employer tells an employee needing to express breast milk to use the restroom, even though providing a legally-mandated lactation room would not pose an undue hardship.

§ 3. Chapter 2 of title 47 of the Official Compilation of the Rules of the City of New York is amended by adding a new section 2-08 to read as follows:

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

The following requirements apply with respect to Title 8 of the Administrative Code's prohibition on unlawful discriminatory practices based on sexual or reproductive health decisions.

(a) *Disparate Treatment Based on a Person's Sexual or Reproductive Health Decisions*. It is a violation of § 8-107 of the Administrative Code for an employer to treat a person less well based on their sexual or reproductive health decisions. An employer's adverse treatment of employees because of their decision to receive services related to sexual or reproductive health, based on assumptions or stereotypes related to ability, behavior, or what is or is not healthy for an individual is unlawful.

(1) Examples of violations:

(i) An employer repeatedly chastises an employee for pursuing in vitro fertilization treatment, which the employer believes is not "natural."

(ii) An employer repeatedly denigrates an employee who is undergoing treatment related to his infertility, joking about how the employee cannot get his wife pregnant.

(iii) A supervisor avoids meetings with one of the employees on their team after learning the employee sought preventative treatment for the human immunodeficiency virus (HIV).

(iv) An employer fires an employee after learning that the employee had an abortion.

(v) An employee openly treats their coworker with disgust after learning that the coworker is receiving treatment for a sexually transmitted infection. The employer is aware of this conduct but does nothing to address it.

(vi) An employee advises a supervisor that their partner is pregnant with their fourth child. The supervisor begins to routinely tell the employee they should have had a vasectomy, emailing them links to doctors who specialize in the surgery.

(b) *Employment Policies that Facially Discriminate Against People Based on Their Sexual or Reproductive Health Decisions*. Under the NYCHRL, employer policies may not target people for unequal treatment based on their sexual or reproductive health decisions.

(1) Examples of violations:

(i) A doctor's office requires all staff to undergo testing for HIV. An employee refuses to get tested and is fired for their decision.

(ii) An employer requires new hires to sign a pledge that they have not used and will not use birth control.

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Hon. Carmelyn P. Malalis
Commissioner
New York City Commission on Human Rights

Re: Application of Human Rights Law to Pregnancy, Childbirth, and Related Conditions

No. 2019 RG 044

Dear Commissioner Malalis:

Pursuant to New York City Charter § 1043 subd. c, the above-referenced rule has been reviewed and determined to be within the authority delegated by law to your agency.

Sincerely,

/s/ Steven Goulden

STEVEN GOULDEN
Senior Counsel
Division of Legal Counsel

cc: Zoey Chenitz (CCHR)
Francisco Navarro (Operations)