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.