REPORT BY THE SEX AND LAW COMMITTEE
AND THE CIVIL RIGHTS COMMITTEE

AMENDING THE NEW YORK CITY HUMAN RIGHTS LAW TO EXPLICITLY ADD
NURSING MOTHERS’ RIGHT TO WORKPLACE ACCOMMODATIONS

The Sex and Law Committee and Civil Rights Committee of the New York City Bar Association recommends amending the New York City Human Rights Law, Administrative Code of the City of New York §§ 8-101 et seq. ("NYC HRL"), to explicitly require workplace accommodations for nursing mothers. Currently, nothing in the NYC HRL explicitly states that nursing mothers cannot be discriminated against or must be reasonably accommodated in the workplace. In addition, although protections already exist at both the state and federal level, courts have questioned whether private litigants can bring lawsuits to enforce their right to breastfeeding-related workplace accommodations. The proposed bill would confirm the enforceability of these protections in a simple and straightforward way that builds upon the recently enacted New York City Pregnant Workers Fairness Act ("NYC PWFA"). The proposed bill would also make explicit some aspects of the scope of the anti-discrimination and accommodation mandates of the NYC HRL, which currently do not expressly protect nursing mothers.1

Section A of this memo provides an overview of the well-documented benefits, as well as the challenges, of breastfeeding. Section B discusses the current legal landscape and the resulting need for the protections contained in the draft bill. Finally, Section C clarifies the content of the draft bill, including the way that content relates to the preexisting protections for nursing mothers. A draft bill is attached as Appendix A.

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1 Int. 0060-2014, introduced by Council Member Ferreras and currently in the Civil Rights Committee, proposes to add a protected class of “nursing mothers” under the NYC HRL. Our approach differs slightly in that we propose augmenting the existing definition of “gender” to encompass “pregnancy and related medical conditions,” including “lactation or the expression of breast milk for a nursing child.” By bringing these concepts all within one definition of “gender,” we believe the proposed bill achieves the same purpose as Int. 0060-2014, thereby obviating the need to create a relatively narrow new protected class of “nursing mothers.” N.Y.C. Council 60-2014, 2014 Comm. Civil Rights (N.Y. 2014).
A. BENEFITS AND CHALLENGES OF BREASTFEEDING

A broad consensus exists among medical and public health professionals that breastfeeding provides a plethora of health benefits for infants and mothers alike. Breastfeeding is associated with a reduced risk of a variety of ailments in infants, including but not limited to skin, ear, stomach, and respiratory infections; type 1 and 2 diabetes; childhood leukemia; pneumonia; celiac disease; and, sudden infant death syndrome. Health-related benefits for nursing mothers are similarly broad: among other things, breastfeeding is associated with a reduced risk of ovarian and breast cancer, cardiovascular disease, and postpartum depression. On a larger scale, these advantages hold the promise of significantly lowering healthcare costs; some studies estimate that “exclusive breastfeeding for the first six months of life translates into a savings of $13 billion in U.S. pediatric health care costs and would prevent over 900 infant deaths each year.” Given these facts, promotion of breastfeeding has emerged over the last quarter of a century as a “key public health issue in the United States,” causing the federal government to adopt a strong, multi-pronged policy of supporting mothers who want to breastfeed.


4 See Polly A. Newcomb et al., Lactation in Relation to Postmenopausal Breast Cancer, 150 (2) Am. J. Epidemiology 174, 174 (1999); Alice S. Whitmore et. al., Characteristics Relating to Ovarian Cancer Risk: Collaborative Analysis of 12 U.S. Case-Controlled Studies, 136 (10) Am. J. Epidemiology 1184, 1184 (1992); Eleanor Bila Schwartz et al., Duration of Lactation and Risk Factors for Maternal Cardiovascular Disease, 113 (5) Obstetrics & Gynecology 974, 976-77 (2009); Tufts New England Med. Ctr. Evidence-Based Practice Ctr., supra note 3, at v (noting that breastfeeding is associated with increased incidence of postpartum depression).

5 Sarah Andrews, Lactation Breaks in the Workplace: What Employers Need to Know About the Nursing Mothers Amendment to the FLSA, 30 Hofstra Lab. & Emp. L.J. 121, 150 (2012).


However, even though these efforts have included measures aimed at securing women’s ability to continue breastfeeding upon return to the paid workforce following childbirth, many working women are faced with significant barriers, including refusal of requests to pump breast milk on the job or retaliation for making such requests or for using break time to pump. These barriers can be particularly difficult to surmount for low-income women, who typically work on an hourly basis, with less flexibility, less privacy, and fewer benefits (such as paid parental/maternity leave) than their counterparts in traditionally salaried positions. Women in non-traditional occupations are likewise acutely vulnerable to denials of breastfeeding-related accommodations, both because their jobs tend to be inflexible and because their employers may be particularly hostile or even unaccustomed to women in the workplace. As a result, breastfeeding is frequently reserved only for the most privileged workers who can afford to take time off, work from home, or negotiate for workplace accommodations with their employers. Given this imbalance, there continues to be a clear need for strong legal protections that can safeguard all working women’s right to breastfeed.

B. THE NEED FOR NURSING-RELATED WORKPLACE PROTECTIONS

Both federal and state laws clearly require employers to accommodate nursing mothers. Under New York State law, employers are required to make reasonable efforts to provide employees who seek to nurse with (1) reasonable unpaid or paid break or meal time, and (2) a room or other location that (a) is private, and (b) close to the work area. These protections apply for up to three years after the baby is born. Similarly, federal law requires employers to provide employees covered by the wage and hour protections of the Fair Labor Standards Act (“FLSA”) with (1) reasonable paid or unpaid time to express milk, and (2) a location that is (a) not a bathroom, (b) shielded from view, and (c) free from intrusion from both coworkers and the general public for up to one year after a baby’s birth.


11 See N.Y. LABOR LAW, Art. 7 § 206-c (McKinney 2007) (“NYLL”).

12 Id.

13 This provision only applies to employees who are not exempt from section 207 of FLSA; FLSA’s numerous exemptions are set forth in 29 U.S.C.A. § 213 (West 2014).

Despite these clear mandates, courts have questioned whether nursing mothers are entitled to bring suits against non-compliant employers. In *Kratzert v. White Lodging Services*, the court held that NYLL conferred no such private right of action because “it [was] clear from the statute and the overall structure of the Labor Law that, as with a number of other statutes concerning workplace conditions, the legislative goal was to improve workplace conditions generally and not to establish a vehicle for the compensation of particular individuals.” Suits brought under FLSA’s nursing provision have met obstacles as well; although courts have found that FLSA’s anti-retaliation provision affords a private right of action, suits brought for non-compliance with the nursing mandate without allegations of retaliation have been rejected. For instance, in *Saltz v. Caseys Mktg. Co.*, the court concluded that the Department of Labor was the sole entity empowered to bring suits against non-compliant employers because FLSA’s remedies provision limits employees to monetary damages, and monetary damages are unavailable when the employer fails to accommodate a nursing mother.

It bears noting that the Fifth Circuit as well as several district courts have recently held for the first time that nursing mothers may be able to obtain relief under Title VII. However, these decisions are limited to cases where employers treat nursing mothers worse than other employees due to those mothers’ desire for a nursing-related workplace accommodation. It is at best unclear whether Title VII would provide relief in a case where the employer refused to accommodate a nursing mother’s accommodation request but did not otherwise discriminate against her.

Lastly, under the recently enacted NYC PWFA, employers are required to provide reasonable accommodations to workers with needs stemming from pregnancy, childbirth, or a related medical condition. Express examples of these accommodations cited in the legislative findings include, among others, leave for disability related to childbirth, more frequent restroom and/or water breaks, periodic rests for women whose jobs require them to stand for extended periods of time, and assistance with manual labor. Since lactation is a pregnancy-related

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16 See, e.g., *Bailey v. Gulf Coast Transp. Inc.*, 280 F.3d 1333, 1335-36 (11th Cir. 2002) (noting that “FLSA specifically provides for equitable relief in an employee suit [for violations of the] antiretaliation provision” and that, as the result, § 216(b) “provides a private right of action to employees to seek this relief”). One district court in the Western District of Pennsylvania has recognized that FLSA’s anti-retaliation provision protects against retaliation for engaging in protected activity in connection with section 207(r), the nursing mothers provision, and that such violations may be enforced through a suit for injunctive relief as well as money damages. *See Bockoras v. Saint Gobain Containers, Inc.*, No. 1:13-CV-00334, slip op. at 1 (W.D. Pa Feb. 5, 2014).


19 See NYC HRL, § 8-107(22).
medical condition, the NYC PWFA would also require an employer to provide reasonable accommodations for nursing mothers, such as reasonable break time and a sanitary, private space to pump. However, that language is not explicitly stated in the statutory text. Any accommodation under that statute need not be provided if doing so would impose an undue hardship on the employer.

In light of these holdings regarding state and federal law, it is clear that nursing mothers face significant obstacles when they attempt to bring suits to hold their employers accountable for refusing to comply with the accommodation mandates the NYLL and FLSA impose. Passing legislation that explicitly confirms a right to enforce these mandates in courts would make clear that discrimination against women on the basis of breastfeeding is prohibited sex discrimination as a matter of New York City law. In addition, the draft bill would encourage employers to ensure they provide adequate accommodations to their nursing employees. Lastly, such legislation would advance compliance by ensuring that individuals and entities other than the Department of Labor have the power to enforce explicit nursing provisions against non-compliant employers.

C. THE TEXT OF THE BILL

In main, the draft bill amends the NYC HRL to:

1. provide that the definition of gender in § 8-102(23) encompasses “pregnancy and related medical conditions,”

2. define “related medical conditions” in § 8-102(29) to encompass “lactation or the expression of breast milk for a nursing child,” and

3. make clear that nothing in the bill shall be construed to affect or diminish any other provision of law relating to disability.

The draft bill thus safeguards nursing mothers’ workplace rights by making clear that discriminating on the basis of a condition related to pregnancy is a form of gender discrimination and that lactation qualifies as a pregnancy-related condition. This approach represents a

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20 See EEOC v. Housing Funding Limited II, 717 F.3d at 428 (holding that lactation is protected under federal anti-discrimination law because it is a sex-linked ability and a medical condition related to pregnancy and childbirth).

21 Some of the factors that help determine whether providing the accommodation would impose undue hardship on the business include “the nature and cost of the accommodation, (…) the number of persons employed (…), the overall size of the business, (…) and the type of (…) operations of the covered entity.” NYC HRL, § 8-102(18).

22 The amendments would also clarify existing protections for pregnant and nursing women in other contexts, such as housing and lending discrimination. Throughout the NYC HRL, the term “gender” appears as part of general anti-discrimination mandates. See, e.g., NYC HRL § 8-107(5)(a) (listing gender as one of the traits that cannot be grounds for refusing to sell or rent a housing accommodation to a particular person or group); NYC HRL § 8-107(5)(b) (enumerating the same prohibition with respect to the rent or sale of land or commercial space); NYC HRL § 8-107(5)(d) (barring lenders from relying on gender, among other protected traits, when making lending-related decisions). Accordingly, these amendments would bar all such discrimination against women who are pregnant or nursing mothers.
commonsense solution for at least three reasons. One, given that only women can become nursing mothers, lactation is inherently a gender-specific trait. Second, clarifying that lactation constitutes a pregnancy-related medical condition is appropriate given the clear physiological connection between lactation and pregnancy. Finally, adding a definition for the term “related medical conditions” helps clarify employers’ existing obligations under the recently passed NYC PWFA; because NYC PWFA amended the NYC HRL to provide that employers must accommodate needs stemming from their employees' pregnancy and/or related medical conditions, defining “related medical conditions” to include lactation is helpful to clarifying the scope of situations that may demand a workplace accommodation under the NYC PWFA. Moreover, given that the inclusion of lactation gives appropriate meaning to a term that is already covered under the NYC HRL, the legislative intent and findings of the draft bill should reflect that the inclusion is intended to clarify existing protections under the NYC PWFA.

D. CONCLUSION

Because courts have questioned whether nursing mothers have the power to enforce laws mandating breastfeeding-related workplace accommodations, amendments to the NYC HRL are warranted to strengthen those provisions’ enforceability. The draft bill would accomplish that goal by amending the term “gender” to include lactation, as well as by adding a definition of “related medical conditions”—a definition that would incorporate lactation—to the definitions section of the NYC HRL. This approach is practical, since it avoids creating a new protected trait, and commonsense, since lactation is a natural, gender-specific byproduct of pregnancy. In addition, the draft bill would clarify employers’ obligations under the recently passed NYC PWFA by specifying that lactation is a related medical condition that warrants workplace accommodations mandated under that law. For all these reasons, the New York City Bar Association’s Sex and Law Committee and Civil Rights Committee urges introduction and passage of the draft bill.

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23 See EEOC v. Housing Funding Limited II, 717 F.3d at 428 (holding that lactation is protected under federal anti-discrimination law because it is a sex-linked ability and a condition related to pregnancy and childbirth). Of course, this bill is not intended to imply that only lactation is a “related medical condition.” By using the phrase “including, but not limited to,” this provision of the NYC HRL clearly covers many additional medical conditions related to pregnancy and childbirth. Specifically naming lactation in this bill does not in any way preclude implicit coverage of other important medical conditions.