THE LEGAL AID SOCIETY CIVIL

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To: Commissioner Mayuga

From: Rebekah Cook-Mack and Elizabeth Saylor, The Employment Law Unit

Re: Proposed Amended Rules Related to the Earned Safe and Sick Time Act, Chapter 55 Section (M) of the Laws of 2024 amended section 196-b of the New York State Labor Law to Include Paid Prenatal Leave

Date: February 14, 2025

The Legal Aid Society submits this comment in response to the New York City Department of Consumer and Worker Protection (hereinafter "DCWP," "the agency," or "the Commission") Notice of Public Hearing and Opportunity to Comment on Proposed Rules to amend the Earned Safe and Sick Time Act, Chapter 55 Section M addressing Paid Prenatal Leave. Thank you for convening this hearing and for the opportunity to provide Comment on a statutory provision that will fill crucial gaps in the rights of working New Yorkers.

The Society is the oldest and largest not-for-profit public interest law firm in the United States, working on more than 300,000 individual legal matters annually for low-income New Yorkers with civil, criminal, and juvenile rights challenges. The Society also brings law reform cases that benefit all New Yorkers by directly benefiting the two million low-income children and adults in New York City. The Society delivers a full range of comprehensive legal services to low-income families and individuals in the City. Our Civil Practice has local neighborhood offices in all five boroughs, along with centralized citywide law reform, employment law, immigration law, consumer law, health law, and homeless rights practices.

The Society's Employment Law Unit represents low-wage workers in employment-related matters such as claims for unpaid wages; claims of discrimination, including discriminatory and retaliatory terminations; and unemployment insurance hearings. The Unit conducts litigation,

outreach, and advocacy designed to assist the most vulnerable workers in New York City, among them, low-wage workers who face arbitrary, discriminatory, and retaliatory treatment on the job.

The Employment Law Unit regularly hears from pregnant workers attempting to navigate their pregnancy and maintain their employment. It can be a complicated and challenging time. Workers and employers alike are adjusting to the new laws. It is helpful to have clear and comprehensive rules issued to provide workers with clarity about their rights.

We are pleased that the New York Paid Prenatal Law gives workers the right to paid time off to receive healthcare services during and related to pregnancy, in addition to their paid sick leave. This is an important right for the workers we serve–many of whom had been forced to compromise either their healthcare or their economic security in the absence of this additional time off. It is a welcome advance. To fully effectuate the law, the Department must issue regulations that are robust, clear, and comprehensive so that workers can fully enjoy the protections afforded to them. We believe the Department has taken action to do just that through its proposed regulations. We offer our recommendations for how the Department may further strengthen and clarify the final rule.

I. Paid Prenatal Leave Coverage Includes Any Healthcare Services Received During Pregnancy, Related to Pregnancy, or Related to Becoming Pregnant.

We call on the Department to affirm the clear wording of the statute, which allows Paid Prenatal Leave usage for all "the health care services received by an employee during their pregnancy or related to such pregnancy." N.Y. Lab. Law § 196-b(4-a). The clear meaning of this language includes any healthcare services that are either received during the pendency of the employee's pregnancy or that are otherwise related to such pregnancy, including services related to becoming pregnant. Confirming the scope of services covered by the statute will provide greater clarity regarding the law's protections. Clarity around the broad scope of the law's coverage is crucial so that workers can fully exercise their rights to paid prenatal leave and employers can understand and implement policies regarding Paid Prenatal Leave.

The current language in the Proposed Rule states: "Paid prenatal personal leave shall mean leave taken for the health care services received by an employee *during or related to such pregnancy.*" **We call on the agency to further specify that this includes all healthcare a pregnant worker receives, including but not limited to, dental care, mental health services, and other specialist care. We also call on the agency to specify, in line with New York State's guidance, that the statute covers fertility-related care.**

We suggest that the Department expand on the proposed language in Section 701(c) to add the following (with additional language **in bold**):

- (c) As used in this subchapter, the term "paid prenatal leave" has the same meaning as "paid prenatal personal leave" as set forth in subdivision 4-a of section 196-b of the labor law**, except that it shall be defined to include all healthcare received by the employee during their pregnancy, as well as all healthcare received by the employee related to their pregnancy, including fertility-related care received prior to a pregnancy.**

This language will clarify the scope of Paid Prenatal Leave and will help avoid gaps in coverage for New Yorkers seeking to use this leave for its intended purpose.

We regularly speak to pregnant workers who need time off from work to get healthcare services that would allow them to maintain their health during their pregnancies. These workers, who are disproportionately low-wage workers, often do not have the sick time banked that would allow them to receive the full breadth of healthcare services they need to maintain their health. There are multiple studies showing that, during pregnancy, the need to maintain routine healthcare is vital to the health of a pregnancy.[1] One key example of this is maintaining proper dental health. Being pregnant increases the risk for oral health problems. These issues, like gum disease, can ultimately impact a pregnancy in varying ways, including by increasing the risk for preterm birth. Another example is needing time off to seek mental health treatment during pregnancy. Postpartum depression is a severe mental health condition that can begin when someone is still pregnant.[2] According to the American College of Obstetrics and Gynecologists, approximately "9% of pregnant women" meet the criteria for major depressive disorders.[3] Postpartum depression rates similarly range as high as 25%.[4] Postpartum depression can cause symptoms that can impact a pregnant worker's physical health, including changes in sleep and appetite.[5] Access to routine mental health services can reduce the symptoms of postpartum depression.

Maintaining routine healthcare is intrinsically tied to maintaining a healthy pregnancy, even if those services are not provided by an obstetrician or midwife. In a similar vein, the statute clearly covers healthcare services related to becoming pregnant. New York State guidance explicitly states that paid prenatal leave covers time off for fertility treatments. Paid, job-protected time off

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[1] March of Dimes, Resource Article: Dental Health During Pregnancy (last reviewed Feb. 2023), https://www.marchofdimes.org/find-support/topics/pregnancy/dental-health-during-pregnancy.

[2] A Better Balance, Fact Sheet: Postpartum Depression and Workplace Rights (last updated June 30, 2023, https://www.abetterbalance.org/resources/postpartum-depression-and-workplace-rights/.

[3] A Better Balance, Fact Sheet: Postpartum Depression and Workplace Rights (last updated June 30, 2023, https://www.abetterbalance.org/resources/postpartum-depression-and-workplace-rights/.

[4] A Better Balance, Fact Sheet: Postpartum Depression and Workplace Rights (last updated June 30, 2023, https://www.abetterbalance.org/resources/postpartum-depression-and-workplace-rights/.

[5] A Better Balance, Fact Sheet: Postpartum Depression and Workplace Rights (last updated June 30, 2023, https://www.abetterbalance.org/resources/postpartum-depression-and-workplace-rights/.

to obtain fertility-related care can mean the difference between starting a family and not for many workers. The rule should make it clear that paid prenatal leave is available for anyone participating in IVF regardless of whether they themselves will become pregnant.

II. We Urge the Department to Include Certified Nurse Midwives for Purposes of Reasonable Documentation

We recommend the Department include certified nurse midwives in the list of healthcare professionals in section 7-206 whose documentation is considered reasonable, while keeping the language allowing reasonable documentation from other licensed healthcare professionals. We propose the following addition (with added language in **bold**):

- For a use of sick time or paid prenatal leave, written documentation signed by a licensed clinical social worker, licensed mental health counselor, **certified nurse midwife**, or other licensed health care provider indicating the need for the amount of sick time or paid prenatal leave, respectively, taken shall be considered reasonable documentation.

We recognize and appreciate that the intent of this language is to create an expansive list that workers may use to provide their employers with required documentation. We have fielded calls from workers who make good faith attempts to comply with their employers' demands for medical documentation, only to be told that their documentation was insufficient.
New Yorkers may choose to work with certified nurse midwives to oversee their care during their pregnancies. These certified midwives are licensed and credentialed by the state of New York and are often experts in administering both family planning and prenatal care.[6] Even though the current proposed language states "other licensed healthcare providers" may provide reasonable documentation in satisfaction of the requirements, our experience counseling pregnant workers proves that, absent explicit allowances, workers are at risk of having their documentation questioned. This puts them at heightened risk for losing access to time off to access prenatal care from their preferred provider.

III. We Urge the Department to Ensure That All Workers Have Notice of Their Accrued Paid Prenatal Leave Time Banks

The language as written risks undermining workers' awareness of their right to Paid Prenatal Leave, particularly those workers who might seek to use Paid Prenatal Leave to become pregnant. If employers are not required to disclose the availability of Paid Prenatal Leave on employees' pay statements until they have already used this leave, there is a significant risk that

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[6] *Frequently Asked Questions for Midwivery*, N.Y. EDUC. DEP'T. OFF. OF THE PRO., https://www.op.nysed.gov/professions/midwifery/questions-answers (last visited Feb. 10, 2025).

employers will only post Paid Prenatal Leave time for workers who have already disclosed their pregnancies and are seeking treatment specifically for obstetrical appointments. This will cause a gap in clarity and will inevitably lead to some workers, who are considering fertility treatments or in the early stages of pregnancy, to miss out on this benefit that is also intended for them.

Accordingly, we propose striking the words "if applicable" and changing the final sentence of Section 7-207(a) to the following language:

- "It must also inform the employee of the amount of paid prenatal leave used during the relevant pay period and the total balance of paid prenatal leave available for use."

We applaud the Department for requiring employers to disclose employees' Paid Prenatal Leave accruals on their pay stubs. This is an important provision, which helps workers calculate and plan for their healthcare services using this leave. It also ensures that workers and employers have a shared understanding of what types of leave each employee has available for use, and how the employer is calculating their time off.

Paystub-based notice provisions like this one are an important source of information we often use to help workers. By reviewing their pay stubs, we can assist workers in calculating their current sick time banks and determining whether they are eligible for benefits under other laws, including New York Paid Family Leave and New York Temporary Disability Insurance benefits.

Our experience counseling workers shows that, without this information on their pay statements, workers may not know that they are eligible for certain benefits or may not know how to determine their eligibility. This prevents workers from understanding the scope of their benefits and rights to time off. In some instances, it prevents them from using the time off at all, risking a loss of their legally entitled benefits.

IV. We Urge the Department to Adopt Language to Avoid Penalizing Workers for Utilizing Paid Prenatal Leave

Employers must adjust their ordinary workplace policies or practices, including but not limited to production standards, productivity quotas, and performance metrics, to ensure these policies do not operate to penalize or threaten penalization of employees for utilizing paid prenatal leave. For example, when a worker utilizes paid prenatal leave that involves a pause in work, this worker should not be penalized or threatened with a penalty for failing to perform work during such a non-work period, such as through discipline for failing to meet production quotas. Absent this explicit requirement, workers could face retaliation for simply exercising their rights. Quotas and metrics should be adjusted to reflect the time off so that workers are not expected to make up for taking paid prenatal leave.

In order to reduce this risk and to provide better clarity to employers regarding their performance expectations of workers who use paid prenatal leave, we recommend the Department adopt the following language (with proposed added language in **bold**):

- "**Penalizing an employee for failing to meet a production standard, productivity quota, or other performance metric solely due to their use of paid prenatal personal leave is a form of retaliation prohibited by this section. If applicable, performance benchmarks should be adjusted to reflect leave taken so that workers' goals reflect the time off taken under this law and they are not required to make up work without additional compensation.**"

The Proposed Rule clearly specifies whether and how employers must adjust a worker's rate of pay when they utilize paid sick time, as well as clearly prohibiting employers from requiring an employee to make up hours or find a replacement employee in order to utilize Paid Prenatal Leave. We appreciate the Department addressing these critical points and recommend the Department additionally state that a worker's production or sales quota, if any, must be proportionately reduced to account for their use of Paid Prenatal Leave time.

We have routinely heard from workers who are disciplined or threatened under productivity quotas, performance metrics, or attendance policies for exercising their rights to paid sick leave, paid family leave, and paid time off. In our experience counseling workers, these retaliatory policies have a significant chilling effect on workers. By granting workers a right to paid time off, but not requiring employers to adjust their expectations of a worker, the resulting impact is that workers will not utilize their rights to paid leave. Similarly, a lack of clarity about whether a worker is expected to have the same performance output means workers will inevitably be forced to "make up" the time they used while exercising their rights to paid prenatal leave, either by working extra shifts or extended hours at a later date.

V. Summary

In summary, our proposed recommendations are:

- First, add language to Section 7-216(c) to include the following: (c) As used in this subchapter, the term "paid prenatal leave" has the same meaning as "paid prenatal personal leave" as set forth in subdivision 4-a of section 196-b of the labor law**, except that it shall be defined to include all healthcare received by the employee during their pregnancy, as well as all healthcare received by the employee related to their pregnancy, including fertility-related care received prior to a pregnancy.**
- Affirm our interpretation that Section 7-216(c) includes all healthcare services **during and related to** a pregnancy, including routine healthcare and mental healthcare services.
- Include **certified nurse midwives** into the list of licensed healthcare professional who can provide medical documentation for purposes of Section 7-206 through the following

language: “For a use of sick time or paid prenatal leave, written documentation signed by a licensed clinical social worker, licensed mental health counselor, **certified nurse midwife**, or other licensed health care provider indicating the need for the amount of sick time or paid prenatal leave, respectively, taken shall be considered reasonable documentation.

- Adjust the language in the final sentence of Section 2-707(a) to read: “It must also inform the employee of the amount of paid prenatal leave used during the relevant pay period and the total balance of paid prenatal leave available for use.”
- Adopt the following language: “**Penalizing an employee for failing to meet a production standard, productivity quota, or other performance metric solely due to their use of paid prenatal leave" is a form of retaliation prohibited by this section.**”

These changes will ensure that workers are fully protected and can access their Paid Prenatal Leave. With these recommendations, we have no further reservations about the proposed rule. We applaud the Department for drafting this proposed rule. Thank you for your consideration.

For more information or further discussion, please contact Rebekah Cook-Mack, Staff Attorney, rcook-mack@legal-aid.org, or Elizabeth Saylor, Citywide Director, Employment Law Unit, esaylor@legal-aid.org.