NYC Commission on Human Rights

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Testimony of Damion Stodola
General Counsel
New York City Commission on Human Rights
Before the Committee on Civil and Human Rights
June 18, 2018

Good afternoon, Chairperson Eugene and members of the Committee on Civil and Human Rights. My name is Damion Stodola, and I am the General Counsel at the New York City Commission on Human Rights ("Commission"). I am joined by Policy Counsel, Zoey Chenitz. On behalf of the Commission, we thank you for convening this afternoon's hearing and are grateful for the opportunity to speak today in support of Intros 799 and 136-A.

Under the leadership of Commissioner and Chair Carmelyn P. Malalis, the New York City Commission on Human Rights works to enforce our City Human Rights Law, one of the most protective anti-discrimination laws in the country. During her tenure, the Commission has consistently championed legislation like the two bills being considered today and other mechanisms that afford the law's protections to more New Yorkers, clarify the agency's expansive interpretation of the law consistent with its construction provision and restoration acts, and generally further the goals of combating discrimination and harassment in key areas of City living. The two bills being considered today expand protections for people who seek reasonable accommodations by protecting them from retaliation by employers, housing providers and providers of public accommodations; and clarify the broad reach of employment protections to independent contractors.

These bills touch on important areas of the Commission's work. Under the City Human Rights Law, individuals are entitled to reasonable accommodations in employment based on their religious beliefs, disability, pregnancy, childbirth, or related medical condition, and status as a victim of domestic violence, sex offenses or stalking. Individuals with disabilities are also entitled to reasonable accommodations in housing and in public accommodations. These rights foster inclusion and help make our workplaces, homes, and public spaces open, accessible, and productive environments for New Yorkers.

Beyond accommodations, employment discrimination as a whole constitutes a significant portion of the Commission's work, representing approximately 51% of all complaints filed at the Commission in calendar year 2017. With recent amendments to the City Human Rights Law regarding sexual harassment, the Commission is poised to address an even broader range of workplace discrimination. The bills that we are discussing today will further ensure that New York City, home to the largest economy in the country, continues to lead the way in protecting the rights of workers.

Int. 799 *– in relation to prohibiting retaliation against individuals who request a reasonable accommodation under the City's human rights law*

The Commission believes that Intro 799 closes a clear loophole in the NYCHRL and fully supports its introduction. The Commission strongly supports Intro 799, which would make it an

unlawful discriminatory practice to retaliate against a person for requesting a reasonable accommodation based on religious beliefs, disability, pregnancy, childbirth, or related medical condition, and status as a victim of domestic violence, sex offenses or stalking.

State courts interpreting the City Human Rights Law's existing retaliation provision have held that a request for reasonable accommodation is not a "protected activity" which can give rise to a retaliation claim.[1] As a result, an individual who requests and receives an accommodation, but is also targeted for negative treatment because of their request (for example, by being assigned less desirable work hours or losing special privileges from their housing provider) may be unable to establish a retaliation claim under the current City Human Rights Law. This omission in coverage makes the City Human Rights Law less protective in this respect than federal law.[2] Indeed, the daylight between the City Human Rights Law and federal law on this is oddly out of place given the City law's history, policy, and liberal rule of construction provided under the restoration acts.

By making clear that requesting reasonable accommodations is a protected activity, Intro 799 will allow people to come forward and communicate with their employers, landlords, and other covered entities about their needs with the knowledge and confidence that they cannot be punished merely for asking. For these reasons, the Commission fully supports Intro 799.

***Int. 136-A** – in relation to protections for workers under the city's human rights law*

Intro 136-A would clarify and identify the list of workers who are protected under the City Human Rights Law. The Commission already interprets the City Human Rights Law to cover independent contractors and all interns. Such coverage is broader than federal law, which often excludes these workers from coverage,[3] and broader than state law, which covers interns but not independent contractors.[4] However, during a public hearing that the Commission held on sexual harassment in the workplace in December 2017, the Commission heard from many individuals who were unaware of existing protections for independent contractors under the City Human Rights Law. Therefore, this amendment would provide additional clarity around these protections,

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1 *See, e.g., Witchard v. Montefiore Medical Ctr.*, 103 A.D.3d 596, 596 (1st Dep't 2013); *Brooks v. Overseas Media, Inc.*, 69 A.D.3d 444, 445 (1st Dep't 2010); *McKenzie v. Meridian Capital Grp., LLC*, 35 A.D.3d 676, 677-78 (2d Dep't 2006); *Hernandez v. Weill Cornell Med. Coll.*, 48 Misc. 3d 1210(A), 2015 WL 4173697, at *2 (N.Y. Sup. Ct. Bronx Cnty. 2015).

2 *See, e.g., Weixel v. Bd. of Educ. of City of N.Y.*, 287 F.3d 138, 149 (2d Cir. 2002) (recognizing request for accommodation as a protected activity under the Rehabilitation Act and the ADA).

3 *See, e.g., Weinberg v. Consol. Edison Co. of N.Y.*, 590 F. App'x 97, 97 (2d Cir. 2015) (affirming decision holding that independent contractor was not protected under Title VII); *York v. Ass'n of Bar of City of N.Y.*, 286 F.3d 122, 126 (2d Cir. 2002) (rejecting claim of unpaid intern under Title VII).

4 *See Scott v. Massachusetts Mut. Life Ins. Co.*, 86 N.Y.2d 429, 434 (1995) (holding that independent contractor was not protected under NYSHRL); *see also* Exec. L. § 296-c (covering interns).

which is particularly necessary given the changing nature of employment in New York City, including alternative work arrangements and increased outsourcing. In this regard, the Commission expresses its gratitude to Council Member Lander for his September 2016 report, Raising the Floor for Workers in the Gig Economy, which underscored some of the challenges that freelancers and independent contractors face and raised awareness about the ever-changing nature of New York's work force and the need for the law to evolve in order to protect these workers.

The Commission looks forward to working with the Council to further refine the language of Intro 136-A to define the relevant time period for assessing whether an employer meets the jurisdictional requirements to fall within the coverage of the City Human Rights Law and to provide clear protections for independent contractors and other categories of workers who are often vulnerable to discrimination and harassment yet excluded from coverage under civil and human rights laws.

The Commission supports an approach that does not rely on the categorical rejection of workers based on their job title or on the corporate form of their employer, and instead aims to meaningfully address discrimination as it is experienced and expand accountability for discriminatory acts to those entities and individuals with the power and resources to effect change. The spirit of these changes reflects this philosophical shift, which we support. The proposed amendments raise potential legal questions that the Commission will need to research further and we look forward to the opportunity to provide feedback once we have completed our review.

Overall, I wish to reinforce the Commission's support for legislation that provides greater protection against discriminatory acts in all spaces throughout the City and our appreciation for City Council's ongoing attention to and efforts to strengthen employment protections. The Commission thanks Chair Eugene and the members of the Committee for calling this hearing. We look forward to working with the Council on these bills and thank each of you for your partnership in strengthening and advocating human rights in our city. I look forward to your questions.

Fair Play Legislation

FOR THE RECORD

Statement of Craig Gurian on behalf of Fair Play Legislation, June 18, 2018

I regret that a scheduling conflict has prevented me from delivering this testimony in person. As some of you may know, I have drafted or otherwise had central participation in most of the major enhancements to the City Human Rights Law, starting with the comprehensive 1991 Amendments to the City HRL.

Intro 136-A

Intro 136-A deserves the strong support of this Committee and of the Council. The bill is a natural outgrowth of the philosophy of the City HRL to insist that those who control or influence a workplace take responsibility to ensure that no discrimination occurs in that workplace. Hiding behind labels, or artificially carving out protections for those who get the benefits of the labor workers perform, should not be tolerated.

One of the things that is evident in employment discrimination litigation is that discrimination defense attorneys do everything they can to avoid getting to the merits of the issue. So, for example, some of those who are functionally employers get off the hook because of a too strict federal test for what constitutes an employer. Intro 136-A simplifies the test.

Instead of turning a blind eye to how some entities game the system by disclaiming responsibility for conduct of subsidiaries or franchisees, Intro 136-A cuts through the legal fictions and provides new incentives for parent companies and franchisors to oversee genuine

and effective efforts to prevent discrimination and, failing that, to compensate those who have been hurt.

In my own experience, every single time there has been a proposed expansion of civil rights law, there are those who gasp, "How can we do this?" But it's exactly the wrong question.

The actual question is, "How can we *not* do this?" It's ok for a hospital to allow sexual harassment because the victim is someone who is volunteering at the hospital? Intro 136-A says no. It's ok for independent contractors to be denied work because of their citizenship status? Intro 136-A says no, and, in so doing, recognizes what we first said back in 1991: that employers can "employ" independent contractors.

If the independent contractor / employee is an "agent" of the employer, then Admin. Code § 8-1078(13)(a) or Admin. Code 8-107(13)(b) will control the scope of the employer's vicarious liability.

Finally, Intro 136-A takes a series of important steps by protecting existing and prospective directors, officers, members and partners of business organizations, regardless of whether such individuals are considered employees of such business organizations. This is the zone where the glass ceiling exerts a particularly pernicious effect on who gets to exercise power, and there is no good reason to permit such discrimination to go unpunished.

Intro 799

Intro 799 is to be commended for taking on the absurd decisions that say that retaliating against someone for having requested a reasonable accommodation is not retaliation under the law.

I would propose a different mechanism, since it is apparent (though it has gone unnoticed) that the conduct is already covered by Admin. Code § 8-107(19), the section called "Interference with Protected Rights." The full text is:

> It shall be an unlawful discriminatory practice for any person to coerce, intimidate, threaten or interfere with, or attempt to coerce, intimidate, threaten or interfere with, any person in the exercise or enjoyment of, or on account of his or her having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected pursuant to this section.

I would say with absolute certainty that taking action against someone for having requested a reasonable accommodation constitutes interfering with a person in the exercise or enjoyment of any right granted or protected pursuant to this section.

We know, however, that courts – including the State Court of Appeals – are still in some cases ignoring the Council's repeated command to liberally construe the statute (those commands are in need of being reinforced). To make absolutely certain that the situation that gave rise to Intro 799 is dealt with – and that other forms of interference with people who are exercising their rights are dealt with – I think a simple addition to Admin. Code § 8-107(19) would work as follows:

> It shall be an unlawful discriminatory practice for any person to coerce, intimidate, threaten, ~~or~~ interfere with, or otherwise take any adverse action against, or attempt to coerce, intimidate, threaten, ~~or~~ interfere with, or otherwise take any adverse action against, any person in the exercise or enjoyment of, or on account of

his or her having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected pursuant to this section.

Thank you for consideration of this testimony, and thanks to Council Members Lander and Williams for sponsoring Intro 136-A and Intro 799, respectively.

Legal Services NYC
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June 18, 2018

Re: Intro 0136-2018

Dear Committee on Civil Rights and Human Rights:

I would like to thank Councilmember Landers for introducing this important bill, and to the entire Committee for holding this important hearing. My name is Nicole Salk, and I'm a Senior Staff Attorney in the Workers' Rights Unit at Brooklyn Legal Services.

This bill comes at a crucial time, when an ever increasing share of workers in New York City work temporary, casual and "gig economy" jobs to make ends meet, and where volunteer and internship positions are still all-but-required in many fields, to ensure that one of the most expansive, progressive, and protective municipal civil rights statutes in the country protects *all* of workers. Moreover, in light of the various attempts that have been made to let franchisors off the hook for the unlawful practices of franchisees, it is important that New York City remain steadfast – where franchisors seek to maintain control over the practices of their franchisees, it must also ensure that its workforce is protected and that franchisees refrain from engaging in unlawful discriminatory practices.

Earlier this year, a poll by NPR and Marist found that 1 in 5 workers is an independent contractor or freelancer.[1] This number may well be an undercounting, given that an increasing number of people with full-time jobs are *also* freelancing on the side. There is also evidence that women are more likely to engage in freelance work than men[2] and that the gender wage gap in freelancing is worse than in other parts of the workforce.[3] People who work in casual, non-permanent jobs are often the most vulnerable to discriminatory practices, with the least bargaining power and the least ability to speak up for themselves. It can be particularly difficult to prove retaliatory conduct in these instances because, after all, freelancers have no guarantee of repeat jobs.

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[1] NPR, *Freelanced: the Rise of Contract Workers*, January 22, 2018. percentage of workers in nyc "independent contractors," available at https://www.npr.org/2018/01/22/578825135/rise-of-the-contract-workers-work-is-different-now.

[2] Fast Company, *Why Are More Women Than Men Freelancing?*, March 11, 2015, available at https://www.fastcompany.com/3043455/why-are-more-women-than-men-freelancing

[3] Inc., *Women Who Freelance Are Paid a Third Less Than Men: Time to Change That*, by Erik Sherman, available at https://www.inc.com/erik-sherman/female-freelancers-you-get-screwed-in-pay-here-are-6-steps-to-better-results.html

As a result, employers often turn to freelancers rather than full-time employees, not only because it saves them (often unlawfully) the cost of payroll taxes and benefits, but also because, without the passage of this bill, an employer may choose to use *only* freelance labor to excuse itself entirely from the reach of the Human Rights Law. This bill would prevent such practices.

The same gender imbalance comes into play in unpaid internships, with one study showing that 77% of undergraduates who had unpaid internships were women.[4] The #MeToo movement has brought into the limelight the degree to which women in male-dominated professions – particularly women early in their careers, which so many freelancers and unpaid interns are – are particularly vulnerable to having to make the nauseating choice between protecting themselves from or reporting unlawful conduct, on the one hand, and keeping quiet to keep food on the table on the other.

While freelancers and unpaid interns generally already receive protections under the Human Rights Law, they might only be covered where the workplace has four or more *other* employees. Not only does this mean that many freelancers, interns, and volunteers are potentially exempt, it may create a perverse incentive for employers to rely on casual or unpaid labor rather than full-time workers in an attempt to circumvent the protections of one of the most progressive municipal human rights laws in the country. With the passage of this new bill, we can ensure that all New Yorkers have a full and fair chance to work, free from discrimination, and find economic stability for ourselves and our families.

In the past two weeks in a single one of Legal Services NYC's many offices, we have received two calls from young women who work in temp-like positions who have been the victims of disgusting and upsetting sexual harassment from individuals in positions of power over them. Both women ultimately lost their jobs, which they could ill-afford.

Ensuring that all workers are protected from discriminatory harassment of all kinds is crucial to low-wage workers and our client base in particular. No one should have to choose between being safe at work and putting food on the table.

Moreover, it is crucial to our client-base that franchisors be held liable for the unlawful practices of their franchisees. All too often, a franchisee is simply a subsidiary by another name, with the risk and liabilities of running a small business pushed off onto smaller entities, while the larger entity who ultimately determines many of the rules of business and who ultimately profits from the expansion of their brand, is largely let off the hook. That is why, again, it is so crucial that the City Council and Councilmember Landers in particular is taking the lead on this issue – particularly now, when some of the progress previously made on this issue at the federal level has been under threat.

I thank the Committee for holding this hearing and for supporting the rights of low wage workers.

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[4] Intern Bridge, Inc., *The Debate Over Unpaid College Internships*, http://www.ceri.msu.edu/wp-content/uploads/2010/01/Intern-Bridge-Unpaid-College-Internship-Report-FINAL.pdf

Respectfully submitted,

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NELA/NY

ADVOCATES FOR EMPLOYEE RIGHTS
NATIONAL EMPLOYMENT LAWYERS ASSOCIATION

Testimony of Margaret McIntyre on behalf of the

National Employment Lawyers Association / New York Affiliate (NELA/NY)

in support of Int. No. 136-A, June 18, 2018

My name is Margaret McIntyre. I am the chair of the Legislative Committee of NELA/NY, the New York Affiliate of the National Employment Lawyers Association. I testify today to express our strong support for Int. No. 136-A. Our roughly 350 attorney members have been on the front line of fighting in court to vindicate the civil rights of New Yorkers. We deeply appreciate the willingness of the New York City Council to continue to seek to improve the New York City Human Rights Law (NYCHRL) and to ensure it is effectively enforced.

Section 1

The proposed amended definition of "Employer" clarifies that employers excluded from coverage under the law because they have too few employees must regularly function as an employer with fewer than four persons in his or her employ. That is, in both the six months before and after the discriminatory action in issue, the employer must have fewer than four employees. This change will ensure that an employer that fires one of its four employees for discriminatory reasons will not evade responsibility under the law by virtue of having only three employees as a result of the

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discriminatory firing. By requiring that the employer have fewer than four persons in its employ in the six months before and after an alleged discriminatory practice, the law will provide a simple test for determining whether the employer qualifies for the exclusion from coverage and thereby minimize litigation over the issue.

Section 2

The proposed change to Section 8-107(1)(f), changing the word "shall" to "do" clarifies that the provisions of the subdivision do not apply to the family members listed in the subdivision.

Section 3

The addition of paragraph (g) to Section 8-107(1) makes clear that "existing and prospective directors, officers, members and partners" of employers are protected against discrimination even if they are not considered employees by the employer. In this way, individuals who are discriminated against on the job will not face the additional obstacle of having to litigate whether or not they are covered by the law *before* having the opportunity to pursue their claims on the merits. This change will make it more likely that individuals holding these positions with employers will come forward to challenge discrimination.

Section 4

This Section of the bill greatly expands the kinds of persons performing work for an employer who will be protected from discrimination and retaliation under the NYCHRL. This expansion will make it far less likely that employers in New York City will tolerate any discrimination in the workplace, because no persons engaged in work for an employer covered by the law will be excluded from the law's protection. The bill will also discourage employers from misclassifying employees in order to avoid liability for discrimination under the NYCHRL.

Section 4(a) expands Section 8-107(23) of the law so that not only interns are protected by the law but also volunteers and independent contractors. This is important because no one who performs services on behalf of an employer subject to the law should be excluded from the law's protection.

Section 4(b) will make clear that a person is "in the employ" of an employer if the employer maintains "full or partial control over (i) the terms, conditions or privileges of the person's work, (ii) the conduct of the person's work or (iii) the right os the person to continue to work, regardless of whether there is any integration of operations between multiple employers and regardless of which, if any, employer compensates the person." This comprehensive definition of what it means to be employed by a person or entity will eliminate wasteful litigation over technical definitions of who is a complaining individual's legal employer. It will make clear that any individual or entity with control over a complaining individual's work will be considered a responsible employer, subject to liability, if the complaining individual is subjected to discrimination or retaliation.

Similarly, Section 4(c) will eliminate the ability of parent companies and franchisors to evade liability for discrimination against employees of their subsidiaries or franchisees. This change will also eliminate wasteful litigation over whether or not the parent or franchisor exercises sufficient control over a single individual's employment to be considered an employer of the individual. It will also give parent companies and franchisors the incentive to require subsidiaries and franchisees to refrain from discrimination and to support them in their efforts to prevent discrimination.

Section 5

By making Int. No. 136-A effective 270 days after the bill becomes law, the City Council will give employers ample time to prepare for compliance with the bill's provisions.

In sum, Int. No. 136-A will further the New York City Council's goal of eliminating employment discrimination in New York City. By expanding the definitions of who may be protected by the NYCHRL and who may be liable under the NYCHRL, this bill will make it far more likely that employers will exercise care to prevent discrimination and retaliation against any person who performs services on their behalf.

I urge the quick passage of Int. No. 136-A.

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New York Civil & Human Rights Committee
250 Broadway
New York, NY 10007

RE: Opposition to Intro-136

Dear Chairman Eugene & Members of the Committee:

On behalf of the International Franchise Association, I wish to express our strong opposition to Intro-136.

Celebrating 56 years of excellence, education and advocacy, the International Franchise Association, or IFA, is the world's oldest and largest organization representing franchising worldwide. IFA works through its government relations and public policy, media relations, and educational programs to protect, enhance and promote franchising and the more than 733,000 franchise establishments that support nearly 7.6 million direct jobs, $674.3 billion of economic output for the U.S. economy and 2.5 percent of the Gross Domestic Product (GDP). IFA members include franchise companies in more than 300 different business format categories, individual franchisees, and companies that support the industry in marketing, law, technology and business development. **Within New York City alone, there are approximately 700 different franchise brands operating, all of which, under Intro-136, will be held per se liable for the actions of their independent franchisees.**

New York City has approximately 9,100 franchise units. These independently-owned and operated businesses employ roughly 110,000 people in a range of jobs – from those just entering the workforce to managers to specialized professionals. In fact, growing numbers of women and minorities own franchise establishments, and preserving the small business franchise model is critical to promoting minority and female entrepreneurship. Over the last five years, minority and women franchise ownership has grown by more than 50% across the country. Nearly one-third of all franchises across the country are owned by minorities, compared to just eighteen percent of non-franchise businesses. Franchising – and franchise ownership – is a path toward increased job creation and economic growth among people from all walks of life and socioeconomic backgrounds.

That potential for growth is threatened by a common misconception of the franchise business model. This misconception, which clearly serves as the underpinning of certain provisions proposed to be added by Intro-136, is that the owner of the franchise brands – the "franchisors" – actually own and operate the stores and make employment decisions for them. In reality, franchise establishments across the city are locally-owned small businesses operating under a national brand or identity. The local business owners are in charge of all employment decisions, including hiring, firing, wages and benefits. It is the local franchisee who owns and operates the establishment, not the franchisor owner of the brand. In fact, the national brands have no role whatsoever in determining wages of a franchisees' employees and/or employment practices of a franchisee.

By making a per se determination that franchisors are the joint employers of franchisees, New York City is also making a per se determination that these minority and female entrepreneurs are not small business owners, but middle managers of large corporations. These small business owners made the decision to get into business for themselves. If Intro-136 were signed into law, New York City would be demonizing the very diverse population of business owners that make the franchise model a melting pot.

Making labor decisions for franchisees is not a brand standard that franchisors can establish or enforce under any law. Proposed Intro-136 makes the improper assumption, and reaches the improper conclusion, that the franchisor and franchisee have some collective control over each other's day-to-day business affairs. This is absolutely untrue. Additionally, passage of Intro-136 would make New York City an outlier: no other city, state or federal government has passed or even contemplated a similar law, primarily due to the realization that franchisors do not in fact employ those who work in a franchisee's establishment. In fact, no less than 19 states have passed legislation affirmatively stating that a franchisee's employees are not the employees of a franchisor. **The per se liability imposed by Intro-136 is unprecedented at any level of government and completely ignores the case-by-case factual analysis that is required and has been used in this context in the past.** It also ignores New York state law – in place for over three decades – which recognizes franchisees and franchisors as separate legal entities.

Franchisees and franchisors are in no way employment partners with each other. No franchisor has any authority over how their franchisees choose to manage their employees on a day to day basis. Independent franchisees are no different than any other independent business owner, and despite what Intro-136 is attempting to do, the legal, contractual, operational and economic realities of the relationship will not change. **Intro-136 will impose a per se liability rule on entities and principals that have no role whatsoever in the issues addressed in the legislation.**

Franchisees are small business owners. They independently invest in their businesses and pay the operating costs of their businesses, as would any other small business owner in New York City. They pay rent, wages, employment-related and other taxes and debt service, and no other party, including the franchisor, shares in these small business obligations. Franchisees pay initial and continuing fees to the franchisor for the right to use the franchisor's brand and other intellectual property. Franchisors are merely the licensors of their brands and methods of doing business; they are not co-venturers in the business affairs, as this law apparently misrepresents.

Franchising is of considerable importance to the economic development of New York City, as it is for the rest of the United States. In fact, just last month, the largest franchise exposition in the world was held at the Javits Center, drawing tens of thousands of prospective entrepreneurs and sizeable economic development. The Expo was well-attended because New Yorkers recognize the innate potential of the franchise model - it allows for the creation of independently owned businesses that enable entrepreneurs to operate their own businesses under recognized brands.

It is also a driving force in the creation of jobs, with franchise job growth outpacing non-franchised job growth across the country. When franchisors contemplate expansion of corporate offices or relocations, a law like Intro-136 would be a serious deterrent to considering New York City, as it sends a very clear message that the city is not a franchise-friendly jurisdiction. The proposed policy contradicts the on-the-

ground reality, where thousands of New Yorkers patronize franchise establishments every day. In fact, numerous franchise brands, like Fastsigns, Philly Pretzel, and Pieology, have expressed intentions to expand in the City, all of which would be threatened by passage of Intro-136. The proposed legislation could also challenge the planned and ongoing franchising of iconic New York brands like Magnolia Bakery or The Halal Guys.

Intro-136 will most certainly damage one of the most significant contributors to job creation in the City. It is both discriminatory and ill-advised. Instead, IFA urges the City to adopt policies that ensure the viability of the vibrant and diverse franchise community. This can be done in a way to preserve civil rights protections and enhance opportunities for minorities, and IFA is ready to partner with you in this endeavor.

IFA strongly recommends the council adopt a policy that clarifies franchisors are joint employers **only if** they exert direct control over the traditional terms of employment, such as hiring, firing, and making pay determinations. IFA has spearheaded similar legislation at the federal level in H.R. 3441, the *Save Local Business Act*, which was adopted in a bipartisan vote by the U.S. House of Representatives on November 7, 2017. This legislation ensures the vague, limitless joint employer definitions that have occurred at the federal level are clarified so that franchisors can adopt workforce development programs and pursue important corporate social responsibility measures without the threat of legal liability over indicia of "indirect or potential control".

IFA is also promoting many policies in line with the City Council's policy agenda, particularly with workforce development programs – many of which are hindered by joint employer proposals like Intro-136. There are labor shortages in many industries, and franchising is not immune. To address these labor shortages some franchisors have attempted to put together workforce development and certification programs that would help franchisees find and recruit talent. In the wake of expanded joint employer at the federal level, some franchisors have opted not to move forward with the workforce development programs at all. Other programs, if adopted, would be at risk of legal liability because some courts have viewed the programs as a measure of a franchisor's indirect control over the franchisee's employees.

Another example is taken from Code Ninjas, which is an emerging concept that teaches STEM education to youth through video game development. At a U.S. House Small Business Committee hearing on May 16, 2018, the Code Ninjas CEO, David Graham, testified that expanded joint employment liability is challenging his brand, and specifically, that the company is unable to put a job recruitment portal on the franchisor's website. This portal would have allowed teenagers who are interested in being considered for jobs teaching kids to code the ability to apply on a one-stop-shop online hub through the franchisor. Because the portal could be construed as a means of "indirect control" over the franchisees' employees, Code Ninjas did not create the job portal and each franchisee must now go through the lengthy and expensive employment recruiting process on their own. These policies are having a direct negative impact on **youth employment** across the country. Businesses need to know with certainty that they can offer these crucial benefits and utilize the power of the franchise business model without running afoul of liability laws.

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Another important topic is our mutual goal of **strong civil right protections**. In franchising, anti-discrimination policies are adopted by franchisors and franchisees independently, as they are separate employers. Civil rights groups, such as the Human Rights Campaign or animal welfare groups, do have relationships with many corporations, such as franchisors, and often urge them to intermediate with franchisees on certain practices of the local business owner. In the wake of expanded joint employer, however, franchisors are hamstrung from providing guidance in this area, which would also be seen as an indicator of indirect control.

To this end, IFA has worked closely with national groups such as the National Gay and Lesbian Chamber of Commerce, the U.S. Black Chambers, and the Southern Christian Leadership Conference to call for Congressional clarification in this area so that the franchisor can proceed with offering recommended courses of action for the franchisee's consideration without running afoul of joint employer liability.

We do not seek special treatment from the City but do ask for the same treatment as any other small business. The IFA respectfully requests New York City not pick winners and losers among businesses but apply existing law equally. We applaud and agree with your efforts to protect all human rights of workers in the City, but we urge the City to adopt policies that ensure the viability of the vibrant and diverse franchise community. This can be done in a way to preserve civil rights protections, and IFA is ready to partner with you in this endeavor. Ensuring a level playing field for all New York City businesses is paramount and assigning liability only to the responsible party is in the interest of all involved.

Thank You,

M. Jeff Hanscom

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Testimony of Caitlin Pearce, Executive Director, Freelancers Union
In support of the "Protections for workers under the city's human rights law"
Before a joint hearing of the New York City Council Committee on Civil and Human Rights and the Committee on Women
In Relation to Extending Equal Protections of the Law to All Working People in New York City

June 18, 2018

Good Afternoon. On behalf of the 150,000 New York City members that Freelancers Union serves, we thank the committees for holding this hearing today, and we thank Council Member Brad Lander for his continued leadership as a champion for the freelance workforce.

Freelancers are a huge and important part of the fabric of New York City, living and working in every borough. Nationally, we represent 36% of the workforce, contributing more than $1.4 trillion annually to the economy.

Unfortunately, despite growing numbers, freelancers continue to face harassment and discrimination in the workplace with few protections or paths for recourse. The simple truth is that too many freelancers must go to work feeling unsafe. They rarely have a supervisor or HR department where they can safely report violations, coworkers they can confide in, or an adequate safety net that would allow them to pursue recourse from clients who threaten to retaliate. Even employers with progressive and inclusive policies almost never include any protections for freelancers.

Independent workers face these issues alone, and for many, bringing attention to acts of harassment or discrimination means losing a client. Not surprisingly, Freelancers Union's research shows that 75% of incidents go unreported.

I want to thank the Freelancers Union members who are here today representing the countless freelancers who have had to endure abuse or walk away at great professional cost. I wanted to share the experience of one member, Angela Ivana, a makeup artist from Astoria, Queens, who has submitted written testimony but could not be here today.

> "As the only African American female beauty professional..., I was held to different standards than everyone else in the agency. I was told I could not have a photograph on the agency website because my agent "didn't want his clients seeing that I was black."
>
> On one occasion, he told me that a photographer I was booked to work with was also African American and that I should "get along with other black people and make friends on this job," and to "keep a smile on my face" so they don't think I'm a "black b*tch."

> This discrimination meant I was being excluded from larger paying jobs and campaigns. I was put in a position where I was reliant on pleasing the person discriminating against me to ensure I could feed, clothe, and house myself. My health and well-being began deteriorating.
>
> When I decided to leave the agency, I lost all my contacts and had to rebuild my entire career. I had to exhaust my savings to survive and now I'm still struggling to find work today, 1.5 years later.
>
> With no repercussions, my agent abused and harassed over 20 beauty professionals on his roster. As contractors, we didn't know who to report his behavior to. Since we were all freelancers and depended on the income of a person who facilitated our work, people were hesitant to speak up. Living in New York is expensive and there's a constant threat of being unable to survive here."

The New York City Council led by example and was the first in the nation to pass a Freelance Isn't Free act, recognizing the challenges faced by freelancers in the new economy. We all know that more work needs to be done. Independent workers must have a clear path to report workplace issues and equal protection from retaliation.

On behalf of Freelancers Union, I urge the council members to pass this bill, and to clarify that the City Human Rights Law protects millions more of New York City's working people.

Testimony of Jillian Richardson, Freelancer from East Williamsburg, Brooklyn
In support of the "Protections for workers under the city's human rights law."
Before a joint hearing of the New York City Council Committee on Civil and Human Rights and the Committee on Women
In Relation to Extending Equal Protections of the Law to All Working People in NYC

June 18, 2018

Thank you for considering this update to the City Human Rights Law. My name is Jillian Richardson, and I am a freelance writer from East Williamsburg, Brooklyn.

Recently, I was typing on my laptop at a co-working space when a fellow freelancer approached me. "I was worried you weren't going to come in today," he said. "I couldn't find you! You should be by the window. That's where the pretty people should sit."

I didn't say anything, but he kept going as he gestured to my body. "That guy who's sitting at the table right now is fine … but he's no you."

After he left, I sent the owner of the space an email. I said that I was being sexually harassed, and wanted the man to be told that his actions were not acceptable. A few minutes later, the owner approached me.

"Don't worry about it," he said. "He does that to everybody!"

The owner never said that he was sorry for the incident, and, to my knowledge, never did anything to address the situation. I sat there the rest of the day, furious. I had no idea what else I could do, except never come back.

Later, I went on the space's website and discovered the company had no official sexual harassment policy, or anything resembling an HR department for that matter. The community aspect of co-working spaces is often similar to an office, at least when it comes to physical proximity. But these spaces are also without the rules and guidelines that seek to ensure respectful and safe office etiquette. No space, to our knowledge, requires sexual harassment training of all of its members.

Many coworking spaces are small franchises. The companies, owners, and operators of these spaces need to be responsible for their own behavior, and for addressing concerns about harassment that are brought to them. And, in this era of increasing independent work, freelancers need to know that the law clearly protects them.

My experience changed the way I think about workplace harassment in this new age of work. It's frustrating to know that I may get cat-called on my way to work, only to walk into a professional space that makes me feel just as unprotected.

Passing this bill to amend the City Human Rights Law would send a clear message to freelancers like me - that our rights are protected just as those of any employee, and it would hold more companies responsible for providing workplaces free from harassment and discrimination.

Thank you for your consideration.

Testimony of Nina Irizarry, Freelancer from Astoria, Queens
In support of the "Protections for workers under the city's human rights law."
Before a joint hearing of the New York City Council Committee on Civil and Human Rights and the Committee on Women
In Relation to Extending Equal Protections of the Law to All Working People in NYC

June 18, 2018

Hello, my name is Nina Irizarry. Thank you for the opportunity to speak with you today. I live in Astoria and work in Arts and Fashion, balancing a full-time position at a luxury boutique and freelancing as a performer, writer, and creative director.

My journey as a freelancer began when I was 17, working as a performance artist and singing professionally in an all-female salsa band. The sexual harassment from my band's senior manager started after about a year, at a point when I had grown to trust this person. There was a clear power dynamic at play when he made his initial advance at me, though I tried to brush it off as something that did not happen or could not happen and ignored the remarks. He would take me on different outings, require me to get all dressed up to meet music industry professionals and gatekeepers, including a record label executive. He was always bringing wine with him on those outings for both of us to drink -- even though I was only 18. I felt like the goal was to get me drunk so I would make unethical decisions. Eventually the advances became more aggressive into things like groping. It was not only him making advances but it was the other managers, too. One had remarked that two other managers were attracted to me as well - and this was considered normal conversation.

The whole situation became unbearable for me to handle, and a constant pressure. I wanted to have my own agency, I wanted to feel safe, I did not want to be harassed, I wanted to have control of my own voice and image. I became fed up with the situation and decided I

had to leave the band altogether, stepping away from a great professional opportunity to avoid the constant harassment.

During the time, I wish there was an HR type of department to make a complaint to or there was some code of ethics in freelance work that all parties would agree to follow. As a freelancer, it feels like you don't have the same respect and rights at work.

Thank you for hearing my testimony and considering this bill - it would positively impact the industries I have worked in, and help prevent the harassment that I, and so many others, experience.

Testimony of Janelle Miau, Freelancer from Brooklyn
In support of the "Protections for workers under the city's human rights law."
Before a joint hearing of the New York City Council Committee on Civil and Human Rights and the Committee on Women
In Relation to Extending Equal Protections of the Law to All Working People in NYC

May 20, 2018

My name is Janelle Miau. I live in Brooklyn and have worked as a freelancer in the animation and motion graphics field since 2010. My clients in this industry have included advertising design agencies, pharmaceutical marketing companies, a television network, and animation and motion graphics houses.

One of my freelance jobs was at a small animation boutique. I was often the first person to arrive in the morning, and the owner of the shop would chat with me about the business. One day he mentioned that he always checked Facebook before he hired anyone because he had once hired someone who turned out to be older, and older people "did not want to work late." I realized when he said this that he thought I was younger than him because I had just graduated from a Master's program and changed careers. However, from our conversations, I knew that I was in fact older than him. After hearing his comment about older people, I felt like I had to hide my age from him since he would think I was less willing to work hard if he knew how old I was.

I worked another job for a large television network. I was full-time but officially an employee of the agency that placed me. So I was considered a freelance employee at the company. Week by week we would be "confirmed" by the placement agency whether we would be working the following week. I worked in this way for over 1 year. The boss at my job, a producer and the only employee of the department, would not "confirm," or rehire, designers who took days off that were inconvenient to her. In one case, she did not "rehire" an employee who had taken leave for surgery. I left the job in 2017 when I had a baby, and I knew that I would not be hired back after taking a few months leave.

I am writing this testimony because in my experience, independent workers feel the need to work around age discrimination and sexual harassment because there is no viable recourse for us when these things take place. We do not feel that the human resources department at our place or employment is there to protect us (beyond the payroll function), and the same job protections do not apply to our employment status. We can fired or let go for any reason, even reasons that would be illegal for full-time employees. I have seen employees not respond to harassment and discrimination because there is no advantage to doing so, and it can only tarnish their reputations as "employable" designers. I have also witnessed freelancers that work when they are sick and hide their pregnancies as long as they are able because they are afraid they will lose their jobs if they tend to their health or announce upcoming absences.

Thank you for the opportunity to submit my testimony to the committee hearing regarding Protections for Workers Under the City's Human Rights Law. Please do not hesitate to contact me at jmiau@yahoo.com if you have any questions.

Testimony of Angela Ivana, Freelancer from Astoria, Queens
In support of the "Protections for workers under the city's human rights law."
Before a joint hearing of the New York City Council Committee on Civil and Human Rights and the Committee on Women
In Relation to Extending Equal Protections of the Law to All Working People in NYC

April 23, 2018

Hello, my name is Angela Ivana. Thank you for the opportunity to submit this testimony to the committees.

I work in the entertainment and advertising industries doing beauty work. I do wigs and makeup for those in advertisements, commercials, film and TV shows. I live in Astoria, Queens, and I have been freelancing for the past 8 years.

Like many beauty professionals, my work on productions is booked through an agency. During my time at my former agency, I experienced constant harassment and race-based discrimination from the makeup agent. The agent managed all my clients and contacts, and had a huge influence on my income and career. When he used my race to discriminate against me he knew that I couldn't do anything about it. It was never subtle.

When I started with the agency, my work history and portfolio was filled with diverse people intentionally because I grew up with diverse cultures who were often unrepresented and underrepresented in media. I wanted my clients to see I could work with people from a variety of backgrounds. But, I recall during February one year, I was yelled at for "having too many black people in my portfolio." I was told to remove photos of all the black people from my portfolio to please my agent so I could get more work with his that catered more to a Caucasian demographic. A week later my agent couldn't book me on a job for a popular black media company because I no longer had black models in my portfolio. I recall him saying, "What the f*ck, you're black...you should have more photos of black people and they should book you because you're black."

On another occasion, he proceeded to tell me that a photographer I was booked to work with soon was also African American and that I should "get along with other black people and make friends on this job," and to "keep a smile on my face" so they don't think I'm a "black b*tch."

As the only African American female beauty professional at the agency, I was held to different standards than everyone else in the agency (who were Caucasian). I was told I could not have my photograph with my biography on the agency website because he "didn't want his clients seeing that I was black."

This discrimination meant I was being excluded from larger paying jobs and campaigns where I would have to work with talent from other racial groups. I was put in a position where I was

reliant on pleasing the person discriminating against me to ensure I could feed, clothe, and house myself. The discrimination and abuse caused me emotional distress.

When I tried to avoid the agents calls, I'd then received more harassment in a barrage of texts, calls and voicemails. If I asked him for respect or he felt challenged, then I would lose money and bookings to work. My health and well-being began deteriorating.

When I decided to leave the agency, I lost all my contacts and had to rebuild my entire career and contact list that I had spent 3 years developing. I had to exhaust my savings to survive and now I'm still struggling to find work today, 1.5 years later.

With no repercussions for my former agent, he abused and harassed over 20 beauty professionals on his roster. As independent contractors, we didn't know who to report his discriminatory behavior to. Since we were all freelancers and depended on the income of a person who facilitated our work arrangements, people were hesitant to speak up. Living in New York is expensive and there's a constant threat of being unable to survive here.

With this new bill, I hope agents and clients will be less likely to make harmful decisions and discriminate against people freelancing. I hope the bill will make it clear that freelancers are protected and should be treated with the same decency and respect that everyone deserves.

Thank you for the opportunity to testify, and for your consideration of this bill.

NELP NATIONAL EMPLOYMENT LAW PROJECT

TESTIMONY

Testimony of Rebecca Smith

National Employment Law Project

Hearing of the New York City Council Committee on Civil and Human Rights

June 18, 2018

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The National Employment Law Project (NELP) is a national legal, research and policy organization. For decades, we have focused on the ways in which various work structures – subcontracting, temp and staffing, calling workers "franchisees" or "independent contractors" -- are drivers of labor standards erosion, rising income and wealth inequality, enduring and evolving structural racism and occupational segregation, and the shifting of power away from workers and toward corporations. While contracting out jobs like payroll administration and cleaning can often represent a legitimate and efficient business decision, contracting out also shifts economic risk away from employers onto middlepersons, and frequently, onto workers themselves. In many cases, it has been employed simply as a tactic to avoid compliance with labor laws.

Intro 136 focuses on protecting workers from discrimination in employment and extends and clarifies the reach of New York's Human Rights law, ensuring that all workers can take advantage of the protection of this law and that all entities that determine terms and conditions of workers' employment are also responsible for maintaining a workplace where all workers have equal opportunities at work – no matter what structure the business has in place or what label it places on its workers. NELP is pleased to submit testimony in support of Intro 136.

Intro 136 comes at a critical moment in policy around both discrimination and contract work. The #MeToo movement has sent a clear message to many abusive men—from household names like Harvey Weinstein to the managers, editors, and coaches whose names don't make headlines—that their behavior is no longer acceptable. Even before #metoo sparked a national conversation and recognition of the extent of sexual harassment and gender discrimination at work, workers themselves, in documentaries such as "Rape in the Fields" and "Rape on the Night Shift" were bringing national attention to sexual abuse in industries like agriculture and janitorial – industries in which contracting out is often the norm. Courts have long wrestled with issues around joint responsibility between contracting entities towards workers who suffer various forms of discrimination at work. More recently, workers and researchers are raising questions about the lack of accountability and transparency in "new economy" online platform-mediated jobs such as driving, cleaning and delivery, with some researchers suggesting that race, gender and other forms of discrimination are hard-wired into algorithmic management and customer star ratings systems.

Subcontracted Work Explained

Rather than classifying their workers as employees, many companies in many different sectors describe their workforce as independent contractors, or contract with middleperson companies and designate these as the "employers' of the workers. These arrangements are variously called "nonstandard" work, "alternative work arrangements," or subcontracting. They occur across many industries, from construction to technology,

homecare, warehousing and materials moving,[1] janitorial[2] and fast food. Workers who work in isolation from other workers, such as those dispatched to perform cleaning, caregiving, delivery and for-hire driving services, are particularly vulnerable to discrimination, whether it be by the companies themselves or their customers.

Results from the just-released 2017 Contingent Worker Supplement (CWS) to the Current Population Survey reveal that 1 in 10 U.S. workers (15.5 million) finds her primary job in a "nonstandard"—i.e., subcontracted, temporary, on-call, on-demand, or freelance—work arrangement. Prior research found that as much as 16% of the workforce is employed in these arrangements.[3] Passage of Intro 136 would eliminate the incentives for firms to use these structures as a way to avoid compliance with critical human rights protections enshrined in our anti-discrimination laws by explicitly covering workers labeled independent contractors and ensuring that joint employers in franchise and other relationships share responsibility for compliance with discrimination laws.

Independent Contractors and Discrimination

Workers in a number of industries are frequently forced to accept being considered "self-employed" contractors as a condition of employment. In many cases, this label is wrong, and the practice is illegal. For many, the effect of being classified as an independent contractor means either going without the protections of anti-discrimination and other laws while on the job, or fighting to be recognized as an employee in order to receive the protections that most workers in the country take for granted.

In order to eradicate bias in our country, workers must be afforded the protections of anti-discrimination laws whether they are called "employees" or "independent contractors." In particular, many contract workers are vulnerable to discrimination, yet lack access to the vital information that can prove their claim. Lack of transparency and accountability means workers labeled as independent contractors face overwhelming obstacles to challenge their treatment.

This lack of transparency means that a job applicant may be rejected due to his or her actual or perceived age, race, creed, color, national origin, gender, disability, marital status, partnership status, sexual orientation or alienage or citizenship status - grounds that are protected by New York City anti-discrimination laws, but the applicant would have no way to know the justification for not being hired or for being fired.

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[1] Jason Rowe, New Jersey's Supply Chain Pain: Warehouse and Logistics Work Under Wal-Mart and Other Big Box Retailers (2012); Jason Sturna, et al., Unsafe and Unfair: Labor Conditions in the Warehouse Industry, Policy Matters: A Quarterly Publication of the University of California, Riverside (2012).

[2] David Weil, Market Structure and Compliance: Why Janitorial Franchising Leads to Labor Standards Problems (Boston Univ. School of Mgmt., Working Paper 2011); Steven Greenhouse, Among Janitors, Labor Violations Go with the Job, NY Times, July 13, 2005, at A19.

[3] Lawrence F. Katz and Alan B. Krueger, The Rise and Nature of Alternative Work Arrangements in the United States, 1995-2015, NBER Working Paper No. 22667 (2016),.

In addition to the potential for discrimination that contract workers may face directly from companies in terms of hiring or firing, workers like janitors, caregivers, delivery and for-hire drivers who work in isolation are vulnerable to discriminatory actions by customers. In particular, researchers have found evidence of bias in the structure of services where workers are rated by customers. A 2016 Northeastern University study found evidence of bias along racial and gender lines in two online platforms they examined: "On Fiverr, the researchers found evidence that black and Asian workers received lower ratings than white people. And on TaskRabbit, women received fewer reviews than men, and black workers received lower ratings than white ones. Perhaps most troubling, the researchers also found evidence of such bias in the recommendation algorithm on TaskRabbit."[4]

There are growing concerns about how customer feedback systems may "hard-wire discrimination into the supervisory techniques of gig economy platforms." Companies that outsource worker assessments, and ultimately the fates of their workers, to their customers make their workers vulnerable to the enduring prevalence of bias and outright discrimination in society.

Intro 136 is directed squarely at these practices. It would explicitly cover independent contractors, defined as "all persons who perform work for an employer, whether paid or unpaid, including volunteers, interns and persons working in furtherance of an employer's business enterprise as independent contractors" under New York City's Human Rights law.

Joint Employers and Discrimination

Intro number 136 would ensure that entities that exert control over the terms and conditions of a workers' employment, no matter whether or not they accept the designation of "employer," share responsibility for discrimination suffered by workers.

Under our nation's long-standing laws dating back as far as the early 1900s, companies that share control with their subcontractors over working conditions may also share accountability for violations of workers' rights. More than one employer can be found to be responsible, jointly with another, so that companies provide better oversight of working conditions, and in so doing, ensure broader compliance with basic labor and employment laws. This concept is known as "joint employment."

Joint employer responsibility is important for several reasons. In contracted jobs, it is often the case that one employer is larger and more established, with a greater ability to implement policies or workplace changes to ensure compliance. When this happens, recognizing that businesses are joint employers is essential to achieve remedies for workers, future compliance with the law, and to hold all responsible parties accountable

[4] For more, see NELP's Report The On-Demand Economy and Anti-Discrimination Protections, and sources cited there.

for their legal obligations.[5] Contracting companies are in an especially strong position to retain authority over the labor when they engage labor-only subcontractors whose workers perform work on the company's premises and who can only pay the workers after receiving payment from the lead company. The workers brought into a job by thinly-capitalized subcontractors are vulnerable to violations of labor laws as the subcontractors yield to the lead company's controls or illegally cut labor costs to preserve their contract.

Research and case law illustrate the importance of joint responsibility towards workers who, after all, are building wealth for more than one company. A national study uncovered rampant discrimination against Black workers both directly by staffing agencies and in the service of their clients' racial prejudices, including using crude code words to discriminate on the basis of both race and gender.[6] Various federal courts have also grappled with joint employment discrimination cases, with varying results. See e.g., *Baetzel v. Home Instead Senior Care*, 370 F.Supp 2d 631 (N.D. Oh, 2005)(homecare worker brought joint employment discrimination claim against franchisor and its franchisee); *Faush v. Tuesday Morning, Inc*, 808 F.3d 208 (3rd Cir. 2015)(joint employment claim involving an African-American worker assigned by a staffing firm to a retail job); *Butler v. Drive Automotive Ind. Of America, Inc.*, 793 F.3d 404 (4th Cir. 2014)(joint employment claim by female worker assigned to a manufacturing job); *EEOC v. Skanska USA Bldg., Inc.*, 550 F. App'x. 253, 256 (6th Cir. 2013)(joint employment claim by an African-American construction worker against general contractor); *Knitter v. Corvias Military Living, LLC*, 758 F.3d 1214, 1225-27 (10th Cir. 2014)(Female "Handyman" for general contractor brought action against national property management company).

Intro 136 would address these issues of joint employment, and set a clear joint employment standard. Under it, a person is in the employ of any employer that maintains full or partial control over (i) the terms, conditions or privileges of the person's work, (ii) the conduct of the person's work or (iii) the right of the person to continue to work. It would explicitly ensure that franchisors take responsibility for discrimination by their franchisees.

Conclusion

Assuming projections about the rise of so-called "independent" and contracted work are correct, it is incumbent on policymakers to do all they can to ensure that workers who create wealth for others, no matter how they are labeled, fall under the protections of labor and employment law. In 2016, New York City led the way with the "Freelancing isn't Free" act. Intro 136 is the next logical step to eradicating employment discrimination for all workers.

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[5] NELP's reports Who's the Boss: Restoring Accountability for Labor Standards in Outsourced Work and our publications on blue collar temp work, manufacturing, home care and warehouses servicing WalMart give a further overview of these subcontracting trends with closer looks within specific sectors and continue to be the baseline studies that make the case for why corporate contracting practices across the economy need to be paid attention to.

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Testimony Before the New York City Council: Intro No. 799 & Intro No. 0136

June 18, 2018

Submitted by:
Sarah Brafman, Skadden Fellow and Rachel Menashe, Legal Intern
A Better Balance: The Work and Family Legal Center

Good afternoon. Our organization, A Better Balance, is a non-profit legal advocacy organization dedicated to promoting fairness in the workplace, helping workers across the economic spectrum care for themselves and their families without risking their economic security. We have been proud to work with the New York City Council in advancing many pioneering solutions to issues that affect workers, especially low-income workers, from the Pregnant Workers Fairness Act to the caregiver discrimination law to the salary history ban law, to most recently, the Stop Sexual Harassment in NYC Act. Beyond just working to pass these laws, our organization has an emphasis on enforcement. To this end, we ensure those who call our free, confidential legal helpline understand their rights in the workplace. We also conduct in-person trainings throughout New York City for a broad range of workers, informing them of their rights. We find that many workers are often completely unaware of their rights, and that community education is essential to ensuring the law does its part to protect the City's most vulnerable workers.

We want to begin by commending the New York City Council for its commitment to ensuring redress for those who face discrimination in the workplace; we thank the Council for

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allowing us to testify on the sensible and critical bills put forth for discussion today. We are grateful to participate in the effort to build a more just and equal New York City.

The introduction of Int. 799 and Int. 0136 reflect the Council and A Better Balance's shared understanding that clarity in the law provides a more direct path to recourse for those who have suffered unlawful discrimination. These bills, codifying protections under the New York City Human Rights Law for independent contractors and creating anti-retaliation provisions for workers who request reasonable accommodations, are necessary to protect *all* workers from discrimination in the workplace.

Intro 799 Would Make Absolutely Clear that New York City Human Rights Law Bars Retaliation for Requesting Reasonable Accommodations.

While it is well understood that retaliation against a worker for asserting her rights is an unlawful violation of the New York City Human Rights Law, it is not yet explicitly codified in statute that workers who request reasonable accommodations cannot be retaliated against for making that request. Intro 799 would rectify this, putting in statute what is already in practice at the City Commission on Human Rights.[1]

[1] 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), https://www1.nyc.gov/assets/cchr/downloads/pdf/publications/Pregnancy_InterpretiveGuide_2016.pdf ("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.").

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At A Better Balance we see first-hand how retaliation against workers who request reasonable accommodations can result in a loss of livelihood, and at the very least the loss of a safe and equitable workplace. We operate a free, confidential legal helpline through which we assist hundreds of callers from New York City and around the nation each year with matters related to workplace rights around caring for one's self or family members. Many New Yorkers call us asserting workplace discrimination and retaliation, particularly with respect to pregnancy and lactation accommodations.

One such caller, Star,[2] who later became our client, called us seeking guidance after she was fired in retaliation for requesting break time to pump milk at work when she returned from maternity leave.[3] On the day Star returned from leave, she discovered that a supervisor intended to explicitly thwart the law. The supervisor had put in writing that she simply did not want to comply with the law by providing her with break time to express milk. A few days later after returning from maternity leave, Star was fired.

We know from our helpline that stories like Star's are all too common. Beyond being terminated from their roles for requesting reasonable accommodations, our callers experience on-the-job harassment and are even denied payment for hours they have already worked once they request an accommodation. The allowance of this sort of mistreatment for requesting and

[2] Name changed to preserve confidentiality.
[3] Lactation is a medical condition related to childbirth. For more information about lactation accommodations under the NYC Human Rights Law *see supra* note 2, at 8–9.

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accommodation is surely not what the Council envisioned in expressly providing workers the right to request reasonable accommodations.

Employer retaliation dissuades employees from requesting accommodations to which they are legally entitled, not only compromising employees' access to protection under the law, but sometimes compromising their health and safety. Intro 799, an express prohibition on retaliation for requesting a reasonable accommodation, would allow these employees to point their employers to plain text in the law. We also know that when employees are empowered by explicit laws to tell their employers that their actions are discriminatory, and able to point to text supporting their position, that employer often thinks twice about following through with retaliatory behavior.

Intro 0136 Would Ensure That Independent Contractors are Clearly Covered by the New York City Human Rights Law.

As with Int. 799, Int. 0136 would provide clarity about that which is already in practice. Civil rights protections for independent contractors are contested in many jurisdictions, but not in New York City – something that sets our employee protections apart from those that pick and choose who is entitled to workplace protection.[4] Despite this, we hear through our helpline that employers argue that independent contractors are not entitled to the same protections as employees. An important response to this refusal to acknowledge the broad scope of the New

[4] N.Y.C. Admin. Code § 8-102(5).

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York City Human Rights Laws is to amend the language: to state, in no uncertain terms, that independent contractors are protected under the law.

Not only does this clarifying law uplift independent contractors seeking protection, but it also assists employees wondering whether their workplace meets the four-employee threshold for many human rights violations by making clear who is included. Under Int. 0136, any employee, including independent contractors and employers' family members who work for the employer, who were working, "during the period six months" before an allegation was made, are included in the count to determine whether the employer is sufficiently large to be held liable.

At present, the parameters of employee protection are simple: if you work in furtherance of your employer's objectives, you are covered by the New York City Human Rights Law, but still certain workers suffer due to misinformation. The more explicit protections are, the more workers, *all* workers, can utilize the laws to ensure equal treatment at work.

We are proud to support Intros 799 and 0136, and we thank the Council for its vigilance in ensuring laws are clear and accessible to those they are created to protect. We look forward to working with the New York City Council to improve protections for the millions of people who live and work in New York City. Thank you for your time and commitment to these issues.

HRL Hearing Comments

Julian Darwall

I. Introduction

The Sikh Coalition is a nonprofit and nonpartisan national community-based organization. Our goal is to work towards a world where Sikhs and other religious minorities in America will be able to practice their faith freely, without bias and discrimination. Our legal program addresses issues of bias and discrimination on a daily basis. The Sikh Coalition has works to secure safer schools, counter hate and discrimination, create equal employment opportunities, and empower the Sikh community. We strongly support the proposed rule, because it would strengthen crucial protections for religious minorities groups by prohibiting retaliation by employers against employees who ask for reasonable accommodations. As we know from our work, protections against retaliation give teeth to the important legal protections that exist.

Sikhism is the world's fifth largest religion, and there are more than 25 million Sikhs around the world, with over 500,000 Sikhs in New York. Sikhs have a physical identity that makes them stand out in public, including turbans and their five articles of faith: kesh [k-ay-s] (unshorn hair), kanga [kunga] (a small comb), kara (a steel bracelet), kirpan (a religious article), and kachera (undergarments).

In order for Sikhs to abide by their sincerely held religious beliefs they must maintain the articles of faith, and often must secure uniform accommodations from employers. For example, headwear and beards are prohibited by many employers, and an accommodation must be negotiated in order for a Sikh to both practice the faith and carry out workplace duties.

Employers are often unwilling to provide these religious accommodations and many have taken adverse actions when Sikhs assert their right to an accommodation. Sometimes a retaliatory act is overt, for example, when an employee is fired. In other cases, an employee may be subject to more subtle adverse actions, such as a change in job roles, being singled out for pretextual sanctions, facing segregation in the workplace, or being made the subject of hostile treatment. Therefore, prohibitions on retaliation are fundamental to the proper functioning of rules that require accommodations. Importantly, any request for religious accommodation, including an informal verbal request, should fall under the protection provided by the proposed amendment.

II. Our Experience with Retaliation

The Sikh Coalition has served numerous clients in employment disputes involving religious accommodations, often addressing issues of retaliation.

In 2004, we represented Mr. Sat Hari Singh-Khalsa, formerly known as Mr. Kevin Harrington, a practicing Sikh employee of the MTA. Mr. Singh-Khalsa had heroically served New Yorkers during 9/11, when he carefully reversed a train away from lower Manhattan, saving lives. In the aftermath of 9/11, the MTA sought to remove him from his post because he wore a turban. Mr. Singh-Khalsa wished to continue operating trains while wearing his turban, which would require a uniform accomodation, but the MTA planned to relegate him to a lesser position

in the train yard if he did not give up his request. Without intervention by the Sikh Coalition, the MTA would have demoted a heroic veteran train operator--an adverse act taken in response to his desire for a uniform accommodation. The proposed protection for employees is crucial for people like Mr. Singh-Khalsa, because it prevents employers from adding insult to injury: they cannot be allowed to enforce discriminatory denials of religious accommodations with additional wrongful actions.

During the same period, the Sikh Coalition successfully represented Frank Mahoney-Borroughs, a practicing Sikh and Senior Sales Associate with AutoZone, after he was mistreated and then terminated after a religious accommodation request. After Mr. Borroughs adopted the Sikh faith and asked to wear his turban at work, his manager threatened to "grab" and "throw" him out of the store and later forced him to either take his turban off or go home. Mr. Borroughs also suffered verbal humiliation by both colleagues and customers following his request for a religious accommodation. Without the proposed legislation, employees like Mr. Borroughs would be unprotected under the Human Rights Law from retaliatory actions such as those taken by AutoZone in response to the accommodation request.

Similarly, between 2008 and 2014, the Sikh Coalition represented four Sikh truck drivers who were selected for employment with the trucking company JB Hunt. Their offers of employment were rescinded after they refused to have their hair cut for drug testing, which would have violated their religious requirement to maintain unshorn hair. These truck drivers

requested the reasonable religious accommodation that some other form of drug testing be used, and faced retaliation for making the request.

Finally, in 2015, the Sikh Coalition represented a practicing Sikh mail carrier who was told by Disney World that because his turban and beard had to be hidden from guests, that he would be relegated to a single mail route. Our client requested to continue in his regular mail routes--where he could be seen by customers--with his religiously mandated turban and beard. In negotiating a settlement, the Sikh Coalition was able to convince Disney not only that they should accept this accommodation, but also that any adverse action taken in response would be subject to the protections against retaliation applying under Article VII of the Civil Rights Act of 1964. Employees who seek to assert their rights under the Human Rights Law deserve the same protections against retaliations as those asserting rights under federal law.

While the Sikh Coalition's experience has primarily been to represent victims of religious discrimination, these same rights should also be provided to the other enumerated categories of employees who seek accommodations. These accommodations are just as important, and employees must be able to hold retaliating employers accountable in each context. Any request for religious accommodation, including informal or verbal requests, should be construed as triggering a cause of action under this proposed section.

Forcing a person to choose between their religion and their profession deprives them of the right to free religious exercise. And we have seen far too often, retaliation is a common step

that some employers take in response to requests for religious accommodations. Retaliation can range from overt actions like termination, to a range of more subtle ones, from harassment to being assigned more limited duties. In order for the accommodation rights provided under the Human Rights Law to have their desired effect, they must be paired with corresponding protections against retaliation. Employers cannot be allowed to doubly mistreat employees when they assert the legal right to an accomodation.

Testimony of Erin Bagwell, Freelancer from Park Slope, Brooklyn
In support of the "Protections for workers under the city's human rights law."
Before a joint hearing of the New York City Council Committee on Civil and Human Rights and the Committee on Women
In Relation to Extending Equal Protections of the Law to All Working People in NYC

June 18, 2018

Hello, my name is Erin Bagwell. I truly appreciate the opportunity to share my story with you all today.

I'm a filmmaker from Park Slope, Brooklyn who produced and directed Dream, Girl - a documentary about inspiring and ambitious female entrepreneurs. To fund the film, I raised $100K in 30 days on Kickstarter and we premiered at Obama's White House in 2016. I was also asked to be part of Oprah's SuperSoul100- a group of 100 influencers making social impact in their industries.

However, before I set out on my own to create Dream, Girl I was working at an advertising company in Midtown as a "perma-freelancer" and was being sexually harassed.

When the CEO would walk by, the women in my department would all pull their chairs in hoping to avoid his unwanted touching. The VP of the company told my colleague that he wished he got in early enough to try to look up her skirt when she plugged in our digital signage every morning. And, my boss told me he almost broke his neck looking at me one day while I was walking to my desk.

I think that comment did it- I stopped wearing skirts and dresses to work. I stopped wearing any clothing I deemed flattering. I stopped speaking up in meetings. I stopped trying to contribute to the growth and the success of my team. I stopped mentally showing up for work.

Feeling like I had no voice in the workplace, and no clear way to protect myself from harassment as a non-employee, I quit in January of 2014, and I have worked for myself for the past 4 years.

However, three months ago I got pregnant and my husband and I decided I should take on more freelance work in order to create more financial stability. I found myself back on the job boards looking for work but honestly- I'm afraid to go back.

I want to know that this time I'll have legal, indisputable rights against the discrimination I might face.I want to know I'll be able to bring all my talents, experience, and ambition to work without

the fear of being taken advantage of. And more than anything I want to know that this time I'll be protected.

I urge you on the committee today to believe in my future and those of the freelancers of New York. Vote yes on bill Int 136-2018.

Testimony of Carolina Salas, Freelance marketer in the Financial District in Manhattan
In support of the "Protections for workers under the city's human rights law."
Before a joint hearing of the New York City Council Committee on Civil and Human Rights
and the Committee on Women
In Relation to Extending Equal Protections of the Law to All Working People in NYC
June 18, 2018

Hello, my name is Carolina Salas. Thank you for the opportunity to speak with you today.

I am a freelance marketing expert working in the Financial District in Manhattan, but back then in 2002, I was in college and working in midtown at Papillon Bistro & Bar on 22 E 54th Street and Madison Avenue as a restaurant hostess. At first, I was an employee. But then was asked by Tommy Burke at Papillon Bistro & Bar and one of his business partners, Conrad Gallagher, an award-winning chef from Ireland, to help out for two weeks with the launch of a new venture in Boston. They stopped paying me as an employee and converted me to a freelancer for this project. I believe it was with the specific purpose of reducing my rights and covering their tracks because of what would happen on this trip.

After the first long day of work in Boston, we gathered at the local restaurant and bar to go over the day's work. Mr. Gallagher placed the order and grabbed drinks for Mr. Burke, for himself, and gave me a fruit punch. Since I was under 21 and not of legal drinking age, I would have never imagined that the fruit punch was highly alcoholic. I drank some of the punch, and soon after my eyesight became blurry and I experienced difficulty walking. Despite feeling sluggish, tired, and out of sorts I made it to my hotel room and was shocked and confused to find Mr. Gallagher there. I was fading quickly and recall passing out as I was questioning what he was doing in my room.

I don't know how much time had passed, but I woke up next to find Mr. Gallagher completely naked and on top of me. I passed out again and woke up the next morning. I quickly gathered my stuff, including my luggage and as I prepared to head out the door, Mr. Gallagher awoke, and asked me if I was going to tell anyone about what happened, and I said "no, but this cannot happen again." He insisted on speaking some more, but I couldn't because I was feeling extremely unsafe. At that moment I felt the only safe option I had was to leave the hotel room. I was then 19/20 years of age and Mr. Gallagher, my boss on the project, was 31/32 years old. By not addressing the sexual assault, I ensured I wouldn't fall apart emotionally and I was concerned with keeping my job. I couldn't afford to lose it.

But am not here just because of what Mr. Gallagher did to me, I am also here because of what Mr. Burke, my former boss and Mr. Gallagher's business partner, did to me. Mr. Burke is the owner of the following 4 restaurants here in NYC:

- Papillon Bistro & Bar on 54th St and Madison Avenue
- Oscar Wilde NYC on 27th St and 6th Avenue
- Lillie's Times Square on 49th St and 8th Avenue
- Lillie's Union Square on 17th St and 5th Avenue

Within 24 hours of being sexually assaulted by Mr. Gallagher, Mr. Burke attempted to sexually assault me. After a very long 2nd day of work, Mr. Burke handed me what looked like a glass of water, and tasted like water, but upon drinking some of it, I began to feel very dizzy and the room we were in started spinning. Given the intensity of my drowsiness, dizziness, slurred speech, and loss of vision, I felt vulnerable, confused, and concerned for my safety. I then told Mr. Burke that I wasn't feeling well and needed to safely get back to my new hotel room. Mr. Burke kept insisting that he go up to my hotel room with me. I kept pushing his advances away but he wouldn't take no for an answer. I quickly rushed to my hotel room and away from him.

At the time, I didn't know what was happening to me, but years later I came to know with certainty that Mr. Burke had drugged the water he handed me with what I believe is a GHB/Ketamine mixture due to the symptoms I experienced: a common date rape drug. Within a minute of placing the latch on door, I stumbled over to the bed and suddenly blacked out. I laid unconscious for about 12 hours before beginning to realize that my body was completely paralyzed. Not knowing why I had blacked out, I suspected that Mr. Burke had not just given me water, but all I could think about at that moment, was that I was already several hours late to work. I didn't want to lose my job as it was my only source of income, and I didn't have relatives to turn for financial help.

Even though Mr. Gallagher sexually assaulted me and Mr. Burke drugged and attempted to sexually assault me, I did not know where to turn or how to report what had happened to me without risking my job. I concluded that my best option was to keep my distance from these two men. I didn't feel safe to work with them, but I was forced to finish out the two weeks in Boston in order to get paid for the work I was already committed to.

In retrospect, I suspect that Mr. Burke and Mr. Gallagher were trying to cover their tracks by paying me in cash as a freelancer, and not an employee. I had nowhere to turn or anyone to talk with about how to handle the unexpected sexual assaults by my two bosses, without them retaliating against me. Being transitioned into an independent worker isolated me even further, and I felt like I lost any protection I would be afforded as an employee.

If the bill passes, I will have clear rights and protections I didn't feel like I had before, and as a freelancer I would have an avenue to pursue justice with clear legal and financial protections, and without fear of retaliation. Freelancers should no longer be ignored, dismissed, discarded and disrespected. I urge you to please take into consideration that my experience with sexual violence in the workplace is not unique but actually happens regularly. By passing this bill you will ensure that freelancers and independent workers know they are afforded the opportunity to stand up for themselves. Thank you very much for considering my testimony.

DISABLED IN ACTION OF METROPOLITAN NEW YORK
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www.disabledinaction.org

June 18, 2018

Intro 799 is a necessary law for people with disabilities to receive accommodations in order to continue working at their jobs. It is scary asking for an accommodation because we do not know what will happen and people with disabilities are concerned that we will be forced to do work that our disabilities prevent us from doing or we will get hurt or will lose our job if we don't ask for an accommodation or even if we do ask.

People with disabilities are typically very hard workers and are valuable to employers, but sometimes we need an accommodation to work. We might need accessible equipment or a chair or a different desk or phone. We might have to leave at a certain time to catch Access-A-Ride. We often are seen by employers and other employees as sloughing off or not doing the necessary work when in actuality we are putting in way more effort than most people are.

It is an excellent idea to pass Intro 799 so that employers will not be able to discriminate against people with disabilities and other people in the class who may be temporarily disabled and need an accommodation.

I was discriminated against in the 90's when I worked for a city university. I asked for 2 simple accommodations of a rolling chair and a safe place to keep and charge my scooter overnight and I could not find anyone who would agree to give the accommodation. I was given the runaround and sent from person to person. No one from my boss to HR to the dean wanted to help me or take me seriously or meet with me. I wondered if I'd have to quit my job because I could not continue to be on my feet so much as I was becoming more and more disabled but did not yet use a wheelchair. I used a cane or crutches and was switching to a scooter. I was worried that I would be fired. I was finally told by my boss that, "No, we cannot do that for you because if we did it for you, we'd have to do it for everyone." I literally was told that in a hallway, not in a private office.

Right away, I realized that my employment situation had become a civil rights situation. I kept asking everyone for weeks until I was finally directed to the 504 person who told me what the federal law was and told me that she would get me the accommodations. She did, but when I saw my boss to get the accommodations, she set conditions which I objected to. She wanted me to sign a waiver holding the university not liable. I told her that I had liability insurance, but that she had personal possessions in school and many other people did, too, and until every single person at that university had to sign a waiver, I wouldn't either. She gave up.

Many people with disabilities have been fired or quit their jobs because of a lack of accommodation. I hope that a great deal of public service information and training will go along with this bill. Otherwise, it won't be effective in making people with disabilities feel they can ask for and get an accommodation and the status quo will continue.

Jean Ryan, VP for Public Affairs, Disabled In Action of Metropolitan NY
pansies007@gmail.com
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THE LEGAL AID SOCIETY

Employment Law Unit
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June 18, 2018

Testimony of The Legal Aid Society, Employment Law Unit
In Support of Proposed Int. 136-A (in relation to protections for workers under the City's Human Rights Law) and Int. 799 (in relation to prohibiting retaliation against individuals who request a reasonable accommodation under the City's Human Rights Law)

Presented Before the New York City Council Committee on Civil and Human Rights

Presented by Karen Cacace, Director, Employment Law Unit

Thank you for the opportunity to present this testimony.

The Legal Aid Society is the oldest and largest legal services provider for low-income families and individuals in the United States. Annually, the Society handles more than 300,000 cases and legal matters for low-income New Yorkers with civil, criminal and juvenile rights problems, including some 48,500 individual civil matters in the past year benefiting nearly 126,000 New Yorkers as well as law reform cases which benefit all two million low-income families and individuals in New York City.

Through a network of neighborhood and courthouse-based offices in all five boroughs and 21 city-wide and special projects, the Society's Civil Practice provides direct legal assistance to low-income individuals. In addition to individual assistance, The Legal Aid Society represents clients in law reform litigation, advocacy and neighborhood initiatives, and provides extensive back up support and technical assistance for community organizations.

The Legal Aid Society's Employment Law Unit

Through our Employment Law Unit (ELU), we provide legal services to low-wage workers in New York City to ensure that these workers receive fair wages, fair treatment, decent working conditions, and the benefits to which they are entitled if they lose their jobs. These cases involve wage violations, workplace discrimination, including discrimination based on

past involvement with the criminal justice system, family and medical leave issues, labor trafficking, and unemployment insurance. The ELU represents low-wage workers, including undocumented workers, in individual, group, and class action cases.

Proposed Int. 136-A (in relation to protections for workers under the City's Human Rights Law)

The Legal Aid Society supports the proposal to expand protections of the City's Human Rights Law. It is particularly important that this proposal will protect interns, volunteers, and independent contractors. It is also significant that franchisors will be deemed an employer of employees who work in for a franchisee. We often represent clients who have suffered discrimination while working for a franchisee and have difficulty obtaining a remedy for the client because the franchisee lacks assets. This change will appropriately require franchisors to be responsible for illegal activity in the franchisee locations.

The proposal also broadens the definition of employer by expanding the categories of workers who will be counted for purposes of the four employee requirement. While we support this change, we do not believe it goes far enough. There is no rational basis for allowing discrimination to be legal if it occurs at a small employer. Indeed, 14 states currently have anti-discrimination laws that prohibit employment discrimination without regard to the size of the employer.[1]

Aside from the recent amendment to the City Human Rights Law which protects employees from sexual harassment regardless of the size of the employer, employees whose employers have fewer than four employees are not protected by the City Human Rights Law. This means they have no right to reasonable accommodations for disabilities, they may be subjected to discrimination based on their criminal record, and they cannot benefit from any of the other protections guaranteed by the city law.

At the Legal Aid Society, we have seen numerous cases where discrimination occurs at small employers. For example, in two cases on behalf of domestic workers, employers employed one white worker and one or two Latina workers and provided the white worker with significantly better terms and conditions of employment compared to the Latina workers, even though they all performed the same work. The employers also routinely made derogatory comments about the Latina workers. This discrimination is currently legal under New York City law.

Domestic workers now have a cause of action for sexual harassment under the State Human Rights Law thanks to the Domestic Workers Bill of Rights. However, the City Human Rights Law is expressly designed to be more expansive than the State law and has significantly more favorable standards and remedies.

[1] Alaska, Colorado, Hawaii, Maine, Michigan, Minnesota, Montana, New Jersey, North Dakota, Oklahoma, Oregon, South Dakota, Vermont, and Wisconsin all have anti-discrimination laws that cover employers without regard to number of employees.

New York City purports to and should have the anti-discrimination law with the broadest possible protections for the City's workers. Currently, however, the City is failing those workers who work at small employers. Accordingly, we strongly urge you to eliminate the four employee requirement in the definition of an employer under the City Human Rights Law.

Int. 799 (in relation to prohibiting retaliation against individuals who request a reasonable accommodation under the City's Human Rights Law)

The Legal Aid Society supports the proposal to clarify that the City's Human Rights Law anti-retaliation provision applies to workers who request reasonable accommodations. We often represent clients with disabilities who make a request for a reasonable accommodation and then are retaliated against by their employer. For example, we have represented a client who required time off to recuperate from a medical condition. When she returned to work her employer changed her job responsibilities and eventually fired her. It should be clear that it is illegal for an employer to retaliate against an employee who is exercising her rights to request a reasonable accommodation for her disability. Accordingly, we strongly support this proposal.

Respectfully Submitted:

Karen Cacace
Director
Employment Law Unit
The Legal Aid Society
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Testimony from Dunkin' Brands, Inc. Opposing

Intro 0136-2018 related to Expanding Liability under the New York City Human Rights law

Committee on Civil and Human Rights

Monday, June 18, 2018

City Hall

Good afternoon, Chair Eugene, and members of the Committee on Civil and Human Rights.

My name is Mike Shutley, and I am the Vice President of Government Affairs & Sustainability at Dunkin' Brands. I submit this testimony in opposition to Intro 0136-2108, a Local Law to amend the administrative code of the City of New York.

Intro 0136-2018 seeks to extend protections and define who is covered and liable for alleged violations under the New York City Human Rights law. One clause in particular states that franchisors and parent companies can be held liable for the unlawful discriminatory practices of their franchisees or subsidiary companies. This clause is an overreach on the part of the Council and assumes that franchisors and parent companies have the ability to control the employment practices of franchisees or subsidiary companies, which is completely false.

Dunkin' Brands, Inc. is the franchisor of both the Dunkin' Donuts and Baskin-Robbins brands, and we have more than 600 franchised stores in New York City alone, through which our franchisees employ over 13,000 workers. All of the Dunkin' Donuts and Baskin-Robbins restaurants are independently owned and operated by individual franchises, each with its own separate legal entity, organizational structure, operations and employees who are hired, trained, and paid exclusively by the franchisees without any input from Dunkin' Brands, the franchisor. Dunkin' Brands has no control over the actions of individual franchisees or their employees. Holding a franchisor liable for the acts of franchisees as proposed contradicts various Federal laws, existing New York state law and their standards for liability, and should be removed from this legislation.

As a franchisor, Dunkin' Brands has created two well-known and respected brands that have become household names across the country. Dunkin' Brands has created a business model that not only focuses on delivering high-quality food and beverages and service to its guests, but also affords individuals the opportunity to realize their dream of owning their own business as a franchisee. Under this model, it is the responsibility of the franchisee, and not the franchisor, to run the day-to-day operations of their restaurants, interact with guests, and set their own employment policies, rules and practices that comply with all applicable laws. As the franchisor and owner of our trademarks, we require that all franchisees maintain a high quality standard for the sale of our food and beverage products bearing those marks. However, once we license franchisees to own and operate their own restaurant using our business model, we do not, and cannot, directly oversee their implementation of

those standards, have no control over their day to day business, and therefore, cannot and should not be considered a party to any action related to alleged discriminatory practices occurring at their restaurants.

The franchisees who run Dunkin' Donuts and Baskin-Robbins' restaurants are independent small business owners who have total control over the daily operation of their businesses. To pass legislation that implies otherwise is simply wrong and would be contrary to the expectations of and bargain between franchisees and franchisors. In our case, this directly contradicts the express language of the franchise agreements that we have entered into with each of our franchisees, which gives them sole control over and responsibility for all aspects of running the day-to-day business, including specifically their own employment matters. We do not have the right to control franchisees' employees, nor do we in fact.

While we understand that some members of the Council who support this legislation believe they are trying to protect workers, this bill goes beyond the law that already exists, contradicts the standards for liability under other laws and is overreaching. This bill's attempt to implicate the franchisor will directly lead to increased litigation and insurance costs, higher prices for guests, higher costs for franchisees, and diminish the ability and desire of franchisees in New York City to grow their businesses here and create good paying jobs for New Yorkers.

The liability imposed by Intro 0136 is unprecedented and does not exist in any other state or city.

We urge the city council to remove the clause holding franchisors liable for the actions of the franchisee.

Thank you for the opportunity to submit public testimony. We look forward to working with you and the rest of the City Council to further explain how this bill will adversely affect all businesses and lead to higher costs and fewer jobs with no added protections under the Human Rights law for employees.

THE COUNCIL
THE CITY OF NEW YORK

Appearance Card

I intend to appear and speak on Int. No. 799/136A Res. No. _____

☒ in favor ☐ in opposition

Date: 6/18/18

(PLEASE PRINT)

Name: SARAH BRAFMAN

Address: 40 WORTH ST. 10TH FLR NY NY

I represent: A BETTER BALANCE

Address: " "

THE COUNCIL
THE CITY OF NEW YORK

Appearance Card

I intend to appear and speak on Int. No. 136-A Res. No. _____

☑ in favor ☐ in opposition

Date: 6/18/18

(PLEASE PRINT)

Name: NICOLE SALIK BKLYN LEGAL SERVICES

Address: 105 COURT ST

I represent: BROOKLYN, NY 11201

Address:

THE COUNCIL
THE CITY OF NEW YORK

Appearance Card

I intend to appear and speak on Int. No. 136 Res. No. 799

☐ in favor ☐ in opposition

Date: 06/18/18

(PLEASE PRINT)

Name: Jessica Perez

Address: 550 Grand St. Brooklyn, NY 1121

I represent: _____

Address: _____

Please complete this card and return to the Sergeant-at-Arms

THE COUNCIL
THE CITY OF NEW YORK

Appearance Card

I intend to appear and speak on Int. No. ~~136-A~~ 479 Res. No. _____

☒ in favor ☐ in opposition

Date: 6.18.2018

(PLEASE PRINT)

Name: DAMION STODOLA

Address: _____

I represent: COMMISSION ON HUMAN RIGHTS

Address: 22 READE ST NY NY 10007

THE COUNCIL
THE CITY OF NEW YORK

Appearance Card

I intend to appear and speak on Int. No. ~~136-A~~ Res. No. _____

☒ in favor ☐ in opposition

Date: _____

(PLEASE PRINT)

Name: Zoey Chenitz, Policy Counsel

Address: _____

I represent: Commission on Human Rights

Address: 22 Reade St, New York NY

THE COUNCIL
THE CITY OF NEW YORK

Appearance Card

I intend to appear and speak on Int. No. 136 Res. No. _____

☐ in favor ☐ in opposition

Date: 6/18/18

(PLEASE PRINT)

Name: Elissa Devins

Address: NYLAG, 7 Hanover Square, 18th Flor

I represent: New York Legal Assistance Grp

Address: 7 Hanover Square, 18th Floor NYC

Please complete this card and return to the Sergeant-at-Arms

THE COUNCIL
THE CITY OF NEW YORK

Appearance Card

I intend to appear and speak on Int. No. 136-A Res. No. _____

☒ in favor ☐ in opposition

Date: _____

(PLEASE PRINT)

Name: CAROLINA SALAS

Address: _____

I represent: MEMBER OF FREELANCERS UNION

Address: _____

THE COUNCIL
THE CITY OF NEW YORK

Appearance Card

I intend to appear and speak on Int. No. 136-A Res. No. _____

☒ in favor ☐ in opposition

Date: _____

(PLEASE PRINT)

Name: JILLIAN RICHARDSON

Address: _____

I represent: MEMBER OF FREELANCERS UNION

Address: _____

THE COUNCIL
THE CITY OF NEW YORK

Appearance Card

I intend to appear and speak on Int. No. 136-A Res. No. _____

☒ in favor ☐ in opposition

Date: June 18, 2018

(PLEASE PRINT)

Name: ERIN BAGWELL

Address: 329 3RD Street Apt 3A Brooklyn, NY 11215

I represent: myself (MEMBER OF FREELANCERS UNION)

Address: _____

Please complete this card and return to the Sergeant-at-Arms

THE COUNCIL
THE CITY OF NEW YORK

Appearance Card

I intend to appear and speak on Int. No. 136-A Res. No. _____

☒ in favor ☐ in opposition

Date: _____

(PLEASE PRINT)

Name: CAITLIN PEARCE

Address: 150 St. JAMES PLACE, BROOKLYN, NY 11238

I represent: FREELANCERS UNION

Address: 408 JAY STREET, BROOKLYN, NY 11201

THE COUNCIL
THE CITY OF NEW YORK

Appearance Card

I intend to appear and speak on Int. No. 799 Res. No. _____

☑ in favor ☐ in opposition

Date: _____

(PLEASE PRINT)

Name: Julian Darwall

Address: 476 Chauncey St. Brooklyn NY 11233

I represent: Sikh Coalition

Address: 50 Broad St. NY NY 10004

THE COUNCIL
THE CITY OF NEW YORK

Appearance Card

I intend to appear and speak on Int. No. _____ Res. No. _____

☐ in favor ☐ in opposition

Date: _____

(PLEASE PRINT)

Name: Nina Iwizumi

Address: 2307 24th Ave, Astoria NY 11102

I represent: Freelancers Union

Address: _____

Please complete this card and return to the Sergeant-at-Arms

THE COUNCIL
THE CITY OF NEW YORK

Appearance Card

I intend to appear and speak on Int. No. 136-A Res. No. _____

☒ in favor ☐ in opposition

Date: 6/18/18

(PLEASE PRINT)

Name: Sia Ziff

Address: _____

I represent: Model Alliance

Address: 302A West 12th St, NY NY 10014

Please complete this card and return to the Sergeant-at-Arms

THE COUNCIL
THE CITY OF NEW YORK

Appearance Card

I intend to appear and speak on Int. No. 136-A & 799 Res. No. _____

☑ in favor ☐ in opposition

Date: 6/18/18

(PLEASE PRINT)

Name: Karen Cacace

Address: 199 Water St. NY, NY 10038

I represent: The Legal Aid Society

Address: _____

Please complete this card and return to the Sergeant-at-Arms

THE COUNCIL
THE CITY OF NEW YORK

Appearance Card

I intend to appear and speak on Int. No. 136 Res. No. _____

☐ in favor ☒ in opposition

Date: 6/18/18

(PLEASE PRINT)

Name: Jeff Hanscom

Address: 1900 K St NW, Washington DC

I represent: International Franchise Association

Address: _____

Please complete this card and return to the Sergeant-at-Arms

THE COUNCIL
THE CITY OF NEW YORK

Appearance Card

I intend to appear and speak on Int. No. 136-A Res. No. and 799

☒ in favor ☐ in opposition

Date: _____

(PLEASE PRINT)

Name: MARGARET McINTYRE

Address: 11 BROADWAY, SUITE 615 NY 10004

I represent: NELA/NY

Address: 39 BROADWAY, Suite 2420 10006

Please complete this card and return to the Sergeant-at-Arms