**Testimony by the New York Legal Assistance Group (NYLAG)**

**Before the New York City Council Committees on Aging, Civil and

Human Rights, Regarding Proposed Legislation Concerning Age**

**Discrimination in the Workforce**

**October 8, 2019**

Good afternoon, and thank you for the opportunity to speak about the pending legislation before the New York City Council. My name is Layla Malamut, and I am a Paralegal in the Employment Law Project at the New York Legal Assistance Group (“NYLAG”). NYLAG is a nonprofit organization dedicated to providing free civil legal services to low-income New Yorkers who cannot afford private attorneys. NYLAG serves immigrants, seniors, the homebound, families facing foreclosure, renters facing eviction, low-wage workers, low-income consumers, those in need of government assistance, children in need of special education, domestic violence victims, persons with disabilities, patients with chronic illness or disease, low-income members of the LGBTQ community, Holocaust survivors, veterans, as well as others in need of free legal services.

The Employment Law Project represents workers in cases relating to employment discrimination, wage and hour violations, unemployment insurance benefits, and requests for accommodations or leave. We represent clients in City, State, and Federal agencies, as well as in litigation. The vast majority of our cases involve discrimination, including but not limited to: age, sex, gender identity, sexual orientation, race, national origin, pregnancy, disability, criminal background, military status, and status as a survivor of domestic violence.

NYLAG commends the City Council for holding this hearing and addressing this pressing issue. This legislation could not come at a better time: the U.S. Bureau of Labor Statistics recently found that the fastest growing segment of the American workforce is employees aged 65 and older, as more Americans are choosing to stay in the workforce longer.[[1]](#footnote-1) The average age of the American worker, according to ADP’s 2019 State of the Workforce Report, is roughly 42.[[2]](#footnote-2) Yet new data indicates that a third of people experience ageism before they turn 45.[[3]](#footnote-3) If the average individual retires around the age of 62,[[4]](#footnote-4) this means that there is a high probability they will experience age discrimination for up to 20 years, or half of their entire career.

Through our work in NYLAG’s Employment Law Project, we have become intimately familiar with the patterns and pervasiveness of age discrimination. Our clients have all too often described supervisors who made overt comments targeting their age, complaining that they were “too old” to do their job or asking them when they planned to retire.

Other clients experience ageism on the job in more subtle ways. For example, some employers target older workers by issuing them negative performance evaluations, when these evaluations are really pretext for discrimination. This happened to one of our clients, a 54 year old Pakistani employee at a fast food restaurant chain. His supervisor constantly singled him out for being “lazy and slow,” alleging that he had production issues. Still, his supervisor did not explicitly mention his age or use the word “old” in his criticisms, making it easier for the employer to hide behind his pretext.

Another client, age 70, worked in advertising sales. After 25 years of service, he was told he was being fired for not meeting his sales revenue quota. The company tried to hide behind what it claimed to be a neutral policy – a sales quota that assigned workers with more years of experience a higher monthly quota – but it was clear that this policy was being utilized to unfairly penalize older workers. We settled his case after further demonstrating that significantly younger workers who had also consistently missed their quotas were not being similarly disciplined.

Despite the prevalence of age discrimination in the workforce, workers often struggle to find attorneys to represent them. One of the primary reasons for this difficulty is that the Age Discrimination in Employment Act (“ADEA”), the federal law that protects workers 40 years or older, imposes a stringent “but-for” standard of causation for proving discrimination; that is, plaintiffs bear the burden of showing that “but-for” their age, the adverse employment action would not have occurred. This standard is much higher than that of other classes of discrimination, where a plaintiff need only show that their protected trait was one “motivating factor” in the adverse employment action.

The challenge of meeting this standard is particularly exacerbated in “failure to hire” cases, where workers well-qualified for a position are passed over for the job due to their age. In these cases, applicants often lack access to the kind of evidence needed to make a but-for showing, such as evidence that other older, qualified applicants were also rejected, or that a younger applicant was hired in their place.

Further, in our experience, the EEOC has not had a strong record of prioritizing age discrimination cases. That is why the New York City Human Rights Law, and legislation like these proposed bills, are so vital to protecting the rights of older workers. Unlike the ADEA, the New York City Human Rights Law applies to persons of all ages (not just persons 40 years or older), and covers employers that employ four or more employees (as opposed to only employers with 20 or more employees, under the ADEA). In addition, the City law applies the more lenient “motivating factor” causation standard for proving age discrimination, unlike its Federal counterpart.

NYLAG is firmly supportive of all of the City Council’s proposed legislation. We are particularly enthusiastic about Intro 1695, which requires the City Commission on Human Rights (“the Commission”) to conduct regular age discrimination investigations through employment testing programs. As mentioned earlier, one of the biggest challenges to proving that age discrimination has occurred in hiring is a lack of access to information about the ages or qualifications of other applicants. Testing of the kind that this Bill proposes would help detect this more subtle, insidious form of discrimination, and would allow the Commission to shine a light on what we believe is a rampant, yet underreported problem.

I want to once again thank the Committee for inviting me to testify today. I am happy to answer any questions.

Respectfully submitted,

New York Legal Assistance Group

1. Toossi, Mitra and Torpey Elka: “Older workers: Labor force trends and career options.” *Bureau of Labor Statistics.* <https://www.bls.gov/careeroutlook/2017/article/older-workers.htm> (May 2017). [↑](#footnote-ref-1)
2. Yildirmaz, Ahu, Ryan, Christopher & Nazaj, Jeff, “2019 State of the Workforce Report: Pay, Promotions, and Retention.” *ADP Research Institute*. https://www.adp.com/resources/articles-and-insights/adp-research-institute/research-topics/-/media/62FB03253C3B4B80A2EE73EB8EC29B82.ashx [↑](#footnote-ref-2)
3. Huang, Georgene, “New Research Shows Ageism Starts as Early as Age 42 — Here’s How Employers Can Combat Age Discrimination.” *Forbes.* https://www.forbes.com/sites/georgenehuang/2019/09/30/new-research-shows-ageism-starts-as-early-as-age-42--heres-how-employers-can-combat-age-discrimination/#74065bb843f2 (September 30, 2019.) [↑](#footnote-ref-3)
4. Brandon, Emily, “The Ideal Retirement Age, and Why You Won’t Retire By Then.” *U.S. News& World Report.* https://money.usnews.com/money/retirement/aging/articles/the-ideal-retirement-age-and-why-you-wont-retire-by-then (April 15, 2019.) [↑](#footnote-ref-4)