

Massachusetts Expands Employment Protections for Pregnant Workers

On July 27, Massachusetts enacted the Pregnant Workers Fairness Act, joining a growing number of states expanding employment protections for pregnant workers. Slated to go into effect on April 1, 2018, the new law prohibits employment discrimination on the basis of pregnancy or pregnancy-related conditions and expands employer obligations to reasonably accommodate new and expectant mothers. Employers should review their hiring, accommodation, lactation, leave and other employment practices to ensure compliance.

Background

Title VII of the Civil Rights Act of 1964 barred employment discrimination on the basis of race, color, religion, sex or national origin. In 1978, the Pregnancy Discrimination Act extended Title VII's proscription to include discrimination based on pregnancy, childbirth, or related medical conditions, requiring employers to treat "women affected by pregnancy" the same as other non-pregnant employees "similar in their ability or inability to work." While the federal Americans with Disabilities Act (ADA) covers pregnancy-related disabilities, it does not consider pregnancy as a disability unless it causes a physical or mental impairment that limits a major life activity.

Like Title VII, the [Massachusetts Fair Employment Practices Act](#) (FEP Act), General Laws Chapter 151B, generally protects job applicants and employees from discrimination in hiring, promotion, discharge, compensation, benefits, training, classification and other aspects of employment. Among other things, the law makes it an unlawful employment practice to discriminate on the basis of race, color, religion, national origin, age, sex (including pregnancy), gender identity, sexual orientation, genetic information, ancestry, military service, and mental or physical handicap, unless based on a *bona fide* occupational qualification.



Massachusetts Pregnant Workers Fairness Act

On July 27, Massachusetts Governor Charlie Baker signed into law the [Pregnant Workers Fairness Act](#), which will go into effect on April 1, 2018. The new law expands the FEP Act's list of protected classes to include pregnancy or a condition related to pregnancy including, but not limited to, lactation or the need to express breast milk for a nursing child. It prohibits employers from discriminating against, refusing to hire, or discharging a person because of her pregnancy or pregnancy-related conditions. A new section 1E expressly requires employers to reasonably accommodate expectant and new mothers in the workplace, and prohibits taking adverse employment actions against pregnant employees who request or use a reasonable accommodation.

Comment. The Affordable Care Act amended the Fair Labor Standards Act to generally require that employers provide reasonable break time and a private place for nursing mothers to express breast milk for one year after her child's birth, but does not require the time to be compensated. The provision did not, however, preempt state laws that provide broader employee protections (such as break times that are compensated, available to exempt employees, or extend beyond one year after the child's birth).

“Reasonable” Accommodation

Like the ADA's requirement to reasonably accommodate employees with disabilities, Massachusetts' new law will require employers to accommodate pregnant employees. It sets out a non-inclusive list of workplace accommodations that employers may have to provide pregnant workers unless it would pose an undue hardship on the business. While the law places the burden to prove undue hardship on the employer, it sets out four factors to consider in determining whether undue hardship exists: the nature and cost of the accommodation; the employer's financial resources; employer size; and the effect of the accommodation on the employer's business.

Reasonable accommodations may include, but are not limited to:

- More frequent or longer paid or unpaid breaks
- Time off to attend to a pregnancy complication or recover from childbirth with or without pay
- Acquisition or modification of equipment or seating
- Temporary transfer to a less strenuous or hazardous position
- Job restructuring
- Light duty
- Private non-bathroom space for expressing breast milk
- Assistance with manual labor
- Modified work schedule

Growing Trend: Greater Workplace Protections for Pregnant Women

Federal law provides certain employment protections for pregnant workers, but states and cities often provide broader protections. In the last few months alone, Nevada and Connecticut enhanced workplace protections for pregnant employees as San Francisco expanded protections for nursing mothers.

The Nevada Pregnant Workers' Fairness Act ([S.B. 253](#)), effective October 1, made it an unlawful employment practice to refuse to provide a reasonable accommodation to an applicant or employee for a condition relating to pregnancy, childbirth or a related medical condition.

Connecticut [Substitute House Bill No. 6668](#) amended the state's anti-discrimination law, effective October 1, to enhance employment protections for pregnant employees and applicants, and expand employer obligations to accommodate pregnancy-related conditions.

Starting next year, a new San Francisco [ordinance](#) will impose new lactation accommodation requirements on employers that exceed current federal and state requirements. The new law requires employers to create and implement a lactation accommodation policy, and lays out best practices and policies.

However, the employer's obligation to accommodate a pregnant worker is not without limitation. Employers will not be required to discharge or transfer an employee with more seniority or promote an employee who cannot perform the essential job functions with or without a reasonable accommodation.

Comment. In 2015, a divided Supreme Court allowed a pregnant employee to pursue a Title VII claim based on her employer's denial of a request for light duty, but did not decide the merits of the failure-to-accommodate claim. Rather, the high court's decision left open questions on the extent to which employers must accommodate pregnant workers – and what types of accommodations they must provide. (See our [March 26, 2015 FYI Alert](#).)

Interactive Process Required

Like the ADA, the new law will require the employer and employee to engage in a “good faith and interactive process” to determine an effective and reasonable accommodation. The obligation will be triggered when an employee or prospective employee who is capable of performing the essential functions of the job requests an accommodation. With certain exceptions, an employer may require documentation of the need for an accommodation – or the extension of a previously agreed to accommodation – from a health care or rehabilitation professional. Employers may not seek or require such documentation if the requested accommodation is for: more frequent restroom, food, or water breaks; seating; limitations on lifting more than 20 pounds; or private spaces for expressing breast milk.

Unlawful Employment Practices

The new law expressly prohibits employers from denying employment opportunities to employees and prospective employees because the worker needs a reasonable accommodation for her pregnancy or related conditions, including lactation. It makes the refusal to hire an applicant because of her pregnancy or a related condition an unlawful practice, as long as the applicant could perform the essential functions of the job with a reasonable accommodation and the accommodation would not impose an undue hardship on the employer.

Taking adverse action against an employee who requests or uses a reasonable accommodation in the terms, conditions or privileges of employment is also unlawful. Such actions may include failing to reinstate the employee to the original employment status or to an equivalent position with equivalent pay and accumulated seniority, retirement, fringe benefits and other applicable service credits when the need for the accommodation ends. In addition, the new law bars an employer from requiring an employee to take a leave due to her pregnancy or a related condition if another reasonable accommodation is available, or to accept an accommodation that is unnecessary for performance of her essential job functions.

Notice Obligations

Employers will be required to provide written notice to employees of their rights under the new law. Notice may be provided in a handbook, pamphlet or other means. Notice must be provided to new employees at or before the start of employment, and to existing employees within 10 days after notifying the employer of a pregnancy or a related condition including, but not limited to, lactation or the need to express breast milk for a nursing child.

In Closing

The new law makes it unlawful for Massachusetts employers to deny an employment opportunity or reasonable accommodation for a worker's pregnancy or a pregnancy-related condition. Employers should review their hiring, accommodation, lactation, leave and other employment practices to ensure compliance.

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