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# Legal Advisory: Pregnant Workers Fairness Act

## I. INTRODUCTION

On July 27, 2017, Governor Charlie Baker signed "An Act Establishing the Massachusetts Pregnant Workers Fairness Act," (H.B. 3680, Chapter 54 of the Acts of 2017) ("Act"). Effective April 1, 2018, the bipartisan legislation will amend and expand G.L. c. 151B, § 4, Massachusetts' anti-discrimination law, by prohibiting pregnancy-related discrimination in the workplace and in hiring. The Act, which is applicable to employers having six (6) or more employees, extends to employees who are pregnant and/or who are experiencing a pregnancy-related condition, "including, but not limited to, lactation or the need to express breast milk for a nursing child."

## II. PROHIBITIONS UNDER THE ACT

The Act prohibits an employer from

(a) taking an adverse action against an employee requesting or using a reasonable accommodation, including but not limited to failing to reinstate to an equivalent position with equivalent compensation, benefits and seniority when accommodation for pregnancy or a pregnancy-related condition is no longer needed;

(b) denying an employee an employment opportunity due to the need for reasonable accommodation of pregnancy or a pregnancy-related condition;

(c) requiring a pregnant employee or an employee with a pregnancy-related condition to accept an accommodation that the employee chooses not to accept, if such accommodation is not necessary for the employee to perform essential job functions;

(d) requiring a pregnant employee or an employee with a pregnancy-related condition to take a leave if another reasonable accommodation may be provided, without undue hardship on the employer's program, enterprise or business; and

(e) refusing to hire a candidate for employment because of the candidate's pregnancy or pregnancy-related condition, provided that the candidate is capable of performing essential job functions with or without reasonable accommodation not imposing an undue hardship on the employer's program, enterprise or business.

## III. REASONABLE ACCOMMODATION VERSUS UNDUE HARDSHIP

"Reasonable Accommodation" is defined by the Act as including, but not being limited to:

(a) more frequent, longer paid or unpaid breaks;

(b) time off to attend to a pregnancy complication or recover from childbirth, with or without pay;

(c) acquisition or modification of equipment or seating;

(d) temporary transfer to a less strenuous or less hazardous position;

(e) job restructuring;

(f) light duty;

(g) private, non-bathroom space for lactation/expression;

(h) assistance with manual labor; or

(i) a modified work schedule; provided that an employer shall not be required to discharge or transfer a more senior employee with more seniority or promote an employee not able to perform essential job functions with or without a reasonable accommodation.

Upon a request for an accommodation from an employee or candidate for employment capable of performing essential job functions, the employee/candidate and the employer must "engage in a timely, good faith and interactive process to determine an effective, reasonable accommodation" to enable the employee or candidate to perform essential job functions.

An employer may deny a request for accommodation if the employer can demonstrate that the requested accommodation would impose an undue hardship, which the Act defines as an action requiring "significant difficulty or expense." Such an analysis turns on

(1) the nature and cost of an accommodation;

(2) the employer's overall financial resources;

(3) the overall size of the employer's business relative to the number of employees and the number, type and location of facilities; and

(4) the impact of the accommodation on the employer's expenses, resources, or program.

## IV. DOCUMENTATION FROM HEALTH CARE PROVIDER

Employers are permitted under the Act to require "appropriate health care provider or rehabilitation professional"[1] documentation regarding the need for or extension of most requested accommodations, with the express exclusion of

(1) more frequent restroom, food or water breaks;

(2) seating;

(3) limits on lifting more than twenty (20) pounds; and

(4) private, non-bathroom space for expressing breast milk.

[1] "Appropriate health care provider or rehabilitation professional" is defined under the Act as including, but not being limited to, "a medical doctor, including a psychiatrist, a psychologist, a nurse practitioner, a physician assistant, a psychiatric clinical nurse specialist, a physical therapist, an occupational therapist, a speech therapist, a vocational rehabilitation specialist, a midwife, a lactation consultant or another licensed mental health professional authorized to perform specified mental health services."

## V. NOTIFICATION OF EMPLOYEES AND PUBLIC EDUCATION

The Act requires employers to notify employees in writing, via a handbook, pamphlet or other materials, of their rights to be free from discrimination based upon pregnancy or pregnancy related conditions, including the right to a reasonable accommodation for pregnancy or a pregnancy-related condition, by April 1, 2018. Employers must notify new employees of these rights prior to or at the start of their employment, and within ten (10) days of an employee's notice to the employer of pregnancy or a pregnancy-related condition. Subject to appropriation, the Act obligates the Massachusetts Commission Against Discrimination ("MCAD") to develop courses and conduct public education efforts to inform employers, employees and employment agencies about related rights and responsibilities within 180 days of appropriation.

## VI. CLAIMS AND REMEDIES

Employees may pursue discrimination claims relating to pregnancy or a pregnancy-related condition, including but not limited to lactation/expression, just as they would any other discrimination claim M.G.L. c. 151B, § 4. Damages, attorneys' fees, costs and injunctive relief are available remedies. The Act does not "preempt, limit, diminish or otherwise affect" any other laws relating to sex discrimination, pregnancy, or pregnancy-related conditions, including but not limited to lactation/expression, such as G.L. c. 149, § 105D.

## VII. SCHOOL IMPLICATIONS

The Act is silent regarding implementation in a school environment. Presumably, non-classroom/non-instructional school staff will be treated like any other office employees relative to what might constitute a reasonable accommodation versus an undue hardship under the Act. For teachers with classroom or other instructional duties, however, requests to carry a reduced teaching load or take more frequent/longer breaks will likely require a more complex balancing

of a teacher's need for accommodation with a potential hardship relative to school operations, such as continuity and coverage of students.

For example, in Pierson v. Stembridge, 2010 WL 3037502 at *6 (Mass. Superior Court, May 24, 2010), the Superior Court found a teacher's request for flex time as an accommodation for her anxiety and depression to be unreasonable, stating, "[t]he requirement to provide a reasonable accommodation does not require an employer to engage in ... fundamental job restructuring," citing Tompson v. Department of Mental Health, 76 Mass.App.Ct. 586, 596 (2010), or "to disregard or waive an employee's inability to perform an essential function of the job," citing Cox v. New England Tel. & Tel. Co., 414 Mass. 375, 383 (1993). The court emphasized that "a regular and reliable level of attendance is a necessary element of most jobs" (internal citations omitted).

Applying the same principles to a teacher's request for accommodation in the form of a flex time schedule during the school day in Pierson, the court stated, "[i]n this regard, a school teacher's prompt and reliable attendance at school is essential to the time-sensitive nature of class scheduling. Students depend on their teachers to conduct the daily lesson as scheduled, and to be available to answer questions during school hours." The court found that it "would be unreasonable to compel the school to depart from its rigid class schedule in order to accommodate the needs of specific teachers," holding that G.L. c. 151B did not entitle the teacher to flexible arrival and departure times.

The extent to which the same or a similar manner of analysis will be applied to school employees' pregnancy-related requests for accommodation under the Act remains to be seen, subject to MCAD. As with any analysis of whether a teacher's request for accommodation of any disability is reasonable, the primary question raised by the Act in a school environment will

likely become the extent to which districts will be required to accommodate requests for pregnancy-related accommodations before they constitute an undue hardship on the district, particularly in a classroom setting.

## VIII. TAKEAWAY

The Act protects employees and candidates for employment who are pregnant and/or who have a pregnancy-related condition, including but not limited to lactation/expression. Districts are required to engage in an interactive process and to grant such employees reasonable accommodation upon request, provided that the requested accommodation does not impose an undue hardship. Such an analysis is fact and circumstance dependent.

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