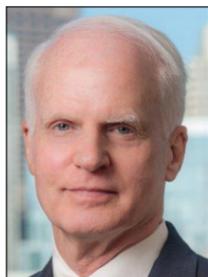


## OPINION

### Massachusetts gives birth to Pregnant Workers Fairness Act

By David C. Henderson  
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On July 27, the governor signed into law the Pregnant Workers Fairness Act, thereby strengthening rights for pregnant employees and imposing additional accommodation obligations on employers.

The act was a rare collaborative effort that received substantial support from diverse groups with varying interests. Both the House and the Senate passed versions of the bill earlier in the year, and they passed the final compromise bill unanimously. Women's rights and business groups promoted the law.

And the law also had inertia on its side. Twenty-one states had passed comparable laws in recent years, and similar federal legislation has been pending since the spring.

#### Robust protections for pregnant workers

The act itself is straightforward. It amends Massachusetts' existing anti-discrimination law, Chapter 151B, so that it now includes pregnancy and related conditions, including

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breastfeeding and pumping milk, as protected categories.

And even though pregnancy and its related conditions still are not classified generally as disabilities, employers now will be required to grant employees reasonable accommodations for these conditions as long as the accommodations do not cause the employer undue hardship.

According to the act, examples of reasonable accommodations include the following: "(i) more frequent or longer paid or unpaid breaks; (ii) time off to recover from childbirth with or without pay; (iii) acquisition or modification of equipment or seating; (iv) temporary transfer to a less strenuous or hazardous position; (v) job restructuring; (vi) light duty; (vii) private non-bathroom space for expressing breast milk; (viii) assistance with manual labor; or (ix) modified work schedules."

Further, the act provides that employers may not do any of the following:

- take adverse action against an employee who requests or uses a reasonable accommodation;
- deny an employment opportunity to an employee based on the need to make a reasonable accommodation;
- require an employee to accept an accommodation that is not necessary to enable the employee to perform the essential functions of the job;
- require an employee to take a leave if another reasonable accommodation may be provided; or
- refuse to hire a person who is pregnant because of the pregnancy or a related condition.

The act also addresses burden of proof. Employers have the burden of proving that a reasonable accommodation would cause "undue hardship" (defined as "an action requiring significant

difficulty or expense").

And upon an employee request for accommodation, the employer and employee must "engage in a timely, good faith and interactive process" to determine an appropriate reasonable accommodation.

Moreover, while an employer may generally require medical documentation about the need for a reasonable accommodation, the employer may not require documentation for "(1) more frequent restroom, food and water breaks; (2) seating; and (3) limits on lifting over 20 pounds."

Enforcement of the act's provisions will be through an existing enforcement framework. Because the act is incorporated into Chapter 151B, claims of discrimination based on pregnancy or related conditions will receive the same treatment as other claims of discrimination under Massachusetts law.

In other words, a claimant must first file a complaint with the Massachusetts Commission Against Discrimination within 300 days of the discrimination, and upon receipt of a "right to sue" letter may bring a claim in court. Employers found to be in violation face substantial penalties including monetary damages, injunctive relief, and attorneys' fees and costs.

#### Act's integration into federal, state law

Prior to the enactment of the Pregnant Workers Fairness Act, federal and state laws provided piecemeal protection for pregnant workers.

It already was the case that the federal Pregnancy Discrimination Act and Massachusetts law prohibited discrimination based on pregnancy in any aspect of employment, but the extent to which they require pregnancy accommodations has been less than crystal-clear.

Likewise, the federal Americans with Disabilities Act and Massachusetts law

already required employers to provide reasonable accommodations for disabilities related to pregnancy. But as suggested above, an ordinary, healthy pregnancy is not considered a disability under the law.

Finally, the Affordable Care Act also requires employers to provide reasonable break time for certain employees to express breastmilk for one year following the birth of a child in a private place other than a bathroom. But that portion of the statute applies only to non-exempt employees and does not cover employers with fewer than 50 employees if the requirement would impose undue hardship. And by contrast, Massachusetts had no law addressing mothers' rights to breastfeed or pump milk at work.

The Pregnant Workers Fairness Act thus covers significant gaps in earlier laws by making women experiencing ordinary, healthy pregnancies a protected class and requiring employers to provide reasonable accommodations, including breaks for breastfeeding or pumping milk.

Finally, one other point is notable. The act explicitly provides that it "shall not be construed to preempt, limit, diminish or otherwise affect any other law relating to sex discrimination or pregnancy," including but not limited to the Massachusetts Parental Leave Law.

#### Action items for employers

The act will not go into effect until April 1, 2018.

All Massachusetts employers nevertheless should be aware of their new obligations and the potentially steep penalties for any noncompliance.

Also, all employers must provide written notice to employees of their rights under the act by April 1. **MLW**

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