

Accommodations for Pregnant Employees

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In January 2017, a bill (H. 136) was introduced in the Vermont Legislature that would ensure healthy pregnant employees in Vermont receive reasonable workplace accommodations during their pregnancies.¹ Since 2001, fifteen states have passed similar legislation and currently, more than ten states have similar bills pending. In 2011², 2013³ and 2015⁴ the Pregnant Workers Fairness act was introduced in the U.S. Senate, which would declare it unlawful to fail to make reasonable accommodations to known limitations related to pregnancy, childbirth, or the related medical condition of applicants and employees.

CURRENT LAW

Under current state and federal law, employees who are experiencing healthy, uncomplicated pregnancies are not entitled to receive workplace accommodations such as having access to water, access to a stool or a chair, longer or more frequent restroom breaks, or avoiding heavy lifting.

Courts have held that the Americans with Disabilities Act (ADA) excludes normal pregnancy. Workers who have pregnancy-related medical conditions, such as preeclampsia, gestational diabetes, or pregnancy-related carpal tunnel are protected by the ADA.

Both the Pregnancy Discrimination Act (PDA) and Vermont's Fair Employment Practices Act (FEPA) require that employers treat pregnant workers in the same manner as other employees who are similarly situated in their ability or inability to work. Neither treat pregnancy, itself, as a disability or create an obligation to accommodate pregnant employees.

NEED FOR CLEAR PROTECTIONS

Pregnant workers who are not disabled, and simply need temporary accommodations to stay healthy or to prevent problems before they occur in the first place, are left to jump through hoops.

Enforcement of the anti-discrimination provisions in the PDA and VT's FEPA are an obstacle for many pregnant workers. The enforcement process can be lengthy, and requires employees demonstrate not just that they've been denied accommodations, but that they've been treated differently than other similarly situated employees. Employees at small businesses face additional difficulties to show that another worker who was similarly situated was

treated differently, because they have fewer comparable co-workers to draw comparisons to. Almost a quarter of Vermont's workforce are employed at firms with fewer than 20 employees,⁵ where proving employment discrimination is especially difficult.

Workers may face additional financial, emotional, and health concerns during pregnancy. Engaging in an investigative and enforcement process can be daunting.

Many pregnant employees hope to return to work after their pregnancy, may plan to request other accommodations such as flexible work schedules or part-time hours, and may fear both retaliation and alienating their employer with a complaint.

Pregnancy is always a temporary condition. Pregnant employees requesting accommodations need them immediately, not months later, and the short duration of necessity creates even more disincentive to file a complaint.

The National Partnership for Women and Families estimates that nationally, 250,000 pregnant workers are denied requests for accommodations every year.⁶ Nine percent of pregnant workers who requested less lifting or the ability to sit were denied their request.⁷ As many as 42% of workers who need a pregnancy-related accommodation don't bother asking, for fear of repercussions, refusal, or uncertainty.⁸ 62% of Americans have personally seen pregnancy discrimination in the workplace.⁹

Pregnant workers deserve clear, affirmable statutory rights to reasonable accommodations.

IMPACT ON EMPLOYEES

Women are increasingly breadwinners in their families; women contribute more than 40% of the income in a third of Vermont families.¹⁰ Pregnant women with partners and single mothers alike depend on their paychecks, particularly at a time when they face the costs associated with having a new member of the family.

Three-quarters of women entering the workforce will be pregnant and employed at some point in their lives.¹¹ The majority of pregnant women in Vermont are employed during their pregnancies.¹²

Workers in part-time or lower-wage jobs, women of color, and those with a high school degree or less education are more likely to need some kind of minor accommodation at work, and are impacted disproportionately compared to their counterparts.¹³

When pregnant women are denied accommodations, or don't ask for them out of fear, they may be forced to choose between their paycheck and a healthy Pregnancy.

Minor accommodations would promote the economic security of pregnant women and their families and would protect the health of women and children.

For women forced out of their jobs because of their pregnancies, the stress associated with job loss can increase the risk of premature birth and/or a baby with low birth weight,¹⁴ and the risk of a downward spiral into poverty.

IMPACT ON BUSINESSES

Most pregnancy accommodations are low- or no-cost. Many of the accommodations requested by pregnant workers, such as sitting rather than standing, avoiding heavy lifting, taking more

frequent bathroom breaks, and carrying water are all no cost accommodations.

Pregnancy-related accommodations are temporary, and often are only needed for a few months, further minimizing the impact on businesses. A clear requirement to accommodate pregnant workers would also clarify expectations for businesses, making compliance easier and avoiding the need for investigations and litigation.

Employers who provide accommodations and flexibility report improved recruitment and retention of employees, and a majority of businesses report that providing accommodations to workers with disabilities increased overall staff morale, increased employee productivity, and reduced absenteeism. Workplace accommodations also lead to improved workplace safety.¹⁵

OTHER U.S. JURISDICTIONS

At least 19 U.S. jurisdictions have enacted state or municipal laws that require employers to provide pregnant employees with reasonable workplace accommodations. These jurisdictions include: California;¹⁶ Central Falls, Rhode Island;¹⁷ Colorado;¹⁸ Delaware;¹⁹ District of Columbia;²⁰ Hawaii;²¹ Illinois;²² Maryland;²³ Minnesota;²⁴ Nebraska;²⁵ New Jersey;²⁶ New York City, New York;²⁷ New York;²⁸ North Dakota;²⁹ Philadelphia, Pennsylvania;³⁰ Rhode Island;³¹ Texas;³² Utah;³³ and West Virginia.³⁴

An additional 3 states have enacted laws that require employers to transfer pregnant employees to a less strenuous or hazardous position, including: Alaska;³⁵ Connecticut;³⁶ and Louisiana.³⁷

In 2017, Georgia;³⁸ Iowa;³⁹ Maryland;⁴⁰ Massachusetts;⁴¹ Missouri;⁴² New Mexico;⁴³ Ohio;⁴⁴ Oklahoma;⁴⁵ South Dakota;⁴⁶ and Washington⁴⁷ have similar pending legislation.

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NOTES

- ¹ H.136. Reg. Sess. 2017-2018. (V.T. 2017).
- ² United States. Cong. Senate. Pregnant Workers Fairness Act of 2013. 112th Cong. 2nd sess. S. 3565.
- ³ United States. Cong. Senate. Pregnant Workers Fairness Act of 2013. 113th Cong. 1st sess. S. 942.
- ⁴ United States. Cong. Senate. Pregnant Workers Fairness Act of 2015. 114th Cong. 1st sess. S. 1512.
- ⁵ U.S. Small Business Administration, Small Business Profile: Vermont (2016).
- ⁶ Listening to Mothers: The Experiences Of Expecting And New Mothers In The Workplace (2014), Nat'l Partnership For Women And Families, <http://www.nationalpartnership.org/research-library/workplace-fairness/pregnancy-discrimination/listening-to-mothers-experiences-of-expecting-and-new-mothers.pdf>.
- ⁷ *Id.* At 3.
- ⁸ *Id.* At 2.
- ⁹ Today Show: Pregnancy Bias is Alive and Well in America, (MSNBC television broadcast Feb. 15,2012). <http://lifeinc.org.today.msnbc.msn.com/news/2012/02/15/10417141-pregnancy-bias-is-alive-and-well-in-america?lite>.
- ¹⁰ U.S. Census Bureau, Public Use Microdata Sample; American Community Survey 5 Year Data Release (2009-2013).
- ¹¹ A Cawthorne & M Alpert, Labor Pains: Improving Employment and Economic Security for Pregnant Women and New Mothers. (2009), http://www.americanprogress.org/issues/2009/08/pregnancy_support.html.
- ¹² U.S. Census Bureau. (2012). American Community Survey 3-Year Estimates 2009-2011.
- ¹³ Listening to mothers, *supra* at 3
- ¹⁴ Stress and Pregnancy (2012), March of Dimes, http://www.marchofdimes.com/pregnancy/lifechanges_indepth.html.
- ¹⁵ Loy Beth, Workplace Accommodations: Low Cost, High Impact (2017), <https://askjan.org/media/lowcosthighimpact.html>.
- ¹⁶ Cal. Code Regs. tit.2, § 11049 (2013).
- ¹⁷ Central Falls, R.I. Code § 12-5 (2014).
- ¹⁸ Colo. Rev. Stat. §§ 24-34-401, 24-34-402.3; Colo. Rev. Stat. § 24-34-401 (2016).
- ¹⁹ Del. Code tit. 19, §§ 710, 711, 716 (2014).
- ²⁰ Protecting Pregnant Workers Fairness Act of 2014, D.C. Act. 20-458 (2014).
- ²¹ Haw. Code R. § 12-46-107 (1990).
- ²² 775 Ill. Comp. Stat. 5/2-101, 102 (2014).
- ²³ Md. Code, State Gov't §§ 20-609, 20-601 (2013).
- ²⁴ Minn. Stat. §§ 181.940, 181.9414, 181.9436 (2014).
- ²⁵ Neb. Rev. Stat. §§ 48-1107.01(2), 48-1107.02(1)(e) (2015).
- ²⁶ N.J. Admin. Code § 13:8-1.2 (2006).
- ²⁷ N.Y. City Admin. Code § 8-107(22)(a) (2015).
- ²⁸ N.Y. Exec. Law § 296(3)(a)-(b) (2015).
- ²⁹ N.D. Cent. Code § 14-02.4-03(2) (2015).
- ³⁰ Philadelphia, Pa., Code § 9-1128 (2014).
- ³¹ R.I. Gen. Laws §§ 28-5-7.4(a)(1), (3), (2), (4) (2015).
- ³² Tex. Loc. Gov't Code §180.004 (2001).
- ³³ Utah Code §§ 34A-5-106(1)(g), (7) (2016).
- ³⁴ W. Va. Code §§ 5-11b-1, et seq. (2014).
- ³⁵ Alaska Stat. § 39.20.520 (2013).
- ³⁶ Conn. Gen. Stat. §§ 46a-60(a)(7), 46a-51 (2011).
- ³⁷ La. Rev. Stat. §§ 23:342, 23-341 (1997).
- ³⁸ H.184. Reg. Sess. 2017-2018. (G.A. 2017).
- ³⁹ S.66. Reg. Sess. 2017-2018. (G.A. 2017).
- ⁴⁰ H.0001. Reg. Sess. 2017-2018. (M.D. 2017).
- ⁴¹ S.338. Reg. Sess. 2017-2018. (M.A. 2017).
- ⁴² H.0225.011. Reg. Sess. 2017-2018. (M.O. 2017).
- ⁴³ H.179. Reg. Sess. 2017-2018. (N.M. 2017).
- ⁴⁴ H.2. Reg. Sess. 2017-2018. (O.H. 2017).
- ⁴⁵ H.1635. Reg. Sess. 2017-2018. (O.K. 2017).
- ⁴⁶ H. 1120. Reg. Sess. 2017-2018. (S.D. 2017).
- ⁴⁷ H.1448. Reg. Sess. 2017-2018. (W.A. 2017).