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CLIENT ALERT: Massachusetts Pregnant Workers Fairness Act Signed by Governor Baker – By Maura McLaughlin and Alexandra Pichette

Yesterday, Governor Baker signed into law "An Act Establishing the Massachusetts Pregnant Workers Fairness Act" (the "Act"). The Act sets out employers' obligations with respect to employees who are pregnant or have pregnancy-related conditions and provides protections beyond those set out in the Federal Pregnancy Discrimination Act, which broadly prohibits discrimination against pregnant workers, and the Americans with Disabilities Act. The Act, which will go into effect on April 1, 2018, amends Massachusetts' anti-discrimination statute, Massachusetts General Laws, Chapter 151B, to include explicit protections for employees who are pregnant and those who have conditions related to pregnancy, including nursing mothers.

Overview

Under the Act, Massachusetts employers will be required to engage in a timely, good faith interactive process with any worker who is pregnant or experiencing a condition related to pregnancy (including but not limited to lactation or the need to express milk for a nursing child) and requests an accommodation for this condition. Employers must either provide such employees with reasonable accommodations or demonstrate that a requested accommodation would present an undue hardship on the employer's program, enterprise, or business.

Reasonable Accommodation

The term "reasonable accommodation" is defined to include (but not be limited to) the following:

- 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; or
- A modified work schedule (provided that an employer will not be required to discharge or transfer a more senior employee and/or promote an employee unable to perform the essential functions of the position).

An employer may ask for documentation about the need for a reasonable accommodation from "an appropriate health care or rehabilitation professional," which is defined to include "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." An employer cannot, however, ask for documentation in connection with a request for the following accommodations: (i) more frequent restroom, food or water breaks; (ii) seating; (iii) limits on lifting over 20 pounds; and (iv) private non-bathroom space for expressing breast milk.

Undue Hardship

The Act defines undue hardship as an "action requiring significant difficulty or expense," and places the burden of proving whether or not a requested accommodation presents an undue hardship on the employer. Factors to be considered in an assessment of undue hardship are similar to the assessment of undue hardship located in other sections of Chapter 151B, and include (i) the nature and cost of the needed accommodation; (ii) the overall financial resources of the employer; (iii) the overall size of the business of the employer with respect to the number of employees and the number, type and location of its facilities; and (iv) the effect on expenses and resources or any other impact of the accommodation on the employer's program, enterprise or business.

Prohibited Conduct

The Act also prohibits employers from the following:

- Absent a showing of hardship, denying a reasonable accommodation for a worker's pregnancy or condition related to pregnancy;
- Taking adverse action against an employee who requests or uses a reasonable accommodation (including failing to reinstate the employee to the original position or an equivalent position of pay, seniority, benefits and service credits when the need for accommodation ends);
- Denying an employment opportunity to an employee based on the need to accommodate conditions related to pregnancy;
- Requiring an employee to take a leave if another reasonable accommodation may be provided; or
- Absent a showing of hardship, refusing to hire an employee who is pregnant because of the pregnancy or because of a condition related to the person's pregnancy, if the employee can perform the essential functions of the position with reasonable accommodation.

Notably, and importantly, an employer may not require an affected employee to accept an accommodation that the employee does not wish to accept "if that accommodation is unnecessary to enable the employee to perform the essential functions of the job." This serves as a reminder that employers may generally not undertake to unilaterally impose a job restriction or modification due to employee pregnancy. Of course, should a separate legal or regulatory consideration forbid pregnant employees from working in a particular space, being exposed to certain chemicals, or impose a similar restriction, this presents a separate and distinct legal issue and should be reviewed with care.

Notification to Employees

Employers must notify all employees of the Act's protections in a "handbook, pamphlet or other

means of notice." While the Act is clear that all employees that must receive this information, it specifically directs employers to provide notification to (i) new employees at or prior to the commencement of employment, and, (ii) an employee who has informed the employer of a pregnancy or a pregnancy related condition within 10 days of notice to the employer.

Summary and Recommendations

The Act, like similar legislation passed in other states, clarifies and adds to the protections for employees who are pregnant or have pregnancy-related conditions, including new mothers. Employers are advised to review their policies and confer with employment counsel with regards to conducting training, the interactive process surrounding reasonable accommodation requests, notices required by the Act, and any other questions about the Act's provisions and interactions with other laws.

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