WEST VIRGINIA
SECRETARY OF STATE
NATALIE E. TENNANT
ADMINISTRATIVE LAW DIVISION

Form #3

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2015 JUL 31 P 3:58

OFFICE WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE
AND
FILING WITH THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

AGENCY: WV HUMAN RIGHTS COMMISSION TITLE NUMBER: 77

CITE AUTHORITY: WV Code 5-11-8(h), 5-11B-4 and 29A-3-1 et seq.

AMENDMENT TO AN EXISTING RULE: YES ____ NO X

IF YES, SERIES NUMBER OF RULE BEING AMENDED: ____

TITLE OF RULE BEING AMENDED: ____

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 10

TITLE OF RULE BEING PROPOSED: Pregnant Workers' Fairness Act

THE ABOVE PROPOSED LEGISLATIVE RULE HAVING GONE TO A PUBLIC HEARING OR A PUBLIC COMMENT PERIOD IS HEREBY APPROVED BY THE PROMULGATING AGENCY FOR FILING WITH THE SECRETARY OF STATE AND THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE FOR THEIR REVIEW.

Authorized Signature

Title 77
Legislative Rule
West Virginia Human Rights Commission
Series 10

Pregnant Workers' Fairness Act (PWFA)

Brief Summary of the Rule

The Pregnant Workers' Fairness Act (PWFA), W. Va. Code §5-11B-1 et seq., provides guidelines for interpreting the Act's prohibition against discrimination on the basis of sex by means of pregnancy discrimination and intended to assist all persons in understanding their rights, obligations and duties under the law in regard to this aspect of the PWFA, which applies to both men and women, respectively.

The PWFA sets forth: (1) definitions related to pregnancy; (2) reasonable accommodations in employment provided by covered entities to pregnant workers; (3) liability of covered entities who are responsible for their acts and those of its officers, agents and supervisory employees; and (4) prohibition of pre-employment practices by covered entities.

Title 77
Legislative Rule
West Virginia Human Rights Commission
Series 10

Pregnant Workers' Fairness Act (PWFA)

Statement of Circumstances Requiring the Rule

The West Virginia Human Rights Commission, pursuant to W.Va. Code §5-11B-4, no later than two years after the enactment of W.Va. Code 11B, *effective June 4, 2014*, shall propose legislative rules in accordance with §29A-3-1, to carry out this article, which shall identify some reasonable accommodations addressing known limitations related to pregnancy, childbirth or related medical conditions that shall be provided to a job applicant or employee affected by such known limitations unless the covered entity can demonstrate that doing so would impose an undue hardship.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Title 77, Series 10, Pregnant Workers' Fairness Act

Type of Rule: [X] Legislative [ ] Interpretive [ ] Procedural

Agency: WV Human Rights Commission

Address: Room 108A
1321 Plaza East
Charleston, WV 25301-1400

Phone Number: 304-558-2616 Email: Mary.K.Jacquet@wv.gov

Fiscal Note Summary

Summarize in a clear and concise manner what impact this measure will have on costs and revenues of state government.

With the enactment of Article 11B. Pregnant Workers' Fairness Act, effective June 4, 2014, it is estimated that the costs and revenues of state government will not increase.

Fiscal Note Detail

Show over-all effect in Item 1 and 2 and, in Item 3, give an explanation of Breakdown by fiscal year, including long-range effect.

FISCAL YEAR			
Effect of Proposal	Current Increase/Decrease (use "-")	Next Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	0.00	0.00	0.00
Personal Services	0.00	0.00	0.00
Current Expenses	0.00	0.00	0.00
Repairs & Alterations	0.00	0.00	0.00
Assets	0.00	0.00	0.00
Other	0.00	0.00	0.00
2. Estimated Total Revenues	0.00	0.00	0.00

Title 77, Series 10, Pregnant Workers' Fairness Act

Rule Title:

Rule Title: _____

3. **Explanation of above estimates (including long-range effect):**
Please include any increase or decrease in fees in your estimated total revenues.

MEMORANDUM

Please identify any areas of vagueness, technical defects, reasons the proposed rule **would not** have a fiscal impact, and/or any special issues **not** captured elsewhere on this form.

Date: July 31, 2015

Signature of Agency Head or Authorized Representative

Mary Kaye Jaynes

TITLE 77
LEGISLATIVE RULE
HUMAN RIGHTS COMMISSION
SERIES 10
PREGNANT WORKERS' FAIRNESS ACT

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SECRETARY OF STATE

§77-10-1. General.

1.1. Scope. -- The following legislative regulations of the West Virginia Pregnant Workers' Fairness Act (PWFA), W. Va. Code §5-11B-1 et seq., set forth guidelines for interpreting the Act's prohibition against discrimination on the basis of sex by means of pregnancy discrimination and are intended to assist all persons in understanding their rights, obligations, and duties under the law in regard to this aspect of the PWFA.

1.2. Authority. -- W. Va. Code §5-11-8(h), §5-11B-4, and §29A-3-1 et seq.

1.3. Filing Date. -- _____

1.4. Effective Date. -- _____

§77-10-2. Definitions.

2.1. "Pregnancy" includes, but is not limited to, current pregnancy, past pregnancy, potential or intended pregnancy, and medical conditions related to pregnancy or childbirth.

2.2. "Undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subsection 2.2.1.

2.2.1. Factors to be considered in determining whether an accommodation would impose an undue hardship on a covered entity include:

2.2.1.a. The nature and cost of the accommodation needed under this article;

2.2.1.b. The overall financial resources of the facility or facilities of the covered entity involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of such facility;

2.2,1.c. The overall financial resources of the covered entity; the overall size of the business of the covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

2.2.1.d. The type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such covered entity, and the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

2.3. "Reasonable accommodation" means reasonable modifications or adjustments to be determined on a case-by-case basis which are designed as attempts to enable a person affected by pregnancy, childbirth, or related medical conditions to be hired or to remain in the position for which she/he was hired.

2.4. "Related medical conditions" means physical and mental symptoms or limitations, including but not limited to, miscarriage, pregnancy termination, complications of pregnancy or childbirth, gestational diabetes, pregnancy-induced hypertension, after-effects of delivery, post-partum depression, fertility, and lactation.

2.5. "Covered entity" means the state, or any political subdivision thereof, and any person employing twelve or more persons within the state for twenty or more calendar weeks in the calendar year in which the act of discrimination allegedly took place or the preceding calendar year.

2.6. "Person" means one or more individuals, partnerships, associations, organizations, corporations, labor organizations, cooperatives, legal representatives, trustees, trustees in bankruptcy, receivers and other organized groups of persons.

§77-10-3. Reasonable Accommodations.

3.1. An employer, potential employer, employment agency, joint apprenticeship committee, or labor organization (hereinafter collectively referred to as "covered entity") must provide a pregnant woman or person affected by pregnancy, childbirth, or related medical conditions with a reasonable accommodation in employment opportunities with respect to hire, tenure, terms, conditions, and privileges of employment, or any other matter, directly or indirectly, related to employment.

3.1.1. Reasonable accommodation requires that a covered entity make reasonable modifications or adjustments designed as attempts to enable a person affected by pregnancy, childbirth, or related medical conditions to remain in the position for which she/he was hired. A covered entity shall make reasonable accommodation to the known limitations related to the pregnancy, childbirth, or related medical conditions of a job applicant or employee where necessary to enable such job applicant or employee to perform the essential functions of the job. Reasonable accommodations include, but are not limited to:

3.1.1.a. A reasonable accommodation includes, but is not limited to, bathroom breaks, breaks for increased water intake, periodic rest, assistance with manual labor, providing time off for prenatal medical appointments, modified work policies and procedures, and temporary transfers to less strenuous or hazardous work;

3.1.1.b. Making existing facilities used by job applicants and employees readily accessible to and usable by persons affected by pregnancy, childbirth, or related medical conditions; and

3.1.1.c. Job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustments or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, providing breaks and private and sanitary facilities for a lactating employee to express breast milk, and other similar accommodations for persons affected by pregnancy, childbirth, or related medical conditions.

3.1.2. The employee or job applicant must request the accommodation, when the employee/applicant's licensed health care provider delineates limitations and what accommodations are needed

3.1.3. A covered entity may not penalize an employee or job applicant for requesting an accommodation or using an accommodation.

3.2. A covered entity shall not be required to make such accommodation if she/he can establish that the accommodation would be unreasonable because it imposes undue hardship on the conduct of his/her business.

§77-10-4. Covered Entity Liability for Pregnancy Discrimination.

4.1. A covered entity is responsible for its acts and those of its officers, agents, and supervisory employees with respect to pregnancy discrimination regardless of whether the specific acts complained of were authorized or even forbidden by the covered entity and regardless of whether the covered entity knew or reasonably should have known of their occurrence.

4.2. Covered entities are encouraged to take all steps necessary to prevent pregnancy discrimination from occurring. Appropriate preventative steps include, but are not limited to, affirmatively expressing strong disapproval of pregnancy discrimination, and developing and implementing appropriate policies and procedures for responding to requests for reasonable accommodations for pregnancy, childbirth, and related medical conditions.

§77-1-5. Pre-Employment Practices.

5.1. A covered entity shall not make pre-employment inquiry of whether the employee or job applicant is affected by pregnancy, except that a covered entity may make pre-employment inquiries into the ability of an employee or a job applicant to perform job-related functions.

5.1.1. Affected by pregnancy includes, but is not limited to, the definition of "pregnancy" in section 2.1., and applies to both men and women, respectively.

QUESTIONNAIRE

(Please include a copy of this form with each filing of your rule: Notice of Public Hearing or Comment Period; Proposed Rule, and if needed, Emergency and Modified Rule.)

DATE: July 31, 2015

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM:(*Agency Name, Address & Phone No.*) West Virginia Human Rights Commission
Room 108A
1321 Plaza East
Charleston, WV 25301-1400

LEGISLATIVE RULE TITLE: Title 77, Series 10, Pregnant Workers' Fairness Act

1. Authorizing statute(s) citation WV Code 5-11-8(h), 5-11B-4 and 29A-3-1 et seq.

2. a. Date filed in State Register with Notice of Hearing or Public Comment Period:

Comment period filed in State Register June 29, 2015

b. What other notice, including advertising, did you give of the hearing?

Advertised with: State Register; WV State Bar Blast; Mountain State Bar; Dept. of Personnel's Stateline News; HRC website; WV Free; ACLU of WV; WV Women's Commission; WV Association of Counties; WV Chamber of Commerce; WV EEO Office; WV Municipal League; YWCA Charleston

c. Date of Public Hearing(s) ***or*** Public Comment Period ended:

Comment period ended July 30, 2015 at 2:00 p.m.

d. Attach list of persons who appeared at hearing, comments received, amendments, reasons for amendments.

Attached 9 Comments No comments received N/A

e. Date you filed in State Register the agency approved proposed Legislative Rule following public hearing: (be exact)

N/A

f. **Name, title, address and <u>phone/fax/e-mail numbers</u>** of agency person(s) to receive all *written correspondence* regarding this rule: (Please type)

Marykaye Jacquet
Executive Director
WV Human Rights Commission
Room 108A
1321 Plaza East
Charleston, WV 25301-1400
Ph: 304-558-2616, Fax: 304-558-0085 Email: Mary.K.Jacquet@wv.gov

g. **<u>IF DIFFERENT</u> FROM ITEM 'f'**, please give **Name, title, address and phone number(s)** of agency person(s) who wrote and/or has responsibility for the contents of this rule: (Please type)

Ann Haight, Deputy Attorney General
Attorney General's Office
Civil Rights Division
208 Capitol St., 3rd Floor
PO Box 1789
Charleston, WV 25326-1789
Ph: 304-558-0546, Fax: 304-558-0649, Ann.L.Haight@wvago.gov

3. If the statute under which you promulgated the submitted rules requires certain findings and determinations to be made as a condition precedent to their promulgation:

a. Give the date upon which you filed in the State Register a notice of the time and place of a hearing for the taking of evidence and a general description of the issues to be decided.

N/A

b. Date of hearing or comment period:

Comment period June 29, 2015 to July 30, 2015, 2:00 p.m.

c. On what date did you file in the State Register the findings and determinations required together with the reasons therefor?

Reasons filed July 31, 2015

d. Attach findings and determinations and reasons:

Attached WV Human Rights Commission's Responses to Public Comments

Title 77 Legislative Rule Human Rights Commission
Series 10 Pregnant Workers' Fairness Act

West Virginia Human Rights Commission's Responses to Public Comments

The following material is the response of the West Virginia Human Rights Commission (WVHRC) to the public comments received up through 2:00 pm on July 30, 2015 relative to the draft Legislative Rules implementing W. Va. Code § 5-11B-1 *et seq.*, the West Virginia Pregnant Workers' Fairness Act. The WVHRC appreciates the time and effort expended by the submitters to review the Rules and provide these public comments.

The WVHRC timely received public comments from:

The West Virginia Division of Personnel, letter dated July 23, 2015
Mountain State Justice, Inc., letter dated July 24, 2015
C. Joan Parker, Attorney at Law, letter dated July 25, 2015
West Virginia Free & National Women's Law Center, letter dated July 27, 2015
David M. Hammer, Attorney at Law, letter dated July 28, 2015
West Virginia Chamber of Commerce, letter dated July 30, 2015
Robert M. Bastress, Jr., WVU College of Law, letter dated July 30, 2015
Susan Thompson, Attorney at Law, letter dated July 30, 2015
Jane E. Peak, Attorney at Law, letter dated July 30, 2015
ACLU of West Virginia, letter dated July 30, 2015

These comments are addressed below; as some of the comments are similar, those comments are addressed together. The undersigned has summarized, rather than repeated the comments and apologizes in advance if the summaries are unclear, and refer back to the submitted letters for specific details.

<u>West Virginia Division of Personnel</u>

The West Virginia Division of Personnel (WVDOP) raises issues with the sections on Definitions and Reasonable Accommodations (Subsections 2 and 3). WVDOP suggests that part of the definition of ""Reasonable Accommodation" should actually be included under Subsection 3, since it provides examples more than a definition. The WVHRC accepts this comment, and has revised the proposed Rules accordingly.

The WVDOP suggests the inclusion of additional language addressing whether a reassignment of an individual is a temporary or permanent accommodation; the WVHRC declines to alter the proposed language, as each situation needs to be determined on a case-by-case basis.

The WVDOP suggests the removal of "or indirectly" in Section 3.1 relating to Reasonable Accommodation; the WVHRC declines to alter the proposed language as each situation needs to be determined on a case-by-case basis.

The WVDOP suggests making two changes regarding written documentation (that written documentation be required and that an employer need not make an accommodation if documentation substantiating the need for accommodation is not provided). Since W. Va. Code § 5-11B-2(1) requires an individual to provide written documentation, the WVHRC does not see the need for these clarifications ("following delivery by the applicant or employee of written documentation from the applicant's or employee's health care provider that specifies the applicant's or employee's limitations and suggesting what accommodations would address those limitations").

C. Joan Parker, Attorney at Law

Attorney Parker suggests changes be made to the definitions of "related medical conditions" under Section 2.4. Similar suggestions were made by Mountain State Justice, Inc. and WV Free/National Women's Law Center. Although perhaps not adopting every suggestion within this category, the WVHRC believes an expansion of the definitions of what is "included by not limited to" in this definition is appropriate, and has modified this definition to include additional medical conditions in this list.

Mountain State Justice, Inc. /WV Free & National Women's Law Center

As the letters from Mountain State Justice, Inc. (MSJ) and WV Free & National Women's Law Center (WV Free) include many of the same comments and suggestions, their overlapping comments are addressed together.

First, MSJ and WV Free raise issues, including other medical conditions related to pregnancy and childbirth, with a specific reference to lactation. As noted above regarding the Parker suggestions, additional examples of medical conditions, including lactation, have been included.

Second, MSJ and WV Free ask to include a reminder to employers that statutes other than the Pregnant Workers' Fairness Act also apply, and provide protection, to pregnant workers. The WVHRC does not believe it is necessary to include this type of statement in the Legislative Rules, as it is self-evident.

Third, MSJ and WV Free request a definition of "limitations related to pregnancy, childbirth or a related medical condition," as to physical symptoms and limitations, and WV Free including mental symptoms as well. WVHRC has made changes to the rules to respond to this request, but also believes the particular circumstances have to be how to address on a case-by-case basis.

Fourth, MSJ and WV Free suggest inclusion of a Rule that if an employee's initial documentation is insufficient, the employer should explain why it is insufficient and provide the employee a chance to

provide additional documentation. The WVHRC believes this is another example of the need to allow a case-by-case determination and that this type of statement is not necessary in the Rules.

Finally, MSJ and WV Free – as well as other Commenters -- raised concerns with the Cost Analysis; the WVHRC agrees with the comments expressed and has revisited the Cost Analysis filed with these Rules.

Mountain State Justice, Inc.

MSJ requests inclusion of examples of "breaks and private and sanitary facilities for a lactating employee to express breast milk" under "Reasonable Accommodation"; the WVHRC agrees and has added that example.

MSJ requests language is added regarding required "written documentation" and allowing an employee to request, and an employer to provide, accommodation before submitting written documentation, not requiring an employee to accept an offered accommodation or an employee to take leave as not dependent on receipt of written documentation. The WVHRC believes these circumstances can be addressed on a case-by-case basis, and does not require inclusion in the Legislative Rules. MSJ requests inclusion of circumstances when an employer already provides a particular accommodation for other employees to be considered evidence that the same accommodation would not constitute an undue hardship on the employer. The WVHRC believes this circumstance would be included in the evaluation of "undue hardship" and evaluation of circumstances on a case-by-case basis and need not be addressed in these Rules. In addition, it is hoped that employees and employers would work together on these issues and only have to refer to the Pregnant Workers' Fairness Act and these Rules when they are unable to otherwise work together.

WV Free & National Women's Law Center

WV Free wants the Rules to indicate that an employer may make an accommodation even without written documentation from a health care provider.

WV Free wants the Rules to define a "health care provider"; as the WVHRC believes it risks limiting, or missing, a particular category of providers and that other statutes define health care providers, such revision is not needed.

WV Free requests revisions to the Reasonable Accommodation Rule by adding that determination of a Reasonable Accommodation is an interactive process. The WVHRC believes that case law and proof of a prima facie case would require this process to occur and inclusion in the Rules is not necessary.

WV Free asks that more examples of reasonable accommodations be included in the list of examples; the WVHRC accepts this suggestion and has included some additional examples if not already readily identifiable in the draft Rule.

WV Free wants to restate the Code section indicating an employer cannot require an applicant or employee to accept any accommodation proposed by the employer. Since the statute clearly addresses this issue, the WVHRC does not deem it necessary to be included in these Rules.

WV Free requests that the Rule include PWFA's prohibition that an employer cannot require an employee to take leave if there is another reasonable accommodation that can be provided. Since the statute clearly addresses this issue, the WVHRC does not deem it necessary to be included in these Rules.

WV Free also suggests inclusion of a record retention policy. The WVHRC believes there are other laws that require retention and protection of records and medical information and does not deem it necessary to be included in these Rules.

WV Free also proposes the definition of "supervisory employee," but the WVHRC believes that Subsection 4.1 accurately reflects existing case law regarding liability for the acts of managerial/ supervisory employees and agents of a covered entity and does not deem it necessary to be included in these Rules.

Finally, WV Free has listed several "Additional Clarifications," one which addresses potential retaliation for an individual requesting an accommodation and three which reference written documentation. The WVHRC believes that the statutory language clearly protects an individual who requests an accommodation and such clarification is not necessary in these Rules, and, as noted above, written documentation is required to be provided under the statute and the proposed clarifications are therefore incorrect statements.

<u>David M. Hammer, Attorney at Law</u>

Attorney Hammer raises concerns regarding the Fiscal Note, which has previously been addressed.

Attorney Hammer objects to the language in 3.1.1., which he interprets as requiring any accommodation request to be upon the advice of a licensed health care provider as expensive and unnecessary, and prevents employees from making accommodation requests. The WVHRC believes it is bound by the language of the statue regarding this requirement.

Attorney Hammer also has concerns with 4.1 and employers not being bound by actions of "employees acting outside the scope of their employment." The WVHRC believes this is a correct

statement of law, but also believes this section is valid without the additional language, and has modified 4.1 accordingly.

West Virginia Chamber of Commerce

The WV Chamber of Commerce requested clarification under 3.1.2 to include an identification that the health care provider is the employee's personal health care provider; substantiation of the need for accommodation; and what accommodations that would address the articulated needs. The WVHRC does not anticipate that the identified duties would not occur, since only an individual's treating health care provider would be able to address any limitation and suggested accommodation, but has modified the language of 3.1.2.

Robert M. Bastress, Jr., WVU College of Law

Professor Bastress addresses concerns with 3.1.2, and asserts that the Rules do not meet the intent of the statute; the WVHRC asserts that this Rule specifically includes the statutory requirements of the Act.

Professor Bastress also raises the issue of current West Virginia law regarding an employer's knowledge ("knew or should have known") of the employee's limitations and that the duty to accommodate is on the advice of the health care provider. Since the statute designates the requirement of a request by the employee and the advice of the health care provider, the WVHRC believes the Rule is in accord with the statutory requirements.

Professor Bastress also notes the redundancy of the sections on Reasonable Accommodation; as noted above, the Rules have been revised to address this issue.

Susan Thompson, Attorney at Law

Attorney Thompson raises concerns with the Fiscal Note, which has previously been addressed.

Attorney Thompson challenges the authority of the WVHRC to draft any of the Rules other than those relating to Reasonable Accommodation; the WVHRC believes this is too narrow of an interpretation of its directive and believes all the Rules presented comply with that directive.

Attorney Thompson raises an issue regarding 4.1 and "employees acting outside the scope of employment;" the WVHRC has addressed this issue as noted above.

Attorney Thompson also raises an issue of an employee/applicant needing to incur the expense of medical visits (Rule 3.1.2); the WVHRC does not have evidence that this is a practical issue since a pregnant worker would normally have a treating health care provider who regularly sees the worker and

there is no requirement that the worker have a specific office visit to address an accommodation request, and that this Rule follows the statutory language.

Jane E. Peak, Attorney at Law

Attorney Peak raises the same issue as Attorney Thompson regarding the authority of the WVHRC to promulgate more than Reasonable Accommodation Rules; see prior response.

Attorney Peak also challenges the inclusion of the "outside the scope of employment" language, which has been previously addressed.

Attorney Peak also raises the same issue as Attorney Thompson regarding the "extra legislative requirement" of a health care provider's advice; see prior response by the WVHRC to this issue. The WVHRC believes that suggested language would go beyond the statutory requirements.

ACLU of West Virginia

Many of the issues noted by the ACLU have been raised by other Public Comments, including a clarification of Undue Hardship when accommodations are provided to non-pregnant workers; additions to the Definitions of "Related Medical Conditions"; suggested listings under Reasonable Accommodations (including 'qualified readers or interpreters" which has been retained); inclusion of a directive to engage in the Interactive Process, Recommended Addition to Unwanted Accommodations and Forced Leave, and Definitions on Limitations Related to Pregnancy, Childbirth or Related Medical Conditions; Written Documentation requirement; and revisions to the Fiscal Note Summary. The WVHRC refers to its previous responses on these issues for the actions taken and responses made to these issues.

It is hoped that the revisions made and responses to the Public Comments are understood by all individuals reviewing these Rules. If there are questions, please contact my office.

Marykaye Jacquet, Executive Director
West Virginia Human Rights Commission

July 31, 2015

West Virginia Division of Personnel

Sara P. Walker, Director

STATE PERSONNEL BOARD
Jason Pizatella, Chairman
Mark Carbone • Sharon Lynch
Eugene Stump • Elizabeth Walker
Erica Mani

Earl Ray Tomblin, Governor Jason Pizatella, Acting Cabinet Secretary

July 23, 2015

Marykaye Jacquet, Executive Director
West Virginia Human Rights Commission
Room 108A 1321 Plaza East
Charleston, WV 25301-1400

Re: Proposed Rule

Dear Ms. Jacquet:

I am writing to provide comments from the West Virginia Division of Personnel ("Division of Personnel") on the Human Rights Commission's proposed Pregnant Workers' Fairness Act (PWFA) legislative rule (77CSR10). I offer the following comments and proposed revisions for your consideration:

1. Subsection 2.3. – The Division of Personnel recommends that the first sentence of Subsection 2.3 remain as the definition and the remainder of the language found under Subsection 2.3 be moved to Section 3 of the Rule.

2. Subsection 2.3.2. – The Division of Personnel recommends adding language to clarify whether or not reassignment to a vacant position is a temporary or permanent accommodation to the Rule should also clarify an employer's obligation to return the employee to the same or similar position upon conclusion of the period of accommodation.

3. Subsection 3.1. – The Division of Personnel recommends removing the language "or indirectly" from this section as it exceeds the scope of the PWFA.

4. Subsection 3.1.2. – The Division of Personnel recommends adding the following language to the end of the existing subsection: "and the covered entity may require documentation to substantiate the need for accommodation."

5. Subsection 3.2. – The Division of Personnel recommends adding the following language to the end of the existing subsection: "or if the person requesting the accommodation fails to provide documentation substantiating the need for accommodation."

I appreciate the opportunity to provide comments on the proposed rule. Should you have any questions regarding this matter, please feel free to contact me at (304) 558-3950.

Sincerely,

Sara P. Walker, Director
Division of Personnel

SPW/jft

MOUNTAIN STATE JUSTICE, INC.

1031 Quarrier St., Suite 200
Charleston, WV 25301
Telephone: (304) 344-3144
Facsimile: (304) 344-3145

•321 W. Main St., Suite 401
Clarksburg, WV 26003
Telephone: (304) 326-0188
Facsimile: (304) 326-0189

Jennifer S. Wagner, Esquire
jennifer@msjlaw.org

July 24, 2015

West Virginia Human Rights Commission
1321 Plaza East Room 108A
Charleston, WV 25301-1400

RE: Implementation of the Pregnant Workers' Fairness Act

Dear Members of the West Virginia Human Rights Commission:

Thank you for the opportunity to comment on the Human Rights Commission's proposed regulations to implement the West Virginia Pregnant Workers' Fairness Act (PWFA). Mountain State Justice, Inc., is a non-profit legal services firm that works to ensure the fair and appropriate treatment of underserved West Virginians. We are thrilled that the PWFA passed unanimously last year. The protections provided by the PWFA will be critical to the health and economic security of working women and their families across the state.

The proposed regulations are strong, and represent a clear statement that women in West Virginia who are affected by pregnancy, childbirth, or related medical conditions are entitled to reasonable accommodations at work, and that no woman can be pushed out of her job for being pregnant. While we support the proposed regulations overall, we wish to take this opportunity to offer some suggestions regarding the content of the rules that would promote greater clarity regarding the obligations and expectations of employers and employees alike.

Explicitly Covering Lactation as a "Related Medical Condition" and Lactation Space as Reasonable Accommodation

There are several places in the proposed regulations where the Commission could make clear that the need to express breast milk is covered by the PWFA. As courts and the Equal Employment Opportunity Commission have recognized, lactation is a condition related to pregnancy and childbirth—but often women find that they have no private space or break time to express breast milk at work. Women unable to express breast milk at work can experience physical pain and medical complications.

- The Commission should explicitly include "lactation or the need to express breast milk" within the definition of "related medical conditions."

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- The Commission should include "Providing breaks and private and sanitary facilities for a lactating employee to express breast milk" among the examples of what constitutes a "reasonable accommodation."

Noting Rights and Obligations Under Multiple Statutes

Pregnant workers will often be protected by multiple laws. It would be helpful for the regulations to alert employers that in some instances a medical condition related to pregnancy or childbirth will also constitute a disability, and thus the pregnant worker may also be entitled to accommodation under the Americans with Disabilities Act and/or the West Virginia Human Rights Act. Similarly, an employee may be entitled to leave both under the Family and Medical Leave Act (FMLA) and as a reasonable accommodation under the PWFA, but even if an employee is not eligible for leave under the FLMA she may still be entitled to leave as a reasonable accommodation under the PWFA. The regulations could helpfully note this.

Relevance of Accommodations Provided to Other Employees

We strongly recommend that the rules state that if an employer already makes a particular accommodation for other employees--to comply with its obligations under the Americans with Disabilities Act or the West Virginia Human Rights Act, or pursuant to a policy or practice of accommodating on-the-job injuries, or for any other reason--that will be considered strong evidence that extending the accommodation to the pregnant employee will not impose an undue hardship on the employer. If an employer has already chosen to accommodate other employees with similar physical limitations, it strongly suggests that providing the accommodation to a pregnant employee is not an undue hardship.

Limitation Related to Pregnancy, Childbirth, or a Related Medical Condition

The proposed regulations do not define "limitations" related to pregnancy, childbirth, or a related medical condition. For clarity, we strongly recommend that the Commission provide a non-exhaustive list of examples of what constitutes such a limitation, including:

- Physical symptoms that an employee is experiencing as a result of pregnancy, childbirth, or a related medical condition, if they affect the employee's ability to perform her job or comply with workplace requirements (*e.g.*, painful or dangerous uterine contractions experienced when an employee cannot drink water throughout the day because of a prohibition on drinking during a shift);
- Limitations in physical ability that an employee is experiencing as a result of pregnancy, childbirth, or a related medical condition, if they affect the employee's ability to perform

her job or comply with workplace requirements (*e.g.*, an inability to climb ladders as a result of changes in balance);

- Measures recommended by a health care provider to prevent injury or complications for which an employee is at risk as the result of pregnancy, childbirth, or a related medical condition, if they affect the employee's ability to perform her job or comply with workplace requirements (*e.g.*, a precautionary lifting restriction); and
- An employee's inability to comply with workplace rules as a result of pregnancy, childbirth, or a related medical condition (*e.g.*, an employee's inability to wear a non-maternity uniform or protective gear that is not sized for pregnancy).

Written Documentation from a Health Care Provider

The PWFA requires that an employer provide reasonable accommodation after receiving "written documentation from a health care provider," but certain rights provided by the PWFA do not turn on receiving this documentation. The regulations should therefore clarify:

- While the PWFA permits an employer to require written documentation before providing an accommodation, an employee may initially request a reasonable accommodation without first having to provide written documentation and an employer can provide the accommodation without any such documentation;
- The PWFA's prohibition on an employer denying employment opportunities based on a refusal to make a reasonable accommodation is not dependent on written documentation from a health care provider;
- The PWFA's prohibition on requiring an applicant or employee to accept accommodations that the individual chooses not to accept is not dependent on written documentation from a health care provider;
- The PWFA's prohibition on requiring an employee to take leave if another reasonable accommodation can be provided is likewise not dependent on the employee or applicant providing written documentation from a health care provider.

The regulations should also state that if an employee's initial documentation is considered insufficient, the employer must explain why and offer the employee a chance to provide additional documentation with necessary detail. These important clarifications will ensure that "written documentation" provision is not exploited to deny rights protected by the PWFA

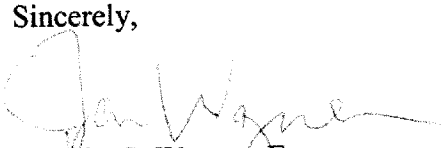
Clarifying the Cost Analysis

The Commission's fiscal analysis predicts that pregnancy discrimination cases will increase as individuals become aware of their rights, leasing to increased costs estimated at $103,680 for the

fiscal year upon full implementation. But the experience of states that have implemented their own pregnancy accommodation laws indicates that clear legislation, like the PWFA, actually decreases pregnancy discrimination litigation, because disputes can be resolved quickly and informally, often with a simple phone call or conversation with an employer. For example, one study found that pregnancy discrimination charges decreased in California since its enactment in 1999, and that many of the accommodations sought by pregnant workers are generally modest and easily met by employers. This finding aligns with reports from other states well. We strongly urge the Commission to revisit its fiscal analysis.

We are grateful for the opportunity to comment on these important proposed regulations to implement the West Virginia PWFA. We are confident that with these changes, West Virginia can lead the nation in implementing a PWFA that is as strong and meaningful as it is clear.

Sincerely,



Jennifer S. Wagner, Esq.
Managing Attorney

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Turley, Monia S

From: Jacquet, Mary K
Sent: Thursday, July 30, 2015 5:58 PM
To: Turley, Monia S
Subject: FW: WV Chamber Comments to Proposed Rule for Pregnant Workers' Fairness Act
Attachments: WV Chamber Comments to WVHRC Pregnant Workers Fairness Act 7-30-15 - SCAN.pdf

From: Brian Dayton [mailto:bdayton@wvchamber.com]
Sent: Thursday, July 30, 2015 11:05 AM
To: Jacquet, Mary K
Cc: Malone, Lawrence J; Steve Roberts
Subject: WV Chamber Comments to Proposed Rule for Pregnant Workers' Fairness Act

Ms. Jacquet,

I have attached a scan of the West Virginia Chamber's comments to proposed rules for the Pregnant Workers' Fairness Act. The hard copy is also being delivered to your office. Please let me know if there is anything else you need. Thank you.



WEST VIRGINIA CHAMBER

Brian Dayton
1624 Kanawha Blvd. East
Charleston, WV 25311
main: 304-342-1115 • direct: 304-342-1266 • fax: 304-342-1130
bdayton@wvchamber.com • www.wvchamber.com

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WEST VIRGINIA CHAMBER

July 30, 2015

Mary.K.Jacquet@wv.gov
Marykaye Jacquet, Executive Director
West Virginia Human Rights Commission
Room 108A
1321 Plaza East
Charleston, WV 25301-1400

Re: Proposed Legislative Rule 77 CSR 10
Pregnant Workers' Fairness Act (PWFA)

Dear Ms. Jacquet:

Thank you for the opportunity to submit the following comment to the West Virginia Human Rights Commission to consider in preparing a final proposal to our Legislature to implement the PWFA regulation. W.Va. Code §5-11B-1, *et seq.*

The West Virginia Chamber of Commerce represents businesses in every county in West Virginia, including many small and/or developing businesses. These businesses employ more than half of West Virginia's workforce and, collectively, constitute a major portion of the engine that drives our state's economy. In order to facilitate the continued operation and expansion of these businesses and to attract new businesses to our state, the West Virginia Chamber consistently advocates for public policies that improve West Virginia's jobs climate.

The West Virginia Chamber offers this brief comment to assist the Commission in insuring that applicants, employees and employers are not confused by the proposed regulation defining an employee or job applicant's duty in substantiating a request for accommodation under the PWFA.

REASONABLE ACCOMMODATIONS

Proposed regulation §77-10-3.1.2 states:

> The employee or job applicant must request the accommodation upon the advice of a licensed healthcare provider.

However, W.Va. Code §5-11B-2(1) which articulates the duty of an applicant or employee seeking an accommodation under the PWFA sets out a broader obligation. The statute anticipates that an employer may commit an unlawful employment practice under the Act by failing to provide a reasonable accommodation, but requires as a condition precedent to that finding that the employee or applicant's limitation be substantiated. Such a finding can only occur:

> ... Following delivery by the applicant or employee of written documentation from the applicant or employee's healthcare provider that specifies the applicant or employee's limitations and suggesting what accommodations would address those limitations ...

Id.

As such, the proposed regulation fails to recite substantial duties which would be fatal to a deserving employee or applicant's request for accommodation such as:

a) a truthful identification that the licensed healthcare provider substantiating the request is their personal healthcare provider;

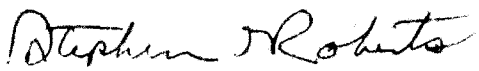
b) a substantiation of the need for the accommodation describing the limitations justifying the accommodation from the licensed healthcare provider; and

c) a substantiation from the licensed healthcare provider that suggests what accommodations would address the described limitations.

The West Virginia Chamber is concerned that the language of the proposed regulation could lead an employee or applicant who would otherwise be entitled to an accommodation may be denied that accommodation due to the lack of necessary substantiation. Further, the Chamber is concerned that a court or Administrative Law Judge could be confused and seek to enforce the language of the regulation when, in fact, the Legislature anticipated – and requires – a more substantive demonstration of an actual limitation, a suggestion of accommodations that would address the identified limitation, and that the opinion be rendered by a licensed healthcare provider of the employee or applicant.

As such, the West Virginia Chamber requests the Human Rights Commission to harmonize the proposed regulation with the standard established in W.Va. Code §5-11B-2(1).

Sincerely,



Stephen G. Roberts
President, West Virginia Chamber of Commerce

cc: Lawrence J. Malone, Governor's Office

FACSIMILE TRANSMISSION

TO: Marykaye Jacquet, Executive Director
West Virginia Human Rights Commission
(304) 558-0085

FROM: Bob Bastress
(304) 293-6891 (FAX)
(304) 293-5308 (Phone)

DATE: 7/30/15

MESSAGE:

Please see accompanying letter/comment, which I have also sent electronically and by U.S. Mail.



West Virginia University
College of Law

July 30, 2015

BY FACSIMILE TRANSMISSION,
U.S. MAIL, AND ELECTRONIC TRANSMISSION

Marykaye Jacquet
Executive Director
West Virginia Human Rights Commission
1321 Plaza East
Charleston, W. Va. 25301-1400

Re: Proposed Legislative Rule 77 C.S.R. 10
Pregnant Workers Fairness Act

Dear Ms. Jacquet:

I write to comment on the proposed rules to implement the Pregnant Workers Fairness Act, W. Va. Code §§ 5-11B-1, *et seq.* My credentials for commenting include 40 years of litigating employment discrimination issues, 35 years of teaching Employment Discrimination Law at the West Virginia University College of Law, several stints serving as a trainer/instructor for the West Virginia Human Rights Commission, and an appointee to the College of Labor and Employment Lawyers.

My particular concern is with proposed rule 77-10-3.1.2, which I strongly urge you to delete. That proposed rule states, "The employee or job applicant must request the accommodation upon the advice of a licensed health care provider." The provision conveys that there must be an employee request and that it must be at the direction of a health care professional before the employer has any duty to accommodate the employee's condition. As such, the section is wholly inconsistent with federal and state reasonable accommodation law, is unrealistic about how workplace accommodations are made, and would seriously undermine the Act's purposes.

I realize that § 5-11B-2(1) of the Act makes it an unlawful employment practice for an employer to fail to accommodate a pregnant (or otherwise covered) employee who provides written documentation from a health care provider who has described the employee's condition and suggested an accommodation. That unlawful practice stands by itself. The subsection implies a *higher* duty to make an accommodation when the suggestion for such comes from a health care provider. The Act continues in the next subsection, § 5-11B-2(2), to make it an unlawful employment practice for an employer to refuse "to make reasonable accommodation to the known limitations related to pregnancy" and related conditions. That subsection creates a separate duty on the employer and a separate claim for relief for the employee than that provided in subsection (1). And subsection (2) says nothing about requiring "the advice of a licensed health care provider." Furthermore, § 5-11B-5(5) states that "reasonable accommodation" in the Act shall be given the same meaning as that term is applied under the American with Disabilities Act. It has *never* been suggested in *any* administrative or judicial interpretation of "reasonable accommodation" under the ADA that an employer's duty to accommodate only arises upon "the advice of a licensed health care provider."

Robert M. Bastress
John W. Fisher II Professor of Law

Phone: 304-293-5308
Fax: 304-293-6891
robert.bastress@mail.wvu.edu

Law Center
PO Box 6130
Morgantown, WV 26506-6130

Equal Opportunity/Affirmative Action Institution

There are two problems with the proposed rule. The first is that it requires there must be "a request" before the duty to accommodate kicks in. Under current West Virginia disability law, the employer has a duty to accommodate an employee's disability if it knows or should know of the need for an accommodation and a reasonable one exists – regardless of whether the employee requests it. *Alley v. Charleston Area Medical Center*, 216 W. Va. 63, 602 S.E.2d 506 (2004). That holding makes sense and serves the purposes of the Human Rights Act. It would also serve the purposes of the Pregnant Workers Fairness Act.

The second problem with the proposed rule is even more serious: it makes the duty to accommodate conditional "upon the advice of a licensed health care provider." There no precedent anywhere for such a requirement. It is also unrealistic about how accommodations are made in the workplace. Most workers do not have the time or money to consult a doctor about workplace needs. To provide that an employer does not have a duty to accommodate until the employee brings in a note from her doctor about a particular accommodation could, as a practical matter, gut the Act. Accommodations in the workplace typically are, and should be, the product of a dialogue between the employer and employee based on their experience and their concerns. The ADA and the HRA contemplate an interactive process, employer and employee working together to figure out what can be can be done to enable the employee to do her job. *E.g.*, 29 C.F.R. § 1630(o)(3); *Tobin v. Liberty Mutual Insurance Co.*, 433 F.3d. 100, 109-10 (1st Cir. 2005). That contemplation could often be thwarted by the required insertion of a doctor or other health care provider.

As a final point, I note a certain redundancy between proposed sections 77-10-2.3 and 77-10-3.1.1 on what is a reasonable accommodation. There may be a point to that, although I don't see it. The redundancy could create some confusion.

I appreciate the opportunity to comment on your proposed rules.

Sincerely yours,

Robert M. Bastress, Jr.

Robert M. Bastress, Jr.
John W. Fisher, II Professor of Law

cc: Hon. Mark R. Maynard, Senator
Hon. Kelli Sobonya, Delegate
Hon. Barbara Evans Fleischauer, Delegate

Attorney at Law

Phone: (304) 820-2374
Fax: (877) 706-1678

FAX

To: 3045580085 **From:** Susan Thompson
Re: **Date:** 07/30/2015

Please deliver my attached comments regarding the Pregnant Workers' Fairness Act

To:

Marykaye Jacquet, Executive Director

WV Human Rights Commission

Room 108A

1321 Plaza East

Charleston, WV 25301-1400

Please contact me with any questions.

Thank you and have a blessed day,

Susan E. Thompson, Attorney at Law

Confidential: This e-mail/facsimile contains confidential information belonging to Susan Thompson, Attorney at Law, which may be legally privileged information. If you are not the intended recipient named above, you are notified that any disclosure, copying, distribution or taking of any action in reliance on this email is strictly prohibited.

93 Crimson Circle, Martinsburg, WV 25403

FILED

Susan Thompson, Attorney at Law

PO Box 6037
Martinsburg, WV 25402
www.myactionlegal.com

office: 304-820-2374 email: susan@myactionlegal.com fax: 877-706-1678

July 30, 2015

SENT VIA FACSIMILE to (304) 558-0085

Marykaye Jacquet, Executive Director
WV Human Rights Commission
Room 108A
1321 Plaza East
Charleston, WV 25301-1400

Re: Pregnant Workers' Fairness Act
Comments upon Proposed Rule

Dear Ms. Jacquet:

Herein I have provided comments on the proposed rules being promulgated pursuant to the Pregnant Workers' Fairness Act, effective June 4, 2014 and the Fiscal Note for Proposed Rules stated at Appendix B.

It is significant to this matter that the Legislature did not authorize promulgation of rules regarding liability. Our Legislature specifically authorized rules regarding examples of reasonable accommodation. I am willing to provide comments regarding examples of reasonable accommodation if that will be useful in the rule development process.

In regard to the Fiscal Note Summary, as an attorney practicing daily in the employment law arena, my expectation is that the legislation and rules will cause pregnancy discrimination to decline dramatically and that costs will correspondingly not see a significant increase, that is, if the rules do not exceed the authority granted by the legislature. Please see my discussions below for additional explanation in the context of the proposed rules. Therefore the language in the FNS that says "as people become aware of their rights, pregnancy discrimination cases will increase, thereby increasing costs to the WV Human Rights Commission to investigate, mediate and litigate these pregnancy related claims for West Virginia" and "the costs of state government will increase exponentially" would be more reflective of actuality if removed.

Regarding the proposed rules:

§77-10-4.1 As a result of my experience in litigating employment claims, I expect the current proposed language to encourage employers to claim that every deviation by their own officers, agents and supervisory employees from written anti-discrimination policy is an act "outside the scope of employment", thus seeking to avoiding responsibility in matters that would

other wise be efficiently investigated and adjudicated. I suggest that the clause in this subsection stating "except that the covered entity is not responsible if the officer, agent, or supervisory employee was acting outside the scope of his or her employment," be removed. In reflecting the intent of the legislation, the rules must encourage accountability and compliance with the law, rather than create extended, subjective, complications to the HRC investigative process and litigation, to determine whether an officer's, agent's or supervisory employee's conduct falls within or without the undefined term "scope of employment." Protection, not complication, is what pregnant workers need, what best serves the HRC and the Judiciary, and what the Legislature intended.

An employer has the obligation to supervise the behavior of its officers, agents and supervisory employees. If such persons are not performing in accordance with company policy, it is, and always has rightly been, the employer's burden to take action to correct such misbehavior by discussion, discipline or discharge. The currently existing methods of contractual indemnity and contribution will continue to encourage compliance with the law in an effective and judicially efficient way. Creating a rule that asks the complex and elusive question whether an officer's, agent's or supervisory employee's conduct falls within or without the undefined term "scope of employment" is not only unnecessary, obstructive to the law it applies, and complex for the HRC to investigate and administer, it also does not take notice that an employer has the ability to protect itself from the unlawful acts of its officers, agents and supervisory employees through contractual indemnity and legal contribution, and an employee who is the target of unlawful discrimination, does not.

§77-10-3.1.2 Requiring a pregnant employee/applicant to incur the expense of a medical visit for every accommodation request is unnecessary and unduly expensive. Therefore, a change in the proposed language would reflect sound reasoning. As an example, consider the rule, as proposed, resulting in requiring a pregnant employee to get a medical slip for more bathroom breaks because she is experiencing the natural physical pressure to relieve herself more often. Deletion of the the words ANY and MUST would be appropriate, because these words put an additional burden on a pregnant woman and extend the scope of the law. A more reasonable proposal is to revise the rule anguage to say:

"A covered entity may require that an employee or job applicant support a request for accommodation with the advice of a licensed health care provider when the covered entity has a good faith question as to the need for or scope of the requested accommodation."

Such rational language will have the positive effect of allowing employers and employees flexibility and will avoid burdensome effort and expense.

Thank you for your kind consideration of my comments.

Very truly yours,

Susan E. Thompson

AMERICAN CIVIL LIBERTIES UNION of WEST VIRGINIA FOUNDATION

P O Box 3952
Charleston WV 25339-3952

(304) 345-9246
www.acluwv.org

July 30, 2015

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Marykaye Jacquet, Executive Director
WV Human Rights Commission
Room 108A
1321 Plaza East
Charleston, WV 25301-1400

Re: Pregnant Workers' Fairness Act
Comments on Proposed Rule

Ms. Jacquet,

We offer these comments in response to the Notice of Comment Period on Proposed Rule Title 77, Pregnant Workers' Fairness Act. We welcome the opportunity to offer our comments.

The ACLU has long been a leader nationally in advocating for the rights of pregnant and caregiving workers, both through litigation and legislation. Through our Women's Rights Project, co-founded in 1972 by Ruth Bader Ginsburg, we have participated in most major Supreme Court cases related to pregnancy discrimination, as well as many at the trial court and appellate levels, and have advocated for increased legislative protection for pregnant and breastfeeding workers at the state and federal level, including actively supporting the enactment of the PWFA.

The proposed regulations will go a long way in fulfilling the promise of the PWFA, which represented an important step forward in ensuring that women in West Virginia will not be forced off the job as a result of pregnancy or related conditions. We offer these comments to identify areas where the proposed rule could be further strengthened and clarified.

Additional Clarification of "Undue Hardship" Exception:

We commend the Commission on the definition of "undue hardship, which strikes the appropriate balance between employees' needs and employers' business objectives. However, we strongly recommend that the rules clarify that evidence that an employer has made or would be obligated to make a particular accommodation for other employees—for example, in order to comply with its obligations under the Americans with Disabilities Act or the West Virginia Human Rights Act, pursuant to a policy or practice of accommodating on-the-job injuries, or for any other reason—will be considered strong evidence that extending that accommodation to the pregnant employee would not constitute an undue hardship. This is necessary in order to ensure that employers do not continue providing a two-tiered system of accommodations, leaving women affected by pregnancy with the short end of the stick.

Proposed Additions to Definition of "Related Medical Conditions"

We support the proposed regulations' definition of "related medical condition" as including, but not being limited to, "miscarriage, pregnancy termination, and the complications of pregnancy and childbirth." However, this list omits several common conditions that have been the subject of

some confusion and misinterpretation by employers and courts. We therefore recommend that the Commission expand the non-exhaustive list to include in the list of related medical conditions in section 2.4 the following additional terms:

1. "morning sickness,
2. physical recovery from childbirth,
3. lactation or the need to express breast milk for a nursing child,[1]
4. illnesses or complications that an employee is experiencing as a result of pregnancy or childbirth (such as gestational diabetes, pregnancy-induced hypertension, pregnancy-related carpal tunnel syndrome, post-partum depression),
5. fertility treatments or assistance with becoming pregnant.

This additional language will ensure that employers are aware of the need to provide reasonable accommodations for these extremely common conditions.

Proposed Changes to the List of "Reasonable Accommodations":

While the Commission has appropriately looked to the ADA as a starting point in defining what constitutes a reasonable accommodation, this has led to both the inclusion of language that is wholly inapplicable to pregnancy and to some important omissions. We therefore offer the following suggestions to ensure that the rule is fully applicable to the issues that are most likely to arise in the context of pregnancy.

1. The Commission could streamline the definition of "Reasonable Accommodation," which is currently given different definitions in section 2.3.2 and section 3.1.1. This could create unnecessary confusion.
2. In section 2.3.2, we suggest eliminating "the provision of qualified readers or interpreters": this type of accommodation, while entirely appropriate to include in the ADA context, is unlikely to apply to someone specifically because of pregnancy.

---

[1] Some courts have incorrectly held that lactation is not included as a matter of federal law.

Women who are breastfeeding and are away from their babies need to extract milk from their breasts on roughly the same schedule as the baby's feeding schedule. This schedule varies from woman to women depending on numerous factors including the age of the child, the amount of solid food the baby is eating, and the physiological needs of the individual woman. *See* U.S. Department of Labor, Wage and Hour Division, *Request for Information, Reasonable Break Time for Nursing Mothers, at* http://webapps.dol.gov/FederalRegister/PdfDisplay.aspx?DocId=24540. Without the opportunity to express breast milk, many breastfeeding women will likely experience extreme pain and discomfort, as well as risk to their health. Failure to express breast milk on schedule, or to completely empty the breasts, can lead to painful engorgement, fever, and even infection, as well as a reduction in the amount of breast milk produced. *See, e.g.*, U.S. Dep't of Health and Human Services, Office of Women's Health, *Your Guide to Breastfeeding* 34 (2011), http://www.womenshealth.gov/publications/our-publications/breastfeeding-guide/BreastfeedingGuide-General-English.pdf.

3. We further suggest that the following examples be added to the existing list of accommodations, and if the two sections are not consolidated, that the list be made consistent across both sections:
    a. time off to recover from childbirth
    b. provision of seating
    c. Provision of time off for prenatal appointments
    d. reassignment to available "light duty" or equivalent positions
    e. break time and private, sanitary non-bathroom space for expressing breast milk
    f. permission to eat or drink
4. It is critical that the final rules implementing the West Virginia PWFA also incorporate a requirement that employers undertake a good faith, interactive process to determine the appropriate reasonable accommodation for the pregnant employee if they decide not to grant the initial accommodation requested by the employee. The Commission should further specify that the failure to list a particular accommodation in the rules does not create a presumption that the accommodation is not reasonable.

Recommended Addition on Unwanted Accommodations and Forced Leave

We recommend that the Commission's rules include language making clear that employers may not force employees or applicants to accept any accommodation that the applicant or employee does not wish to accept if the applicant or employee does not have any known limitations related to pregnancy, childbirth or a related medical condition, or if this accommodation is not necessary in order for the applicant/employee to adequately perform her job. Further, we recommend that the Commission's final rules emphasize that pursuant to W. Va. Code § 5-11B-2(4), an employer cannot require an employee to take leave if there is another reasonable accommodation that can be provided to the known limitations of the employee. The rule should make clear that the prohibition on requiring an employee to take leave applies to Family and Medical Leave Act leave, sick leave, annual leave, or any other form of paid or unpaid leave, even if not part of any official employer policy or program. The rules should further explain that this prohibition on an employer requiring an employee to take leave does not prevent an employee electing to take any form of leave to which she is entitled or which the employer permits.

Recommended Definition of "Limitations" Related to Pregnancy, Childbirth, or a Related Medical Condition:

The proposed regulations do not define "limitations" related to pregnancy, childbirth, or a related medical condition. For clarity, we strongly recommend that the Commission provide a non-exhaustive list of examples of such limitations, including:

- Physical symptoms that an employee is experiencing as a result of pregnancy, childbirth, or a related medical condition, if they affect the employee's ability to perform her job or comply with workplace requirements (*e.g.*, painful or dangerous uterine contractions experienced when an employee cannot drink water throughout the day because of a prohibition on drinking during a shift);

- Limitations in physical ability that an employee is experiencing as a result of pregnancy, childbirth, or a related medical condition, if they affect the employee's ability to perform her job or comply with workplace requirements (*e.g.*, an inability to climb ladders as a result of changes in balance);
- Measures recommended by a health care provider to prevent injury or complications for which an employee is at risk as the result of pregnancy, childbirth, or a related medical condition, if they affect the employee's ability to perform her job or comply with workplace requirements (*e.g.*, a precautionary lifting restriction); and
- An employee's inability to comply with workplace rules as a result of pregnancy, childbirth, or a related medical condition (*e.g.*, an employee's inability to wear a non-maternity uniform or protective gear that is not sized for pregnancy, or to work for certain periods without breaks above what is normally offered).

Requested Change to Written Documentation Requirement

Section 3.1.2 provides that an employee "must request the accommodation upon the advice of a licensed health care provider." This language suggests that a medical opinion is necessary in all cases. However, employers may choose to honor many simple, common-sense requests without putting employees to the time and expense of seeking medical advice. We therefore recommend that this language be removed in order to remove the suggestion, which is nowhere mandated in the PWFA, that *each* request must be supported by medical advice. We recommend that the rule instead make clear that employers may grant such requests without requiring such advice or documentation, and that they may not deny an employee's request for reasonable accommodation for lack of written medical documentation, but that they may request medical documentation if there is a reasonable basis to question the need for the requested accommodation. This will provide some flexibility and eliminate an unnecessary burden on employees.

Requested Revision of the Fiscal Note Summary

Finally, the fiscal note summary contains a projection of increased enforcement costs (from $25,920 to $103,680 over three years), and states that in response to the required rulemaking, "the costs of state government will increase exponentially."

We offer three comments in response to this statement and the cost projection.

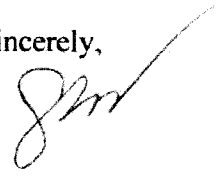
1. Any increased costs associated with enforcement are a result not of the regulation but of the authorizing regulation, which has already been enacted into law. The legislature was aware of and considered the potential fiscal implications and did not consider them significant enough to impede passage of the legislation. See Fiscal Note Summary, HB4284 (listing fiscal cost of zero). The regulation itself should have zero fiscal impact on top of what is already the law.
2. To the extent that the agency faces an increase in complaints, we agree that funding may need to be increased to ensure adequate enforcement capability. However, the projected increase is entirely speculative and not borne out by evidence from states where similar provisions have been enacted. On the contrary, California, which enacted similar

legislation over fifteen years ago, actually saw a decrease in pregnancy discrimination claims following enactment of the accommodation law, and other states that passed similar laws more recently have reported similar findings.

3. The term "exponentially" is inaccurate and unnecessarily inflammatory. Even if the projected costs were supported (which, as just discussed, they are not), they do not represent an "exponential" increase.

This language should therefore be replaced by an estimate that better reflects the neutral costs to the state of the rule itself, and the uncertain costs (and possibility of cost savings) associated with the underlying statute as a result of its decreasing litigation.

Sincerely,



Jennifer Meinig
Executive Director, ACLU of West Virginia Foundation

HAMMER, FERRETTI & SCHIAVONI
408 W. King Street
Martinsburg, West Virginia 25401
Tel. (304) 264-8505
Fax (304) 264-8506
www.hfslawyers.com
FEIN: 55-0718047

David M. Hammer, Esquire
Joseph R. Ferretti, Esquire
Robert J. Schiavoni, Esquire

Krista L. Kidwell, Legal Assistant
Courtney Lambert, Legal Assistant
Christina Bernhard, Legal Assistant
Catherine Ryan, Legal Assistant

Direct Dial: (304) 264-8505
Writer's e-mail: dhammer@hfslawyers.com

July 28, 2015

Marykaye Jacquet, Executive Director
WV Human Rights Commission
Room 108A
1321 Plaza East
Charleston, WV 25301-1400

Re: Pregnant Workers' Fairness Act
Comments upon Proposed Rule

Dear Ms. Jacquet:

Please accept these comments on the proposed rules being promulgated pursuant to the Pregnant Workers' Fairness Act, effective June 4, 2014 and the accompanying Fiscal Note for Proposed Rules stated at Appendix B.

First, I take issue with the Fiscal Note Summary. The assertion that "as people become aware of their rights, pregnancy discrimination cases will increase, thereby increasing costs to the WV Human Rights Commission to investigate, mediate and litigate these pregnancy related claims for West Virginia" is pure speculation. It is more likely that as employers become aware of clearly defined obligations the incidence of pregnancy discrimination will decline rapidly. Such a decline will have the beneficial effect of helping individuals and families maintain the dignity of employment, support their families, pay medical bills incident to pregnancy, meet their other financial obligations, pay their taxes, and reduce the number and costs of claims for unemployment compensation and other claims for state aid - all of which will substantially benefit West Virginia as a whole and likely far out-weigh the costs identified in the Fiscal Note Detail.

Second, I take issue with the use of hyperbole in the Fiscal Note Summary. The Note states that "the costs of state government will increase exponentially." It is obvious from the Fiscal Note Detail that there is no mathematical "exponential" increase in costs – costs are not squared, cubed, or worse. Rhetoric simply has no place in a Fiscal Note and the rhetoric in this note should be removed.

Turning to the proposed rules themselves, I make the following comments:

§77-10-3.1.2

This subsection requires that an employee or job applicant, in order to request any of the reasonable accommodations listed in subsection 3.1.1, must make the accommodation request upon the advice of a licensed health care provider. Requiring a pregnant employee/applicant to incur the expense of a medical visit for every accommodation request seems unnecessary and unduly expensive. For example, it makes no practical sense to require a medical slip for a pregnant employee to be able to take an increased number of bathroom breaks while she is increasing water intake.

I suggest that the language be changed to read as follows: "A covered entity may require that an employee or job applicant support a request for accommodation with the advice of a licensed health care provider when the covered entity has a good faith question as to the need for or scope of the requested accommodation."

This or similar language will have the beneficial effect of allowing sensible entities and employees needed flexibility to avoid unnecessary and burdensome expense.

§77-10-4.1

My concern is that clause in this subsection stating "except that the covered entity is not responsible if the officer, agent, or supervisory employee was acting outside the scope of his or her employment" will cause unnecessary, time consuming, and expensive litigation. It will encourage employers to claim that every deviation by their own officers, agents and supervisory employees from written anti-discrimination policy is an act "outside the scope of employment" and thus they are not responsible. In other words, it will encourage the willful blindness of covered entities to the discriminatory acts of officers, agents and supervisory employees.

First, there should be no question that an employer has the obligation to supervise the behavior of its officers, agents and supervisory employees. If such individuals are not performing in accordance with company policy, it is the burden of the employer to take affirmative steps to correct such misbehavior by caution, discipline or discharge. It is the employer, after all, who occupies the superior position to correct unlawful behavior – not subordinate employees who already risk their livelihood and the well-being of their families for reporting the unlawful behavior of officers, agents and supervisory employees.

Second, in ways unlike an employee who is the victim of unlawful discrimination, an employer has the ability to protect itself from the unlawful acts of its officers, agents and

supervisory employees through contractual indemnity and legal contribution. For example, an employer can require as a contractual condition of employment that officers, agents and supervisory employees comply with its written policies and, in the event that an officer, agent or supervisory employee causes the employer to incur liability as a result of non-compliance, the officer, agent or supervisory employee shall be contractually liable to indemnify the employer.

Alternatively, an employer facing liability for the unlawful discriminatory acts of its officers, agents or supervisory employees has the legal right to assert cross-claims and seek recovery against the tortfeasor who committed the wrongful act.

Both of these alternatives, contractual indemnity and contribution, encourage accountability and compliance with the law; far better outcomes than a legal guessing-game as to whether an officer's, agent's or supervisory employee's conduct falls within or without the undefined term "scope of employment."

Thank you for the opportunity to comment on theses proposed rules. I am willing to testify regarding these issues if that would be of assistance.

Sincerely,

David M. Hammer, Esq.

Allan N. Karlin
& Associates

Allan N. Karlin
ank@wvjustice.com

Jane E. Peak
jep@wvjustice.com

174 Chancery Row, Morgantown, WV 26505 • 304-296-8266 • (fax) 304-296-8640 • www.wvjustice.com

FILED

July 30, 2015

Marykaye Jacquet, Executive Director
West Virginia Human Rights Commission
Room 18A
1321 Plaza East
Charleston, WV 25301

Via Hand Delivery

Re: Comments on Pregnant Workers' Fairness Act proposed Legislative Rules. W. Va. C.S.R. §77.10.1, *et seq.*

Ms. Jacquet:

I have reviewed the proposed Legislative Rules regarding the Pregnant Workers' Fairness Act, W. Va. C.S.R. §77.10.1, *et seq.*, which were filed on June 29, 2015, and submit the following comments for your consideration.

Foremost, the proposed Rules go well beyond the authority provided to the Human Rights Commission ("the Commission") by the Legislature in the Pregnant Workers' Fairness Act ("the Act"), W. Va. Code §5-11B-1 *et seq.* The Act directs the Commission to propose legislative rules which

> shall identify some reasonable accommodations addressing known limitations related to pregnancy, childbirth, or related medical conditions that shall be provided to a job applicant or employee affected by such known limitations unless the covered entity can demonstrate that doing so would impose an undue hardship.

W. Va. Code § 5-11B-4. Yet, rather than providing examples of accommodations, the proposed Rules may change long standing law and employee rights in West Virginia by arguably strengthening an employer's argument that an officer, agent or supervisor failed to follow an employer's written antidiscrimination policy and also places additional burdens

on workers and employers by requiring workers to obtain written doctors' excuses for every accommodation the worker requests.

Section 4 of the proposed Rules is outside of the scope of the Commission's legislative mandate. Even if the section is properly included, **§77.10.4.1** contains a clause that should be deleted because it could be used by employers to attempt to escape liability under the Act by claiming the officer, agent or supervisor acted "outside the scope of his or her employment."[1] Employers are in the best position to, and have the duty to, ensure a workplace free from discrimination. Merely putting in writing that the employer expects its officers, agents and supervisors to follow policy and to not discriminate does not excuse the employer from its duty to provide training and information to its officers, agents and supervisors regarding antidiscrimination laws. Nor does it excuse the employer from its duty to take action to correct the conduct of its officers, agents and supervisors if they violate the employer's antidiscrimination policies. By fulfilling these duties, an employer may protect itself from complaints and suits for violations of the Act.

Workers have no similar opportunity to protect themselves from illegal discrimination and, in fact, place their jobs and livelihoods at stake by even complaining about violations of the Act and other antidiscrimination laws. Including this clause in the Rule would invite employers to engage in wilful blindness by ignoring the duty to train officers, agents and supervisors regarding the law and the employer's antidiscrimination policies and/or to fail to correct violations of the law or policy. The result would be to increase arguments about the employer's liability for the actions of its officers, agents and supervisors and, thereby, increase the costs and duration of litigating a claim under the Act. In short, the clause is unnecessary and will lead to increased litigation.

Also, § 3 regarding reasonable accommodations, although expressly within the Commission's legislative directive, expands beyond the requirements of the Act the burden for a worker to receive an accommodation. *See* **§77.10.3.1.2**. Although the Rule states, "The employee or job applicant must request the accommodation *upon the advice of* a licensed health care provider" (emphasis added), the practical effect of this extra-legislative requirement is that the worker will have to obtain the "advice" in writing to present to the employer. This creates a burden for the employee of incurring the expense of medical office visits to obtain the written advice. The requirement further creates a burden for both the

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[1] The clause at issue is in the fourth line of §4.1 and states, "except that the covered entity is not responsible if the officer, agent, or supervisory employee was acting outside the scope of his or her employment."

employer and the worker in lost work time as the worker will most likely have to miss work to go to the office visit to obtain the written advice. Such burdens are unnecessary and may create a hardship for both the worker and the employer.

This burden could be reduced and still protect the employer against unreasonable accommodation requests by changing the wording of §77.10.3.1.2 to allow the employer to require the worker to show that the accommodation request is necessary by supporting the request with the advice of a licenced health care provider only where the employer has a good faith concern regarding the need for or the scope of the requested accommodation.

Thank you for the opportunity to provide comment regarding these proposed Rules. Please contact me should you have questions or require further information concerning my comments. I am also available to provide testimony regarding these comments, if necessary or desired.

Sincerely,

JANE E. PEAK

wvfree

NATIONAL WOMEN'S LAW CENTER
EXPANDING THE POSSIBILITIES

a better balance
the work and family legal center

July 27, 2015

West Virginia Human Rights Commission
1321 Plaza East Room 108A
Charleston, WV 25301-1400

FILED
2015 NOV 16 A 9:42
OFFICE WEST VIRGINIA SECRETARY OF STATE

RE: Implementation of the Pregnant Workers' Fairness Act

Dear Members of the West Virginia Human Rights Commission:

For over 40 years, the National Women's Law Center has been working to advance and protect women's equality and opportunity, with a particular focus on women's economic security, education, employment and health. WV FREE, founded in 1989, is a reproductive health education and advocacy organization that works every day to protect the health of West Virginia women and families. The National Women's Law Center and WV FREE worked together with West Virginia legislators to craft the West Virginia Pregnant Workers' Fairness Act (PWFA) and were thrilled when it was adopted by unanimous vote last year. A Better Balance: The Work and Family Legal Center (ABB) is a national non-profit legal advocacy organization dedicated to ensuring that workers have the time and flexibility they need to care for their families without sacrificing their economic security. ABB has worked in twelve states and localities to advance, implement, and enforce pregnancy accommodation laws across the country. Our organizations agree that the protections provided by the West Virginia PWFA will be critical to the health and economic security of working women and their families across the state.

We are grateful for the opportunity to comment on the Human Rights Commission's proposed regulations to implement the PWFA. Overall, the proposed regulations provide strong protections for West Virginia's pregnant workers. We wish to take this opportunity, however, to offer some suggestions regarding the content of the rules that would promote greater clarity regarding the obligations and expectations of employers and employees alike.

I. *Medical Condition Related to Pregnancy or Childbirth*

A. Clarifying Meaning of "Related Medical Conditions"

We support the proposed regulations' definition of "related medical condition" as including, but not being to, "miscarriage, pregnancy termination, and the complications of pregnancy and childbirth." However, to clarify what the Commission means by "complications of pregnancy and childbirth," it would be helpful to include an explicitly non-exhaustive list of examples of what constitutes a medical condition related to pregnancy or childbirth. This list might include:

- Morning sickness;
- Illnesses or complications that an employee is experiencing as a result of pregnancy such as gestational diabetes, pregnancy-induced hypertension, pregnancy-related carpal tunnel syndrome;

- Lactation or the need to express breast milk;
- Physical recovery from childbirth;
- Fertility treatments or other assistance with becoming pregnant;
- Illnesses or complications that an employee is experiencing as a result of childbirth; such as postpartum depression, etc.

B. Adding Language to Alert Employers to Obligations Under Multiple Laws

To ensure that employers fully understand their obligations under state and federal law, the rules should also note that in some instances a medical condition related to pregnancy or childbirth will also constitute a disability under the Americans with Disabilities Act and/or the West Virginia Human Rights Act; and that failure to provide accommodations in some instances could also be a violation of the federal Pregnancy Discrimination Act and/or West Virginia Human Rights Act sex discrimination provision. This will alert employers and their legal counsel that they should consider their obligations under multiple statutes, saving valuable time and resources for employers.

II. *Limitation Related to Pregnancy, Childbirth, or a Related Medical Condition*

The West Virginia PWFA in § 5-11B-2 states that it is unlawful for a covered entity to "not make reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical conditions" of an applicant or employee. Although the proposed regulations do offer a definition of "related medical conditions," they do not contain a definition of the "limitations related to pregnancy, childbirth, or a related medical condition."

We recommend that the Commission provide a non-exhaustive list of examples of what constitutes a limitation related to pregnancy, childbirth or a related medical condition. Again, emphasizing in the rule that this list is illustrative rather than exclusive (by using the language: "including, but not limited to") is important. We recommend that this list include:

- Physical or mental symptoms that an employee is experiencing as a result of pregnancy, childbirth, or a related medical condition, if they affect the employee's ability to perform her job or comply with workplace requirements (*e.g.*, swelling of legs experienced when an employee stands for long periods of time for work, or uterine contractions experienced when an employee cannot drink water throughout the day because of a prohibition on eating or drinking during a shift);
- Limitations on physical or mental ability that an employee is experiencing as a result of pregnancy, childbirth, or a related medical condition, if they affect the employee's ability to perform her job or comply with workplace requirements (*e.g.*, an inability to climb ladders as a result of changes in balance);
- Measures recommended by a health care provider to prevent injury or complications for which an employee is at risk as the result of pregnancy, childbirth, or a related medical condition, if they affect the employee's ability to perform her job or comply with workplace requirements (*e.g.*, a precautionary lifting restriction, or a requirement that an employee avoid exposure to particular toxins in the workplace); and
- An employee's inability to comply with workplace rules as a result of pregnancy, childbirth, or a related medical condition (*e.g.*, an employee's inability to wear a non-maternity uniform or protective

gear that is not sized for pregnancy, or an employee's inability to fulfill otherwise required procedures before taking a break when an employees is suffering from acute and unpredictable bouts of nausea).

III. *Written Documentation from a Health Care Provider*

The PWFA indicates that an employee seeking reasonable accommodation may be required to provide written documentation from a health care provider specifying her limitations related to pregnancy, childbirth, or a related medical condition and suggesting accommodations to address those limitations. In its proposed regulations, the Commission states: "The employee or job applicant must request the accommodation upon the advice of a licensed health care provider."

The Commission should clarify that employers may provide accommodation even without medical documentation, although alternatively they may request verification after the request for accommodation has been made. In other words, employees do not need to provide written documentation from a medical provider in the first instance of requesting a reasonable accommodation. We also recommend that the Commission expand on "licensed health care provider" to give fuller understanding to the health care options accessed by pregnant workers. We urge the Commission to define "health care provider" for purposes of this provision to include a physician, nurse, midwife, pharmacist, physician assistant, physical therapist, occupational therapist, mental health practitioner, or other health care professional providing care to the employee. The Commission should also specify that if initial documentation provides insufficient detail to determine the nature of the pregnant employee's limitation or the type of accommodation necessary to address this limitation, the employer must explain why the documentation is insufficient and offer the employee a chance to provide additional documentation with the necessary detail.

IV. *Reasonable Accommodation*

We support the Commission's proposed regulations on "reasonable accommodations," but strongly urge the Commission to more clearly lay out what reasonable accommodations may look like in the context of pregnancy-related limitations.

In defining and discussing reasonable accommodations in its proposed regulations, the Commission appropriately draws upon the regulations implementing the federal Americans with Disabilities Act, 29 C.F.R. § 1630.2. For example, the proposed regulations define "reasonable accommodations" as meaning,

> [R]easonable modifications or adjustments to be determined on a case-by-case basis which are designed as attempts to enable a person affected by pregnancy, childbirth, or related medical conditions to be hired or to remain in the position for which she/he was hired. Reasonable accommodation requires that a covered entity make reasonable modifications or adjustments designed as attempts to enable a person affected by pregnancy, childbirth, or related medical conditions to remain in the position for which she/he was hired. A covered entity shall make reasonable accommodation to the known limitations related to pregnancy, childbirth, or related medical conditions for a job applicant or employee where necessary to enable such job applicant or employee to perform the essential functions of the job.

A. Adding that the Process of Determining Reasonable Accommodations is an Interactive Process

Similar to the language in the ADA, the Commission states that reasonable accommodations include but are not limited to making existing facilities accessible to and useable by workers affected by pregnancy, as well as,

> job restructuring, part-time or modified works schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustments or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for persons affected by pregnancy childbirth or related medical conditions.

However, while this language is largely taken from the federal regulations implementing the ADA, the proposed regulations do not include language on the interactive process of identifying appropriate accommodations as the ADA does. The federal regulations implementing the ADA states that "to determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the individual" who needs the accommodation, to work to identify the limitations and potential reasonable accommodations to meet those limitations.

It is critical that the final rules implementing the West Virginia PWFA also incorporate a requirement that employers undertake a good faith, interactive process to determine the appropriate reasonable accommodation for the pregnant employee if they decide not to grant the initial accommodation requested by the employee.

B. Incorporating a Stronger List of Examples of Reasonable Accommodations Addressing Known Limitations of Pregnancy

The West Virginia PWFA specifically requires the Commission to incorporate into its rules a list of examples of reasonable accommodations addressing known limitations related to pregnancy, childbirth, or related medical conditions that shall be provided to a job applicant or employee affected by such known limitations, unless the covered entity can demonstrate that doing so would impose an undue hardship. The Commission has responded by providing:

> A reasonable accommodation includes, but is not limited to, bathroom breaks, breaks for increased water intake, periodic rest, assistance with manual labor, job restructuring or modified work schedules, modified work policies and procedures, and temporary transfers to less strenuous or hazardous work.

While this list represents a helpful starting point, these broad categories would better illustrate the accommodation possibilities open to employees and employers if they included specific examples. We suggest that this list should at minimum include the following accommodations:

- Providing a stool or other seating if a pregnant employee whose job ordinarily requires her to stand has a limitation in her ability to stand;
- Modifying a no-food-or-drink policy if a pregnant employee has a limitation that requires her to drink water or eat more frequently than normal;
- Providing more frequent breaks if a pregnant employee has a limitation that requires her to rest more frequently, requires her to eat or drink more frequently than normal, and/or requires her to use the bathroom more frequently than normal;
- Providing time off for prenatal medical appointments;

- Reassigning specific job duties – such as those involving heavy lifting, climbing ladders, repetitive bending, etc. – if a pregnant employee has a limitation that prevents her from doing these specific duties;
- Reassignment to available "light duty" or equivalent positions;
- Transferring a pregnant employee to an alternative, available position for which she is qualified if the employee has a limitation that prevents her from performing her current position, regardless of whether or not an employer maintains an official "light duty" policy or program; and
- Providing breaks and private and sanitary facilities for a lactating employee to express breast milk.

Under the proposed regulations, some of these accommodations may fall within broader categories already listed such as "modified work policies and procedures" and "job restructuring or modified work schedules." However, some of these suggestions do not fall within any of the proposed examples. For example, "Providing time off for prenatal medical appointments" and "Providing breaks and private and sanitary facilities for a lactating employee to express breast milk" are critical and common accommodations for the women who need them, but it is not clear from the proposed regulations whether these would fall within the examples of reasonable accommodations. While it is important to state that the list of examples is not exhaustive, it is equally important to ensure that the list contains some of the most common accommodations needed, to make the process as clear and easy as possible for employees and employers.

It is also essential to emphasize in the rule that the failure to list a particular accommodation in the rules does not create a presumption that the accommodation is not reasonable.

V. *Undue Hardship*

We strongly support Commission's definition of "undue hardship." The definition, borrowed from the regulations implementing the federal ADA in 29 C.F.R. § 1630.2, includes both an explanation of how undue hardship on the operation of an employer's business will be assessed ("an action requiring significant difficulty or expense, when considered in light" or particular factors), as well as an identification of the factors that are relevant in making a determination of undue hardship.

A. Including an Explanation of How an Employer's Existing Accommodation Policies May Affect Its Obligations Towards Pregnant Workers

While we support the definition of "undue hardship" and the enumerated factors to be considered, an important element is missing. There is no explanation of how an employer's existing policies and practices with regards to accommodating non-pregnant workers affects its obligation to accommodate pregnant workers. We strongly recommend that the rules include an explicit statement that if an employer already makes a particular accommodation for other employees to comply with its obligations under the Americans with Disabilities Act or the West Virginia Human Rights Act, pursuant to a policy or practice of accommodating on-the-job injuries, or pursuant to any another law or policy, that will be considered strong evidence that extending the accommodation to the pregnant employee will not impose an undue hardship on the employer. This clear statement would prevent confusion as well as potential litigation costs, since the rule would advise employers about how their existing policies would be calculated into an undue hardship analysis.

B. Including an Explanation of Employee's Right to Refuse an Unnecessary Accommodation

We recommend that the Commission's rules explain that pursuant to W. Va. Code § 5-11B-2(3) an employer cannot require an applicant or employee to accept any accommodation that the applicant or employee chooses not to accept if the applicant or employee does not have any known limitations related to pregnancy, childbirth or a related medical condition or if this accommodation is not necessary for the applicant or employee to be able to adequately perform her job. The rules should further explain that the prohibition on requiring an applicant or employee to accept an unnecessary accommodation does not prevent an employer and employee from mutually agreeing to any accommodation.

VI. *Forced Leave*

The proposed regulations are silent on explaining the PWFA's prohibition on forced leave. Therefore, we recommend that the Commission's final rules explain that pursuant to W. Va. Code § 5-11B-2(4) an employer cannot require an employee to take leave if there is another reasonable accommodation that can be provided to the known limitations of the employee. This prohibition on requiring an employee to take leave should apply to Family and Medical Leave Act leave, sick leave, annual leave, or any other form of paid or unpaid leave, even if not part of any official employer policy or program. The rules should further explain that this prohibition on an employer requiring an employee to take leave does not prevent an employee electing to take any form of leave to which she is entitled or which the employer permits.

VII. *Record Retention*

The proposed regulations are also silent on an employer's recordkeeping obligations. We urge the Commission to include in its final rules a requirement that employers must retain any written requests for reasonable accommodation that have been made by employees or applicants affected by pregnancy, childbirth, or related medical conditions and any written response that was made to each of those requests for at least one year, similar to the requirements imposed by the ADA to retain records related to requests for accommodation. This should include a requirement to maintain a copy of any written documentation submitted by employees to support a request, with appropriate safeguards for employee privacy. However, the rules should also include an explicit statement that any absence of such a record shall not be offered as competent evidence in any later litigation as to whether or not an employee actually made a request for reasonable accommodation.

VIII. *Employer Liability for Pregnancy Discrimination*

We support the proposed regulation's explanation that a covered entity may be vicariously liable for pregnancy discrimination when conducted by itself and its officers, agents, and supervisory employees, regardless of whether the alleged bad act was authorized or even forbidden, and regardless of whether the covered entity knew or should have known about its occurrence. Equally as important is the Commission's statement that it will examine the circumstances of a particular employment relationships and job functions on a case-by-case basis. However, we urge the Commission to define "supervisory employee" as one who directs the daily duties of an employee's job, such as controlling schedules and shifts.

We also support the proposed regulations' statement that covered entities are encouraged to take all steps necessary to prevent pregnancy discrimination, and the inclusion of examples of appropriate preventative

steps. However, the Commission should make clear that while this may reduce a covered entity's liability, an employer might still be found vicariously liable for pregnancy discrimination depending on the facts and circumstances of each case.

IX. *Pre-Employment Practices*

We strongly support the Commission's proposal to prohibit pre-employment inquiries of whether an employee or job applicant is affected by pregnancy, childbirth, or related medical conditions. This prohibition, taken from the federal regulations implementing the ADA (29 C.F.R. § 1630.13), along with the proposed regulations' definition of "pregnancy," will work to prevent pregnancy discrimination and ensure that workers affected by current pregnancy, past pregnancy, potential or intended pregnancy, and medical conditions related to pregnancy or childbirth, are entitled to equal job opportunities.

X. *Rights Protected Under Other Statutes*

Finally, we encourage the Commission to explain in its rules that employees protected by the PWFA may also have rights under the Americans with Disabilities Act, West Virginia Human Rights Act, Family and Medical Leave Act, Pregnancy Discrimination Act, or other provisions of law. The rules should also in particular explain:

- That an employee may be entitled to a reasonable accommodation because of a medical condition related to pregnancy both as a result of the PWFA and as a result of that medical condition qualifying as a disability under the Americans with Disabilities Act and/or the West Virginia Human Rights Act; and
- That an employee may be entitled to leave both under the Family and Medical Leave Act and as a reasonable accommodation under the PWFA, but that even if an employee is not eligible for leave under the Family and Medical Leave Act she may still be entitled to leave as a reasonable accommodation under the PWFA if providing this leave will not impose an undue hardship on her employer.
- That an employee may be entitled to protections related to pregnancy as a result of the Pregnancy Discrimination Act.

XI. *Additional Clarifications*

There are a few additional clarifications to the PWFA that we urge the Commission to make through its rules:

- A clarification that making a request for a reasonable accommodation is a form of activity protected against discrimination by W. Va. Code § 5-11B-3(b), and that an individual may not be subjected to any retaliation for making such a request;
- A clarification that the laws' prohibition on denying employment opportunities based on an employer's refusal to make a reasonable accommodation in W. Va. Code § 5-11B-2(2) is not dependent on the employee or applicant providing written documentation from a health care provider;
- A clarification that the law's prohibition on requiring an applicant or employee to accept accommodations that the individual chooses not to accept in W. Va. Code § 5-11B-2(3) is not dependent on the employee or applicant providing written documentation from a health care provider;
- A clarification that the law's prohibition on requiring an employee to take leave if another reasonable accommodation can be provided in W. Va. Code § 5-11B-2(4) is not dependent on the employee or applicant providing written documentation from a health care provider.

XII. *Fiscal Note for Proposed Rules*

We urge the Commission to reanalyze the fiscal note summary, in light of evidence from other states that have implemented similar legislation without seeing a rise in cost to the state. Clear legislation, like the PWFA, actually decreases litigation, because disputes can be resolved quickly and informally, often with a simple phone call or conversation with an employer. For example, A Better Balance has over a year of experience implementing the New York City Pregnant Workers Fairness Act, and has seen this result in action. In California, which has had similar legislation on the books for over fifteen years, pregnancy discrimination claims filed with their agency decreased after the accommodation law was passed, even as claims increased in the rest of the country. Hawaii, Illinois, Alaska, and Connecticut have reported similar findings. Additionally, it is certainly hyperbole and inaccurate to describe that the costs to the state will "increase exponentially." We recommend that the fiscal note be eliminated, with possible savings to the state acknowledged instead.

Thank you for your consideration of these comments as you finalize implementing regulations.

Sincerely,

Margaret Chapman Pomponio

Margaret Chapman Pomponio
Executive Director
WV FREE

Emily Martin
Vice President & General Counsel
National Women's Law Center

Dina Bakst
Co-President
A Better Balance