

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

Form #4

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2015 DEC -8 A 10:48

OFFICE WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF RULE MODIFICATION OF A PROPOSED RULE

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

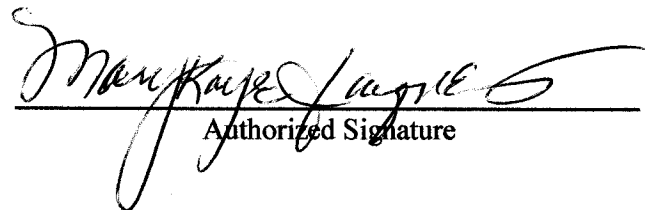
IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

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 RULES, FOLLOWING REVIEW BY THE LEGISLATIVE RULE MAKING REVIEW COMMITTEE, IS HEREBY MODIFIED AS A RESULT OF REVIEW AND COMMENT BY THE LEGISLATIVE RULE MAKING REVIEW COMMITTEE. THE ATTACHED MODIFICATIONS ARE FILED WITH THE SECRETARY OF STATE.


Authorized Signature

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

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§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 PWFA's prohibition against pregnancy discrimination and are intended to assist all persons in understanding their rights, obligations, and duties under the law.

1.2. Authority. -- W. Va. Code §5-11B-4.

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 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 a covered entity; the overall size of the business of a 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 are 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, including an employer, potential employer, employment agency, joint apprenticeship committee, or labor organization: Provided, that such terms shall not be taken, understood or construed to include a private club.

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. A 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. 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 an accommodation if it can establish that the accommodation would impose undue hardship on the conduct of its 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.

§77-10-5. 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.



WEST VIRGINIA LEGISLATURE
Legislative Rule-Making Review Committee

Senator Mark Maynard, Co-Chair
Delegate Kelli Sobonya, Co-Chair

Debra A. Graham, Chief Counsel
Jared Wyrick, Analyst

November 19, 2015

NOTICE OF ACTION TAKEN BY THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

To: Natalie E. Tennant, Secretary of State, State Register
To: Marykaye Jaquet
Human Rights Commission, WV
1321 Plaza East
Room 108A
Charleston, WV 25301-1400
From: Legislative Rule-Making Review Committee
Proposed Rule: Pregnant Workers' Fairness Act, 77CSR10

The Legislative Rule-Making Review Committee Recommends that the West Virginia Legislature

- 1. Authorize the agency to promulgate the Legislative rule:
(A) as originally filed
(B) as modified by the agency
2. Authorize the agency to promulgate the Legislative rule with certain amendments; amendments and a statement of reasons for such recommendation is attached.
3. Authorize the agency to promulgate the Legislative rule as modified with certain amendments; amendments and a statement of reasons for such recommendation is attached.
4. Recommends that the Legislature rule be withdrawn; a statement of reasons for the recommendation is attached.

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WV HUMAN RIGHTS COMMISSION

Vertical line markings and an 'X' mark next to item 3 in the list.

LRMRC Action Notice

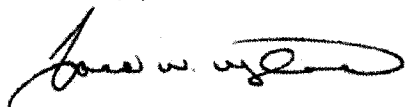
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November 23, 2015

If the first page of this form indicates that your agency has agreed to modify the proposed rule in accordance with a motion adopted by the Committee, your agency should consult with the Committee's counsel on the preparation of the modifications. By **Wednesday, December 9, 2015**, your agency must file **1** copy of your modified rule with the Secretary of State's office and **10** copies with the Legislative Rule-Making Review Committee.

Please disregard this notice if you have already filed your modified rule. Committee rules state that a copy of this letter must be on file for each agency filing a rule.

Very truly yours,

A handwritten signature in black ink, appearing to read "Jared Wyrick", written in a cursive style.

Jared Wyrick

Committee Amendment

Pregnant Workers' Fairness Act, 77CSR10

The Legislative Rule-Making Review Committee moved to amend the Human Rights Commission's proposed rule Pregnant Workers' Fairness Act, 77CSR10, as follows:

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WV HUMAN RIGHTS
COMMISSION

On page 2, Subsection 2.4, following the word "miscarriage" and the comma, by striking the words "pregnancy termination,";

On page 2, Subsection 2.4, following the word "depression" and the comma, by striking the word "fertility";

On page 2, Subsection 2.4, following the word "lactation", by changing the period to a colon and inserting the following proviso: "Provided, That an elective abortion shall not be considered a related medical condition.";

On page 2, Subdivision 3.1.2, by striking out all of subdivision 3.1.2 and inserting in lieu thereof the following:

"3.1.2. The employee or job applicant must request the accommodation, and deliver to the employer documentation from the employee/applicant's licensed health care provider that delineates the employee or applicant's limitations and suggesting what accommodation(s) would address those limitations for the purpose of asserting a claim pursuant to the PWFA.";

On page 3, Subdivision 5.1.1, by striking out all of subdivision 5.1.1.

Statement of Reason

The Committee amendment removes "fertility" and "pregnancy termination" as examples of related medical conditions, it provides that elective abortions are not to be considered a related

medical condition, clarifies the written documentation requirement, and removes language applying the rule series to both men and women.