

Washington Enacts Healthy Starts Act: New Workplace Accommodation Protections for Pregnant Employees

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Washington recently enacted new workplace accommodation protections for pregnant employees.

The Healthy Starts Act (RCW 43.10.005):^[1]

- Applies to employers of 15 or more employees.
- Specifies four accommodations for which employers MAY NOT (1) ask for medical verification; (2) claim undue hardship.
- Specifies four additional accommodations for which employers MAY (1) ask for medical verification; (2) claim undue hardship.
- Includes a catchall provision requiring consideration of other possible accommodations (which essentially mirrors the interactive process under the WLAD/ADA for disability accommodation analysis).
- Prohibits discrimination and retaliation.
- Provides employers with some flexibility in accommodating pregnant employees, with important caveats.
- Creates a private right of action for aggrieved employees.
- Permits recovery of damages and attorney fees and costs to a prevailing employee.

The following provides additional detail about the new law's requirements.

Accommodations Requiring No Medical Verification & Precluding Undue Hardship Defense

If an employee asks for any of the following, an employer may not request any form of medical verification or claim that allowing it would be an undue hardship:

- More frequent, longer or flexible restroom breaks;
- A change to policies precluding eating or drinking during work;
- Access to seating or more frequent sitting breaks, if the job requires the employee to stand; and
- Restricting lifting to 17 pounds or less.

The first three of these accommodations appear to be relatively minor and should not, generally speaking, cause significant disruption to operations. The lifting restriction may have more of a significant impact on operations depending on the nature of the job.

Accommodations Allowing Medical Verification & Undue Hardship Defense

If an employee asks for any of the following, an employer may ask for verification and may assert the undue hardship defense.

- Job restructuring, which includes part-time or modified schedules, reassignment to a vacant position, work station modification (including buying equipment/devices); and
- Temporary transfer to a different job that is less strenuous or hazardous;
- Providing assistance with manual labor and limits on lifting; and
- Flexible scheduling to address prenatal visits.

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Catchall Accommodation Provision

- Employers must give “reasonable consideration” to “any further pregnancy accommodation an employee may request.”
- This section envisions an employer consulting information on pregnancy accommodations published by the Washington Department of Labor and Industries and/or the employee’s healthcare provider.

In the latter scenarios, it will be important for employers to follow the typical good faith interactive procedure/dialogue that should be followed in any disability accommodation situation. It will be helpful to ensure clear, consistent documentation of the communications between management, the employee and the employee’s healthcare provider. Anti-Discrimination and Retaliation

The Healthy Starts Act forbids employers from:

- Failing or refusing to make a reasonable pregnancy accommodation unless the employer can prove undue hardship, where permitted.
- Taking adverse action against an employee who requests, declines or uses an accommodation.
- Denying other “employment opportunities” to an otherwise qualified employee if the denial is based solely on the employee’s need for accommodation.
- Requiring an employee to take leave from work if another reasonable accommodation can be provided.

What is NOT Required as an Accommodation under the Healthy Starts Act

- Creating a new job the employer would not otherwise create—UNLESS the employer does so or would do so for other employees;
- Discharging an employee;
- Transferring an employee with more seniority; and
- Promoting an employee who is not qualified—UNLESS the employer does so or would do so to accommodate other employees.

Enforcement Mechanisms

The law may be enforced either by the Washington Attorney General or by private lawsuit.

Remedies Available to Prevailing Employee

If any employee proves a violation of the Act, the employee would be entitled to:

- An injunction forbidding further violations;
- “Actual” money damages;
- Attorney fees and costs; and
- “Any other appropriate” remedy.

Conclusion

The Healthy Starts Act significantly bolsters the already strong legal protections for pregnant workers in Washington. Washington employers should be particularly careful when faced with a request for accommodation by a pregnant worker, including consulting with counsel before denying such a request.

For more details about the Healthy Starts Act and how to prepare for compliance, please contact a Jackson Lewis attorney.

[1] The text of the statute can be found here: <http://lawfilesexternal.wa.gov/biennium/2017-18/Pdf/Bills/Session%20Laws/Senate/5835-S.SL.pdf#page=1>

matters before state and federal courts and administrative agencies. For more information, please contact the attorney(s) listed or the Jackson Lewis attorney with whom you regularly work.

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