

CLIENT ALERT: Update - Preparing for the Pregnant Workers Fairness Act - By Jaclyn L. Kugell and Alexandra L. Pichette

The Pregnant Workers Fairness Act (the “Act”) becomes effective April 1, 2018. The Act, which amends Massachusetts General Laws, Chapter 151B, expressly prohibits discrimination against applicants or employees who are pregnant or experiencing pre- and post-birth pregnancy related medical needs, including, but not limited to, lactation, expressing breast milk, and recovering from childbirth. Pursuant to the Act, upon request, employers must engage in a timely, good faith interactive process with affected workers and provide reasonable accommodations for pregnancy or pregnancy-related (including post-pregnancy) conditions, unless doing so would cause the employer undue hardship. The Act also prohibits retaliation against an applicant or employee who requests or utilizes an accommodation provided under the Act. For more information on the Act, please see [our July 2017 client alert](#).

In advance of the April 1, 2018 effective date, the Massachusetts Commission Against Discrimination (“MCAD”), the agency responsible for enforcing the Act, released Guidance and responses to Frequently Asked Questions, [available here](#). These publications provide instruction on how the MCAD is interpreting the Act. Highlights from these documents are included below in a summary of recommended next steps for employers.

Written Notice

Most immediately, employers must provide employees with notice of the Act in a handbook, pamphlet, or by other written means by April 1, 2018. This requirement can be fulfilled by distributing copies of the [Guidance prepared by the MCAD](#). Alternatively, a policy can be inserted into a handbook or distributed as a stand-alone notice; contact your MBJ lawyer if you would prefer to distribute a policy instead of the MCAD guidance.

After April 1, 2018, employers must continue to provide written notice of the Act on two occasions.

First, new employees must receive notice at or before the start of their employment. Second, any employee who informs their employer of a pregnancy or pregnancy-related condition must receive notice within 10 days of such notification. Employers are well-advised to ensure supervisors are aware of the continuing obligation to provide notice to new employees and employees who indicate they are pregnant or have pregnancy related conditions.

Finally, although not clearly required by the Act, employers are well-advised to post a copy of any written notice in an employee breakroom or other common space in addition to the written notice.

Private, Non-Bathroom Space to Express Breast Milk

Pursuant to the Act, an employer must provide a private, non-bathroom space for employees to express breast milk or to breastfeed as a reasonable accommodation, unless the employer can demonstrate that doing so would impose an undue hardship. While an employer does not have to designate or set up a space if none of its employees currently need one, once the employer is on notice that a space is needed, it must prepare the space promptly so that it is ready at the appropriate time.

With respect to the physical space, the MCAD advises that the space should be free from intrusion, including from other employees, visitors, and the public (in other words, a lock on the door is likely necessary), convenient enough so that traveling to and from the space does not materially impact the employee’s break time, and should include seating, sufficient electrical outlets for breast pumps, and

tables or other surfaces to hold breast pumps and other needed items.

If the employee's personal workspace meets these qualifications, it can be used as an appropriate, private space. Further, an employee may continue to work while breastfeeding or expressing breast milk if the employee is able to do so.

Next Steps

Employers are also advised to review their policies and confer with employment counsel with regards to conducting training, the interactive process surrounding reasonable accommodation requests, other notices required by the Act, and any other questions about the Act's provisions and interactions with other laws. In particular, employers and supervisors should be aware of the following:

- An employee's request for an accommodation under the Act does not need to be in any particular form and can be made orally or in writing. Once the request is made, the employer must engage in a timely, good faith interactive process, which must include discussion(s) between the employee and the employer with respect to the requested accommodations.
- While an employer may require medical documentation for most requested accommodations, an employer may not require documentation for accommodation requests relating to: (i) more frequent restroom, food or water breaks; (ii) seating; (iii) limits on lifting more than 20 pounds; and (iv) private non-bathroom space for expressing breast milk.
- The Act does not limit how often employees can take a break to breastfeed or express breast milk, and the MCAD advises employers that each worker has individualized needs, "which may vary month to month or even day to day." The Act also does not specify how long breaks to breastfeed or express milk should last, and, according to the MCAD, breaks must allow the employee the time needed to breastfeed or express breast milk. The MCAD cites guidance from the U.S. Department of Health and Human Services, Office on Women's Health, recommending that breaks may typically last approximately 15 to 20 minutes, plus additional time to get to and from the break room and set up and break down equipment.
- Breaks to breastfeed or express breast milk may be paid or unpaid. However, if the employer provides paid breaks to employees, the employer must allow employees to use their paid breaks to breastfeed or express breast milk.

Jaclyn L. Kugell and Alexandra L. Pichette are attorneys at Morgan, Brown & Joy, LLP, and may be reached at 617-523-6666 or at jkugell@morganbrown.com and apichette@morganbrown.com. Morgan, Brown & Joy, LLP focuses exclusively on representing employers in employment and labor matters.

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