

Virginia's Pregnancy Accommodation Law Will Require Most Employers to Update Their Policies

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As part of Virginia's overhaul of its labor and employment laws—on which we previously [reported](#)—the Commonwealth also enacted Virginia Senate Bill 712, which amended the Virginia Human Rights Act (hereafter, the "VHRA") to require covered employers to reasonably accommodate the known limitations of an employee as it relates to pregnancy, childbirth, or related medical conditions, unless such an accommodation would impose an undue hardship on the employer.

The new law, which went into effect on July 1, 2020, applies to employers "employing five or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year." It requires covered employers to engage in a timely, good faith interactive process with employees who request an accommodation to determine if the accommodation is reasonable and, if not, to discuss alternative accommodations that the employer may provide. The law states that reasonable accommodations may include, but are not limited to, the following:

- temporary transfer to a less strenuous or hazardous position
- assistance with manual labor
- job restructuring
- a modified work schedule
- light duty assignments
- leave to recover from childbirth.
- more frequent or longer bathroom breaks
- breaks to express breast milk

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- access to a private location other than a bathroom for the expression of breast milk
 - acquisition or modification of equipment or seating

The law also states that employers cannot force an employee to take leave if another reasonable accommodation is available that does not impose an undue hardship on the employer.

In determining whether an accommodation would constitute an undue hardship, a covered employer must consider:

1. hardship on the conduct of the employer's business, considering the nature of the employer's operation, including composition and structure of the employer's workforce;
2. the size of the facility where employment occurs; and,
3. the nature and cost of the accommodations needed.

If the employer provides a similar accommodation to other classes of employees (*i.e.*, employees who are not pregnant, have not recently birthed a child, or have no related medical condition), it creates a rebuttable presumption that the accommodation does not impose an undue hardship.

This law also states that employers are prohibited from retaliating against any employee who requests such an accommodation. Employers are required to reinstate the employee to her "previous position or an equivalent position with equivalent pay, seniority, and other benefits when her need for a reasonable accommodation ceases." For example, if an employee is temporarily transferred or had her job restructured, she must be reinstated to her former or an equivalent position. Failing to do so would constitute an "adverse employment action."

By no later than October 29, 2020 (120 days after enactment of the law), employers are required to provide employees with information concerning "(i) the prohibition against unlawful discrimination on the basis of pregnancy, childbirth, or related medical conditions and (ii) an employee's rights to reasonable accommodation for known limitations related to pregnancy, childbirth, or related medical conditions." The information must be:

1. posted in a conspicuous location;
2. included in employee handbooks;
3. provided directly to new hires at the start of their employment; and
4. provided directly to pregnant employees within 10 days of when the pregnant employee notifies the employer of the pregnancy.

The Virginia Department of Labor & Industry has indicated its intent to publish a model notice of employee rights but has not yet done so.

Penalties for failing to comply with the law includes back wages, compensatory damages, attorneys'

fees, costs, and injunctive and equitable relief such as reinstatement of a terminated employee. These remedies dramatically expand the damages available in the pre-July 1, 2020 version of the VHRA, which capped back pay, capped attorneys' fees, prohibited compensatory and punitive damages, and excluded reinstatement as a remedy.

Covered Virginia employers should review their handbook and policies governing pregnancy leave and reasonable accommodations to ensure compliance with this law. Ideally, managers and human resources professionals should be trained about the requirements of the law and how it interacts with federal disability and leave laws. Lastly, employers should ensure that all the required posting and employee notifications are in place by October 29, 2020.

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