

THE JOB DESCRIPTION



New Illinois Law Requires Employers to Accommodate Pregnant Employees

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Illinois law now gives pregnant women additional protections in the workplace. House Bill 8 (P.A. 98-1050) amends the Illinois Human Rights Act (IHRA) and creates new responsibilities for employers that have at least 15 employees in Illinois.

Illinois joins a growing number of states that make employers provide some form of accommodation to pregnant workers. This new Illinois law imposes different and greater obligations on businesses than the federal Pregnancy Discrimination Act and Americans with Disabilities Act (ADA).

The new Illinois law defines “pregnancy” as “pregnancy, childbirth, or medical or common conditions related to pregnancy or childbirth” and adds pregnancy to the IHRA’s list of classes protected against discrimination.

The new law requires employers to provide reasonable accommodations to employees (and job applicants) for any medical or common condition related to pregnancy or childbirth and makes it

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unlawful to fail to hire or otherwise retaliate against an employee or applicant for requesting such accommodations.

If an employer demonstrates the accommodation would impose an undue hardship on the “ordinary operation of the business of the employer,” however, the employer need not provide the requested accommodation. “Undue hardship” is an action that is “prohibitively expensive or disruptive.”

The new law defines reasonable accommodations as modifications or adjustments to the job application process, work environment, or circumstances under which a position is customarily performed. It gives the following as examples of possible reasonable accommodations, depending on the situation:

- More frequent or longer bathroom breaks;
- Breaks for increased water intake;
- Breaks for periodic rest;
- Private non-bathroom space for expressing breast milk and breastfeeding;
- Seating accommodations;
- Assistance with manual labor;
- Light duty;
- Temporary transfer to a less strenuous or non-hazardous position;
- Acquisition or modification of equipment;
- Job restructuring;
- Part-time or modified work schedule;
- Appropriate adjustment or modifications of examinations or training materials;
- Assignment to a vacant position; or
- Providing leave.

An employer need not create an additional employment position that it otherwise would not have created, unless the employer does so or would do so for other classes of employees (i.e. employees with limitations due to something else besides pregnancy). Similar to the ADA, the new law mandates that both the employer and employee engage in a “timely, good faith, and meaningful exchange to determine effective reasonable accommodations.”

The law prohibits employers from requiring that an employee or applicant accept an accommodation she did not request or from requiring that an employee or applicant accept the employer’s preferred accommodation.

The new law requires employers to reinstate an employee affected by pregnancy, childbirth, or medical or common conditions related to pregnancy or childbirth to her original job or to an equivalent position, unless the employer can demonstrate that doing so would impose an undue hardship.

An employer must also display a new poster in a conspicuous location, and include in any employee handbook a summary of the new law, which includes information relating to the filing of a charge with the Illinois Department of Human Rights, and the right to be free from discrimination and the right to certain reasonable accommodations.

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So what should Illinois employers do?

Since the new law identifies “light duty” as a reasonable accommodation (one that might be particularly relevant to pregnant employees), employers should review their policies, practices, and contracts with respect to alternative work arrangements and restricted/light duty programs. They also should avoid offering light duty programs only for workers’ compensation situations.

Actions Illinois employers should consider taking to comply with the new law include:

- Reviewing and updating their policies on reasonable accommodations;
- Reconsidering their policies and practices about obtaining medical certification;
- Adding the new required poster to their current workplace posters;
- Revising any employee handbooks to ensure compliance with the new law’s handbook notice requirement; and
- Training managers and supervisors on procedures for responding to accommodation requests from pregnant employees.

What did the EEOC do in 2014?

The number of charges filed with the U.S. Equal Employment Opportunity Commission (EEOC) were the fewest since FY 2007. Retaliation charges constituted over 42% of the total charges filed, the highest percentage ever. The most common charges alleged race discrimination and gender discrimination (including sexual harassment).

In fiscal year (FY) 2014, the EEOC secured \$296.1 million in monetary relief for individuals alleging employment discrimination through mediation, conciliation, and other administrative enforcement. The EEOC also secured \$22.5 million in monetary relief for charging parties through litigation, and \$74 million in monetary relief for federal employees and applicants.

The EEOC received 88,778 private sector charges in FY 2014, a decrease of about 5,000 charges from FY 2013. In addition, a total of 87,442 charges were resolved, 9,810 fewer than in FY 2013, which may be due to the government shutdown and the

effects of sequestration.

The EEOC’s mediation program for private sector charges continues to be an integral part of the agency's work. In FY 2014, the EEOC's national mediation program secured 7,846 mediated resolutions out of 10,221 conducted. The agency obtained \$144.6 million for individuals through mediations.

The EEOC filed 133 lawsuits during FY 2014. This included 105 individual suits, 11 non-systemic class suits, and 17 systemic suits. Legal staff resolved 136 lawsuits for a total recovery of \$22.5 million. At the end of the fiscal year, the EEOC had 228 cases on its active docket.

The agency continues to build a strong national systemic enforcement program. During the fiscal year, the agency completed 260 systemic investigations, resulting in 78 settlements and conciliation agreements securing approximately \$13 million in monetary relief.

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While a hiring freeze and attrition shrunk the EEOC's staff between FY 2012 and FY 2013, the agency hired more than 300 staff at the end of FY 2014, so the EEOC will continue to remain active in 2015.

The 2014 figures and the EEOC's emphasis on retaliation enforcement initiatives are important reminders that employers should take

appropriate steps to minimize the likelihood of a retaliation claim even when the underlying discrimination claim is not meritorious. Employers should ensure they maintain up-to-date anti-discrimination and anti-retaliation policies, enforce these policies consistently, communicate with employees regarding these policies and the complaint process, and educate and train supervisors on them on a regular basis.

The Pros and Cons of Severance Agreements

Since the economic downturn, employers have used severance agreements with departing employees to obtain peace of mind and predictability regarding the associated costs of involuntary employee separations. While severance agreements and the accompanying consideration can be valuable tools to avoid litigation, some employers have learned the hard way that severance agreements are not always the best course of action.

The benefits of entering into severance agreements with departing employees are fairly obvious. For a simple payout and signature, the employer avoids messy legal action. Employers can avoid these headaches by buying some freedom, or at least some certainty that a lawsuit will not follow. The clear upside of such agreements is the notion of a clean break—employer and employee agree to part ways completely and forever, never again having to deal with each other.

On the downside, severance agreements are not right for every employer and every situation. An employer must consider, for example, how much money it will take to induce the employee to sign. Another consideration is whether the circumstances of the separation warrant severance. Giving an employee departing under less than ideal circumstances, such as misconduct or incompetence, could have a negative impact on



employee morale. Moreover, offering severance pay and a severance agreement to a departing employee could drive that employee to speak to an attorney, and those discussions could cause the employee to reject the severance pay and to pursue a lawsuit instead.

Even when appropriate, if such agreements are not carefully crafted, they can back-fire and actually create liabilities. For example, the U.S. Equal Employment Opportunity Commission (EEOC) has recently taken aim at severance agreements that it argues unlawfully interfere with employees' abilities to communicate voluntarily with the EEOC regarding potential discrimination.

The age of the employee involved will impact the content and potential risk in the severance

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agreement. If a departing employee is age 40 or above, and if the employer has at least 20 employees, that employee must receive special legal protections pursuant to the federal Age Discrimination in Employment Act (ADEA) and Older Workers' Benefits Protection Act (OWBPA). The severance agreement must contain certain language advising the employee of his or her rights under federal law and advise him or her to seek legal advice before signing the document.

Also, an employee age 40 or above must be given at least 21 days to consider the agreement and a waiting period of at least 7 days between the time the employee signs the document and the severance is paid, during which time the employee can rescind the agreement.

With all of these warnings, many employers might be skittish about severance agreements, and rightfully so. They are not a "one size fits all" tool and should be used only after deliberation.

ACA Questions Linger for Employers

Employers are anxiously waiting the U.S. Supreme Court's decision in *King v. Burwell* on the availability of subsidized exchange coverage under the Affordable Care Act (ACA). The exposure for an employer to penalties under the ACA's shared responsibility requirements hinges on whether full-time employees obtain subsidized exchange coverage. Although the ACA specifically provides for subsidies in state-run exchanges, the IRS has provided through regulations that subsidies are available in all exchanges. If the Court determines the IRS exceeded its authority by making subsidies available in the 36 federally-run exchanges, there would be a dramatic impact on the potential for employer penalties and the viability of the ACA as a whole.

NLRB Allows Employee Use of Employer Email Systems

The National Labor Relations Board's decision in *Purple Communications* grants employees access to their employer's email systems on non-work time, even if all personal use is now prohibited, so long as employees regularly use the system for their work. The Board's decision is unprecedented

in terms of expanding employee use of employer equipment for union organizing and similar purposes and even for discussing wages and other workplace conditions. The decision will likely open a floodgate of disruptive workplace activity, because employee rights protected under

the National Labor Relations Act are so broadly defined to include virtually any discussion relating to wages, benefits, and working conditions. The Board's distinctions between working and non-working time use will be largely unworkable. An employer's banning all personal use of its email and computer systems is largely unrealistic these days, but employers who currently ban all personal use of their email systems will be required to modify their policies to comply with this decision.



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