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OFFICE OF THE GENERAL COUNSEL**

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MEMORANDUM

TO: All Community College Presidents
All Human Resource Directors
All Title IX Coordinators and Deputy Coordinators
William Hart, Executive Officer

FROM: Gina Yarbrough, Associate General Counsel

DATE: March 28, 2018

RE: **Massachusetts' Pregnant Workers Fairness Act**

The Massachusetts Community Colleges will face new obligations when the state's new Pregnant Workers Fairness Act ("the Act") takes effect on April 1, 2018. Amending the current statute prohibiting discrimination in employment (Massachusetts General Laws Chapter 151B, §4), the Act makes it unlawful to discriminate against an employee or job applicant due to pregnancy or a condition related to pregnancy and requires that employers reasonably accommodate pregnancy and pregnancy-related conditions.

Under existing law, the Community Colleges are required to provide reasonable accommodations as a result of a disability (including a disability that may arise from pregnancy and/or post-pregnancy related conditions). However, the Act expressly creates a new protected class of employees and job applicants who are entitled to reasonable accommodation solely due to being pregnant or having a condition related to pregnancy, but who do not have a disability. Additionally, while the Community Colleges typically require medical documentation supporting reasonable accommodation requests, under the Act, an employer may not request medical

documentation for the following accommodation requests for pregnancy and post-pregnancy related conditions:¹

- More frequent restroom, food or water breaks during pregnancy;
- Seating;
- Limits on lifting over 20 pounds; or
- Private non-bathroom space for expressing breast milk.

Please be advised that the Act imposes certain notice requirements beginning on or before April 1, 2018. Specifically, employers must provide existing employees written notice of their rights under the Act on or before April 1. Additionally, new employees must receive written notice at the time of hire, and employees who inform their employer of their pregnancy or related condition must receive written notice of their rights within 10 business days of the day the employer learns of the pregnancy or related condition.

The Massachusetts Commission Against Discrimination (MCAD) has issued two documents regarding the Act including Guidance and a Q&A which are attached to this memorandum. The MCAD has also recently indicated that its Guidance may be used by employers to fulfill the notice requirement of the Act. Accordingly, on or before April 1, 2018, the Community Colleges should ensure that its existing employees receive the “MCAD Guidance on Pregnant Fairness Workers Act” (attached) and utilize the MCAD’s Guidance for its notice obligations thereafter for new employees at the time of hire or upon learning of an employee’s pregnancy or related condition.

The Act was most recently discussed with the Title IX Coordinators and Deputy Coordinators at their meeting on March 23, 2018. A similar discussion will be held with the Human Resources Vice Presidents and Directors at their meeting on March 30, 2018. If you have any questions, or your institution requires additional technical assistance, please do not hesitate to contact the General Counsel’s Office.

Presidents/memorandums/2017-18/PWFA-#y

¹ If an employee requests an extension or modification of an existing accommodation, an employer may require medical documentation in order to evaluate that request.

MCAD Guidance
PREGNANT WORKERS FAIRNESS ACT
Issued 1/23/2018

The Pregnant Workers Fairness Act (“the Act”) amends the current statute prohibiting discrimination in employment, G.L. c. 151B, §4, enforced by the Massachusetts Commission Against Discrimination (MCAD). The Act, effective on April 1, 2018, expressly prohibits employment discrimination on the basis of pregnancy and pregnancy-related conditions, such as lactation or the need to express breast milk for a nursing child. It also describes employers’ obligations to employees that are pregnant or lactating and the protections these employees are entitled to receive. Generally, employers may not treat employees or job applicants less favorably than other employees based on pregnancy or pregnancy-related conditions and have an obligation to accommodate pregnant workers.

Under the Act:

- Upon request for an accommodation, the employer has an obligation to communicate with the employee in order to determine a reasonable accommodation for the pregnancy or pregnancy-related condition. This is called an “interactive process,” and it must be done in good faith. A reasonable accommodation is a modification or adjustment that allows the employee or job applicant to perform the essential functions of the job while pregnant or experiencing a pregnancy-related condition, without undue hardship to the employer.
- An employer must accommodate conditions related to pregnancy, including post-pregnancy conditions such as the need to express breast milk for a nursing child, unless doing so would pose an undue hardship on the employer. “Undue hardship” means that providing the accommodation would cause the employer significant difficulty or expense.
- An employer cannot require a pregnant employee to accept a particular accommodation, or to begin disability or parental leave if another reasonable accommodation would enable the employee to perform the essential functions of the job without undue hardship to the employer.
- An employer cannot refuse to hire a pregnant job applicant or applicant with a pregnancy-related condition, because of the pregnancy or the pregnancy-related condition, if an applicant is capable of performing the essential functions of the position with a reasonable accommodation.
- An employer cannot deny an employment opportunity or take adverse action against an employee because of the employee’s request for or use of a reasonable accommodation for a pregnancy or pregnancy-related condition.
- An employer cannot require medical documentation about the need for an accommodation if the accommodation requested is for: (i) more frequent restroom, food or water breaks; (ii) seating; (iii) limits on lifting no more than 20 pounds; and (iv) private, non-bathroom space for expressing breast milk. An employer, may, however, request medical documentation for other accommodations.
- Employers must provide written notice to employees of the right to be free from discrimination due to pregnancy or a condition related to pregnancy, including the right to reasonable accommodations for conditions related to pregnancy, in a handbook, pamphlet, or other means of notice no later than April 1, 2018.

- Employers must also provide written notice of employees' rights under the Act: (1) to new employees at or prior to the start of employment; and (2) to an employee who notifies the employer of a pregnancy or a pregnancy-related condition, no more than 10 days after such notification.

The foregoing is a synopsis of the requirements under the Act, and both employees and employers are encouraged to read the full text of the law available on the General Court's website here:

<https://malegislature.gov/Laws/SessionLaws/Acts/2017/Chapter54>.

If you believe you have been discriminated against on the basis of pregnancy or a pregnancy-related condition, you may file a formal complaint with the MCAD. You may also have the right to file a complaint with the Equal Employment Opportunity Commission if the conduct violates the Pregnancy Discrimination Act, which amended Title VII of the Civil Rights Act of 1964. Both agencies require the formal complaint to be filed within 300 days of the discriminatory act.

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www.mass.gov/mcad/

MCAD Q&A
PREGNANT WORKERS FAIRNESS ACT
Issued 2/6/2018

The Pregnant Workers Fairness Act, effective April 1, 2018, amends Massachusetts' current law against discrimination in employment, G.L. c. 151B, §4, to expressly forbid discrimination against employees due to pregnancy or conditions related to pregnancy. The Act also requires employers to provide "reasonable accommodations" to an employee who is pregnant or who has a condition related to pregnancy. The law is enforced by the Massachusetts Commission Against Discrimination (MCAD). Frequently Asked Questions (FAQs) are answered below.

Q1. What does the Act do?

A1. Under the Act, employers:

- Cannot discriminate against employees due to pregnancy or a condition related to pregnancy.
- Must grant an employee a "reasonable accommodation" for an employee's pregnancy or condition related to pregnancy, unless doing so would impose an "undue hardship" on the employer. For definitions of "condition related to pregnancy," "reasonable accommodation" and "undue hardship," please see Q&A 2, 3, and 4.
- Cannot deny an employment opportunity to, or take an adverse (negative) action against, an employee because of the employee's request for or use of a reasonable accommodation.
- Cannot make an employee accept a particular accommodation if another reasonable accommodation would allow the employee to perform the essential functions of the job, or require an employee to take a leave if another reasonable accommodation may be provided without undue hardship.
- Cannot refuse to hire a person who is pregnant because of the pregnancy or a pregnancy-related condition, if the person can perform the essential functions of the position with a reasonable accommodation.
- Must communicate with the employee in a timely, good faith, interactive process, once an employer is on notice of the need for an accommodation, in order to determine what accommodation may be needed.
- Must provide written notice to employees of their rights under the Act no later than April 1, 2018. The notice must be given to (1) new employees; and (2) an employee who notifies the employer of a pregnancy or a pregnancy-related condition, not more than 10 days after notification.

Q2. What is a "condition related to pregnancy?"

A2. A condition related to pregnancy can be during or after pregnancy. Examples include, but are not limited to, morning sickness, lactation, or the need to express breast milk. For example, if a pregnant employee needs to start her workday later than her usual start time due to morning sickness, the employee may be covered by the Act.

Q3. What is a "reasonable accommodation"?

A3. A reasonable accommodation is a modification or adjustment that allows an employee to perform the "essential functions" of the employee's position. Some examples of reasonable accommodations are: (1) more frequent or longer breaks; (2) time off; (3) providing equipment or seating; (4) temporary transfer to a less strenuous or hazardous job; (5) job restructuring; (6) light duty; (7) private space for expressing breast milk; (8) assistance with manual labor; and (9) a modified work schedule. Employers are not required to discharge or transfer another employee with more seniority, or to promote an unqualified employee, as an accommodation.

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Q4. What is an “undue hardship”?

A4. An undue hardship is an action requiring significant difficulty or expense on the part of the employer. Some factors considered include (1) the nature and cost of the needed accommodation; (2) the employer’s financial resources; (3) the overall size of the business; and (4) the effect on expenses and resources of the accommodation on the employer.

Q5. How does an employee request a reasonable accommodation?

A5. An employee must notify the employer of a need for a reasonable accommodation due to pregnancy or a pregnancy-related condition. The statute does not require that the request be made in any particular fashion, i.e., orally vs. in writing. The employer must then engage in a timely, good faith, interactive “process” to determine what reasonable accommodation may be made, absent undue hardship. The process must include discussion(s) between the employee and the employer with respect to the requested accommodation.

Q6. What kind of documentation is an employer allowed to ask for in response to a request for an accommodation?

A6. Employers can generally require documentation about the need for accommodation from a healthcare professional that explains what accommodation the employee needs, and from there, the employer and employee should discuss how the accommodation(s) relate to the essential functions of the employee’s job. However, the employer cannot require documentation for an employee’s need for the following: (1) more frequent restroom, food, or water breaks; (2) seating; (3) limits on lifting more than 20 pounds; and (4) private, non-bathroom space for expressing breast milk.

Q7. How often can an employee take a break to breastfeed or express breast milk?

A7. The law does not specify or limit how often an employee can take a break to breastfeed or express breast milk. Employers should be aware that every employee has individualized needs, which may vary month to month or even day to day. Employers must allow employees to breastfeed or express milk as often as they need to do so, absent undue hardship.

Q8. How long do employees’ breaks to breastfeed or express breast milk need to last?

A8. As with the frequency of breaks, the law does not require breaks to be a specific length. However, breaks must allow the employee the time needed to breastfeed or express breast milk. Guidance from the U.S. Department of Health and Human Services, Office on Women’s Health suggests 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: https://www.womenshealth.gov/files/documents/bcfb_employees-guide-to-breastfeeding-and-working.pdf

Q9. Does an employer have to pay an employee for breaks to breastfeed or express breast milk?

A9. Breaks may either be paid or unpaid under the law. However, if the employer does provide paid breaks to employees, the employer must allow the employee to use those paid breaks to breastfeed or express breast milk.

MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION

Q10. What kind of space does the employer have to provide for an employee to breastfeed or express milk?

A10. The employer must provide an employee a private, non-bathroom space to express breast milk or to breastfeed. Examples include, but are not limited to, a private room or office. The space should be free from intrusion by other employees, visitors, and the public. The space should be convenient enough for the employees that traveling to and from the space does not materially impact an employee's break time.

Q11. What does the space have to contain?

A11. Besides being a private, non-bathroom space, the space should allow employees to comfortably express breast milk and/or breastfeed. Examples of features that should be included in the space are sufficient electrical outlets for breast pumps, tables or other surfaces to hold breast pumps and other needed items, and seating.

Q12. Can an employee be permitted to breastfeed or express milk in their personal workspace during the break, rather than taking additional unpaid time to travel to the designated private space?

A12. Yes. If the employee's space is equivalent to a private, non-bathroom space, the employee may breastfeed or express breast milk at the workspace.

Q13. Can an employee continue working while she breastfeeds or expresses breast milk, rather than taking an unpaid break?

A13. Yes. If an employee has a private, non-bathroom space in which to work, and is able to work while breastfeeding or expressing breast milk, the employee may continue working while doing so.

Q14. Is it an undue hardship for an employer if an employee requests that another employee cover the employee's job responsibilities while taking a break to breastfeed or express breast milk?

A14. Whether it is an undue hardship depends on the facts of each individual case. For example, an employer may be able to have another employee cover an office's reception desk while the receptionist takes a break to breastfeed or express breast milk. Some jobs may not require another employee to cover them at all. Other jobs, such as a manufacturing line, may be more difficult for employers to accommodate. Employers and employees should attempt to resolve these issues during the interactive discussion phase of the process.

Q15. Does an employer have to provide a space for expressing breast milk for employees, if none of its employees currently need to do so?

A15. However, once the employer is on notice that an employee will need such a space, the employer should prepare the space promptly so that it is ready when needed. Additionally, employers are free to set up such a space in advance, even if none of its employees currently need one.

MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION

Q16. If an employee works less than a normal day or shift because of her paid or unpaid breaks, can an employer reduce her pay or benefits?

A16. Employers cannot take an “adverse” (negative) action against an employee because of her need to take a break permitted under the Act. For example, if an employer generally allows its employees to take breaks without loss of pay or benefits, but reduces the pay or benefits of an employee who takes breaks to express breast milk, the employer would likely be in violation of the Act.

Q17. Are there any federal laws that cover pregnancy or pregnancy-related conditions?

A17. Title VII prohibits discrimination on the basis of sex. The Pregnancy Discrimination Act bars employers from discriminating against employees on the basis of pregnancy. The Fair Labor Standards Act has requirements regarding break time for mothers who need to express breast milk. The Americans with Disabilities Act may cover certain pregnancy-related conditions. The Family and Medical Leave Act also has certain requirements regarding leave for an employee’s serious health conditions. More information on those laws is available at www.eeoc.gov and www.dol.gov.

Q18. How do federal and state laws interact?

A18. If state law provides an employee more protections than federal law, the employer must comply with the greater protections provided by state law.

Q19. What can I do if I believe I’ve been discriminated against?

A19. If you believe you have been discriminated against, you can file a complaint with the Massachusetts Commission Against Discrimination within 300 days of the date the discriminatory act occurred. You do not have to have an attorney to file a claim (though you may hire an attorney). You can contact the Commission at the information below.

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