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HOUSE BILL 409

**52ND LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2015**

INTRODUCED BY

Terry H. McMillan

AN ACT

RELATING TO EMPLOYMENT; ENACTING NEW SECTIONS OF CHAPTER 28  
NMSA 1978 AS THE "PREGNANT WORKER ACCOMMODATION ACT" TO ENSURE  
REASONABLE WORKPLACE ACCOMMODATIONS FOR WORKERS WHOSE ABILITY  
TO PERFORM THE FUNCTIONS OF A JOB ARE LIMITED BY PREGNANCY,  
CHILDBIRTH OR A RELATED MEDICAL CONDITION.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

SECTION 1. A new section of Chapter 28 NMSA 1978 is  
enacted to read:

"[NEW MATERIAL] SHORT TITLE.--This act may be cited as the  
"Pregnant Worker Accommodation Act"."

SECTION 2. A new section of Chapter 28 NMSA 1978 is  
enacted to read:

"[NEW MATERIAL] DEFINITIONS.--As used in the Pregnant  
Worker Accommodation Act:

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1           A. "affected by pregnancy" means a condition that,  
2 due to pregnancy, childbirth or a related medical condition,  
3 renders it medically advisable for an employee to be reasonably  
4 accommodated by her employer;

5           B. "disabled by pregnancy" means an employer's  
6 finding of disability on the basis that an employee's health  
7 care provider has issued a recommendation that the employee:

8                   (1) is unable because of pregnancy to perform  
9 any one or more of the essential functions of her job or to  
10 perform any of these functions without undue risk to herself,  
11 to her pregnancy's successful completion or to other persons;  
12 or

13                   (2) suffers from severe "morning sickness" or  
14 requires leave from her employment for prenatal or postnatal  
15 care; bed rest; gestational diabetes; pregnancy-induced  
16 hypertension; preeclampsia; post-partum depression; childbirth;  
17 loss of or end of pregnancy; or recovery from childbirth, loss  
18 of or end of pregnancy; provided that the preceding list of  
19 conditions is intended to be nonexclusive and illustrative  
20 only;

21           C. "employer" means a person or entity, including a  
22 partnership, association, corporation, business trust,  
23 unassociated group or agency employing fifty or more employees  
24 or a person or entity acting on behalf of or as an agent of an  
25 employer;

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1 D. "health care provider" means:

2 (1) a physician or osteopathic physician  
3 licensed in New Mexico or in another state who directly treats  
4 or supervises the treatment of the employee's pregnancy,  
5 childbirth or a related medical condition;

6 (2) any of the following individuals licensed  
7 in New Mexico or in another state who directly treats or  
8 supervises the treatment of an employee's pregnancy, childbirth  
9 or related medical condition while working within that  
10 individual's scope of practice:

- 11 (a) a marriage and family therapist;
- 12 (b) a doctor of oriental medicine;
- 13 (c) a nurse practitioner;
- 14 (d) a certified nurse-midwife;
- 15 (e) a clinical psychologist;
- 16 (f) a physician assistant;
- 17 (g) an osteopathic physician assistant;
- 18 (h) an independent social worker;
- 19 (i) a podiatrist;
- 20 (j) a dentist;
- 21 (k) an optometrist; or

22 (l) a chiropractic physician; provided  
23 that a chiropractic physician's treatment is limited to  
24 treatment consisting of manual manipulation of the spine to  
25 correct a subluxation as demonstrated by x-ray to exist; or

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1 (3) a health care provider from whom an  
2 employer or a group health plan's benefits manager will accept  
3 medical certification of the existence of a health condition to  
4 substantiate a claim for benefits;

5 E. "medical certification" or "medical  
6 recertification" means a written communication from the  
7 employee's health care provider to the employer stating that  
8 the employee is disabled because of pregnancy or that it is  
9 medically advisable for the employee to be reasonably  
10 accommodated;

11 F. "reasonable accommodation" means a change in the  
12 work environment or in the way a job is customarily performed  
13 that an employer implements or authorizes to effectively enable  
14 an employee affected by pregnancy or disabled by pregnancy to  
15 perform the essential functions of her job. "Reasonable  
16 accommodation" includes the following measures that an employer  
17 implements:

- 18 (1) modifying work duties;  
19 (2) modifying work schedules to permit earlier  
20 or later hours;  
21 (3) modifying work schedules to permit more  
22 frequent breaks;  
23 (4) allowing for a reduced work schedule;  
24 (5) providing furniture or acquiring or  
25 modifying equipment or devices;

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1 (6) providing a reasonable amount of break  
2 time and use of a room or other location in close proximity to  
3 the employee's work area;

4 (7) transferring an employee; or

5 (8) granting paid or unpaid leave;

6 G. "reduced work schedule" means a work schedule  
7 that permits an employee to work less than the employee's usual  
8 number of hours per work week, or hours per work day;

9 H. "related medical condition" means any medically  
10 recognized physical or mental condition related to pregnancy,  
11 childbirth or recovery from pregnancy or childbirth. "Related  
12 medical condition" includes lactation-related medical  
13 conditions such as mastitis, gestational diabetes,  
14 pregnancy-induced hypertension, preeclampsia, post-partum  
15 depression, loss or end of pregnancy or recovery from loss or  
16 end of pregnancy;

17 I. "transfer" means reassigning temporarily an  
18 employee affected by pregnancy or disabled by pregnancy to a  
19 less strenuous or hazardous position or to less strenuous or  
20 hazardous duties; and

21 J. "undue hardship" means an accommodation  
22 requiring significant difficulty or expense when considered in  
23 light of the following factors:

24 (1) the nature and cost of the accommodation;

25 (2) the financial resources of the employer

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1 involved in the provision of the reasonable accommodation;  
2 (3) the number of persons the employer  
3 employs;  
4 (4) the effect on expenses and resources;  
5 (5) the impact otherwise of the accommodation  
6 upon the employer's business;  
7 (6) the overall financial resources of the  
8 employer;  
9 (7) the overall size of the business of an  
10 employer with respect to the number, type and location of its  
11 facilities;  
12 (8) the type of operation of the employer,  
13 including the composition, structure and functions of the work  
14 force of the employer; and  
15 (9) the geographic separateness or  
16 administrative or fiscal relationship to the employer of the  
17 employer's facilities."

18 SECTION 3. A new section of Chapter 28 NMSA 1978 is  
19 enacted to read:

20 "[NEW MATERIAL] EMPLOYEE AFFECTED BY PREGNANCY--DISABLED  
21 BY PREGNANCY--REASONABLE ACCOMMODATION.--

22 A. It is unlawful for an employer to deny a request  
23 for reasonable accommodation made by an employee affected by  
24 pregnancy or disabled by pregnancy, if:

25 (1) the employee's request is based on the

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1 advice of her health care provider that reasonable  
2 accommodation is medically advisable; and

3 (2) the requested accommodation will not cause  
4 an undue hardship upon the employer.

5 B. An employee who seeks accommodation as an  
6 employee affected by pregnancy or disabled by pregnancy and her  
7 employer shall engage in a good faith interactive process to  
8 identify and implement the employee's request for reasonable  
9 accommodation as set forth in Section 4 of the Pregnant Worker  
10 Accommodation Act.

11 C. An employer may require a medical certification  
12 substantiating the employee's need for reasonable  
13 accommodation, as set forth in Section 4 of the Pregnant Worker  
14 Accommodation Act."

15 SECTION 4. A new section of Chapter 28 NMSA 1978 is  
16 enacted to read:

17 "[NEW MATERIAL] EMPLOYEE AFFECTED BY PREGNANCY--DISABLED  
18 BY PREGNANCY--REQUESTS FOR REASONABLE ACCOMMODATION--ADVANCE  
19 NOTICE--MEDICAL CERTIFICATION--EMPLOYER RESPONSE.--

20 A. An employee who seeks reasonable accommodation  
21 pursuant to the Pregnant Worker Accommodation Act shall:

22 (1) provide timely oral or written notice  
23 sufficient to make the employer aware that the employee needs  
24 reasonable accommodation, and, where practicable, the  
25 anticipated timing and duration of the reasonable

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1 accommodation;

2 (2) provide the employer at least fifteen  
3 days' advance notice before the start of reasonable  
4 accommodation, if the need for the reasonable accommodation is  
5 foreseeable;

6 (3) consult with the employer and make a  
7 reasonable effort to schedule any planned appointment or  
8 medical treatment to minimize disruption to the employer's  
9 operations, subject to the health care provider's approval; or

10 (4) provide notice to her employer that  
11 reasonable accommodation is needed as soon as practicable in  
12 cases where a need for reasonable accommodation is not  
13 reasonably foreseen due to a change in circumstances, a medical  
14 emergency or other good cause shown.

15 B. An employer:

16 (1) shall not deny reasonable accommodation,  
17 the need for which is an emergency or is otherwise  
18 unforeseeable, on the basis that the employee did not provide  
19 adequate advance notice of the need for the reasonable  
20 accommodation;

21 (2) shall respond to the reasonable  
22 accommodation request as soon as practicable and, in any event,  
23 no later than ten calendar days after receiving the request for  
24 reasonable accommodation; and

25 (3) may require, as a condition of granting



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1 reasonable accommodation, that an employee who is affected by  
2 pregnancy or who is disabled by pregnancy obtain written  
3 medical certification from the employee's health care provider;  
4 provided that the employer shall notify the employee of:

5 (a) the need to provide reasonable  
6 medical certification;

7 (b) the deadline for providing  
8 certification;

9 (c) what constitutes sufficient medical  
10 certification;

11 (d) the consequences for failing to  
12 provide medical certification; and

13 (e) the medical certification  
14 requirement each time a certification is required.

15 C. An employer may provide notice of the need for  
16 medical certification pursuant to Paragraph (3) of Subsection B  
17 of this section verbally if the employee is already on leave  
18 from her job because the need for the leave was unforeseeable.  
19 The employer shall thereafter mail or send via electronic mail  
20 or by facsimile a copy of the medical certification form to the  
21 employee or to her health care provider as the employee  
22 designates.

23 D. An employee shall attempt to provide notice to  
24 an employee of her need for reasonable accommodation directly,  
25 rather than through a third party, where practicable.

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1           E. When an employer requires medical certification  
2 of the need for reasonable accommodation, the employer shall  
3 request that the employee furnish medical certification from a  
4 health care provider:

5                   (1) at the time the employee gives notice of  
6 the need for reasonable accommodation;

7                   (2) within two business days of the time the  
8 employee gives notice of the need for reasonable accommodation;

9                   (3) in the case of unforeseen leave, within  
10 two business days after the leave commences; or

11                   (4) a date later than those provided in  
12 Paragraphs (1) through (3) of this subsection if the employer  
13 later has reason to question the appropriateness of the  
14 reasonable accommodation.

15           F. At the time an employer requests medical  
16 certification, the employer shall also advise the employee  
17 whenever the employer finds a medical certification inadequate  
18 or incomplete and provide the employee a reasonable opportunity  
19 to cure any deficiency.

20           G. A medical certification indicating the medical  
21 advisability of reasonable accommodation or a transfer is  
22 sufficient if it contains:

23                   (1) a description of the requested reasonable  
24 accommodation;

25                   (2) a statement describing the medical

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1 advisability of the reasonable accommodation; and

2 (3) the date on which the need for reasonable  
3 accommodation became or will become medically advisable and the  
4 estimated duration of the reasonable accommodation.

5 H. If medical certification satisfies the  
6 requirements of Subsection G of this section, an employer shall  
7 accept it as sufficient. The employer shall not ask the  
8 employee to provide additional information beyond that provided  
9 in this section. An employer may require an employee to obtain  
10 medical recertification if an employee affected by pregnancy or  
11 disabled by pregnancy requests additional time for reasonable  
12 accommodation upon expiration of the original time period  
13 allocated.

14 I. An employer is responsible for complying with  
15 all applicable law regarding the confidentiality of any medical  
16 information received.

17 J. In the case of a foreseeable need for reasonable  
18 accommodation, an employer may delay granting the reasonable  
19 accommodation, until the required medical certification is  
20 provided, to an employee who fails to provide timely medical  
21 certification after the employer has requested the employee to  
22 furnish the certification.

23 K. When the need for reasonable accommodation is  
24 not foreseeable, or in the case of recertification, an employee  
25 shall provide medical certification or recertification within

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1 the time frame requested by the employer, a time frame that  
2 shall be at least fifteen days after the employer's request, or  
3 as soon as reasonably possible under the circumstances. An  
4 employer shall grant an exception of the deadline in the case  
5 of a medical emergency. If an employee fails to provide a  
6 medical certification within a reasonable time under the  
7 pertinent circumstances, the employer may delay the employee's  
8 continuation of the reasonable accommodation.

9 L. As a condition of an employee's return from  
10 leave or transfer, the employer may require the employee to  
11 obtain a release to return to work from her health care  
12 provider stating that she is able to resume her original job or  
13 duties.

14 M. An employer shall not deny, refuse to renew or  
15 terminate an employee's health care coverage on the basis of an  
16 employee's pregnancy, childbirth or related medical condition."

17 SECTION 5. A new section of Chapter 28 NMSA 1978 is  
18 enacted to read:

19 "[NEW MATERIAL] PREGNANCY ACCOMMODATION NOTICE.--

20 A. An employer shall provide written notice of an  
21 employee's rights pursuant to the Pregnant Worker Accommodation  
22 Act to:

23 (1) existing employees within one hundred  
24 twenty days after the effective date of the Pregnant Worker  
25 Accommodation Act; and

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1 (2) within ten days of her notification, any  
2 employee who notifies the employer of her pregnancy.

3 B. The notice provided pursuant to this section  
4 shall also be conspicuously posted at an employer's place of  
5 business in an area accessible to employees."

6 SECTION 6. A new section of Chapter 28 NMSA 1978 is  
7 enacted to read:

8 "[NEW MATERIAL] RETALIATION PROHIBITED.--It is a violation  
9 of the Pregnant Worker Accommodation Act for an employer or any  
10 other person to discharge, demote, deny promotion to or in any  
11 other way discriminate against an employee in the terms or  
12 conditions of employment in retaliation for the person  
13 asserting a claim or right pursuant to the Pregnant Worker  
14 Accommodation Act, for assisting another person to assert a  
15 claim or right pursuant to the Pregnant Worker Accommodation  
16 Act or for informing another person about employment rights or  
17 other rights provided by law."

18 SECTION 7. A new section of Chapter 28 NMSA 1978 is  
19 enacted to read:

20 "[NEW MATERIAL] ADMINISTRATIVE REVIEW.--A person claiming  
21 to be aggrieved by an unlawful practice in violation of the  
22 Pregnant Worker Accommodation Act may seek relief under the  
23 Human Rights Act pursuant to the process set out in Sections  
24 28-1-10 through 28-1-13 NMSA 1978."