F I S C A L I M P A C T R E P O R T

SPONSOR HBEC **ORIGINAL DATE** 02/04/15 **LAST UPDATED** 03/02/15 **HB** 37/HBECS

SHORT TITLE Pregnant Worker Accommodation Act **SB**

ANALYST Daly

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY15	FY16	FY17	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		$5.0		$5.0	Nonrecurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

Relates to and may conflict with HB 409 and SB 375
Relates to HM 2.

SOURCES OF INFORMATION
LFC Files

Responses Received From

Workforce Solutions Department (WSD)
Administrative Office of the Courts (AOC)
State Personnel Office (SPO)
Department of Health (DOH)
Children, Youth & Families Department (CYFD)

SUMMARY

Synopsis of Bill

The House Business and Employment Substitute for House Bill 37 enacts the Pregnant Worker Accommodation Act. The Act prohibits certain employment discrimination practices based on pregnancy or related serious medical conditions. It requires every employer employing four or more employees or agents to furnish an affected employee with reasonable accommodations that do not present an undue hardship on the employer, including a reasonable unpaid leave of up to three months.

Reasonable accommodations means modification or adaptation of a work environment, work rules or job responsibilities that enables an employee who is incapacitated due to pregnancy, childbirth or a related serious medical condition that limits one or more of the employee's major life activities to perform the employee's job and that does not impose an undue hardship on the

employer. To determine whether an undue hardship on the employer (defined to mean an action requiring significant difficulty or expense) exists, factors such as the nature and cost of the accommodation, the effect on expenses and resources, any impact on the employer's business, the employer's overall financial resources, and the number of employees employed by the employer must be considered.

Under the Act a female employee who is incapacitated by pregnancy, childbirth or a related serious medical condition has the right to a reasonable unpaid leave period, upon reasonable notice, not to exceed three months and to return to work in the same or a similar position. This leave would be uncompensated (except to the extent the employee uses accrued personal or sick leave), but health coverage offered by the employer must be maintained at the same level and conditions during that leave. The employer may recover from the employee any health plan premiums that the employer paid as required during any leave taken by a covered employee under the Act. As to a state agency employee, this coverage requirement is governed by the collective bargaining agreement. An employer's failure to comply with these leave provisions constitutes an unlawful discriminatory practice.

Other discriminatory practices under CS/HB 37 include refusing a request for or failing to make reasonable accommodation for an incapacitated employee or job applicant in the absence of undue hardship on the employer; refusing to hire or promote, or discharging or demoting or otherwise discriminating in any manner in the employment of an incapacitated person otherwise qualified for employment on the basis of that incapacitation; printing or circulating any statements , using any form of application or making any inquiry that expresses, either directly or indirectly, any limitation, specification or discrimination as to the incapacitation addressed in the Act. In addition, requiring an employee to take leave if another reasonable accommodation can be provided, refusing to list, properly classify or refuse to refer a person for employment who is otherwise qualified on the basis of that incapacitation and similar actions by an employee's agent are also prohibited.

The Act declares it does not limit the rights and remedies afforded an incapacitated employee or job applicant under the state Human Rights Act (HRA) or any other law that may provide equal or greater protection for workers. It also requires all employers give notice of the employee rights the Act protects, and prohibits retaliation by an employer.

An employee claiming violations of the Act may file suit in state court or seek relief under the HRA. The employee may recover injunctive and other equitable relief, including employment, reinstatement or promotion, or actual damages, including unpaid wages and damages arising from retaliation, or reasonable attorney fees and costs.

FISCAL IMPLICATIONS

WSD estimates that the costs of training its staff on the provisions of the Act would be minimal, and that the cost of printed material (such as posters) would be approximately $5 thousand. That cost is reflected in the figures set out in the operating budget impact table above.

SIGNIFICANT ISSUES

Responding agencies discuss various state and federal laws that address, to some degree, discrimination against pregnant workers, although there are numerous differences between the

rights afforded under HB 37 and existing state and federal law. WSD calls attention to the federal Family Medical Leave Act (FMLA), which provides certain employees with 12 weeks of unpaid, job-protected leave during any 12 month period for certain pregnancy–related events. It reports that that federal law only applies to private-sector employers with 50 or more employees (as well as local, state and federal agencies and public or private elementary and secondary schools regardless of the number of employees). In addition, in light of the three month leave granted under both that federal law and CS/HB 37, WSD points out that it is unclear as to FMLA-covered employees whether leave under this substitute bill is in addition to or runs concurrently with the federally granted leave.

Further, AOC in its earlier analysis advised that coverage under the federal Americans with Disabilities Act (ADA) and the HRA do not include the reasonable accommodation (subject to an employer's undue hardship) requirement contained in CS/HB 37. WSD reports that pregnancy in and of itself is not considered a disability that triggers the application of the ADA, although it advises that certain pregnancy-related maladies, such as hypertension, gestational diabetes, severe nausea and sciatica are disabilities covered by ADA and its amendments when they substantially limit a major life activity. DOH calls attention to the ADA requirement that an individual must be qualified to perform the essential functions of the job with or without accommodation. DOH also notes that an employer's obligation to maintain the employee's health coverage during the leave period contained in Section 3 is not required in existing state or federal law. WSD advises the Employee Retirement Income Security Act (ERISA) may preempt some aspects of the Act, given that it concerns employee benefit plans and expands liability with respect to such plans.

As to the provisions of CS/HB 37 itself, DOH calls attention to the directive in Section 3(A)(2)(c) that if the employer is a state agency, continued receipt of group health plan coverage is governed by the collective bargaining agreement. That provision fails to recognize that not all state employees are covered by such an agreement. Further, it advises that the collective bargaining agreements in place are silent on this issue.

SPO raises a concern that Section 7, by allowing a protected employee to recover employment, reinstatement and promotion in the event of a violation of the Act, might allow a state employee to circumvent the administrative remedies which are exclusively within the jurisdiction of the State Personnel Board. Additionally, SPO notes that the Act also allows pregnant women to similarly bypass the administrative remedies provided for by the HRA and Title VII of the Civil Rights Act, both of which already encompass pregnant workers as a protected class, in order to sue employers directly in district court for actual damages and attorneys' fees.

Additionally, as to the requirement in Section 3(A)(2) that an employer continue health care coverage while an employee is on leave, SPO points out what it believes to be a conflict between the Act and two existing provisions of existing law: one outlines what contributions the state may make from public funds for healthcare benefits, and does not include an employee's portion in this schedule. See Section 10-7-4, NMSA 1978. The second permits the state to deduct the employees' share from the employee's salary, which it would be unable to do while the incapacitated employee is on unpaid leave. See Section 10-7-5, NMSA 1978.

Finally, Section 7(B), which lists damages that may be recovered, uses the conjunction "or" rather than "and", so that an employee who successfully challenges an employer's actions as violative of the Act may recover equitable relief or damages based on unpaid wages and those

arising from retaliation, or any other actual damages or reasonable attorney fees and costs. This use of "or" suggests that the prevailing employee may recover only from one of these categories, which is inconsistent with remedies authorized in other laws, where award from any or all categories may be authorized, and in particular, any award of attorney fees is typically in addition to an award of damages. See, for example, Section 28-1-13(D), NMSA 1978 allowing the court to award a prevailing complainant actual damages and reasonable attorney fees in an appeal brought under the Human Rights Act. Additionally, a prevailing party is generally entitled to recover costs by court rule. See Rule 1-054, NMRA.

Further, if the intent of the Act is to make the State as an employer liable just the same as a private employer, language to that effect in Section 7 may avoid further legal disputes. See Section 28-1-13(D).

ADMINISTRATIVE IMPLICATIONS

DOH reports that as a large employer, if the three month leave authorized in the Act is read as being in addition to that provided in the federal FMLA, there could be administrative performance implications for that agency caused by employees being out on leave for a period of up to six months.

RELATIONSHIP

This bill is related to HM 2, Parental Paid-Leave Working Group, which group is to develop recommendations for the establishment of a parent paid-leave program funded by a publicly managed fund containing contributions by private and public employees and employers that would fund up to eighty per cent of a protected employee's regular pay for up to twelve weeks for childbirth and to care for newborn, newly adopted or newly placed foster children.

This bill is also related to and may conflict with HB 409, which also requires reasonable workplace accommodations for an employee affected or disabled by pregnancy absent an undue hardship upon the employer, but only applies to employers employing 50 or more employees.

It is also related to and may conflict with SB 375, which enacts the New Mexico Family Act, which allows employees to request unpaid medical leave for specified reasons, including their own serious health issues and to bond with a newborn or newly adopted minor child. It also provides a reasonable level of compensation (similar to that of unemployment compensation) during this unpaid leave.

TECHNICAL ISSUES

HB 409 has the same short title as this bill: Pregnant Worker Accommodation Act.

OTHER SUBSTANTIVE ISSUES

AOC reports on an issue that arose at the committee hearing that led to this substitute concerning whether it is constitutional to refer in a New Mexico statute to a federal statute, which type of reference now appears on lines 6-7 on page 4 of CS/HB 37. After first advising that there is no clear resolution to this issue, AOC concludes that it does not appear to present a substantial constitutional question. It provides this analysis:

The New Mexico Constitution, art. IV, sec. 18, allows for federal tax provisions to be enacted into law by reference in state tax legislation. This is a narrow authorization, and does not expressly disallow other references to federal law by reference. So, in *Middle Rio Grande Water Users Ass'n v. Middle Rio Grande Conservancy Dist.*, 57 N.M. 287 (1953), the New Mexico Supreme Court held that reference to a federal law in state legislation was not violative of the state Constitution because the reference was surplusage. The question is whether the current substitute's reference to a federal tax law is enacting federal law, which is inappropriate, or is more like surplusage, which is allowable.

The precise use of the reference to federal law in CS/HB 37 is to identify what kind of health coverage an employer must maintain for an employee during the period of time the employee may not be working due to pregnancy or child birth. The bill does not enact provisions of the federal law and thus impose provisions of federal law on New Mexico; the bill merely uses federal law as an identifier. In fact, the Internal Revenue Code section 5000(b)(1) defines the term "group health plan" by use of generally understood, common language terms.

Section 10-7-15(B), NMSA 1978, which defines the term "cafeteria plan" for the purposes of what sort of health insurance is offered public employees, refers to federal law for a definition in virtually the same way that CS/HB 37 does. This provision has never been challenged on constitutional grounds. However, it is instructive that the provision has been enacted since 1987 without causing a problem.

Additionally, as to the matters addressed more generally in CS/HB 37, WSD reported in its earlier analysis that 12 states have passed legislation requiring some employees to provide reasonable accommodations to pregnant workers, including Alaska, California, Connecticut, Delaware, Hawaii, Illinois, Louisiana, Maryland, Minnesota, New Jersey, Texas and West Virginia.

Finally, DOH provides this background information:

Data from the New Mexico Pregnancy Risk Assessment Monitoring System (PRAMS) indicate that over half (55.5 per cent) of women giving live birth in 2012 had a paying job while they were pregnant. Three per cent of those indicated that they took no work leave, paid or unpaid, after the birth of their children. That meant they had to return to work on the next business day or take personal sick leave, as negotiated with their employers. Fewer than half (40.8 per cent) of women who had a paying job also had paid maternity leave. Women with leave said their decision was strained by the following factors: 37 per cent could not afford to take the time off, 37 per cent also said no paid leave was available, 28.2 per cent indicated their employers did not offer a flexible schedule, 27 per cent said they did not have enough personal leave built up to take the time they needed, 16 per cent were afraid they would lose their jobs, and 13 per cent said they had too much work to take more time off after the birth of their children.

Among women with some type of leave, 49 per cent had already returned to work by the time they answered the PRAMS survey, which was about 60 days after giving birth, and 14 per cent planned to return to work. The remainder said they would not return to work at all.

Among the 2012 PRAMS cohort, just 25 per cent of Native American women who had been employed during pregnancy had paid maternity leave compared to 40 per cent and 50 per cent of Hispanic and White women, respectively. In all three population groups about one-third of women said they could not afford to take off the time they really needed and 13 per cent to 16 per cent of all women expressed a fear of losing their jobs if they took longer leave. Forty percent of Native American women and 39 per cent of White women said paid leave was not an option compared to 32 per cent of Hispanic women. A quarter of all women said they did not have enough personal leave to take more time off after the birth of their children.

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