

# Employment Practices Liability

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## CHRO Issues Legal Enforcement Guidance On Its Pregnancy Discrimination Law

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Recently, Connecticut Fair Employment Practices Act was amended to clarify and add additional protections to workers who are pregnant, under-go childbirth or due to pregnancy related conditions (i.e. lactation or other conditions resulting from pregnancy or childbirth).

The CFEPA, which covers three or more employees, makes it unlawful to terminate or otherwise discriminate against an employee or applicant because of pregnancy, childbirth or related conditions. It is also unlawful to deny an employee or applicant reasonable accommodations or leave absent a showing of undue hardship to the employer. On April 23, 2019, the CHRO released enforcement guidelines to assist with the enforcement of these provisions of the CFEPA.

**Pregnancy-Related Conditions.** Symptoms and conditions that may give rise to need for reasonable accommodation or leave of absence include (but are not limited to): nausea, morning sickness, dehydration, lower blood sugar, swelling of extremities, increased body temperature, need for bed rest, anemia, abnormal placentation, bladder dysfunction, fatigue, migraines, sciatica, carpal tunnel, gestational diabetes, pregnancy-induced hypertension, preeclampsia, postpartum depression, infertility or need for fertility treatments, loss or termination of pregnancy and lactation conditions such as mastitis.

**Accommodation Examples.** The enforcement guidelines provide the following examples of reasonable accommodations:

1. Being permitted to sit or eat while working;
2. More frequent or longer breaks, including but not limited to bathroom, water or rest breaks;
3. Modifying policies prohibiting food or drinks while an employee is working;
4. Periodic rest;
5. Assistance with manual labor;
6. Being provided assistive equipment, such as a stool, chair or assistive lifting equipment;
7. Job restructuring;
8. Light duty or desk duty assignment;
9. Modified work schedules, including but not limited to option to telework;
10. Modified dress code or uniform requirements;
11. Moving a workstation to permit the movement or stretching of extremities, or to be closer to a bathroom;
12. Temporary transfers to less strenuous or hazardous work;
13. Time-off to attend pre-natal or post-natal appointments;
14. Time off for fertility treatments and to attend appointments.

**Medical Certification Typically Not Required.** Unlike the typical request for reasonable accommodation for disabled employees or applicants, the enforcement guidance prohibits an employer from requiring a doctor's

note before discussing the need for a reasonable accommodation and in many instances, a medical certification "should not be needed before granting the request." If the request involves time away from work to attend appointments for fertility treatments, an employer may request medical documentation.

**May Not Force Accommodation.** Notwithstanding the obligation to provide a reasonable accommodation unless doing so would create an undue hardship, it is also unlawful to force an employee or applicant to accept a reasonable accommodation they do not seek if they do not have a known limitation related to their pregnancy or if they do not require a reasonable accommodation to perform the essential functions of their job. It is also unlawful to force an employee to take a leave of absence if another reasonable accommodation can be provided instead of leave.

**Reasonable Leave.** Employees may request a reasonable leave of absence due to disability resulting from pregnancy. Typically, a reasonable leave is six weeks following a regular delivery and eight weeks following a caesarian section. There may be circumstances where longer is necessary.

**Medical Certifications Permitted For Leaves.** An employer may require an employee to provide medical certification for a reasonable leave of absence but only if the employee requests documentation from other employees requesting leave for reasons other than pregnancy, childbirth or related conditions. Employer must provide notice of this requirement. Employers should allow at least 15 days or as long as reasonably needed to comply with this requirement.

**Advance Notice.** When an employee knows in advance that they will need to take reasonable leave, they should provide advance notice in accordance with their policy, but cannot require more notice than asking for a leave of absence for other foreseeable reasons. When need for leave is not foreseeable, they should notify employer as soon as practicable/possible.

**Return Fitness for Duty.** If an employer requires a fitness for duty certification upon return from other types of leave and wishes to impose the same obligation, it must provide notice of that requirement to the employee prior to the leave.

**Lactation Breaks.** Employers must allow employees to use their break time to express milk or breast feed and must give them time off to do so in excess of their break time as frequently as needed typically three times per 8-hour workday. The time is unpaid unless an employer compensates the employees for break times, such as paid lunch breaks

**Lactation Location.** While already a law, the enforcement guidance reiterated requirements for a lactation requirement. An employer must make a reasonable effort to provide a room or other location in close proximity to an employee's work area other than a bathroom to express breast milk. The space should, at a minimum, provide a place to sit, a

surface place for a pump and an outlet and near running water and provide access to a refrigerator.

**Confidentiality.** An employee may choose to keep any medical diagnosis. An employee need only reveal: (1) the nature of the limitations that give rise to the need for an accommodation (i.e. back pain or inability to concentrate); and (2) that the limitations are related to the employee's pregnancy, childbirth or related condition.

**Interactive Process.** As with the ADA and the CFEPA, employers must engage in an interactive process with an employee when an employee makes a request for accommodation or anytime an employer knows or has a reasonable basis to believe that an employee may be in need of an accommodation. An employer must grant an employee's request for accommodation or leave unless it poses an undue hardship. If the employer reasonably determines that the request constitutes an undue hardship, the employer must explore alternative accommodations that might meet the employee's needs.

**Undue Hardship.** An undue hardship is a "high bar," requiring an employer to show significant difficulty or expense. The CHRO will take into account the size and resources of the employer and the impact of the accommodation on the operations of the employer. The CHRO will also consider whether the employer has an existing policy whereby it accommodates on-the-job or non-pregnancy related off-the-job injuries.

**Pay and Benefits During Leave.** An employer must pay an employee during leave if the employer provides pay to other similarly situated employees during temporary disability leaves. Similarly, an employer must maintain the same health coverage for employees on pregnancy leave as other temporary disability leaves. Notably, the FMLA requires continuation of health benefits during FMLA leave.

**Reinstatement to Equivalent Position.** The employee who returns from a reasonable leave is entitled to be reinstated to her original job or an equivalent position (equal pay, duties, benefits, work schedule and other terms and conditions of employment) unless, with a private employer, circumstances have so changed as to make it impossible or unreasonable for the employer to do so. Such circumstances are limited to those events that would have happened even if the employer had never taken leave.

**Notice to Employees.** An employer must provide employees written notice (in a language in which an employee is proficient) of their right to be free from discrimination based upon pregnancy, childbirth and related conditions, including reasonable accommodation and reasonable leave. Notice must be given at the beginning of employment (like in a handbook or workplace poster) and at the time an employee notifies the employer of her pregnancy within 10-days of notification.

**Retaliation Prohibited.** An employer may not retaliate against an employee based upon an employee's request for accommodation or leave or opposed a discriminatory practice, filed a complaint or testified, assisted or participated in an investigation before the CHRO.

**Practical Tips.** In light of this enforcement guidance, employers should review their discrimination policies, reasonable accommodation policies and leaves of absence policies to ensure that these rights have been clearly articulated and that there is parity among pregnancy related leaves and other leaves as discussed above. Moreover, employers should take great care before denying a request for an accommodation and should consult with counsel before making a determination that an accommodation request will pose an undue hardship.

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Robin Kallor is a partner at Rose Kallor, LLP. Rose Kallor, LLP regularly represents and advises private and public sector employers on matters pertaining to the employer-employee relationship, including the selection process, discrimination and harassment related issues and frequently conducts neutral workplace investigations. If you have questions about this legal update, please contact us at 860-361-7999. If you wish to receive future updates on labor and employment related topics, please contact Jacqueline Smith, CIRMA Communications Associate at [jsmith@ccm-ct.org](mailto:jsmith@ccm-ct.org).

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