

**WEST VIRGINIA  
SECRETARY OF STATE  
NATALIE E. TENNANT  
ADMINISTRATIVE LAW DIVISION**

Form #2

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OFFICE WEST VIRGINIA  
SECRETARY OF STATE

**NOTICE OF A COMMENT PERIOD ON A PROPOSED RULE**

AGENCY: WV Human Rights Commission TITLE NUMBER: 77

RULE TYPE: Legislative CITE AUTHORITY: WV Code 5-11-8(h), 5-11B-4 and 29A-3-1 et seq

AMENDMENT TO AN EXISTING RULE: YES  NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: \_\_\_\_\_

TITLE OF RULE BEING AMENDED: \_\_\_\_\_

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 10

TITLE OF RULE BEING PROPOSED: Pregnant Workers' Fairness Act

IN LIEU OF A PUBLIC HEARING, A COMMENT PERIOD HAS BEEN ESTABLISHED DURING WHICH ANY INTERESTED PERSON MAY SEND COMMENTS CONCERNING THESE PROPOSED RULES. THIS COMMENT PERIOD WILL END ON July 30, 2015 AT 2:00 p.m. ONLY WRITTEN COMMENTS WILL BE ACCEPTED AND ARE TO BE MAILED TO THE FOLLOWING ADDRESS:

Attn: Marykaye Jacquet, Executive Director

WV Human Rights Commission  
Room 108A

1321 Plaza East  
Charleston, WV 25301-1400

THE ISSUES TO BE HEARD SHALL BE LIMITED TO THIS PROPOSED RULE.

  
Authorized Signature

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

Title 77  
Legislative Rule  
West Virginia Human Rights Commission  
Series 10

Pregnant Workers' Fairness Act (PWFA)

Brief Summary of the Rule

The Pregnant Workers' Fairness Act (PWFA), W. Va. Code §5-11B-1 et seq., provides guidelines for interpreting the Act's prohibition against discrimination on the basis of sex by means of pregnancy discrimination and intended to assist all persons in understanding their rights, obligations and duties under the law in regard to this aspect of the PWFA, which applies to both men and women, respectively.

The PWFA sets forth: (1) definitions related to pregnancy; (2) reasonable accommodations in employment provided by covered entities to pregnant workers; (3) liability of covered entities who are responsible for their acts and those of its officers, agents and supervisory employees; and (4) prohibition of pre-employment practices by covered entities.

Title 77  
Legislative Rule  
West Virginia Human Rights Commission  
Series 10

Pregnant Workers' Fairness Act (PWFA)

Statement of Circumstances Requiring the Rule

The West Virginia Human Rights Commission, pursuant to W.Va. Code §5-11B-4, no later than two years after the enactment of W.Va. Code 11B, *effective June 4, 2014*, shall propose legislative rules in accordance with §29A-3-1, to carry out this article, which shall identify some reasonable accommodations addressing known limitations related to pregnancy, childbirth or related medical conditions that shall be provided to a job applicant or employee affected by such known limitations unless the covered entity can demonstrate that doing so would impose an undue hardship.

APPENDIX B

**FISCAL NOTE FOR PROPOSED RULES**

Pregnant Workers' Fairness Act

Rule Title: \_\_\_\_\_

Type of Rule:  Legislative  Interpretive  Procedural

Agency: WV Human Rights Commission

Address: Room 108A  
1321 Plaza East  
Charleston, WV 25301-1400

Phone Number: 304-558-2616 Email: Mary.K.Jacquet@wv.gov

**Fiscal Note Summary**

Summarize in a clear and concise manner what impact this measure will have on costs and revenues of state government.

With the enactment of Article 11B. Pregnant Workers' Fairness Act, effective June 4, 2014, it is estimated that the costs of state government will increase exponentially. At first, this proposed rule will have a low impact on cost and revenue.

However, as people become aware of their rights, pregnancy discrimination cases will increase, thereby increasing costs to the WV Human Rights Commission to investigate, mediate and litigate these pregnancy related claims for West Virginia. It is projected that, not only will the increase of these claims affect the work load of legal staff, this will ultimately necessitate the need for additional investigative and/or clerical staff.

**Fiscal Note Detail**

Show over-all effect in Item 1 and 2 and, in Item 3, give an explanation of Breakdown by fiscal year, including long-range effect.

| FISCAL YEAR                 |                                      |                                   |  |
|-----------------------------|--------------------------------------|-----------------------------------|--|
| Effect of Proposal          | Current Increase/Decrease (use "--") | Next Increase/Decrease (use "--") | Fiscal Year (Upon Full Implementation) |
| 1. Estimated Total Cost     | 25,920.00                            | 57,840.00                         | 103,680.00                             |
| Personal Services           | 21,513.00                            | 43,027.00                         | 86,054.00                              |
| Current Expenses            | 3,888.00                             | 7,776.00                          | 15,552.00                              |
| Repairs & Alterations       |                                      |                                   |  |
| Assets                      |                                      |                                   |  |
| Other                       | 519.00                               | 1,037.00                          | 2,074.00                               |
| 2. Estimated Total Revenues | 24,375.00                            | 24,375.00                         | 24,375.00                              |

Pregnant Workers' Fairness Act

Rule Title: \_\_\_\_\_

Rule Title: \_\_\_\_\_

**3. Explanation of above estimates (including long-range effect):**

Please include any increase or decrease in fees in your estimated total revenues.

Note #1: Estimates are for pregnancy cases only.

Note #2: Estimates are for FY 2016, FY2017 and FY2018.

Note #3: Estimated Revenue from State to remain constant.  
However, the last three years have decreased.

Note #4: Estimated Cost based on:

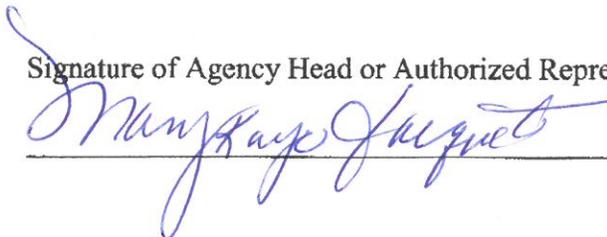
05 cases in FY 2016  
10 cases in FY 2017  
20 cases in FY 2018

**MEMORANDUM**

Please identify any areas of vagueness, technical defects, reasons the proposed rule **would not** have a fiscal impact, and/or any special issues **not** captured elsewhere on this form.

Date: June 29, 2015

Signature of Agency Head or Authorized Representative

  
\_\_\_\_\_

TITLE 77  
LEGISLATIVE RULE  
HUMAN RIGHTS COMMISSION

SERIES 10  
PREGNANT WORKERS' FAIRNESS ACT

§77-10-1. General.

1.1. Scope. — The following legislative regulations of the West Virginia Pregnant Workers' Fairness Act (PWFA), W. Va. Code §5-11B-1 et seq., set forth guidelines for interpreting the Act's prohibition against discrimination on the basis of sex by means of pregnancy discrimination and are intended to assist all persons in understanding their rights, obligations, and duties under the law in regard to this aspect of the PWFA.

1.2. Authority. -- W. Va. Code §5-11-8(h), §5-11B-4, and §29A-3-1 et seq.

1.3. Filing Date. — \_\_\_\_\_

1.4. Effective Date. — \_\_\_\_\_

§77-10-2. Definitions.

2.1. "Pregnancy" includes, but is not limited to, current pregnancy, past pregnancy, potential or intended pregnancy, and medical conditions related to pregnancy or childbirth.

2.2. "Undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subsection 2.2.1.

2.2.1. Factors to be considered in determining whether an accommodation would impose an undue hardship on a covered entity include—

2.2.1.a. The nature and cost of the accommodation needed under this article;

2.2.1.b. The overall financial resources of the facility or facilities of the covered entity involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of such facility;

2.2.1.c. The overall financial resources of the covered entity; the overall size of the business of the covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

2.2.1.d. The type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such covered entity, and the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

2.3. "Reasonable accommodation" means reasonable modifications or adjustments to be determined on a case-by-case basis which are designed as attempts to enable a person affected by pregnancy, childbirth, or related medical conditions to be hired or to remain in the position for which she/he was hired. Reasonable accommodation requires that a covered entity make reasonable modifications or adjustments designed as attempts to enable a person affected by pregnancy, childbirth, or related medical conditions to remain in the position for which she/he was hired. A covered entity shall make reasonable accommodation to the known limitations related to the pregnancy, childbirth, or related medical conditions of a job applicant or employee where necessary to enable such job applicant or employee to perform the essential functions of the job. Reasonable accommodations include, but are not limited to:

2.3.1. Making existing facilities used by job applicants and employees readily accessible to and usable by persons affected by pregnancy, childbirth, or related medical conditions; and

2.3.2. Job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustments or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for persons affected by pregnancy, childbirth, or related medical conditions.

2.4. "Related medical conditions" include, but are not limited to, miscarriage, pregnancy termination, and the complications of pregnancy or childbirth.

2.5. "Covered entity" means the state, or any political subdivision thereof, and any person employing twelve or more persons within the state for twenty or more calendar weeks in the calendar year in which the act of discrimination allegedly took place or the preceding calendar year.

2.6. "Person" means one or more individuals, partnerships, associations, organizations, corporations, labor organizations, cooperatives, legal representatives, trustees, trustees in bankruptcy, receivers and other organized groups of persons.

#### §77-10-3. Reasonable Accommodations.

3.1. An employer, potential employer, employment agency, joint apprenticeship committee, or labor organization (hereinafter collectively referred to as "covered entity") must provide a pregnant woman or person affected by pregnancy, childbirth, or related medical conditions with a reasonable accommodation in employment opportunities with respect to hire, tenure, terms, conditions, and privileges of employment, or any other matter, directly or indirectly, related to employment.

3.1.1. A reasonable accommodation includes, but is not limited to, bathroom breaks, breaks for increased water intake, periodic rest, assistance with manual labor, job restructuring or modified work schedules, modified work policies and procedures, and temporary transfers to less strenuous or hazardous work.

3.1.2. The employee or job applicant must request the accommodation upon the advice of a licensed health care provider.

3.1.3. A covered entity may not penalize an employee or job applicant for requesting an accommodation or using an accommodation.

3.2. A covered entity shall not be required to make such accommodation if she/he can establish that the accommodation would be unreasonable because it imposes undue hardship on the conduct of his/her business.

#### §77-10-4. Covered Entity Liability for Pregnancy Discrimination.

4.1. A covered entity is responsible for its acts and those of its officers, agents, and supervisory employees with respect to pregnancy discrimination regardless of whether the specific acts complained of were authorized or even forbidden by the covered entity and regardless of whether the covered entity knew or reasonably should have known of their occurrence, except that the covered entity is not responsible if the officer, agent, or supervisory employee was acting outside the scope of his or her employment. The Commission will examine the circumstances of the particular employment relationship and the job functions performed by the individual in determining whether an individual acted as an officer, or in either a supervisory or agency capacity, and acted within or outside of the scope of his/her employment.

4.2. Covered entities are encouraged to take all steps necessary to prevent pregnancy discrimination from occurring. Appropriate preventative steps include, but are not limited to, affirmatively expressing strong disapproval of pregnancy discrimination, and developing and implementing appropriate policies and procedures for responding to requests for reasonable accommodations for pregnancy, childbirth, and related medical conditions.

#### §77-1-5. Pre-Employment Practices.

5.1. A covered entity shall not make pre-employment inquiry of whether the employee or job applicant is affected by pregnancy, except that a covered entity may make pre-employment inquiries into the ability of an employee or a job applicant to perform job-related functions.

5.1.1. Affected by pregnancy includes, but is not limited to, the definition of "pregnancy" in section 2.1., and applies to both men and women, respectively.

**Amendments to West Virginia Code  
Addition of Article 11B (effective June 4, 2014)**

**ARTICLE 11B. PREGNANT WORKERS' FAIRNESS ACT.**

**§ 5-11B-1. Short title.**

This article may be cited as the Pregnant Workers' Fairness Act.

**§ 5-11B-2. Nondiscrimination with regard to reasonable accommodations related to pregnancy.**

It shall be an unlawful employment practice for a covered entity to:

(1) Not make reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical conditions of a job applicant or employee, following delivery by the applicant or employee of written documentation from the applicant's or employee's health care provider that specifies the applicant's or employee's limitations and suggesting what accommodations would address those limitations, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity;

(2) Deny employment opportunities to a job applicant or employee, if such denial is based on the refusal of the covered entity to make reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical conditions of an employee or applicant;

(3) Require a job applicant or employee affected by pregnancy, childbirth, or related medical conditions to accept an accommodation that such applicant or employee chooses not to accept; or

(4) Require an employee to take leave under any leave law or policy of the covered entity if another reasonable accommodation can be provided to the known limitations related to the pregnancy, childbirth, or related medical conditions of an employee.

**§ 5-11B-3. Remedies and enforcement.**

(a) The powers, procedures, and remedies provided in article eleven of this chapter to the Commission, the Attorney General, or any person, alleging a violation of the West Virginia Human Rights Act shall be the powers, procedures, and remedies this article provides to the Commission, the Attorney General, or any person, respectively, alleging an unlawful employment practice in violation of this article against an employee or job applicant.

(b) No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this article or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this article. The remedies and procedures otherwise provided for under this section shall be available to aggrieved individuals with respect to violations of this subsection.

**§ 5-11B-4. Rule-making.**

Not later than two years after the date of enactment of this article, the Commission shall propose legislative rules in accordance with article three, chapter twenty-nine-A of this code, to carry out this article. Such rules shall identify some reasonable accommodations addressing known limitations related to pregnancy, childbirth, or related medical conditions that shall be provided to a job applicant or employee affected by such known limitations unless the covered entity can demonstrate that doing so would impose an undue hardship.

**§ 5-11B-5. Definitions.**

As used in this article:

- (1) "Attorney General" means the West Virginia Attorney General;
- (2) "Commission" means the West Virginia Human Rights Commission;
- (3) "Covered entity" has the meaning given the word employer in section three, article eleven of this chapter;
- (4) "Person" has the meaning given the word in section three, article eleven of this chapter; and
- (5) "Reasonable accommodation" and "undue hardship" have the meanings given those terms in section 101 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111) and shall be construed as such terms have been construed under such Act and as set forth in the rules required by this article.

**§ 5-11B-6. Relationship to other laws.**

Nothing in this article shall be construed to invalidate or limit the remedies, rights, and procedures that provides greater or equal protection for workers affected by pregnancy, childbirth, or related medical conditions.

**§ 5-11B-7. Reports.**

The Commission shall annually on October 1 of each year report to the Joint Committee on Government and Finance on the number of complaints filed under this article during the pervious year and their resolution.