

SENATE BILL REPORT

ESSB 6149

As Amended by House, March 4, 2016

Title: An act relating to providing reasonable accommodations in the workplace for pregnant women.

Brief Description: Providing reasonable accommodations in the workplace for pregnant women.

Sponsors: Senate Committee on Commerce & Labor (originally sponsored by Senators Keiser, Conway, Jayapal, Cleveland, Rolfes, Fraser, Litzow, Fain, Nelson, Habib, Chase, Mullet, Lias, Pedersen, Takko, Hasegawa, Ranker, Frockt, Hill, Benton, Billig and Darneille).

Brief History:

Committee Activity: Commerce & Labor: 2/01/16, 2/03/16 [DPS].

Passed Senate: 2/16/16, 49-0.

Passed House: 3/04/16, 56-41.

SENATE COMMITTEE ON COMMERCE & LABOR

Majority Report: That Substitute Senate Bill No. 6149 be substituted therefor, and the substitute bill do pass.

Signed by Senators Baumgartner, Chair; Braun, Vice Chair; Hasegawa, Ranking Minority Member; Conway, Keiser, King and Warnick.

Staff: Richard Rodger (786-7461)

Background: Washington State Law Against Discrimination (WLAD). Under the WLAD a person has the right to be free from discrimination related to a protected status, such as race, national origin, sex, veteran or military status, sexual orientation, and disability. This includes the right to be free from discrimination in employment. It is an unfair practice for an employer to refuse to hire or to fire a person, or discriminate against a person in pay or conditions of employment, because of the person's protected status.

The WLAD defines "employers" to include persons who employ eight or more persons. It does not include any religious or sectarian organization not organized for private profit. "Employees" do not include any person employed by his or her parents, spouse, or child, or in the domestic service of any person.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Discrimination Based on Pregnancy. Depending on the circumstances, an employee who believes she has been discriminated against because of her pregnancy may be able to establish a claim of disability discrimination or sex discrimination.

Under Washington case law a pregnancy itself is not considered a disability; however, if a pregnancy-related medical condition results in the employee becoming temporarily disabled, the laws prohibiting discrimination because of disability could apply. Under the WLAD, an employer must provide reasonable accommodation to a disabled worker unless the employer can show that the accommodation would impose an undue hardship.

Regarding sex discrimination, an employer generally may not treat male employees differently than female employees. An employer may not refuse to hire, demote, or fire a woman, or impose different terms and conditions of employment on a woman because of pregnancy or childbirth. Generally, if an employer provides reasonable accommodations to a male employee who is impaired from doing his job, the employer may have to provide reasonable accommodations to a female employee who is impaired due to pregnancy.

Federal Acts. A number of federal acts provide a variety of protections or benefits relating to pregnant women. These acts include:

- Civil Rights Act - Female employees must be treated the same as other employees who have similar ability or inability to work. Covers employers with 15 or more employees.
- Family & Medical Leave Act - Eligible employees may take 12 weeks of unpaid leave. Covers employers with 50 or more employees, all public agencies, and all public or private elementary and secondary schools.
- Fair Labor Standards Act - Requires reasonable break time for nursing mothers. Generally covers all employers who engage in interstate commerce; hospitals; schools; and federal, state, and local government agencies. Exempts employers with fewer than 50 employees, if compliance imposes an undue hardship.
- Pregnancy Discrimination Act - Prohibits discrimination such that pregnant workers and job applicants must be treated like all other workers with similar temporary disabilities. Accommodations such as light duty, alternative assignments, disability leave, or unpaid leave to pregnant employees may be required, if it is offered to other temporarily disabled employees. Covers most employers with 15 or more employees.
- Americans with Disabilities Act - The ADA does not consider a normal pregnancy to be a disability; however, women with high-risk complications may qualify as disabled and be entitled to reasonable accommodations. Covers most employers with 15 or more employees, unless the accommodation would impose an undue hardship on the employer.

A Health Impact Review of Senate Bill 6149 was requested and is available at the Washington State Board of Health's website: <http://sboh.wa.gov/Portals/7/Doc/HealthImpactReviews/HIR-2016-04-SB6149.pdf>.

Summary of Engrossed Substitute Bill: An employer must provide reasonable accommodations to an employee for a pregnancy-related or childbirth-related health condition, unless the employer demonstrates that the accommodation would impose an undue

hardship. The employee must provide written notice to the employer stating that a health condition related to pregnancy or childbirth requires accommodation. The notice must include a certification from a licensed health care provider.

The licensed health care provider advice is not required for the following accommodations: more frequent, longer, or flexible restroom, food, and water breaks; seating; and limits on lifting over 20 pounds. An employer may not claim undue hardship for these accommodations.

The employee and employer must engage in an interactive process with respect to an employee's request for a reasonable accommodation.

The Department of Labor and Industries (L&I) must post information explaining the respective rights and responsibilities of the employer and the employee who has a health condition related to pregnancy or childbirth. Additionally, L&I must include information in the required workplace posters.

An employer is not required to create a new or additional position in order to accommodate an employee. An employer is also not required to discharge any employee, transfer any other employee with greater seniority, or promote any employee.

An employer may not require an employee who has a pregnancy-related or childbirth-related health condition to accept an accommodation, if such accommodation is unnecessary to enable the employee to perform her job.

An employer may not: (a) take adverse action against an employee who requests or uses an accommodation; (b) deny employment opportunities to an otherwise qualified employee; or (c) require an employee to take leave if another reasonable accommodation can be provided.

The bill does not preempt, limit, diminish, or otherwise affect any other provision of law relating to sex discrimination or pregnancy, or in any way diminish or limit the coverage for pregnancy, childbirth, or a pregnancy-related health conditions.

"Employer" is defined to mean a person engaged in an industry who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, but does not include tax-exempt nonprofit entities.

"Reasonable accommodations" include: (a) making existing facilities used by employees readily accessible to and usable by employees who have a pregnancy-related or childbirth-related disability; (b) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, or appropriate adjustment or modifications of examinations; (c) temporary transfer to a less strenuous or hazardous position; (d) limits on heavy lifting; and (e) scheduling flexibility for prenatal visits.

"Undue hardship" means an action requiring significant difficulty or expense.

The Attorney General is designated to investigate complaints and enforce these provisions. An aggrieved person injured by any act in violation of these provisions may also file a civil cause of action to enjoin further violations and to recover damages. Damages may include the actual damages sustained, the costs of suit, reasonable attorneys' fees, or any other appropriate remedy authorized by state or federal law.

Appropriation: None.

Fiscal Note: Available.

Committee/Commission/Task Force Created: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony on Original Bill: PRO: Many simple common-sense accommodations can be provided to pregnant employees without imposing a great burden on employers. These are generally minor, temporary accommodations such as bathroom breaks, need for water or food, and the ability to stand-up. Pregnant women need more protections from adverse employment actions related to their medical conditions. Federal and state laws prohibit discrimination, however, the worker must often show that non-pregnant disabled workers are treated differently. An undue hardship standard would provide a clear standard for both employees and employers. Five cities and fifteen other states have adopted these types accommodations. This bill allows women to take better care of their children and follow their doctors orders.

CON: We are not opposed to providing pregnancy accommodations. While this discussion has been focused around minor accommodations, the bill includes definitions that are hardly minor. This bill places the provisions in the discrimination statutes regarding civil rights and not in the worker's rights statutes. Not every pregnancy requires an accommodation, but the bill could require accommodations for every pregnancy. We believe the bill should be more narrowly focused and address specific accommodations that are more informed and targeted to the specific need for the specific worker.

OTHER: The State Board of Health conducted a Health Impact Review on this bill. The review shows findings including: there is a fair amount of evidence that employers would comply with reasonable pregnancy accommodations policies; there is very strong evidence that the pregnancy accommodations have potential to improve child and maternal health outcomes; and there is very strong evidence that the accommodations would decrease health disparities by race and ethnicity and income.

We don't discriminate against pregnant women, but these provisions shouldn't be put into black letter law. It would be tough on a employer if we had to bring in another employee to do their work.

Persons Testifying on Original Bill: PRO: Danielle Campoamor; Tara Mudaliar, Rainier Valley Community Clinic; Janet Chung, Legal Voice; Tatsuko Go Hollo, Children's Alliance; Maggie Humphries, Mom's Rising.

CON: Patrick Connor, NFIB/Washington.

OTHER: Sierra Rotakhina, WA State Board of Health; Larry Stevens, Mechanical Cont Assoc., Nat. Elect. Contractors Assn.

Persons Signed In To Testify But Not Testifying on Original Bill: No one.

House Amendment(s): Changes the definition of employer to reference the definition used under the Washington Law Against Discrimination - employers with eight or more employees - but exempts nonprofit religious and sectarian organizations. Requires an employer to provide reasonable accommodation for pregnancy, not just for a pregnancy-related or childbirth-related health condition.

Removes the requirement that the employee provide written notice stating that a health condition related to pregnancy or childbirth requires accommodation. Instead, the written certification from the employee's licensed health care provider must describe the specific physical needs, limitations, or conditions that require reasonable accommodation. Specifies that an employer is not required to create new or additional positions or discharge, transfer, or promote an employee under the bill, unless otherwise required under provisions of law relating to sex discrimination or disability discrimination. Specifies that the bill does not preempt, limit, diminish, or otherwise affect other provisions of law related to disability discrimination.

Changes the definition of "reasonable accommodation" to:

1. make it a nonexclusive list;
2. provide that making existing facilities accessible and usable is an accommodation for a "condition" rather than "disability"; and
3. add scheduling flexibility as a reasonable accommodation for postnatal visits, in addition to prenatal visits.

Changes the definition of "undue hardship" to mean that the cost or difficulty is unreasonable in view of:

1. the size of the employer and the financial and other resources available to the employer;
2. whether the cost can be included in planned remodeling or maintenance; and
3. the requirements of other laws and contracts, and other appropriate considerations.

Provides the Attorney General certain subpoena powers to enforce the provisions and allows the Attorney General to seek all appropriate relief in court, including costs and reasonable attorneys' fees. Specifies that the Department of Labor and Industries' inclusion of information in the workplace posters must be within existing resources.