July 27, 2015

West Virginia Human Rights Commission
1321 Plaza East Room 108A
Charleston, WV 25301-1400

RE: Implementation of the Pregnant Workers' Fairness Act

Dear Members of the West Virginia Human Rights Commission:

For over 40 years, the National Women's Law Center has been working to advance and protect women's equality and opportunity, with a particular focus on women's economic security, education, employment and health. WV FREE, founded in 1989, is a reproductive health education and advocacy organization that works every day to protect the health of West Virginia women and families. The National Women's Law Center and WV FREE worked together with West Virginia legislators to craft the West Virginia Pregnant Workers' Fairness Act (PWFA) and were thrilled when it was adopted by unanimous vote last year. A Better Balance: The Work and Family Legal Center (ABB) is a national non-profit legal advocacy organization dedicated to ensuring that workers have the time and flexibility they need to care for their families without sacrificing their economic security. ABB has worked in twelve states and localities to advance, implement, and enforce pregnancy accommodation laws across the country. Our organizations agree that the protections provided by the West Virginia PWFA will be critical to the health and economic security of working women and their families across the state.

We are grateful for the opportunity to comment on the Human Rights Commission's proposed regulations to implement the PWFA. Overall, the proposed regulations provide strong protections for West Virginia's pregnant workers. We wish to take this opportunity, however, to offer some suggestions regarding the content of the rules that would promote greater clarity regarding the obligations and expectations of employers and employees alike.

I. *Medical Condition Related to Pregnancy or Childbirth*

A. Clarifying Meaning of "Related Medical Conditions"

We support the proposed regulations' definition of "related medical condition" as including, but not being to, "miscarriage, pregnancy termination, and the complications of pregnancy and childbirth." However, to clarify what the Commission means by "complications of pregnancy and childbirth," it would be helpful to include an explicitly non-exhaustive list of examples of what constitutes a medical condition related to pregnancy or childbirth. This list might include:

- Morning sickness;
- Illnesses or complications that an employee is experiencing as a result of pregnancy such as gestational diabetes, pregnancy-induced hypertension, pregnancy-related carpal tunnel syndrome;

- Lactation or the need to express breast milk;
- Physical recovery from childbirth;
- Fertility treatments or other assistance with becoming pregnant;
- Illnesses or complications that an employee is experiencing as a result of childbirth; such as postpartum depression, etc.

B. Adding Language to Alert Employers to Obligations Under Multiple Laws

To ensure that employers fully understand their obligations under state and federal law, the rules should also note that in some instances a medical condition related to pregnancy or childbirth will also constitute a disability under the Americans with Disabilities Act and/or the West Virginia Human Rights Act; and that failure to provide accommodations in some instances could also be a violation of the federal Pregnancy Discrimination Act and/or West Virginia Human Rights Act sex discrimination provision. This will alert employers and their legal counsel that they should consider their obligations under multiple statutes, saving valuable time and resources for employers.

II. *Limitation Related to Pregnancy, Childbirth, or a Related Medical Condition*

The West Virginia PWFA in § 5-11B-2 states that it is unlawful for a covered entity to "not make reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical conditions" of an applicant or employee. Although the proposed regulations do offer a definition of "related medical conditions," they do not contain a definition of the "limitations related to pregnancy, childbirth, or a related medical condition."

We recommend that the Commission provide a non-exhaustive list of examples of what constitutes a limitation related to pregnancy, childbirth or a related medical condition. Again, emphasizing in the rule that this list is illustrative rather than exclusive (by using the language: "including, but not limited to") is important. We recommend that this list include:

- Physical or mental symptoms that an employee is experiencing as a result of pregnancy, childbirth, or a related medical condition, if they affect the employee's ability to perform her job or comply with workplace requirements (*e.g.*, swelling of legs experienced when an employee stands for long periods of time for work, or uterine contractions experienced when an employee cannot drink water throughout the day because of a prohibition on eating or drinking during a shift);
- Limitations on physical or mental ability that an employee is experiencing as a result of pregnancy, childbirth, or a related medical condition, if they affect the employee's ability to perform her job or comply with workplace requirements (*e.g.*, an inability to climb ladders as a result of changes in balance);
- Measures recommended by a health care provider to prevent injury or complications for which an employee is at risk as the result of pregnancy, childbirth, or a related medical condition, if they affect the employee's ability to perform her job or comply with workplace requirements (*e.g.*, a precautionary lifting restriction, or a requirement that an employee avoid exposure to particular toxins in the workplace); and
- An employee's inability to comply with workplace rules as a result of pregnancy, childbirth, or a related medical condition (*e.g.*, an employee's inability to wear a non-maternity uniform or protective gear that is not sized for pregnancy, or an employee's inability to fulfill otherwise required procedures before taking a break when an employees is suffering from acute and unpredictable bouts of nausea).

III. *Written Documentation from a Health Care Provider*

The PWFA indicates that an employee seeking reasonable accommodation may be required to provide written documentation from a health care provider specifying her limitations related to pregnancy, childbirth, or a related medical condition and suggesting accommodations to address those limitations. In its proposed regulations, the Commission states: "The employee or job applicant must request the accommodation upon the advice of a licensed health care provider."

The Commission should clarify that employers may provide accommodation even without medical documentation, although alternatively they may request verification after the request for accommodation has been made. In other words, employees do not need to provide written documentation from a medical provider in the first instance of requesting a reasonable accommodation. We also recommend that the Commission expand on "licensed health care provider" to give fuller understanding to the health care options accessed by pregnant workers. We urge the Commission to define "health care provider" for purposes of this provision to include a physician, nurse, midwife, pharmacist, physician assistant, physical therapist, occupational therapist, mental health practitioner, or other health care professional providing care to the employee. The Commission should also specify that if initial documentation provides insufficient detail to determine the nature of the pregnant employee's limitation or the type of accommodation necessary to address this limitation, the employer must explain why the documentation is insufficient and offer the employee a chance to provide additional documentation with the necessary detail.

IV. *Reasonable Accommodation*

We support the Commission's proposed regulations on "reasonable accommodations," but strongly urge the Commission to more clearly lay out what reasonable accommodations may look like in the context of pregnancy-related limitations.

In defining and discussing reasonable accommodations in its proposed regulations, the Commission appropriately draws upon the regulations implementing the federal Americans with Disabilities Act, 29 C.F.R. § 1630.2. For example, the proposed regulations define "reasonable accommodations" as meaning,

> [R]easonable 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 pregnancy, childbirth, or related medical conditions for a job applicant or employee where necessary to enable such job applicant or employee to perform the essential functions of the job.

A. Adding that the Process of Determining Reasonable Accommodations is an Interactive Process

Similar to the language in the ADA, the Commission states that reasonable accommodations include but are not limited to making existing facilities accessible to and useable by workers affected by pregnancy, as well as,

> job restructuring, part-time or modified works 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.

However, while this language is largely taken from the federal regulations implementing the ADA, the proposed regulations do not include language on the interactive process of identifying appropriate accommodations as the ADA does. The federal regulations implementing the ADA states that "to determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the individual" who needs the accommodation, to work to identify the limitations and potential reasonable accommodations to meet those limitations.

It is critical that the final rules implementing the West Virginia PWFA also incorporate a requirement that employers undertake a good faith, interactive process to determine the appropriate reasonable accommodation for the pregnant employee if they decide not to grant the initial accommodation requested by the employee.

B. Incorporating a Stronger List of Examples of Reasonable Accommodations Addressing Known Limitations of Pregnancy

The West Virginia PWFA specifically requires the Commission to incorporate into its rules a list of examples of 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. The Commission has responded by providing:

> 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.

While this list represents a helpful starting point, these broad categories would better illustrate the accommodation possibilities open to employees and employers if they included specific examples. We suggest that this list should at minimum include the following accommodations:

- Providing a stool or other seating if a pregnant employee whose job ordinarily requires her to stand has a limitation in her ability to stand;
- Modifying a no-food-or-drink policy if a pregnant employee has a limitation that requires her to drink water or eat more frequently than normal;
- Providing more frequent breaks if a pregnant employee has a limitation that requires her to rest more frequently, requires her to eat or drink more frequently than normal, and/or requires her to use the bathroom more frequently than normal;
- Providing time off for prenatal medical appointments;
- Reassigning specific job duties – such as those involving heavy lifting, climbing ladders, repetitive bending, etc. – if a pregnant employee has a limitation that prevents her from doing these specific duties;
- Reassignment to available "light duty" or equivalent positions;

- Transferring a pregnant employee to an alternative, available position for which she is qualified if the employee has a limitation that prevents her from performing her current position, regardless of whether or not an employer maintains an official "light duty" policy or program; and
- Providing breaks and private and sanitary facilities for a lactating employee to express breast milk.

Under the proposed regulations, some of these accommodations may fall within broader categories already listed such as "modified work policies and procedures" and "job restructuring or modified work schedules." However, some of these suggestions do not fall within any of the proposed examples. For example, "Providing time off for prenatal medical appointments" and "Providing breaks and private and sanitary facilities for a lactating employee to express breast milk" are critical and common accommodations for the women who need them, but it is not clear from the proposed regulations whether these would fall within the examples of reasonable accommodations. While it is important to state that the list of examples is not exhaustive, it is equally important to ensure that the list contains some of the most common accommodations needed, to make the process as clear and easy as possible for employees and employers.

It is also essential to emphasize in the rule that the failure to list a particular accommodation in the rules does not create a presumption that the accommodation is not reasonable.

V. *Undue Hardship*

We strongly support Commission's definition of "undue hardship." The definition, borrowed from the regulations implementing the federal ADA in 29 C.F.R. § 1630.2, includes both an explanation of how undue hardship on the operation of an employer's business will be assessed ("an action requiring significant difficulty or expense, when considered in light" or particular factors), as well as an identification of the factors that are relevant in making a determination of undue hardship.

A. Including an Explanation of How an Employer's Existing Accommodation Policies May Affect Its Obligations Towards Pregnant Workers

While we support the definition of "undue hardship" and the enumerated factors to be considered, an important element is missing. There is no explanation of how an employer's existing policies and practices with regards to accommodating non-pregnant workers affects its obligation to accommodate pregnant workers. We strongly recommend that the rules include an explicit statement that if an employer already makes a particular accommodation for other employees to comply with its obligations under the Americans with Disabilities Act or the West Virginia Human Rights Act, pursuant to a policy or practice of accommodating on-the-job injuries, or pursuant to any another law or policy, that will be considered strong evidence that extending the accommodation to the pregnant employee will not impose an undue hardship on the employer. This clear statement would prevent confusion as well as potential litigation costs, since the rule would advise employers about how their existing policies would be calculated into an undue hardship analysis.

B. Including an Explanation of Employee's Right to Refuse an Unnecessary Accommodation

We recommend that the Commission's rules explain that pursuant to W. Va. Code § 5-11B-2(3) an employer cannot require an applicant or employee to accept any accommodation that the applicant or employee chooses not to accept if the applicant or employee does not have any known limitations related to pregnancy, childbirth or a related medical condition or if this accommodation is not necessary for the applicant or

employee to be able to adequately perform her job. The rules should further explain that the prohibition on requiring an applicant or employee to accept an unnecessary accommodation does not prevent an employer and employee from mutually agreeing to any accommodation.

VI. *Forced Leave*

The proposed regulations are silent on explaining the PWFA's prohibition on forced leave. Therefore, we recommend that the Commission's final rules explain that pursuant to W. Va. Code § 5-11B-2(4) an employer cannot require an employee to take leave if there is another reasonable accommodation that can be provided to the known limitations of the employee. This prohibition on requiring an employee to take leave should apply to Family and Medical Leave Act leave, sick leave, annual leave, or any other form of paid or unpaid leave, even if not part of any official employer policy or program. The rules should further explain that this prohibition on an employer requiring an employee to take leave does not prevent an employee electing to take any form of leave to which she is entitled or which the employer permits.

VII. *Record Retention*

The proposed regulations are also silent on an employer's recordkeeping obligations. We urge the Commission to include in its final rules a requirement that employers must retain any written requests for reasonable accommodation that have been made by employees or applicants affected by pregnancy, childbirth, or related medical conditions and any written response that was made to each of those requests for at least one year, similar to the requirements imposed by the ADA to retain records related to requests for accommodation. This should include a requirement to maintain a copy of any written documentation submitted by employees to support a request, with appropriate safeguards for employee privacy. However, the rules should also include an explicit statement that any absence of such a record shall not be offered as competent evidence in any later litigation as to whether or not an employee actually made a request for reasonable accommodation.

VIII. *Employer Liability for Pregnancy Discrimination*

We support the proposed regulation's explanation that a covered entity may be vicariously liable for pregnancy discrimination when conducted by itself and its officers, agents, and supervisory employees, regardless of whether the alleged bad act was authorized or even forbidden, and regardless of whether the covered entity knew or should have known about its occurrence. Equally as important is the Commission's statement that it will examine the circumstances of a particular employment relationships and job functions on a case-by-case basis. However, we urge the Commission to define "supervisory employee" as one who directs the daily duties of an employee's job, such as controlling schedules and shifts.

We also support the proposed regulations' statement that covered entities are encouraged to take all steps necessary to prevent pregnancy discrimination, and the inclusion of examples of appropriate preventative steps. However, the Commission should make clear that while this may reduce a covered entity's liability, an employer might still be found vicariously liable for pregnancy discrimination depending on the facts and circumstances of each case.

IX. *Pre-Employment Practices*

We strongly support the Commission's proposal to prohibit pre-employment inquiries of whether an employee or job applicant is affected by pregnancy, childbirth, or related medical conditions. This prohibition, taken from the federal regulations implementing the ADA (29 C.F.R. § 1630.13), along with the proposed regulations' definition of "pregnancy," will work to prevent pregnancy discrimination and ensure that workers affected by current pregnancy, past pregnancy, potential or intended pregnancy, and medical conditions related to pregnancy or childbirth, are entitled to equal job opportunities.

X. *Rights Protected Under Other Statutes*

Finally, we encourage the Commission to explain in its rules that employees protected by the PWFA may also have rights under the Americans with Disabilities Act, West Virginia Human Rights Act, Family and Medical Leave Act, Pregnancy Discrimination Act, or other provisions of law. The rules should also in particular explain:

- That an employee may be entitled to a reasonable accommodation because of a medical condition related to pregnancy both as a result of the PWFA and as a result of that medical condition qualifying as a disability under the Americans with Disabilities Act and/or the West Virginia Human Rights Act; and
- That an employee may be entitled to leave both under the Family and Medical Leave Act and as a reasonable accommodation under the PWFA, but that even if an employee is not eligible for leave under the Family and Medical Leave Act she may still be entitled to leave as a reasonable accommodation under the PWFA if providing this leave will not impose an undue hardship on her employer.
- That an employee may be entitled to protections related to pregnancy as a result of the Pregnancy Discrimination Act.

XI. *Additional Clarifications*

There are a few additional clarifications to the PWFA that we urge the Commission to make through its rules:

- A clarification that making a request for a reasonable accommodation is a form of activity protected against discrimination by W. Va. Code § 5-11B-3(b), and that an individual may not be subjected to any retaliation for making such a request;
- A clarification that the laws' prohibition on denying employment opportunities based on an employer's refusal to make a reasonable accommodation in W. Va. Code § 5-11B-2(2) is not dependent on the employee or applicant providing written documentation from a health care provider;
- A clarification that the law's prohibition on requiring an applicant or employee to accept accommodations that the individual chooses not to accept in W. Va. Code § 5-11B-2(3) is not dependent on the employee or applicant providing written documentation from a health care provider;
- A clarification that the law's prohibition on requiring an employee to take leave if another reasonable accommodation can be provided in W. Va. Code § 5-11B-2(4) is not dependent on the employee or applicant providing written documentation from a health care provider.

XII. *Fiscal Note for Proposed Rules*

We urge the Commission to reanalyze the fiscal note summary, in light of evidence from other states that have implemented similar legislation without seeing a rise in cost to the state. Clear legislation, like the PWFA,

actually decreases litigation, because disputes can be resolved quickly and informally, often with a simple phone call or conversation with an employer. For example, A Better Balance has over a year of experience implementing the New York City Pregnant Workers Fairness Act, and has seen this result in action. In California, which has had similar legislation on the books for over fifteen years, pregnancy discrimination claims filed with their agency decreased after the accommodation law was passed, even as claims increased in the rest of the country. Hawaii, Illinois, Alaska, and Connecticut have reported similar findings. Additionally, it is certainly hyperbole and inaccurate to describe that the costs to the state will "increase exponentially." We recommend that the fiscal note be eliminated, with possible savings to the state acknowledged instead.

Thank you for your consideration of these comments as you finalize implementing regulations.

Sincerely,

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