

DEPARTMENT OF HUMAN RIGHTS

NOTICE OF PROPOSED RULES

- 1) Heading of the Part: Joint Rules of the Human Rights Commission and Department of Human Rights: Rules on Pregnancy Discrimination and Accommodation in Employment
- 2) Code Citation: 56 Ill. Adm. Code 2535
- 3)

<u>Section Numbers:</u>	<u>Proposed Actions:</u>
2535.10	New Section
2535.20	New Section
2535.100	New Section
2535.110	New Section
2535.120	New Section
2535.130	New Section
2535.140	New Section
2535.150	New Section
2535.160	New Section
2535.170	New Section
2535.200	New Section
2535.210	New Section
2535.220	New Section
2535.300	New Section
- 4) Statutory Authority: Implementing Sections 2-102(I), (J) and (K), and authorized by Sections 7-101(A) and 8-102(E) of the Illinois Human Rights Act [775 ILCS 5/2-102, 7-101, and 8-102]
- 5) A Complete Description of the Subjects and Issues Involved: The proposed rules will provide specific implementation procedures for PA 98-1050 with regards to the duty for employers to accommodate pregnant employees.
- 6) Published studies or reports, and sources of underlying data, used to compose this rulemaking: None
- 7) Will this rulemaking replace any emergency rule currently in effect? No
- 8) Does this rulemaking contain an automatic repeal date? No
- 9) Does this rulemaking contain incorporations by reference? No
- 10) Are there any other rulemakings pending on this Part? No

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- 11) Statement of Statewide Policy Objective: The proposed rules offer employers specific procedures for accommodating pregnant employees.
- 12) Time, Place, and Manner in which interested persons may comment on this proposed rulemaking: Interested parties may submit comments in writing within 45 days after publication to:

David T. Rothal
Staff Attorney
Illinois Department of Human Rights – Legal Division
100 W. Randolph St., Ste. 10-100
Chicago IL 60601

312/814-6257 or 866/740-3953 (TTY)
- 13) Initial Regulatory Flexibility Analysis:
 - A) Types of small businesses, small municipalities and not for profit corporations affected: The amendments affect all employers' duty to accommodate pregnant employees.
 - B) Reporting, bookkeeping or other procedures required for compliance: No changes
 - C) Types of professional skills necessary for compliance: None
- 14) Regulatory Agenda on which this rulemaking was summarized: The proposed amendments were contained in the regulatory agenda for January 2015.

The full text of the Proposed Rules begins on the next page:

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TITLE 56: LABOR AND EMPLOYMENT
CHAPTER II: DEPARTMENT OF HUMAN RIGHTS

PART 2535

JOINT RULES OF THE HUMAN RIGHTS COMMISSION AND DEPARTMENT OF
HUMAN RIGHTS: RULES ON PREGNANCY DISCRIMINATION
AND ACCOMMODATION IN EMPLOYMENT

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Section

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2535.20	Definitions

SUBPART B: REASONABLE ACCOMMODATION

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2535.120	Interactive Process
2535.130	Temporary Transfer or Reassignment as an Accommodation
2535.140	Time Off or Leave as an Accommodation
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2535.160	Duties of the Employer
2535.170	Documentation of the Need for an Accommodation

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2535.200	Discrimination on the Basis of Pregnancy in Employment
2535.210	Retaliation for Requesting an Accommodation
2535.220	Forced Accommodation or Leave

SUBPART D: NOTICE

2535.300	Posting of Pregnancy Discrimination Notice
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AUTHORITY: Implementing Sections 2-102(I), (J) and (K), and authorized by Sections 7-101(A) and 8-102(E), of the Illinois Human Rights Act [775 ILCS 5/2-102, 7-101 and 8-102].

SOURCE: Adopted at 39 Ill. Reg. _____, effective _____.

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SUBPART A: INTERPRETATIONS

Section 2535.10 Purpose

This Part interprets the provisions of Section 2-102(I), (J) and (K) of the Illinois Human Rights Act [775 ILCS 5] prohibiting discrimination in employment on the basis of pregnancy, requiring employers to reasonably accommodate a job applicant's or employee's pregnancy, and requiring employers to notify employees of their rights under these statutes. For purposes of these prohibitions against discrimination on the basis of pregnancy, Section 2-102(I), (J) and (K) apply to all units of State and local government in Illinois, to all persons employing one or more individuals, and to all employment agencies and labor organizations (see Section 2-101(B), (C) and (D) of the Act).

Section 2535.20 Definitions

Act – the Illinois Human Rights Act [775 ILCS 5].

Commission – the Illinois Human Rights Commission.

Common condition related to pregnancy or childbirth – a condition that commonly develops as a result of pregnancy or childbirth, or the physiological changes or processes that accompany pregnancy or childbirth. Examples of common conditions related to pregnancy or childbirth include, but are not limited to, backaches, cramping, headaches, morning sickness or nausea, frequent urination, sleeplessness, swollen ankles, feet or fingers, and lactation.

Department – the Illinois Department of Human Rights.

Health care provider – a person who provides medical or health services related to pregnancy or childbirth, including, but not limited to, obstetricians or gynecologists, perinatologists, family physicians, physician assistants, nurse practitioners, certified nurse midwives, and certified doulas.

Medical condition related to pregnancy or childbirth – a physical or mental impairment, condition, feature or attribute that develops as a result of or in conjunction with pregnancy or childbirth. Medical conditions related to pregnancy or childbirth need not constitute a disability within the meaning of the Act and may be transitory in nature. Examples of medical conditions related to

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pregnancy or childbirth include, but are not limited, to gestational diabetes, preeclampsia, post-partum depression, ectopic pregnancy, miscarriage, hypothyroidism and toxoplasmosis.

Pregnancy condition – pregnancy, childbirth or medical or common condition related to pregnancy or childbirth.

Reasonable accommodation – shall have the same meaning ascribed in Section 2-102(J) of the Act.

Undue hardship – shall have the same meaning ascribed in Section 2-102(J) of the Act.

SUBPART B: REASONABLE ACCOMMODATION

Section 2535.100 Duty to Accommodate

- a) Employers and labor organizations must make reasonable accommodations for any medical or common condition related to pregnancy or childbirth, unless the employer or labor organization can demonstrate that the accommodation would impose an undue hardship on the ordinary operations of the business of the employer or labor organization.
- b) Reasonable accommodations include:
 - 1) Modifications or adjustments to a job application process that enable a qualified job applicant affected by a pregnancy condition, to be considered for the position;
 - 2) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position is customarily performed, that enable a qualified employee affected by a pregnancy condition to perform the essential functions of her position;
 - 3) Modifications or adjustments to an employee's full or part-time employment status, work schedule, job structure or job assignments, or a temporary transfer to another position, if the employee affected by a pregnancy condition is unable to perform the essential functions of her position;

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- 4) Modifications or adjustments that enable an employee affected by a pregnancy condition to enjoy equal benefits and privileges of employment as are enjoyed by other similarly situated employees.
- c) Examples of reasonable accommodations include:
- 1) More frequent or longer bathroom breaks, breaks for increased water intake, breaks for periodic rests and seating;
 - 2) Private non-bathroom space for expressing breast milk and breastfeeding;
 - 3) Assistance with manual labor, light duty, temporary transfer to a less strenuous or hazardous position, and reassignment to a vacant position;
 - 4) Making existing facilities and worksites readily accessible and usable;
 - 5) Job restructuring, part-time or modified work schedules, acquisition or modifications of equipment or devices, and appropriate adjustment or modification of examinations, training materials or policies; and
 - 6) Time off to recover from conditions related to childbirth, and leave necessitated by a pregnancy condition.
- d) Accommodations of a personal nature (e.g., providing a breast pump) need not be provided.
- e) No employer is required to:
- 1) Create additional employment that the employer would not otherwise have created to accommodate an employee affected by a pregnancy condition, unless the employer does so or would do so for other classes of employees who need accommodation.
 - 2) Discharge any employee, or transfer any employee with more seniority, to accommodate an employee under this Section, unless the employer does so or would do so to accommodate other classes of employees who need it.

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- 3) Transfer or promote an employee who is not qualified to perform the job as an accommodation under this Section, unless the employer does so or would do so to accommodate other classes of employees who need it.

Section 2535.110 Undue Hardship

- a) The employer has the burden of proving undue hardship.
- b) Whether an accommodation would impose an undue hardship on the ordinary operation of the business of the employer will involve consideration of the following factors:
 - 1) The nature and cost of the accommodation needed;
 - 2) The overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at the facility, the effect on expenses and resources, or the impact otherwise of the accommodation upon the operations of the facility;
 - 3) The overall financial resources of the employer, the overall size of the business of the employer with respect to the number of its employees, and the number, type and location of its facilities; and
 - 4) The type of operation or operations of the employer, including the composition, structure and functions of the workforce of the employer and the geographic separateness and administrative or fiscal relationship to the employer of the facility or facilities in question.
- c) Evidence that the employer provides or would be required to provide a similar accommodation to similarly situated job applicants or employees creates a rebuttable presumption that the accommodation does not impose an undue hardship on the employer.

Section 2535.120 Interactive Process

- a) To determine the appropriate reasonable accommodation, the employer and job applicant or employee shall engage in a timely, good faith, meaningful, exchange to determine the effective reasonable accommodation. This process should

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identify the precise limitations resulting from the pregnancy condition, and the potential reasonable accommodations that could overcome those limitations. If the employer believes the requested accommodation will impose an undue hardship, this process should also cover whether there is any less restrictive alternative available that could accommodate the job applicant's or employee's pregnancy condition in lieu of the requested accommodation.

- b) During the interactive process, the employer and job applicant or employee should first explore whether there are any accommodations that would permit the job applicant or employee to perform the essential functions of the applied for or current position. If no such accommodation is available, the employer and job applicant or employee should explore whether there are any accommodations that would permit the job applicant or employee to work in another capacity for the duration of the pregnancy or the recovery from the pregnancy condition. Examples of accommodations that may allow a job applicant or employee to begin work or continue working include, but are not limited to, a temporary transfer, reassignment or job restructuring.
- c) During the interactive process, an employer may offer alternate accommodations to the job applicant or employee. A job applicant's or employee's refusal to accept an alternate accommodation offered by the employer during the interactive process may constitute evidence that the job applicant or employee is not participating in good faith during the interactive process if:
 - 1) The alternative accommodation would adequately accommodate the job applicant's or employee's pregnancy condition;
 - 2) The alternative accommodation offered by the employer would impose a lesser disruption to the operations of the employer; and
 - 3) The alternative accommodation is approved by the job applicant's or employee's health care provider.
- d) In the event that a requested accommodation would impose an undue hardship on the employer after the employer and job applicant or employee had engaged in the interactive process, a job applicant or employee can provide her own accommodation at her own expense, provided that the accommodation does not unduly disrupt the ordinary conduct of the employer's business.

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Section 2535.130 Temporary Transfer or Reassignment as an Accommodation

- a) If, as a result of a job applicant's or employee's pregnancy condition, the job applicant or employee is unable to perform the essential functions of her current position, the job applicant or employee may request accommodation. Examples of accommodations that may allow a job applicant or employee to work include, but are not limited to:
- 1) A temporary transfer to either a less strenuous or less hazardous position, or to a light duty position;
 - 2) A temporary reassignment to a vacant position;
 - 3) A temporary restructuring of the position sought or held;
 - 4) A temporary modification of the job applicant's or employee's work schedule; or
 - 5) A temporary transfer to a part-time position or to part-time status.
- b) An employer is not obligated to transfer or reassign a job applicant or employee to a position for which the job applicant or employee is not qualified and immediately able to perform the duties of the position, unless the employer does so or would do so to accommodate other classes of employees who need it.
- c) An employer may reduce the rate of pay of a job applicant or employee who receives a temporary job transfer or reassignment to another position at the rate of pay of the position into which the job applicant or employee transfers, unless the employer did not do so or would not do so for other classes of job applicants or employees under similar circumstances. If the rate of pay of the position into which the job applicant or employee transfers is compensated at a rate of pay higher than the job applicant's or employee's previous position, the employer must compensate the job applicant or employee at the higher rate of pay while the job applicant or employee is performing the new position.
- d) An employer may reduce the rate of pay of an employee whose position is temporarily restructured or whose schedule is modified, or who is reduced to part-time status to reflect the new or modified job duties, schedule or part-time status, unless the employer did not do so or would not do so for other classes of

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employees under similar circumstances. If an employer chooses to reduce a job applicant's or employee's pay pursuant to this Section, the burden is on the employer to show that the change in pay is justified by and consistent with the change in job duties, schedule or employment status.

- e) An employer may not reduce the fringe benefits, including insurance coverage, because the employee was temporarily transferred or reassigned to another position, placed on light duty, reduced to part-time status, or placed on a modified work schedule, or because the employee's position was restructured, unless the employer can demonstrate that not doing so would impose an undue hardship on the ordinary operation of the business of the employer.

Section 2535.140 Time Off or Leave as an Accommodation

- a) An employer must grant a job applicant or employee time off or a leave of absence necessitated by the employee's pregnancy condition as an accommodation, unless the employer can demonstrate that there is another effective accommodation that would enable the employee to continue working, or the accommodation would impose an undue hardship on the ordinary operation of the business of the employer.
- b) If the necessity for time off or leave is foreseeable, the job applicant or employee shall provide the employer with prior notice of the expected need for time off or leave in a manner that is reasonable and practicable, unless the employer does not or would not require prior notice for other classes of employees taking time off or leave.
- c) If the necessity for time off or leave is foreseeable based on planned medical treatment or supervision, the job applicant or employee shall also make a reasonable effort to schedule the treatment or supervision so as not to unduly disrupt the operations of the employer, subject to the approval of the job applicant's or employee's health care provider.
- d) If the necessity for time off or leave is not foreseeable or expected, the job applicant or employee shall provide notice to the employer as soon as possible and practical, and in a manner that is reasonable and practicable.
- e) An employee may choose to use accrued paid leave to cover some or all of the time off or leave. An employer is not required to provide paid leave for the

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duration of the time off or leave unless the paid leave is required by other laws or the employer does so for other classes of employees under similar circumstances.

- f) When the need for an accommodation ceases, an employer shall reinstate an employee who took time off or a leave of absence under this Section to her original job or to an equivalent position with equivalent pay and accumulated seniority, retirement, fringe benefits, and other applicable service credits as of the date the employee went on a leave of absence, unless the employer can demonstrate that doing so would impose an undue hardship on the ordinary operation of the business of the employer.

Section 2535.150 Duties of the Job Applicant or Employee Requesting the Accommodation

- a) It is the duty of the job applicant or employee seeking a reasonable accommodation to:
- 1) Apprise the employer of the job applicant's or employee's pregnancy condition;
 - 2) Cooperate in any ensuing discussion and evaluation aimed at determining the possible or feasible accommodations; and
 - 3) Submit to the employer any documentation that is requested in accordance with this Subpart.
- b) A job applicant or employee is not required to accept an accommodation when the job applicant or employee did not request the accommodation and the job applicant or employee chooses not to accept the employer's accommodation.

Section 2535.160 Duties of the Employer

- a) Once the job applicant or employee has initiated a request for accommodation for her pregnancy condition, it is the duty of the employer to provide the necessary accommodation in conformance with this Part.
- b) An employer has an obligation to provide timely responses to reasonable accommodation requests. An undue delay in responding to a reasonable accommodation request may be deemed to be a failure to provide a reasonable accommodation.

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Section 2535.170 Documentation of the Need for an Accommodation

- a) An employer is entitled to obtain the following information to evaluate if a requested reasonable accommodation may be necessary because of a job applicant's or employee's pregnancy condition:
 - 1) The medical justification for the requested accommodation;
 - 2) A description of the reasonable accommodation medically advisable;
 - 3) The date the reasonable accommodation became medically advisable; and
 - 4) The probable duration of the reasonable accommodation.
- b) An employer may request documentation from the job applicant's or employee's health care provider concerning the need for the requested accommodation if:
 - 1) The employer would request the same or similar documentation from a job applicant or employee regarding the need for a reasonable accommodation for conditions related to disability;
 - 2) The employer's request for documentation is job-related and consistent with business necessity; and
 - 3) The information sought is not known or readily apparent to the employer.
- c) The determination of whether an employer's request for documentation from the employee's health care provider concerning the need for a reasonable accommodation is job-related or consistent with business necessity will depend upon the totality of the circumstances, including, but not limited to the following factors:
 - 1) Whether the need for a reasonable accommodation is readily apparent;
 - 2) Whether the job applicant or employee is able to explain the relationship between the requested accommodation and her pregnancy condition;
 - 3) The employer's reasons for requesting the information; and

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- 4) The degree to which the requested accommodation would impact the ordinary operations of the employer's business if it were granted by the employer.
- d) If the employee needs the reasonable accommodation beyond the probable duration identified by the job applicant's or employee's healthcare provider, the employer may request additional information from the job applicant's or employee's health care provider consistent with this Part. An employer must continue to accommodate the job applicant or employee while the employer is requesting additional documentation from the employee's healthcare provider.
- e) An employer may require documentation by the employee's healthcare provider to determine compliance with other laws.

SUBPART C: PROHIBITION AGAINST DISCRIMINATION

Section 2535.200 Discrimination on the Basis of Pregnancy in Employment

- a) An employer may not refuse to hire, to segregate, or to act with respect to recruitment, hiring, promotion, renewal of employment, selection for training or apprenticeship, discharge, discipline, tenure or terms, privileges or conditions of employment on the basis of a pregnancy condition.
- b) An employer shall treat women affected by a pregnancy condition the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other job applicants or employees not so affected but similar in their ability or in ability to work, regardless of the source of the inability to work or employment classification or status.
- c) An employer may not deny employment opportunities or benefits to, or otherwise take an adverse action against, a job applicant or employee based on the job applicant's or employee's past pregnancy condition or because of the employee's potential or intention to become pregnant.

Section 2535.210 Retaliation for Requesting an Accommodation

- a) An employer may not deny employment opportunities or benefits, or otherwise take an adverse action against a qualified job applicant or employee because the

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job applicant or employee requested or needed an accommodation for her known pregnancy condition.

- b) An employer may not retaliate against a person because the person requested, attempted to request, used or attempted to use a reasonable accommodation for her pregnancy condition.

Section 2535.220 Forced Accommodation or Leave

- a) An employer shall not require a job applicant or employee affected by her pregnancy condition to accept an accommodation when the job applicant or employee did not request the accommodation and the job applicant or employee chooses not to accept the employer's accommodation.
- b) An employer may suggest alternative accommodations to the job applicant or employee as part of the interactive process set forth in Section 2535.120.
- c) An employer may not require an employee to take leave under any leave law or policy of the employer if another reasonable accommodation can be provided to the employee to accommodate her pregnancy condition.

SUBPART D: NOTICE

Section 2535.300 Posting of Pregnancy Discrimination Notice

- a) An employer must post and keep posted in a conspicuous location on the premises of the employer where notices to employees are customarily posted a notice approved by the Department.
 - 1) The notice approved by the Department will summarize the prohibition against discrimination regarding pregnancy and an employee's right to a reasonable accommodation for her pregnancy condition, including information pertaining to the filing of a charge, the right to be free from unlawful discrimination, and the right to certain reasonable accommodations.
 - 2) The Department will make the notice available for download from its website at http://www2.illinois.gov/dhr/Publications/Pages/Pregnancy_Rights_Notice_Requirement.aspx.

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- b) An employer must include in any employee handbook information concerning a job applicant's or employee's rights regarding pregnancy in the workplace. An employer's handbook that contains the same information as set forth in the Department's notice will be sufficient to comply with this subsection. However, nothing in this subsection prohibits the employer from providing additional information.