Pregnant Workers Fairness Policy
For Executive Branch Agencies

Issued by the Human Resources Division

Commonwealth of Massachusetts

March 2018

# INTRODUCTION

Agencies of the Commonwealth are to provide accommodations to allow pregnant employees or prospective employees or those with conditions related to their pregnancy to perform the essential functions of their jobs. In addition, Agencies will not discriminate against employees or prospective employees who are pregnant or have a condition related to pregnancy including, but not limited to, lactation or the need to express breast milk for a nursing child.

# DEFINITIONS

Appropriate health care or rehabilitation professional: includes, but shall not be limited to, a medical doctor, including a psychiatrist, a psychologist, a nurse practitioner, a physician assistant, a psychiatric clinical nurse specialist, a physical therapist, an occupational therapist, a speech therapist, a vocational rehabilitation specialist, a midwife, a lactation consultant or another licensed mental health professional authorized to perform specified mental health services.

Employee: an employee who is pregnant or has a condition related to pregnancy including but not limited to, lactation or the need to express breast milk for a nursing child.

Essential Functions of the Position: The fundamental job duties of a position.

Private non-bathroom space for expressing breast milk: A place, other than a bathroom, that is shielded from view and free from intrusion from co-workers and the public, which may be used by an employee to express breast milk.

Prospective employee: a job applicant who is pregnant or has a condition related to pregnancy including but not limited to, lactation or the need to express breast milk for a nursing child.

Reasonable accommodation: can include, but shall not be limited to: (i) more frequent or longer paid or unpaid breaks; (ii) time off to attend to a pregnancy complication or recover from childbirth with or without pay; (iii) acquisition or modification of equipment or seating; (iv) temporary transfer to a less strenuous or hazardous position; (v) job restructuring; (vi) light duty; (vii) private non-bathroom space for expressing breast milk; (viii) assistance with manual labor; or (ix) a modified work schedule; provided, however, that an employer shall not be required to discharge or transfer an employee with more seniority or promote an employee who is not able to perform the essential functions of the job with or without a reasonable accommodation.

Undue hardship: an action requiring significant difficulty or expense; provided, however, that the employer shall have the burden of proving undue hardship; provided further, that in making a determination of undue hardship, the following factors shall be considered: (i) the nature and cost of the needed accommodation; (ii) the overall financial resources of the Agency; (iii) the overall size of the of the Agency with respect to the number of employees and the number, type and location of its facilities; and (iv) the effect on expenses and resources or any other impact of the accommodation on the Agency’s operation.

# GENERAL PROVISIONS

1. It is unlawful for an Agency to deny a reasonable accommodation for an employee or prospective employee’s pregnancy or any condition related to the employee or prospective employee’s pregnancy including, but not limited to, lactation or the need to express breast milk for a nursing child if the employee requests such an accommodation; provided, however, that an employer may deny such an accommodation if the employer can demonstrate that the accommodation would impose an undue hardship on the Agency.

B. It is unlawful to take adverse action against an employee or prospective employee who requests or uses a reasonable accommodation in terms, conditions or privileges of employment including, but not limited to:

i. fail to reinstate the employee to the original employment status or to an equivalent position with equivalent pay and accumulated seniority, retirement, fringe benefits and other applicable service credits when the need for a reasonable accommodation ceases;

ii. deny an employment opportunity to an employee if the denial is based on the need of the employer to make a reasonable accommodation to the known conditions related to the employee’s pregnancy including, but not limited to, lactation or the need to express breast milk for a nursing child;

iii. require an employee to accept an accommodation that the employee chooses not to accept, if that accommodation is unnecessary to enable the employee to perform the essential functions of the job;

iv. require an employee to take a leave if another reasonable accommodation may be provided for the known conditions related to the employee’s pregnancy, including, but not limited to, lactation or the need to express breast milk for a nursing child, without undue hardship on the employer’s program, enterprise or business;

v. refuse to hire a person who is pregnant because of the pregnancy or because of a condition related to the person’s pregnancy, including, but not limited to, lactation or the need to express breast milk for a nursing child; provided, however, that the person is capable of performing the essential functions of the position with a reasonable accommodation and that reasonable accommodation would not impose an undue hardship, demonstrated by the employer, on the employer’s program, enterprise or business.

# Procedures or instructions

1. Reasonable Accommodation:

The ADA Coordinator in each Agency shall be identified as the individual responsible for managing the accommodation process pursuant to this policy.

Upon request for an accommodation from the employee or prospective employee capable of performing the essential functions of the position involved, the ADA Coordinator and the employee or prospective employee shall engage in a timely, good faith and interactive process to determine an effective, reasonable accommodation to enable the employee or prospective employee to perform the essential functions of the employee’s job or the position to which the prospective employee has applied.

The ADA Coordinator may require that documentation about the need for a reasonable accommodation come from an appropriate health care or rehabilitation professional; provided, however, that an employer shall not require documentation for the following accommodations:

(i) more frequent restroom, food or water breaks;

(ii) seating;

(iii) limits on lifting more than 20 pounds; and

(iv) private non-bathroom space for expressing breast milk.

The ADA Coordinator shall approve or deny an accommodation, in writing, within 7 business days of the request and/or receipt of documentation from an appropriate health care or rehabilitation professional. Accommodations that do not involve the procurement of equipment or the modification of job duties shall be implemented upon approval. Any accommodation involving a request for equipment or modification to job duties or location shall be implemented as soon as practicable.

Any denial of a request for a reasonable accommodation may be appealed by the employee to their Secretariat ADA Coordinator within 5 business days of the denial.

An Agency may require documentation for an extension of the accommodation beyond the originally agreed to accommodation.

1. Use of Private non-bathroom space for expressing breast milk:

Agencies must make available to its employees a private, non-bathroom space for the purpose of expressing breast milk.

Employees should contact their HR Director/Liaison for information related to the location and procedures for use of the private space reserved for the purpose of expressing milk. The location provided by the Agency must be functional as a space for expressing milk.

Agencies are required to provide a reasonable amount of break time to express milk, as frequently as needed by the nursing mother. The frequency and duration of the breaks may vary.

Agencies are not required to compensate nursing mothers for breaks taken for the purpose of expressing milk. Where an Agency already provides compensated breaks, an employee who uses that break time to express milk must be compensated in the same way that other employees are compensated for break time. In addition, the FLSA general requirement that the employee must be completely relieved from duty or else the time must be compensated as work time applies.

Agencies may not consider nursing mother’s break time to be FMLA leave or counted against an employee's FMLA leave entitlement as nursing is not considered a “serious health condition” under the FMLA per the DOL.

1. Documentation

Any information/documentation received by the Agency related to the request for an accommodation or the use of private, non-bathroom space for expressing breast milk, shall be maintained in a confidential file, separate from the employee’s personnel file.

Agencies may not request an employee provide documentation from a health care or rehabilitation professional for more frequent restroom, food or water breaks; seating; limits on lifting more than 20 pounds; and/or private non-bathroom space for expressing breast milk.

# ROLES AND RESPONSIBILITIES

## HRD:

Distribute to policy to current employees.

Include notice in employee orientation materials/handbooks.

## Agencies:

To provide this policy and/or Employee Fact Sheet within 10 days to:

* New employees;
* Employees who notify the Agency of a pregnancy;
* Employees who notify the Agency of a condition related to the employee’s pregnancy, including but not limited to lactation.

Timely investigate any allegations of violation of this policy or MGL c. 151B sec. 4.

Manager or Supervisor:

Inform Agency HR when employee discloses a pregnancy or condition related to pregnancy, including but not limited to lactation.

Refrain from discriminating and/or taking adverse action against any employee or prospective employee due to pregnancy or a condition related to pregnancy.

Maintain employee confidentiality.

## Employee:

Employees are not required to disclose their pregnancy to their employer. However, if employees intend to take time off from work related to their pregnancy or following the birth of a child, 30 days notice of an absence must be given when practicable. If employees do not have 30 days advance notice of the need to be absent, notice must be given as soon as possible.

Employees must engage in the interactive process related to a request for a reasonable accommodation under this policy and provide documentation from a health care professional, when requested.

## ADA Coordinator

Engage in the interactive process with employees or prospective employees seeking a reasonable accommodation. Provide a timely approval or denial of the request for accommodation. Ensure that an accommodation has been implemented.

# Compliance and Remedies

If it is determined a supervisor or manager has discriminated against an employee in violation of this policy, the Agency will take such action as is appropriate under the circumstances. Such action may range from counseling to termination from employment, and may include such other forms of disciplinary action deemed appropriate under the circumstances.

# RELATED POLICIES OR RESOURCES

MGL c. 151B sec. 4;

Fair Labor Standards Act, (Patient Protection and Affordable Care Act ( 2010)

MA Parental Leave Law (MGL c. 149 sec. 105D),

Family and Medical Leave Act (FMLA),

Federal) Fair Labor Standards Act

Superseding policy dated: 11/7/2011 Break Time for Nursing Mothers

[Contact the ADA Coordinator for your agency](https://www.mass.gov/lists/mod-publications-0) – please click on the link and scroll to the document entitled “Contact Information for Executive Branch ADA Coordinators.”

# Document History

| Date Issued | Action | Effective Date *(Version Change)* | Next Review Date |
| --- | --- | --- | --- |
| 3/29/2018 | Original policy issued | 4/1/2018 | 4/1/2019 |