

LFC Requester:	Marty Daly
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**AGENCY BILL ANALYSIS
2015 REGULAR SESSION**

WITHIN 24 HOURS OF BILL POSTING, EMAIL ANALYSIS TO:

LFC@NMLEGIS.GOV

and

DFA@STATE.NM.US

{Include the bill no. in the email subject line, e.g., HB2, and only attach one bill analysis and related documentation per email message}

SECTION I: GENERAL INFORMATION

{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}

Check all that apply: **Date** Feb. 20, 2014
Original **Amendment** **Bill No:** HB 37
Correction **Substitute**

Sponsor: HBEC Substitute **Agency Code:** Attorney General's Office
Short Pregnant Worker **Person Writing** Sean Cunniff
Title: Accommodation Act **Phone:** 827-6469 **Email** scunniff@nmag.gov

SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY15	FY16		

(Parenthesis () Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY15	FY16	FY17		

(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY15	FY16	FY17	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total						

(Parenthesis () Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to:
 Duplicates/Relates to Appropriation in the General Appropriation Act:

SECTION III: NARRATIVE

This analysis is neither a formal Attorney General’s Opinion nor an Attorney General’s Advisory Letter. This is a staff analysis in response to an agency’s, committee’s, or legislator’s request.

BILL SUMMARY

The HBEC Substitute of HB 37 maintains all of the core provisions of the bill as originally introduced, but alters the manner of implementation and standards imposed from the original version.

Noteworthy changes in the Substitute version include the following:

- **Definition of Employers:** The definition of “employers” is revised to limit the scope of the bill’s applicability to only those employers “employing four or more employees.” The original version included all employers “employing one or more employees.”
- **Definition of Reasonable Accommodations:** The definition of “reasonable accommodations” is altered in multiple respects, including extending accommodations only to employees who are “incapacitated” by pregnancy-related conditions “that limit[] one or more of the employee’s major life activities.” The original version extended the right to receive workplace accommodations to those employees suffering from “limitations due to pregnancy” and did not include the “major life activities” modifier.
- **Definition of Undue Hardship:** In the substitute version, the factors to be considered in determining whether the employer will realize an “undue hardship” are expanded to include “the impact otherwise of the accommodation upon the employer’s business.”
- **Limitations on the Right to Demand Leave:** In the enumeration of prohibited discriminatory practices in Section 3 of the substitute, the employee’s right to seek “three months” of “unpaid leave” is limited to only those employees “incapacitated” by pregnancy related conditions. The original version provided this right to employees “disabled” by pregnancy related conditions.
- **Limitations on What Constitutes Discrimination:** The use of the modifier “incapacitated” is included in various prohibited discriminatory practices enumerated under Section 3. Again, the use of the term “incapacitated” replaces the use of the term “disabled” in the original version.
- **Conflict Language:** The substitute version includes language that the legislation does not limit or invalidate the rights of New Mexicans under the state Human Rights Act “or the law of any jurisdiction that provides greater or equal protection for workers.” See § 3(D).
- **Remedies:** The substitute version limits judicial remedies to certain equitable relief, actual damages, and reasonable attorney fees. See § 7. The original version also provided for treble and punitive damages.

FISCAL IMPLICATIONS

Note: major assumptions underlying fiscal impact should be documented.

Note: if additional operating budget impact is estimated, assumptions and calculations should be reported in this section.

SIGNIFICANT ISSUES

This legislation relates to multiple federal laws which currently serve to provide workplace protections for certain pregnant workers. While the legislation does include a provision addressing conflict between the legislation and the “law of any jurisdiction,” see § 3(D), ensuring there is no direct conflict with these laws will enable this legislation to withstand judicial scrutiny. In addition, eliminating any conflict will provide clarity to New Mexico workers attempting to identify the scope of rights available.

THE AMERICANS WITH DISABILITIES ACT

The protections set forth in the substitute version relate closely to analogous protections provided pregnant women under the American with Disabilities Act (ADA). 42 U.S.C. §§ 12101 to - 12213. Like the proposed legislation, the ADA requires employers to provide certain workplace accommodations to certain disabled employees unless undue hardship would result for the employer. See 42 U.S.C. § 12112(5)(A). Although the ADA does not explicitly identify pregnancy as a disabling condition, due to extensive amendments to the ADA in 2008 that liberalized the definition of “disability,” see 42 U.S.C. § 12102, it is now generally accepted that certain pregnancy-related maladies may be covered disabilities within the meaning of the ADA. Indeed, according to ADA enforcement guidelines issued by the United States Equal Employment Opportunity Commission (EEOC), examples of such maladies include hypertension, gestational diabetes, severe nausea, sciatica, abnormal heart rhythms, and depression. See EEOC Enforcement Guidance on Pregnancy Discrimination (July 14, 2014).

Under the ADA, states are permitted to enhance the protections extended under the federal law, but may not enforce provisions which fall below the ADA’s baseline. See 42 U.S.C. 12201. Thus, to the extent that the proposed legislation undermines or provides lesser protections than the ADA, it potentially runs afoul of federal law.

Certain provisions of the bill are plainly at odds with the provisions of the ADA. For instance, the ADA generally requires that an employer provide accommodations to an employee “disabled” by a “physical or mental impairment that substantially limits one or more of the major life activities of [an] individual,” see 29 CFR Part 1630.2, while the substitute requires that accommodations be provided to persons “incapacitated” by pregnancy-related maladies. See HB 37 HBEC Substitute, § 2(B). A second example: while the legislation largely tracks the ADA’s definition of “undue hardship,” the proposed legislation includes an additional provision that permits inquiry into “the impact otherwise of the accommodation upon the employer’s business.” See Id. at § 2(C)(5).

In order to avoid such conflicts, to insulate the legislation from judicial scrutiny, and to clarify legislative intent, the Legislature may wish to address these conflicts – including reconciling the

“incapacitated” language of the proposed legislation with the analogous language (regarding disability) under the ADA.

However, it is important to bear in mind that the legislation provides express protections for pregnant women, while the ADA does not. In addition, the ADA only applies to those employers employing 15 or more employees. Thus, to the extent that the legislation is construed to provide additional protections – separate and apart from the ADA – it is consistent with this federal law and would likely withstand judicial scrutiny.

Leave Rights Under the ADA and FAMILY MEDICAL LEAVE ACT

The federal Family Medical Leave Act (FMLA) provides employees, of either gender, meeting certain tenure and service requirements, *see* 29 U.S.C. 2611(2), a “total of 12 workweeks of leave during any 12-month period “[b]ecause of the birth of a son or daughter of the employee and in order to care for such son or daughter,” among other bases for invoking the leave right. The proposed legislation also furnishes a right to take leave, with said right only extended to “an employee incapacitated” by certain pregnancy-related maladies for a period “not to exceed three months.” *See* § 3(A)(1).

In addition to the leave rights extended under the FMLA, the ADA requires that leave be provided as a reasonable accommodation, subject to the “undue hardship” balancing of interests standard. *See EEOC Enforcement Guidance on Pregnancy Discrimination* (July 14, 2014)

In order to preserve its intent, the Legislature may wish to clarify expressly the manner in which the right extended in the legislation reconciles with the rights extended under the FMLA and the ADA. In particular, whether the right provides such “incapacitated” workers leave in addition to that provided under the FMLA.

PREGNANCY DISCRIMINATION ACT

Many of the prohibited discriminatory practices enumerated in Section 3 of the legislation are limited in application to those women “incapacitated” by pregnancy-related maladies.

Under the federal Pregnancy Discrimination Act (PDA), codified in Title VII of the 1964 Civil Rights Act, employment discrimination is prohibited on the “basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work.” 42 U.S.C. 2000e(k).

The Legislature may wish to clarify its intent with respect to reconciling the “incapacitated” language in the proposed legislation with existing protections under the PDA.

PERFORMANCE IMPLICATIONS

ADMINISTRATIVE IMPLICATIONS

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

The HBEC substitute for HB 37 relates to another bill introduced during this session, HB 409. Also short-titled the “Pregnancy Accommodation Act,” this legislation also provides for workplace accommodations for women suffering from pregnancy-related maladies. Distinct from HB 37, HB 409 provides a detailed process by which reasonable accommodation requests will be processed. However, HB 409 does not include provisions setting forth prohibited discriminatory acts.

TECHNICAL ISSUES

OTHER SUBSTANTIVE ISSUES

ALTERNATIVES

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

AMENDMENTS