

LFC Requester:	Kelly Klundt
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**AGENCY BILL ANALYSIS
2015 REGULAR SESSION**

WITHIN 24 HOURS OF BILL POSTING, EMAIL ANALYSIS TO:

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and

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{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:

Original	<input checked="" type="checkbox"/>	Amendment	<input type="checkbox"/>	Date	<u>Feb. 16, 2015</u>
Correction	<input type="checkbox"/>	Substitute	<input type="checkbox"/>	Bill No:	<u>HB 409</u>

Sponsor:	<u>Rep. Terry H. McMillan</u>	Agency Code:	<u>Attorney General's Office</u>
Short Title:	<u>Pregnant Worker Accommodation Act</u>	Person Writing	<u>Sean Cunniff, AAG</u>
		Phone:	<u>827-6469</u>
		Email	<u>scunniff@nmag.gov</u>

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)

Relates to: HB 37

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

HB 409 requires that certain “reasonable” workplace accommodations be extended to certain employees “affected by pregnancy” or “disabled by pregnancy,” unless such an accommodation would “cause an undue hardship upon the employer.” The legislation would apply only to certain enumerated employers employing “fifty or more employees.”

The bill provides a detailed description of the process by which an employee may seek an accommodation. Both the employee and employer are required to “engage in good faith” to “identify and implement the employee’s request for reasonable accommodation.” The legislation also provides employers with the right to seek medical certification of the employee’s condition by a “health care provider.”

The bill enumerates examples of what constitutes a “reasonable accommodation” and also enumerates exclusive factors to be applied in the determination of what constitutes an “undue hardship.”

In addition, the bill requires that employers provide employees with written notice of the rights contained in HB 409; retaliation is prohibited; and redress is authorized through the procedures outlined in the New Mexico Human Rights Act.

FISCAL IMPLICATIONS

None for this office.

SIGNIFICANT ISSUES

I. INTERPLAY WITH THE FEDERAL AMERICANS WITH DISABILITIES ACT

The protections set forth in HB 409 relate closely to analogous protections provided pregnant women under the American with Disabilities Act (the “ADA”). 42 USC §§ 12101 to -12213. Like HB 409, the ADA requires employers to provide certain workplace accommodations to certain disabled employees unless undue hardships would result for the employer. See 42 USC § 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 USC § 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 (the “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 enact provisions which fall below the ADA’s baseline. See 42 USC 12201. Thus, to the extent that HB 409 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 applies to employers employing 15 or more employees, see 42 USC § 12111(5), while the protections in HB 409 apply only to employers employing 50 or more employees. A second example: the ADA generally defines a disability as 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 HB 409 provides a different standard that includes an enumeration of certain events that constitute disability. See HB 409 at § 2(B). A third example: while HB 409 largely tracks the ADA’s definition of “undue hardship,” the proposed legislation includes a vague and general provision that permits inquiry into “the impact otherwise of the accommodation upon the employer’s business.” See Id. at § 2(J).

However, it is important to bear in mind that HB 409 provides express protections for pregnant women, while the ADA does not. Thus, to the extent that HB 409 is construed to provide additional protections – separate and apart from the ADA – it is consistent with federal law and would likely withstand judicial scrutiny.

PERFORMANCE IMPLICATIONS

None for this office.

ADMINISTRATIVE IMPLICATIONS

None for this office.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

HB 409 relates to another House Bill introduced this session, HB 37. Like HB 409, HB 37 requires employers to provide accommodations for pregnant workers. While both bills set forth a balancing mechanism to determine whether an accommodation is required, HB 37 applies to all employers, does not include a detailed description of the process for granting an accommodation, and provides a means of direct judicial review, among other distinctions.

TECHNICAL ISSUES

See discussion above.

OTHER SUBSTANTIVE ISSUES

The definition of “employer” does not include state or local government entities. The Legislature may wish to provide greater clarity on this front to ensure its intent in this regard is clear.

ALTERNATIVES

N/A

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

The ADA (and to some extent the New Mexico Human Rights Act, see NMSA 1978, Section 28-1-7) will remain as the exclusive means for pregnant women to seek redress for workplace-related grievances.

AMENDMENTS

N/A