

MARYLAND'S REASONABLE ACCOMMODATIONS FOR DISABILITIES DUE TO PREGNANCY ACT: MEANING, INTERPRETATIONS, AND IMPLICATIONS

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INTRODUCTION

In 2013, the Fourth Circuit decided *Young v. UPS*, a case that pushed Maryland legislators to draft Maryland's Reasonable Accommodation for Disabilities Due to Pregnancy Act.¹ This amendment to Maryland's anti-discrimination law took effect on October 1, 2013, and requires employers with fifteen or more employees to explore reasonable accommodations with their pregnant employees.² Maryland has now joined a few other states in expanding the rights of pregnant workers by categorizing pregnant workers in accordance with their ability or inability to work for purposes of discrimination law, and not by their sex.³

Maryland's response provides necessary protection to employees with disabilities due to pregnancy. However, this special legislation creates confusion with yet-more complicated and ambiguous legislation with which employers must comply.

In addition to already treating pregnancy disabilities as temporary disabilities, the new law instructs employers to actively discuss accommodations with their pregnant employees.⁴ The law

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1. MD. CODE ANN., STATE GOV'T § 20-609 (LexisNexis 2009 & Supp. 2013); *Young v. UPS*, 707 F.3d 437 (4th Cir. 2013), *cert. granted*, 134 S. Ct. 2898 (2014).
2. MD. CODE ANN., STATE GOV'T §§ 20-601, -609 (LexisNexis 2009 & Supp. 2013).
3. *See, e.g.*, ALASKA STAT. § 39.20.520 (2012); CAL. GOV'T CODE § 12945 (West 2011 & Supp. 2014); CONN. GEN. STAT. ANN. § 46a-60(a)(7)(West 2009 & Supp. 2014); HAW. CODE R. § 12-46-107 (LexisNexis 2014); 775 ILL. COMP. STAT. ANN. 5/2-102(H) (West 2011); LA. REV. STAT. ANN. § 23:342(2010 & Supp. 2014); TEX. LOC. GOV'T CODE ANN. § 180.004 (West 2008 & Supp. 2014).
4. *See* MD. CODE ANN., STATE GOV'T § 20-609(g) (Supp. 2013).

mandates the employer to reasonably accommodate the pregnant employee unless an undue hardship would be bestowed upon the employer.⁵

II. IMPLICATIONS OF THE MARYLAND LAW

The types of reasonable accommodations mandated by the legislature are:

- (1) changing the employee's job duties;
- (2) changing the employee's work hours;
- (3) relocating the employee's work area;
- (4) providing mechanical or electrical aids;
- (5) transferring the employee to a less strenuous or less hazardous position; or
- (6) providing leave.⁶

The statute also states that if a pregnant employee requests a transfer to a less strenuous position, the employer must make the transfer as long as there is already a policy in place that would transfer a temporarily disabled employee, or if the employer's health provider advises the transfer and the employer can provide the transfer.⁷

However, if the transfer would require the creation of additional employment, the discharge of another employee, the transfer of an employee with more seniority than the pregnant employee, or the promotion of a non-qualified employee, then the transfer is not required.⁸

Advocates of the reasonable accommodation law⁹ wanted to use the new law to eliminate a loophole in discrimination law,¹⁰ give clarity to employers,¹¹ and specify which accommodations are

5. *Id.* § 20-609(a).

6. *Id.* § 20-609(d).

7. *Id.* § 20-609(e).

8. *Id.* § 20-609(e)(2).

9. *Reasonable Accommodations for Disabilities Due to Pregnancy: Hearing on H.D. 804 Before the H. Comm. on Econ. Matters*, 2013 Leg., 433d Sess. (Md. 2013), [hereinafter *Hearing on H.D. 804*]. Advocates include the American Civil Liberties Union of Maryland, UFCW Local 400, the Women Legislators of Maryland Caucus, Maryland Employment Lawyers Association, National Abortion and Reproduction Rights Action League (NARAL), Progressive Maryland, and Better Balance. *Id.*

10. *Id.* (statement of June White Dillard, Md. State Conference of NAACP Branches) ("House Bill 804 helps ensure that pregnant women can maintain healthy pregnancies as well as financial security by closing a loophole in the current Maryland law.").

11. *See id.* (statement of Joanna Diamond, Am. Civil Liberties Union of Md.) ("This law simply aims to clarify what employers' obligations are.").

mandated.¹² Advocates emphasized that this law mandates a continuous dialogue between the employer and the employee.¹³ These provisions generally benefit low-income workers that have physically demanding jobs,¹⁴ and will now be able to drink water while working, retain a stool to sit on, or be allowed adequate bathroom breaks.¹⁵

III. AMBIGUITY OF THE MARYLAND LAW

Despite the intentions behind the law, the new law does not state which specific accommodations must be provided, such as water or bathroom breaks. This lack of specificity contributes to the ambiguity of the law.

While the new Maryland law was meant to give clarity to many Maryland employers on how to treat disabilities due to pregnancy, the law still remains indefinite and ambiguous.¹⁶ Specifically, the terms “reasonable accommodation” and “undue hardship” have broad meanings in need of interpretation and guidance.

A. “Undue Hardship” and “Reasonable Accommodations” under the Maryland Law

Maryland defines a reasonable accommodation as an accommodation for a “disability caused or contributed to by pregnancy . . . that does not impose an undue hardship on the employer.”¹⁷ An employer examining this statute might question the meaning of “undue hardship”; more specifically, in what situation do

12. *Id.* (statement of Mary Keating, Project Dir., Women’s Law Ctr.’s Emp’t Law Hotline) (stating that some employers may deny accommodations to pregnant workers because of the employer’s concern that other workers will try to negotiate aspects of their jobs unrelated to pregnancy, but “this [bill] is not an opening for everybody to start talking. The accommodations are to be temporary, they have to be related to pregnancy problems, they have to be backed up by a doctor’s note, and at all times they have to be subject to the limitations of reasonableness.”).

13. *See id.*

14. *Id.* (statement of June White Dillard, Md. State Conference of NAACP branches).

15. *Id.* (statement of Mary Keating, Project Dir., Women’s Law Center’s Emp’t Law Hotline) (“[This law] doesn’t protect poor performers . . . it just requires some reasonable understanding of some things that happen to women when they are pregnant—maybe more frequent bathroom breaks or being able to sit down if she’s a cashier and so forth.”).

16. *See supra* note 11 and accompanying text.

17. MD. CODE ANN., STATE GOV’T § 20-609(a) (LexisNexis Supp. 2013).

I *not* have to accommodate?¹⁸ There is no explicit definition of “undue hardship” in the law.¹⁹

Maryland’s Department of Budget and Management published the *Reasonable Accommodations Policy and Procedure* to outline reasonable accommodation procedure.²⁰ This guidance stated that “undue hardship” is a “[s]ignificant difficulty or expense incurred by the employer to provide a reasonable accommodation. The employer has the burden of proving that providing a reasonable accommodation would impose undue hardship on the employer.”²¹

In 2002, the District Court of Maryland stated, however, that the employer “does not have to provide every accommodation on [an employee’s] ‘wish list’” to be in compliance with disability discrimination laws, “[n]or does it have to provide an accommodation that imposes undue hardship upon it, but it must ‘make whatever accommodations are reasonably possible in the circumstances so as to allow the employee to perform the functions essential to [her] position.’”²²

The search into the meaning of reasonable accommodations and undue hardships further illustrates that the new Maryland law is too complex and unclear. An employer must be able to look at a statute and understand what they can and cannot do, for the purposes of cost-efficiency, avoidance of litigation, and enforcement of established business models.

IV. CONCLUSION

The indeterminate language used in Maryland’s new law is not the only point of contention. The bottom-line question remains whether pregnancy should be categorized as a disability and whether

18. See *Hearing on H.D. 804*, *supra* note 9 (statement of Del. Kelly M. Schulz) (“I am assuming that . . . providing leave is the last effort if the work hours can’t be changed or adjusted, or they can’t . . . for example, relocate the employee’s work area. My question is, what if the business isn’t such where there are alternative job duties or work hours? What would the business owner do then?”).

19. The plain language of section 20-609 of the Reasonable Accommodation for Disabilities Due to Pregnancy Act does not define “undue hardship.” See § 20-609(a). *But cf.* § 20-609(d) (outlining certain duties that the employer must explore to reasonably accommodate a pregnant employee, including changing the employee’s duties, work hours, work area, supplying mechanical or electrical aid or transferring the employee to a less hazardous job).

20. MD. DEP’T OF BUDGET AND MGMT., REASONABLE ACCOMMODATIONS POLICY AND PROCEDURE (2014).

21. *Id.* ¶ 3.7

22. See *Ross v. Bd. of Educ. of Prince George’s Cnty.*, 195 F. Supp. 2d 730, 736 (D. Md. 2002) (quoting *Miranda v. Wis. Power & Light Co.*, 91 F.3d 1011, 1017 (7th Cir. 1996)).

employers should be taking the hit financially to accommodate these conditions. The Maryland law is another piece of legislation taking a stance in the debate among scholars on what pregnancy in the workplace means.²³ These questions will likely be addressed by the Supreme Court at oral argument in December.²⁴

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23. See Brigid Schulte, *States Move to Ensure Pregnant Workers Get Fair Chance to Stay on Job*, WASH. POST. (Sept. 8, 2014), <http://www.washingtonpost.com/blogs/she-the-people/wp/2014/09/08/states-move-where-congress-wont-to-ensure-pregnant-workers-get-fair-shot-to-stay-on-job>.
24. *Case File of Young v. United Parcel Service*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/young-v-united-parcel-service> (last visited Sept. 17, 2014).