

HOUSE BUSINESS AND EMPLOYMENT COMMITTEE SUBSTITUTE FOR
HOUSE BILL 409

52ND LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2015

AN ACT

RELATING TO EMPLOYMENT; AMENDING AND ENACTING SECTIONS OF THE
HUMAN RIGHTS ACT TO PROVIDE PROTECTIONS AND REASONABLE
ACCOMMODATION OF PREGNANT WOMEN.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

SECTION 1. Section 28-1-7 NMSA 1978 (being Laws 1969,
Chapter 196, Section 7, as amended) is amended to read:

"28-1-7. UNLAWFUL DISCRIMINATORY PRACTICE.--It is an
unlawful discriminatory practice for:

A. an employer, unless based on a bona fide
occupational qualification or other statutory prohibition, to
refuse to hire, to discharge, to promote or demote or to
discriminate in matters of compensation, terms, conditions or
privileges of employment against any person otherwise qualified
because of race, age, religion, color, national origin,

.200636.3

1 ancestry, sex, pregnancy, physical or mental handicap or
2 serious medical condition, or, if the employer has fifty or
3 more employees, spousal affiliation; provided, however, that 29
4 U.S.C. Section 631(c)(1) and (2) shall apply to discrimination
5 based on age; or, if the employer has fifteen or more
6 employees, to discriminate against an employee based upon the
7 employee's sexual orientation or gender identity;

8 B. a labor organization to exclude a person or to
9 expel or otherwise discriminate against any of its members or
10 against any employer or employee because of race, religion,
11 color, national origin, ancestry, sex, pregnancy, sexual
12 orientation, gender identity, spousal affiliation, physical or
13 mental handicap or serious medical condition;

14 C. any employer, labor organization or joint
15 apprenticeship committee to refuse to admit or employ any
16 person in any program established to provide an apprenticeship
17 or other training or retraining because of race, religion,
18 color, national origin, ancestry, sex, pregnancy, sexual
19 orientation, gender identity, physical or mental handicap or
20 serious medical condition, or, if the employer has fifty or
21 more employees, spousal affiliation;

22 D. any person, employer, employment agency or labor
23 organization to print or circulate or cause to be printed or
24 circulated any statement, advertisement or publication, to use
25 any form of application for employment or membership or to make

1 any inquiry regarding prospective membership or employment that
2 expresses, directly or indirectly, any limitation,
3 specification or discrimination as to race, color, religion,
4 national origin, ancestry, sex, pregnancy, sexual orientation,
5 gender identity, physical or mental handicap or serious medical
6 condition, or, if the employer has fifty or more employees,
7 spousal affiliation, unless based on a bona fide occupational
8 qualification;

9 E. an employment agency to refuse to list and
10 properly classify for employment or refer a person for
11 employment in a known available job, for which the person is
12 otherwise qualified, because of race, religion, color, national
13 origin, ancestry, sex, pregnancy, sexual orientation, gender
14 identity, spousal affiliation, physical or mental handicap or
15 serious medical condition, unless based on a bona fide
16 occupational qualification, or to comply with a request from an
17 employer for referral of applicants for employment if the
18 request indicates either directly or indirectly that the
19 employer discriminates in employment on the basis of race,
20 religion, color, national origin, ancestry, sex, pregnancy,
21 sexual orientation, gender identity, spousal affiliation,
22 physical or mental handicap or serious medical condition,
23 unless based on a bona fide occupational qualification;

24 F. any person in any public accommodation to make a
25 distinction, directly or indirectly, in offering or refusing to

.200636.3

1 offer its services, facilities, accommodations or goods to any
2 person because of race, religion, color, national origin,
3 ancestry, sex, pregnancy, sexual orientation, gender identity,
4 spousal affiliation or physical or mental handicap, provided
5 that the physical or mental handicap is unrelated to a person's
6 ability to acquire or rent and maintain particular real
7 property or housing accommodation;

8 G. any person to:

9 (1) refuse to sell, rent, assign, lease or
10 sublease or offer for sale, rental, lease, assignment or
11 sublease any housing accommodation or real property to any
12 person or to refuse to negotiate for the sale, rental, lease,
13 assignment or sublease of any housing accommodation or real
14 property to any person because of race, religion, color,
15 national origin, ancestry, sex, pregnancy, sexual orientation,
16 gender identity, spousal affiliation or physical or mental
17 handicap, provided that the physical or mental handicap is
18 unrelated to a person's ability to acquire or rent and maintain
19 particular real property or housing accommodation;

20 (2) discriminate against any person in the
21 terms, conditions or privileges of the sale, rental,
22 assignment, lease or sublease of any housing accommodation or
23 real property or in the provision of facilities or services in
24 connection therewith because of race, religion, color, national
25 origin, ancestry, sex, pregnancy, sexual orientation, gender

.200636.3

1 identity, spousal affiliation or physical or mental handicap,
 2 provided that the physical or mental handicap is unrelated to a
 3 person's ability to acquire or rent and maintain particular
 4 real property or housing accommodation; or

5 (3) print, circulate, display or mail or cause
 6 to be printed, circulated, displayed or mailed any statement,
 7 advertisement, publication or sign or use any form of
 8 application for the purchase, rental, lease, assignment or
 9 sublease of any housing accommodation or real property or to
 10 make any record or inquiry regarding the prospective purchase,
 11 rental, lease, assignment or sublease of any housing
 12 accommodation or real property that expresses any preference,
 13 limitation or discrimination as to race, religion, color,
 14 national origin, ancestry, sex, pregnancy, sexual orientation,
 15 gender identity, spousal affiliation or physical or mental
 16 handicap, provided that the physical or mental handicap is
 17 unrelated to a person's ability to acquire or rent and maintain
 18 particular real property or housing accommodation;

19 H. any person to whom application is made either
 20 for financial assistance for the acquisition, construction,
 21 rehabilitation, repair or maintenance of any housing
 22 accommodation or real property or for any type of consumer
 23 credit, including financial assistance for the acquisition of
 24 any consumer good as defined by Section 55-9-102 NMSA 1978, to:

25 (1) consider the race, religion, color,

.200636.3

1 national origin, ancestry, sex, pregnancy, sexual orientation,
2 gender identity, spousal affiliation or physical or mental
3 handicap of any individual in the granting, withholding,
4 extending, modifying or renewing or in the fixing of the rates,
5 terms, conditions or provisions of any financial assistance or
6 in the extension of services in connection with the request for
7 financial assistance; or

8 (2) use any form of application for financial
9 assistance or to make any record or inquiry in connection with
10 applications for financial assistance that expresses, directly
11 or indirectly, any limitation, specification or discrimination
12 as to race, religion, color, national origin, ancestry, sex,
13 pregnancy, sexual orientation, gender identity, spousal
14 affiliation or physical or mental handicap;

15 I. any person or employer to:

16 (1) aid, abet, incite, compel or coerce the
17 doing of any unlawful discriminatory practice or to attempt to
18 do so;

19 (2) engage in any form of threats, reprisal or
20 discrimination against any person who has opposed any unlawful
21 discriminatory practice or has filed a complaint, testified or
22 participated in any proceeding under the Human Rights Act; or

23 (3) willfully obstruct or prevent any person
24 from complying with the provisions of the Human Rights Act or
25 to resist, prevent, impede or interfere with the commission or

.200636.3

1 any of its members, staff or representatives in the performance
2 of their duties under the Human Rights Act; or

3 J. any employer to refuse or fail to accommodate a
4 person's physical or mental handicap or serious medical
5 condition, unless such accommodation is unreasonable or an
6 undue hardship."

7 SECTION 2. Section 28-1-9 NMSA 1978 (being Laws 1969,
8 Chapter 196, Section 8, as amended) is amended to read:

9 "28-1-9. EXEMPTIONS.--Nothing contained in the Human
10 Rights Act shall:

11 A. apply to any single-family dwelling sold,
12 leased, subleased or rented by an owner without the making of
13 any notice, statement or advertisement with respect to the
14 sale, lease, sublease or rental of a dwelling unit that
15 indicates any preference, limitation or discrimination based on
16 race, color, religion, national origin, ancestry, sex,
17 pregnancy, sexual orientation or gender identity. This
18 exemption is subject to these further reservations:

19 (1) to qualify for the exemption, the seller
20 must not be an owner of or own or have reserved any interest in
21 more than three single-family dwellings; and

22 (2) if the seller does not currently live in
23 the dwelling or [~~he~~] was not the most recent occupant, the
24 exemption granted in this section shall only apply to one sale
25 in twenty-four months;

.200636.3

1 B. bar any religious or denominational institution
2 or organization that is operated, supervised or controlled by
3 or that is operated in connection with a religious or
4 denominational organization from limiting admission to or
5 giving preference to persons of the same religion or
6 denomination or from making selections of buyers, lessees or
7 tenants as are calculated by the organization or denomination
8 to promote the religious or denominational principles for which
9 it is established or maintained, unless membership in the
10 religious or denominational organization is restricted on
11 account of race, color, national origin or ancestry;

12 C. bar any religious or denominational institution
13 or organization that is operated, supervised or controlled by
14 or that is operated in connection with a religious or
15 denominational organization from imposing discriminatory
16 employment or renting practices that are based upon sexual
17 orientation or gender identity; provided that the provisions of
18 the Human Rights Act with respect to sexual orientation and
19 gender identity shall apply to any other:

20 (1) for-profit activities of a religious or
21 denominational institution or religious organization subject to
22 the provisions of Section 511(a) of the Internal Revenue Code
23 of 1986, as amended; or

24 (2) nonprofit activities of a religious or
25 denominational institution or religious organization subject to

1 the provisions of Section 501(c)(3) of the Internal Revenue
2 Code of 1986, as amended;

3 D. apply to rooms or units in dwellings containing
4 living quarters occupied or intended to be occupied by no more
5 than four families living independently of each other, if the
6 owner actually maintains and occupies one of the living
7 quarters as [~~his~~] the owner's residence;

8 E. apply to public restrooms, public showers,
9 public dressing facilities or sleeping quarters in public
10 institutions, where the preference or limitation is based on
11 sex; and

12 F. prevent the mandatory retirement of an employee
13 upon reaching the age of sixty-five years or older, if the
14 employer is operating under a retirement plan that meets the
15 requirements of Public Law 93-406, the Employee Retirement
16 Income Security Act of 1974."

17 SECTION 3. A new section of the Human Rights Act is
18 enacted to read:

19 "[NEW MATERIAL] PREGNANT EMPLOYEE--REASONABLE
20 ACCOMMODATION.--

21 A. It is unlawful for an employer to deny a request
22 for reasonable accommodation made by a pregnant employee if:

23 (1) the employee's request is based on the
24 advice of her health care provider that reasonable
25 accommodation is medically advisable; and

.200636.3

1 (2) the requested accommodation will not cause
2 an undue hardship upon the employer.

3 B. An employee who seeks accommodation as a
4 pregnant employee and her employer shall engage in a good faith
5 interactive process to identify and implement the employee's
6 request for reasonable accommodation, as set forth in this
7 section.

8 C. An employer may require a medical certification
9 substantiating the employee's need for reasonable
10 accommodation.

11 D. A pregnant employee who seeks reasonable
12 accommodation shall:

13 (1) provide timely oral or written notice
14 sufficient to make the employer aware that the employee needs
15 reasonable accommodation, and, where practicable, the
16 anticipated timing and duration of the reasonable
17 accommodation;

18 (2) provide the employer at least fifteen
19 days' advance notice before the start of reasonable
20 accommodation, if the need for the reasonable accommodation is
21 foreseeable;

22 (3) consult with the employer and make a
23 reasonable effort to schedule any planned appointment or
24 medical treatment to minimize disruption to the employer's
25 operations, subject to the health care provider's approval; or

1 (4) provide notice to her employer that
2 reasonable accommodation is needed as soon as practicable in
3 cases where a need for reasonable accommodation is not
4 reasonably foreseen due to a change in circumstances, a medical
5 emergency or other good cause shown.

6 E. An employer:

7 (1) shall not deny reasonable accommodation,
8 the need for which is an emergency or is otherwise
9 unforeseeable, on the basis that the employee did not provide
10 adequate advance notice of the need for the reasonable
11 accommodation;

12 (2) shall respond to the reasonable
13 accommodation request as soon as practicable and, in any event,
14 no later than ten calendar days after receiving the request for
15 reasonable accommodation; and

16 (3) may require, as a condition of granting
17 reasonable accommodation, that a pregnant employee obtain
18 written medical certification from the employee's health care
19 provider; provided that the employer shall notify the employee
20 of:

21 (a) the need to provide reasonable
22 medical certification;

23 (b) the deadline for providing
24 certification;

25 (c) what constitutes sufficient medical

.200636.3

1 certification;

2 (d) the consequences for failing to
3 provide medical certification; and

4 (e) the medical certification
5 requirement each time a certification is required.

6 F. An employer may provide notice of the need for
7 medical certification pursuant to Paragraph (3) of Subsection E
8 of this section verbally if the pregnant employee is already on
9 leave from her job because the need for the leave was
10 unforeseeable. The employer shall thereafter mail or send via
11 electronic mail or by facsimile a copy of the medical
12 certification form to the employee or to her health care
13 provider as the employee designates.

14 G. A pregnant employee shall attempt to provide
15 notice to her employer of her need for reasonable accommodation
16 directly, rather than through a third party, where practicable.

17 H. When an employer requires medical certification
18 of the need for reasonable accommodation, the employer shall
19 request that the pregnant employee furnish medical
20 certification from a health care provider:

21 (1) at the time the employee gives notice of
22 the need for reasonable accommodation;

23 (2) within two business days of the time the
24 employee gives notice of the need for reasonable accommodation;

25 (3) in the case of unforeseen leave, within

1 two business days after the leave commences; or

2 (4) a date later than those provided in
3 Paragraphs (1) through (3) of this subsection if the employer
4 later has reason to question the appropriateness of the
5 reasonable accommodation.

6 I. At the time an employer requests medical
7 certification, the employer shall also advise the pregnant
8 employee whenever the employer finds a medical certification
9 inadequate or incomplete and provide the employee a reasonable
10 opportunity to cure any deficiency.

11 J. A medical certification indicating the medical
12 advisability of reasonable accommodation or a transfer is
13 sufficient if it contains:

14 (1) a description of the requested reasonable
15 accommodation;

16 (2) a statement describing the medical
17 advisability of the reasonable accommodation; and

18 (3) the date on which the need for reasonable
19 accommodation became or will become medically advisable and the
20 estimated duration of the reasonable accommodation.

21 K. If medical certification satisfies the
22 requirements of Subsection J of this section, an employer shall
23 accept it as sufficient. The employer shall not ask the
24 pregnant employee to provide additional information beyond that
25 provided in this section. An employer may require a pregnant

.200636.3

1 employee to obtain medical recertification if the employee
2 requests additional time for reasonable accommodation upon
3 expiration of the original time period allocated.

4 L. An employer is responsible for complying with
5 all applicable laws regarding the confidentiality of any
6 medical information received.

7 M. In the case of a foreseeable need for reasonable
8 accommodation, an employer may delay granting the reasonable
9 accommodation, until the required medical certification is
10 provided, to a pregnant employee who fails to provide timely
11 medical certification after the employer has requested the
12 employee to furnish the certification.

13 N. When the need for reasonable accommodation is
14 not foreseeable, or in the case of recertification, a pregnant
15 employee shall provide medical certification or recertification
16 within the time frame requested by the employer, a time frame
17 that shall be at least fifteen days after the employer's
18 request, or as soon as reasonably possible under the
19 circumstances. An employer shall grant an exception of the
20 deadline in the case of a medical emergency. If a pregnant
21 employee fails to provide a medical certification within a
22 reasonable time under the pertinent circumstances, the employer
23 may delay the employee's continuation of the reasonable
24 accommodation.

25 O. As a condition of a pregnant employee's return

1 from leave or transfer, the employer may require the employee
2 to obtain a release to return to work from her health care
3 provider stating that she is able to resume her original job or
4 duties.

5 P. An employer shall not deny, refuse to renew or
6 terminate a pregnant employee's health care coverage on the
7 basis of the employee's pregnancy.

8 Q. As used in this section:

9 (1) "employer" means a person or entity,
10 including a partnership, association, corporation, business
11 trust, unassociated group or agency employing twenty or more
12 employees or a person or entity acting on behalf of or as an
13 agent of an employer;

14 (2) "health care provider" means an individual
15 licensed to provide health care in the state in the regular
16 course of business;

17 (3) "medical certification" or "medical
18 recertification" means a written communication from a pregnant
19 employee's health care provider to the employer stating that it
20 is medically advisable for the employee to be reasonably
21 accommodated;

22 (4) "reasonable accommodation" means a change
23 in the work environment or in the way a job is customarily
24 performed that an employer implements or authorizes to
25 effectively enable a pregnant employee to perform the essential

.200636.3

1 functions of her job. "Reasonable accommodation" includes the
2 following measures:

- 3 (a) modifying work duties;
- 4 (b) modifying work schedules to permit
5 earlier or later hours;
- 6 (c) modifying work schedules to permit
7 more frequent breaks;
- 8 (d) allowing for a reduced work
9 schedule;
- 10 (e) providing furniture or acquiring or
11 modifying equipment or devices;
- 12 (f) providing a reasonable amount of
13 break time and use of a room or other location in close
14 proximity to the employee's work area;
- 15 (g) transferring an employee; or
- 16 (h) granting paid or unpaid leave;
- 17 (5) "transfer" means reassigning temporarily a
18 pregnant employee to a less strenuous or hazardous position or
19 to less strenuous or hazardous duties; and
- 20 (6) "undue hardship" means an accommodation
21 requiring significant difficulty or expense when considered in
22 light of the following factors:
 - 23 (a) the nature and cost of the
24 accommodation;
 - 25 (b) the financial resources of the

1 employer involved in the provision of the reasonable
2 accommodation;

3 (c) the number of persons the employer
4 employs;

5 (d) the effect on expenses and
6 resources;

7 (e) the impact otherwise of the
8 accommodation upon the employer's business;

9 (f) the overall financial resources of
10 the employer;

11 (g) the overall size of the business of
12 an employer with respect to the number, type and location of
13 its facilities;

14 (h) the type of operation of the
15 employer, including the composition, structure and functions of
16 the work force of the employer; and

17 (i) the geographic separateness or
18 administrative or fiscal relationship to the employer or the
19 employer's facilities."