Rule Summary and Fiscal Analysis (Part A)

Ohio Civil Rights Commission
Agency Name

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Division | Contact

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4112-5-05 — Rule Number

AMENDMENT — TYPE of rule filing

Rule Title/Tag Line — **Sex discrimination.**

RULE SUMMARY

1. Is the rule being filed consistent with the requirements of the RC 119.032 review? **Yes**

2. Are you proposing this rule as a result of recent legislation? **No**

3. Statute prescribing the procedure in accordance with the agency is required to adopt the rule: **119.03**

4. Statute(s) authorizing agency to adopt the rule: **4112.04 (A) (4)**

5. Statute(s) the rule, as filed, amplifies or implements: **4112.01 (B)**

6. State the reason(s) for proposing (i.e., why are you filing,) this rule:

The Ohio Civil Rights Commission is proposing this amendment to its administrative rule addressing pregnancy discrimination in order to effectuate the statutory provisions of Ohio Revised Code Chapter 4112, as well as its avowed purpose of ensuring equal employment opportunity and preventing unlawful discriminatory practices. In doing so, the agency is guided by the now well-established principle of statutory interpretation that "the commission, initially, and the courts, upon review, are to construe those statues liberally in order to effectuate the legislative purpose and fundamental policy implicit in their enactment, and to assure that the rights granted by the statutes are not defeated by overly restrictive interpretation." Ohio Civil Rights Comm. v. Lysyj (Ohio Sup. Ct.

1974), 38 Ohio St.2d 217, 220. See also R.C. 4112.08 ("This chapter [i.e., Chapter 4112] shall be construed liberally for the accomplishment of its purposes, and any law inconsistent with any provision of this chapter shall not apply.")

The enabling statute, Ohio Revised Code Section 4112.02(A)(4), vests the Ohio Civil Rights Commission with both the duty and broad authority to "adopt, promulgate, [and] amend . . rules to effectuate the provisions of [Chapter 4112] and the policies and practices of the commission in connection with this chapter." A rule promulgated by the agency does not exceed the bounds of this enabling statute where the rule "is not in conflict with this enabling provision and also furthers the policy of the legislation to prevent unfair discriminatory employment practices," City of Cleveland v. Ohio Civil Rights Comm. (8th Dist. 1994), 98 Ohio App.3d 243, 247, or, conversely, where the rule "is merely an extension of the statutory definition and does not come into conflict with the legislative policy against discrimination," Foltz v. Able Fence & Guard Rail, No. 94-L-020, 1994 Ohio App. LEXIS 5079, at *10-11 (11th Dist. Nov. 10, 1994).

Ohio Revised Code Section 4112.01(B) defines sex discrimination to include discrimination "because of or on the basis of pregnancy, any illness arising out of and occurring during the course of a pregnancy, childbirth, or related medical conditions." The proposed amendment identifies and eliminates the invisible barriers to equality and fairness that women face in the workplace due to pregnancy-those policies and practices that on the surface appear neutral and equally applied, but in reality create an unfair, gender-specific disadvantage for women.

As aptly explained by one Ohio appellate court, the rationale underlying the rule addressing pregnancy discrimination "is clearly to provide substantial equality of employment opportunity by prohibiting an employer from terminating a female worker because of pregnancy without offering a leave of absence, even if no disability leave is available generally to employees." Frank v. Toledo Hospital (6th Dist. 1992), 84 Ohio App.3d 610, 617. This rationale, moreover, is wholly consistent with decisions issued in other cases. See McConaughy v. Boswell Oil Co. (1st Dist. 1998), 126 Ohio App.3d 820, 829 (holding that "if an employer has a leave policy, a female employee 'must be granted leave on account of childbearing,'" and that "if there is no leave policy, the employee must be provided a leave of absence 'for a reasonable period of time'"); Marvel Consultants, Inc. v. Ohio Civ. Rights Comm. (8th Dist. 1994), 93 Ohio App.3d 838, 841 (holding that "[d]enial of maternity leave mandated by [O.A.C. 4112-5-05(G)(6)] is, in effect, terminating the employee because of her pregnancy").

Today, roughly 75% of women in the workplace find themselves taking on the role of both mother and full-time employee. As expectant mothers, these women shoulder a unique responsibility in the workplace, one with truly unique needs. Pregnancy, as a practical matter, always requires a minimum leave of absence, and sometimes requires a change in work schedule or job duties. For far too many

women, however, especially younger and minority women employed in low wage jobs, these options are either insufficient, not applicable, or nonexistent. As a result, these women are forced to choose between motherhood and livelihood, and sometimes the choice is made for them.

A report prepared by Policy Matters Ohio, entitled Adopting Maternity Leave, noted that "[W]hen pregnant women are fired or discouraged from taking maternity leave, or when they quit because they do not have maternity leave benefits, they lose more than just their jobs; their career paths are put into jeopardy." Likewise, they may also lose benefits such as health insurance, which covers much of the costs associated with pregnancy and childbirth. The report further noted that when pregnancy leave is not available "everything can come toppling down," finding that "25 percent of poverty spells begin with a pregnancy." Against this backdrop, it should come as no surprise that women continue to earn lower incomes than men, and continue to hold the majority of low wage jobs.

The proposed amendment ensures that women do not pay a penalty in the workplace for choosing to have a child by clarifying both the rights of pregnant employees and the obligations of employers. To begin with, the amendment makes clear that women affected by pregnancy, childbirth or related medical conditions are entitled to the same benefits and privileges of employment as any other employee similar in his or her inability to work. Sometimes, however, the benefits and privileges made available by employers are not adequate for, and have a disparate impact upon, pregnant employees. The amendment, therefore, establishes a minimum amount of leave of up to 12 weeks, whether paid or unpaid, that must be made available when medically necessary, except when a lesser amount of leave is justified by a business necessity. Along the same lines, the amendment ensures that pregnant employees are able to return to work without a change in position, or a loss of service time or other benefits.

It is sometimes argued that the current rule, the proposed rule, and the court decisions require preferential treatment of pregnant employees. In reality, however, requiring pregnancy leave "does not compel . . . employers to treat pregnant workers better than other disabled employees; it merely establishes benefits that employers must, at a minimum, provide to pregnant workers. Employers are free to give comparable benefits to other disabled employees, thereby treating 'women affected by pregnancy' no better than 'other persons not so affected but similar in their ability or inability to work.'" California Fed. Sav. & Loan Assn. v Guerra (U.S. Sup. Ct. 1987), 479 U.S. 272, 290, 107 S.Ct. 683, 695, 93 L.Ed.2d 613. Indeed, the U.S. Supreme Court found that requiring pregnancy leave actually "promotes equal employment opportunity" because it "ensures that [women] will not lose their jobs on account of pregnancy disability." Guerra, 479 U.S. at 289, 107 S.Ct. at 694.

7. If the rule is an AMENDMENT, then summarize the changes and the content

of the proposed rule; If the rule type is RESCISSION, NEW or NO CHANGE, then summarize the content of the rule:

In its present version, the Ohio Civil Rights Commission's administrative rule addressing pregnancy discrimination (originally promulgated in 1977) requires that employers provide pregnancy leave for a "reasonable period of time," and makes it illegal for an employer to terminate a female employee under a policy providing "insufficient" or no leave. This rule, however, has generated a noticeable degree of uncertainty and is often difficult to apply because it does not tell employers or employees when leave for pregnancy, childbirth or related medical conditions is "reasonable" or, on the other hand, "insufficient."

The amendment proposed by the Ohio Civil Rights Commission takes the guesswork out of the process in two important ways. First, the amendment explains that women affected by pregnancy, childbirth or related medical conditions are entitled to the same benefits and privileges of employment as any other employee similar in his or her inability to work, irrespective of whether the pregnant employee is otherwise similarly situated in all respects. This means that an employer cannot refuse to provide the same benefits and privileges to a woman affected by pregnancy, childbirth or related medical conditions simply because she has not been on the job long enough, or because her pregnancy is not due to a work-related injury.

Second, when the benefits and privileges made available by employers are not adequate for, and therefore have a disparate impact upon, those employees affected by pregnancy, childbirth or related medical conditions, the amendment establishes a minimum amount of leave of up to twelve weeks, except when a lesser amount of leave is justified by a business necessity. Moreover, upon signifying her intent to return to employment, the amendment ensures that pregnant employees are able to return to work without a change in position, or a loss of service time or other benefits.

There are, however, several important limitations with respect to the minimum amount of leave referenced in the amendment. The amendment clearly states that the leave may be "paid or unpaid" at the discretion of the employer. The amendment also clearly states that the leave must be "medically recommended." In other words, the need for leave not only must be due to pregnancy, childbirth or related medical conditions, but also must be recommended by a medical professional. Finally, the amendment limits the right of reinstatement to that period of leave otherwise available to a pregnant employee under the rule.

Taken together, the amendment's establishment of 12 weeks as the minimum amount of leave that must be made available in the absence of business necessity, but limited by the phrases "paid or unpaid" and "medically recommended," does no more than eliminate a barrier for pregnant women in the workplace, provide a level

playing field, and ensure equal employment opportunity as envisioned by Ohio Revised Code Chapter 4112.

8. If the rule incorporates a text or other material by reference and the agency claims the incorporation by reference is exempt from compliance with sections 121.71 to 121.74 of the Revised Code because the text or other material is **generally available** to persons who reasonably can be expected to be affected by the rule, provide an explanation of how the text or other material is generally available to those persons:

This response left blank because filer specified online that the rule does not incorporate a text or other material by reference.

9. If the rule incorporates a text or other material by reference, and it was **infeasible** for the agency to file the text or other material electronically, provide an explanation of why filing the text or other material electronically was infeasible:

This response left blank because filer specified online that the rule does not incorporate a text or other material by reference.

10. If the rule is being **rescinded** and incorporates a text or other material by reference, and it was **infeasible** for the agency to file the text or other material, provide an explanation of why filing the text or other material was infeasible:

Not Applicable.

11. If **revising** or **refiling** this rule, identify changes made from the previously filed version of this rule; if none, please state so:

*This rule is being refiled on November 16, 2007 in order to reflect that the only new language in paragraph (G)(1) of this rule includes ", childbirth or related medical conditions."

After reviewing the public testimony, public comment and other information received as part of the rulemaking process, the Ohio Civil Rights Commission made three changes from the previously filed amendment to its rule addressing pregnancy discrimination. Each of these changes relates to the 12-week minimum amount of leave referenced in the amendment. The first change clarifies that the leave referenced in the amendment may be "paid or unpaid" at the discretion of the employer. The second change clarifies that the leave must be "medically recommended," i.e., both resulting from pregnancy, childbirth or a related medical condition and recommended by a medical professional. (These two changes reflect

the agency's longstanding interpretation of the existing rule as requiring unpaid leave and only when based on a medical need.) The final change clarifies that the right of reinstatement is limited to that period of leave otherwise available to a pregnant employee under the rule.

12. 119.032 Rule Review Date: **1/19/2007**

(If the rule is not exempt and you answered NO to question No. 1, provide the scheduled review date. If you answered YES to No. 1, the review date for this rule is the filing date.)

NOTE: If the rule is not exempt at the time of final filing, two dates are required: the current review date plus a date not to exceed 5 years from the effective date for Amended rules or a date not to exceed 5 years from the review date for No Change rules.

FISCAL ANALYSIS

13. Estimate the total amount by which *this proposed rule* would **increase / decrease** either **revenues / expenditures** for the agency during the current biennium (in dollars): Explain the net impact of the proposed changes to the budget of your agency/department.

This will have no impact on revenues or expenditures.

$0

The Ohio Civil Rights Commission's administrative rule addressing pregnancy discrimination already makes clear that the prohibition against pregnancy discrimination set forth in Ohio Revised Code Chapter 4112 includes the failure or refusal of an employer to provide a pregnant employee with leave related to pregnancy, childbirth or a related medical condition. The amendment proposed by the Ohio Civil Rights Commission only clarifies when, and how much, leave must be made available, and for this reason is not expected to have any impact on the agency's revenues or expenditures during the current biennium (although it is hoped that by clarifying the rights of pregnant employees and the obligations of employers that fewer cases alleging pregnancy discrimination will be filed).

14. Identify the appropriation (by line item etc.) that authorizes each expenditure necessitated by the proposed rule:

$0

15. Provide a summary of the estimated cost of compliance with the rule to all

directly affected persons. When appropriate, please include the source for your information/estimated costs, e.g. industry, CFR, internal/agency:

Since its initial promulgation in 1977, the Ohio Civil Rights Commission's administrative rule addressing pregnancy discrimination has made clear that the prohibition against pregnancy discrimination set forth in Ohio Revised Code Chapter 4112 includes the failure or refusal of an employer to provide a pregnant employee with leave for pregnancy, childbirth or a related medical condition. Whether requiring leave for a "reasonable period of time," or prohibiting termination based upon a policy under which "insufficient" or no leave is available, all employers in Ohio covered by Ohio Revised Code Chapter 4112 (those with four or more employees) have been required to provide pregnant employees with leave for nearly 30 years. Given that the obligation to provide leave to pregnant employees is not new for covered employers, the amendment proposed by the Ohio Civil Rights Commission, which again only clarifies when, and how much, leave must be made available, is not expected have a measurable cost of compliance, i.e., covered employers should already be providing leave to pregnant employees. Moreover, the amendment permits an employer to provide a lesser amount of leave than what might otherwise be required when justified by a business necessity. The public comment received from businesses and business groups and organizations stated, among other things, that providing unpaid leave of up to 12 weeks for pregnancy, childbirth and related medical conditions is cost-prohibitive for small businesses. Again, however, the obligation to provide unpaid leave to pregnant employees is not new (having been in effect for 3 decades), the leave need only be available when "medically recommended," and a lesser amount of leave may be provided when justified by a business necessity. Moreover, in their report Policy Matters Ohio found that without the availability of paid leave, pregnant employees take on average only 6.6 weeks off work. They also found that, because only 48 in every 1000 employed women give birth in a given year (nationally), the costs of providing unpaid pregnancy leave are modest, and that these costs are often less than turnover costs.

16. Does this rule have a fiscal effect on school districts, counties, townships, or municipal corporations? **No**

17. Does this rule deal with environmental protection or contain a component dealing with environmental protection as defined in R. C. 121.39? **No**