GUIDANCE ON DISCRIMINATION ON THE BASIS OF PREGNANCY: PITTSBURGH CITY CODE CHAPTER 659,

SECTION §659.02

I. BACKGROUND:

Article V, Chapter 659, Section 659.02 of the Pittsburgh City Code treats pregnancy discrimination as a form of sex discrimination, and prohibits unlawful employment practices based on pregnancy, childbirth, or related medical conditions. An employee or applicant for employment who believes they have been discriminated against on this basis has the right to file a complaint with the Pittsburgh Commission on Human Relations (the Commission) within 365 days of the discriminatory act.

Historically, pregnancy is among the most common reasons that female employees are discharged or subject to reduction in their work hours or loss of health insurance, with such discrimination disproportionately affecting females of color. Pregnant employees typically work late into their pregnancies and often provide a significant portion of their household income. In light of these factors, and the relatively short duration of the need for pregnancy-related accommodation, the Commission's policy is that accommodations, which enable pregnant individuals to preserve their employment and health and to provide for their families, should be liberally granted.

This document is meant to provide guidance for employers regarding their obligations to reasonably accommodate the needs of employees due to pregnancy, childbirth, or related medical conditions and events, as well as the rights of their partners related to the same. This document is not meant to serve as an exhaustive list of all potential forms of pregnancy-related discrimination under the Code. Employers should consult their attorneys for advice regarding particular situations.

II: DEFINITIONS:

Childbirth: Labor or childbirth, whether or not it results in a live birth.

Pregnancy: the state of being pregnant, including being the partner* of a pregnant person, and/or experiencing symptoms of pregnancy, including but not limited to: nausea, morning sickness, dehydration, increased appetite, swelling of extremities, increased body temperature, back pain.

Related medical condition or event: the state of seeking to become pregnant; any medical condition or event that is related to or caused by pregnancy or childbirth, including but not limited to: infertility, gestational diabetes, pregnancy-induced hypertension, pregnancy-related anemia, pregnancy-related sciatica, preeclampsia, complications requiring bed rest, post-partum depression, miscarriage, lactation, recovery from childbirth, and termination of pregnancy; as well as subsequent appointments, testing, and procedures, including being the partner* of a person affected by any such related medical condition or event.

* For these purposes, the term "partner" applies broadly to mean a person of any gender with whom a pregnant person or person with a related medical condition has a relationship of mutual emotional and/or physical support, and does not require a marital or domestic relationship.

III: PROHIBITED DISCRIMINATION

A *Disparate Treatment of Pregnant Employees:* Treating an employee less favorably than others because they are pregnant or perceived to be pregnant, or because they experienced childbirth or have a pregnancy-related medical condition, is discrimination in violation of the Code. This remains true if pregnancy, childbirth, or a related medical condition is even *part of* the reason or motivation for the less favorable treatment of (or "adverse action" against) the employee. These prohibitions apply equally to applicants for employment, and to the partners of a pregnant individual. Such treatment is often rooted in assumptions and stereotypes regarding the capabilities, reliability, and dedication of pregnant employees. Examples of unlawful adverse actions include:

- Refusing to hire a pregnant individual or someone perceived as likely to become pregnant in the future, based on the belief that they will be less committed to the job or may not return to work after giving birth;
- Refusing to consider a pregnant individual for a particular position, promotion, or project, based on the assumption that they will be distracted, less focused, or frequently absent because of their pregnancy;
- Demoting or firing a pregnant employee, reducing their hours, denying a raise or training, or removing responsibilities, based on the assumption that the employee will be unreliable or have trouble meeting the demands of their job during the pregnancy and/or after having a child;
- Denying a promotion to the partner of a pregnant individual because the employer believes the partner will be missing work frequently to attend pregnancy-related appointments and/or will be less dedicated to their work after becoming a parent;
- Transferring a pregnant employee to another position or placing them on unpaid leave, based solely on the employer's belief that the physical demands of their existing position may be harmful to the employee;
- Reprimanding or disciplining a pregnant employee for conduct, when non- pregnant employees who engage in comparable conduct are not reprimanded or disciplined;

B. *Policies that Single Out Pregnant Employees*:

It is a violation of the Code for an employer to implement policies, whether written or unwritten, official or unofficial, directed at employees or applicants who are currently pregnant, or who are believed to be capable of or likely to become pregnant in the future. Such policies are a form of disparate treatment, and, like the examples listed in Paragraph A. above, are often based upon assumptions or stereotypes regarding pregnancy, traditional gender roles or norms, or maternal or fetal health and safety. Examples of such unlawful policies include:

- A policy that categorically excludes pregnant employees (or employees who are believed to have the intent or potential to become pregnant in the future) from specified job categories or positions, such as positions involving exposure to hazardous chemicals;
- A policy requiring that pregnant employees provide medical clearance to perform certain job duties, when other employees performing such duties are not subject to the same requirement;
- A policy of requiring pregnant employees to take leave by a certain point in their pregnancies, or requiring that they continue leave for a certain period of time after giving birth before returning to work;
- Any other policy that treats pregnant employees or applicants differently from non-pregnant employees in similar circumstances.

C. *Policies with a Disparate Impact on Pregnant Employees*: Policies that do not *explicitly* treat pregnant employees differently and may not have been intended to do so, but which are likely to result in less favorable treatment of pregnant employees, also violate the Code's prohibitions against pregnancy discrimination. For example:

- A policy that provides that light duty work will be made available only to employees who are injured on the job;
- A policy that requires all persons hired to work in the employer's warehouse to be able to lift up to 50 pounds, if the lifting requirement is not essential for all positions in the warehouse.

D. *Pregnancy-Based Harassment:* Pregnancy discrimination may also take the form of gender-based harassment related to pregnancy, childbirth, or pregnancy-related medical conditions. Such harassment may consist of a single severe incident, or of repeated acts or behaviors which create an environment pervaded by stereotyping, degradation, humiliation, bias, and/or objectification. Examples include:

- Comments regarding a pregnant employee's body, weight, size, or appearance;
- Comments regarding a pregnant employee's age in relation to their pregnancy;
- Comments regarding a pregnant employee's marital status;

- Comments regarding a pregnant employee's commitment to their job or ability to focus;
- Comments regarding whether the pregnant employee should be performing certain tasks or engaging in certain activities;
- Comments regarding what the pregnant employee should or should not be eating or drinking;
- Comments regarding the pregnant employee's intent to continue working during pregnancy and/or after childbirth.

Pregnancy-based harassment may also include ridicule, offensive jokes, insults, name-calling, offensive pictures, or physical threats or conduct, such as unwelcome touching, if such behavior is motivated by pregnancy, childbirth, or related medical condition.

- *E: Failure to Provide Reasonable Accommodations to an Employee in regard to Pregnancy, Childbirth, or a Related Medical Condition or Event:* When an employer knows, or reasonably should know, of an employee's pregnancy, childbirth, or related medical condition, or that an employee is the partner of a person who is pregnant or affected by a related medical condition, the Code requires the employer to provide the employee with reasonable accommodations that will allow them to perform the essential duties of their job. A reasonable accommodation is an accommodation that can be made without causing the employer undue hardship in conducting its business.

  An employer's duty under the Code to provide reasonable accommodations based on pregnancy, childbirth, or a related medical condition applies regardless of whether the employee's condition would qualify as a "disability" under federal, state, or local law regarding disability discrimination. Examples of reasonable accommodations are listed in Paragraph 2. below.

  It is a violation of the Code for an employer to deny a reasonable accommodation that (1) will enable the employee to perform their essential duties and (2) will not cause the employer undue hardship.

  1. The Interactive Process

     It is the duty of the employer to initiate a dialogue with an employee (the "interactive process") when:

     (a) The employer learns, either directly (e.g., is informed by the employee) or indirectly (e.g., the condition is visible and obvious) that the employee is pregnant, has recently experienced childbirth, or has a pregnancy-related medical condition, or that an employee is the partner of such a person;
     (b) The employer has knowledge that the employee is having an issue with their performance or conduct at work; and
     (c) The employer has reason to believe that the performance or conduct

issue(s) are related to the employee's or their partner's pregnancy, childbirth, or a related medical condition.

If all of the above apply, the employer has a duty to initiate the interactive process, *whether or not* the employee has made a request for accommodation.

The purpose of the interactive process is for the employer to gain an understanding of the individualized needs of the employee, and for both parties to explore ways in which those needs can be met. While the employer need not grant an employee's request for a specific accommodation, it must propose reasonable alternatives that accommodate the limitation(s) affecting the employee because of pregnancy, childbirth, or related medical condition/event. (Refer to Paragraph 2. below for examples of possible accommodations.) This dialogue between the employer and the employee may occur in person, over the phone, or through electronic communication such as e-mail.

The employer must participate in the interactive process in good faith, including:

- Ensuring that all employees have been notified in writing of their right to request reasonable accommodation for pregnancy, childbirth, and related medical conditions, and of the process for making such a request;
- Initiating the interactive process promptly upon becoming aware that an employee may need an accommodation (as referenced in subparagraphs (a) through (c) above), or expeditiously responding to an employee's request for an accommodation; and
- Thoroughly exploring possible ways of accommodating the employee's needs, and considering the feasibility of alternative accommodations.

The interactive process remains ongoing until either (a) a reasonable accommodation has been agreed upon, or (b) the employer reasonably concludes that (i) there is no available accommodation that will not cause undue hardship, or (ii) there is no accommodation that will enable the employee to perform the essential duties of their position.

An employer may not deny an accommodation on the basis that no accommodation exists that would enable the employee to perform the basis duties of their position without first considering whether any comparable positions are available for which the employee is qualified and in which their limitations could be reasonably accommodated. If no such comparable positions exist, before denying an accommodation, the employer must offer the employee any lesser position which is available and in which their limitations could be reasonably accommodated, or, as a last resort, offer the employee an unpaid leave of absence. If such accommodations are not acceptable to the employee, or would pose an undue hardship to the employer, then the employer may conclude that reasonable

accommodation cannot be made.

In determining whether a proposed accommodation would pose an undue hardship, the employer must consider factors including the cost of the accommodation in relation to the overall financial resources of the employer; the size of the employer's business and its workforce; the type of operation; and the impact of the accommodation upon the operation of the facility. Employers are advised to consult their attorneys with specific questions in this regard, or in regard to any other aspect of the interactive process.

Even when an employee has been provided an accommodation, the employer must permit the employee to make new requests for accommodation as their condition changes. Each time a new request is made, the employer must re-initiate and engage in the interactive process as described above.

Whether a reasonable accommodation has been granted or determined not to be possible, the employer should notify the employee in writing of its decision.

An employer's failure to engage in the interactive process as outlined above amounts to a failure to accommodate in violation of the Code.

2 Examples of Reasonable Accommodations

Reasonable accommodations for pregnancy, childbirth, or a related medical condition may include, but are not limited to:

Schedule Modifications/Leave Requests

- Making minor or temporary modifications to the employee's work schedule, including start and/or end time, number of hours worked, or shift assignment;
- Offering the employee a flexible schedule;
- Leave to recover from childbirth;
- Permitting the employee to take temporary unpaid leave;
- Permitting the employee to take additional breaks to rest, use the bathroom, or get water or a snack;
- Time off to attend medical appointments and procedures related to pregnancy, related medical conditions, and fertility treatments; The leave need not be paid if paid time off (PTO) is unavailable, but the employee should not be penalized;
- Allowing an employee who is the partner of a pregnant person time off to attend such medical appointments and procedures with the pregnant person, and to attend the birth;
- Leave to recover from childbirth or to care for a partner who is recovering from childbirth;
- Leave to recover from a miscarriage or termination of pregnancy, including allowing time off to the partner of an individual who has experienced such an event for the partner's own emotional recovery;

- Adjusting the employee's schedule or allowing additional breaks to allow them to address lactation-related needs;
- Offering the employee reduced work hours;

Modified Duties/Job Requirements

- Offering the employee light duty work;
- Temporarily reassigning non-essential job duties that the employee is unable to perform due to pregnancy, childbirth, or a related medical condition to other employees;
- Offering the employee a vacant alternative position (only after the employer has fully considered whether reasonable accommodation is possible in the employee's current position and has determined that it is not);
- Permitting the employee to work from home.
- Adjustment of uniform requirements or dress codes;

Modified Work Station

- Permitting the employee to eat at their work station;
- Permitting the employee to sit during shifts, or providing a stool at their work station;
- Providing a fan at the employee's work station;
- Providing access to refrigeration for food/milk storage

Requests for Medical Documentation: An employer may not require an employee to provide medical documentation or confirmation of the employee's or their partner's pregnancy, childbirth, or a related medical condition. Medical documentation may be requested only when:

(d) The employee has requested time off from work, including for medical appointments, other than the presumptive period for recovering from childbirth – or – the employee has requested to work from home, on either an intermittent or longer-term basis; and

(e) The employer requires such documentation from employees who request time off or permission to work at home for reasons other than pregnancy, childbirth, or related medical conditions.

Subject to paragraph (b), an employer may also request documentation confirming that an employee who is the partner of a pregnant individual attended an appointment with the pregnant individual. However, the employer may not require that such documentation confirm the pregnancy or childbirth, or confirm or describe the related medical condition which was the basis of the appointment.

If the employer believes that the documentation provided is insufficient, it must, before denying the request, give the employee the opportunity to provide additional documentation. If the employee prefers that the employer instead speak with the health care provider who provided the documentation and the employee gives written and signed consent for the same,

the employer may do so in lieu of requiring further documentation.

Except in the circumstances addressed above (involving requests for time off or to work at home), it is a violation of the Code for an employer to require an employee to provide medical documentation for any other accommodation due to pregnancy, childbirth, or a related medical condition.

F. *Retaliation:* The Code also prohibits an employer, employment agency, or labor organization from taking action against a person because he or she has opposed a discriminatory act prohibited by the Code; made a complaint of discrimination under the Code; or testified or otherwise assisted or participated in an investigation by the Commission or a proceeding before the Commission.

In the context of pregnancy discrimination in employment, examples of such unlawful retaliation include, but are not limited to, taking adverse action (such as discipline, demotion, reassignment to less desirable duties, or termination) against an employee because the employee:

- Requested a reasonable accommodation;
- Reported to management that they believes they are being discriminated against based upon pregnancy, childbirth, or a related medical condition;
- Filed a complaint with the Commission alleging that the employer has violated the Code's prohibitions regarding pregnancy discrimination;
- Told their employer that they intend to file such a complaint with the Commission; or
- Testified as a witness in regard to a complaint of pregnancy discrimination made by a coworker.

IV: BEST PRACTICES

Employers should develop written policies, distributed to all employees, to inform them of the Code's prohibition of pregnancy discrimination and retaliation, and of their right to request reasonable accommodations for pregnancy, childbirth, or related medical conditions, and to whom such requests should be made. When an employer is notified by an employee of their pregnancy or related condition, the employer should provide the employee with a copy of the policy and remind the employee of the availability of accommodations. Employers should also ensure that their managers receive training regarding prohibited discrimination and their responsibilities in the handling of requests for accommodations.

Employers should document all efforts to initiate, engage in, and conclude the interactive process with an employee, including the following information for each such employee:

- When and under what circumstances the interactive process was initiated;
- What information, if any, was provided to the employer during the interactive process;
- The employee's stated or observed limitation(s);
- The types of accommodation(s) that were requested by the employee or suggested by the employer during the interactive process;
- The dates of each subsequent conversation between the employer and employee regarding the accommodation(s);
- Whether or not a reasonable accommodation was ultimately identified and, if not, the employer's justification for denying an accommodation;
- A copy of the notice provided to the employee regarding the determination reached at the conclusion of the interactive process.

Employers may be required to share this information with the Commission in the course of an investigation. Prompt responses to requests by the Commission for information or documents may help to avoid a Commission-initiated investigation into employment practices.

Employers should respond promptly to any complaints of discrimination, including conducting a thorough investigation and implementing appropriate corrective and disciplinary action when warranted.

Employers should make all efforts to maintain the confidentiality of communications regarding requests for reasonable accommodation and all circumstances surrounding an employee's pregnancy, childbirth, or related medical condition or event.

The information contained in this Guidance is not intended as legal advice. Employers should consult their attorneys for case-specific advice when situations arise involving an employee's pregnancy, childbirth, or related medical condition or event.