

CITY OF BALTIMORE

CATHERINE E. PUGH, Mayor



DEPARTMENT OF LAW

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October 15, 2018

The Honorable President and Members
of the Baltimore City Council
Attn: Natawna B. Austin, Executive Secretary
Room 409, City Hall
100 N. Holliday Street
Baltimore, Maryland 21202

Re: City Council Bill 18-0276 – Lactation Accommodations in the Workplace

Dear President and City Council Members:

The Law Department has reviewed City Council Bill 18-0276 for form and legal sufficiency. The bill requires certain employers to provide certain lactation accommodations and to develop, distribute and implement certain policies and procedures for providing these accommodations; establishes minimum standards for lactation accommodations; defines certain terms, provides for certain exceptions and authorizes certain waivers or variances under certain conditions; requires employers to maintain certain records; prohibits retaliatory or discriminatory actions against persons exercising rights under this ordinance; authorizes the adoptions of rules and regulations to carry out the ordinance, provides for administrative, judicial and appellate review of and remedial relief for violations; imposes certain criminal penalties for violations and provides for a special effective date.

Federal law, as part of the Affordable Care Act, requires certain employers to provide “reasonable break time” and a private location (not a bathroom) for nursing mothers to express breast milk for one year after the child’s birth. 29 U.S.C.A. § 207 (r)(1). The employer is not required to pay the employee for the time spent and employers with less than 50 employees may be excepted from the requirement if it would “impose an undue hardship” “when considered in relation” to the size or nature of the employer’s business. 29 U.S.C.A. § 207 (r)(2), (3). The law expressly allows for states to pass “greater protections to employees” and many states and cities have done so. 29 U.S.C.A. § 207 (r)(4). Although Maryland does not have a parallel provision for private employers, the General Assembly recently passed a law requiring certain state agencies to provide a private lactation room for nursing mothers. Md. Code, State Personnel and Pensions, § 2-310. Similarly, the City has a policy that requires lactation accommodations for City employees for one year after the birth of their child. AM 204-7.

As expressly authorized by federal law, Bill 18-0276 imposes stricter and more specific requirements for lactation accommodations on employers. The bill, for example, requires that the lactation location be in close proximity to the employee’s work area, have a door that locks from the inside, contain a surface to place materials needed, a place to sit, an electrical outlet and



a sink and refrigerator close by. CCB 18-0276, p. 5 line 13- p.6 line 9. The bill broadens the waiver permitted by Federal law to include any employer demonstrating an undue hardship in relation to the nature of his business. CCB 18-0276, p. 7 lines 1-9. The bill broadens the scope of application as federal law exempts certain types of employers. Since federal law expressly allows "greater protections to employees" the bill can go further and apply more broadly without preemption. 29 U.S.C.A. §207 (r)(4). Many other states and cities have passed similar laws with more stringent requirements and broader application. *See, e.g.* Colorado, CO ST § 8-13.5-104 and Philadelphia Police Code, Title 9 § 9-1103.

The City has the authority to legislate in this area, subject to federal and state law. City Charter, Art. II, §§ 11,27,47.

The bill requires employers to develop and implement a lactation accommodation policy which, among other requirements, gives notice to the employee that they have a right to request accommodation, requires the employer to respond in a certain amount of time, gives notice to the employee that she may file a complaint if a request is denied and that retaliation against the employee is prohibited. CCB 18-0276, p.7, line 19 – p.8, line 17. While this is potentially an impairment of the employment contract, to violate the Contract Clause, the impairment must be substantial and even then, can be overridden by a legitimate exercise of police power. *Bannum, Inc. v. Town of Ashland*, 922 F.2d 197 (4th Cir. 1990) (citing *Allied Structural Steel v. Spannaus*, 438 U.S. 234 (1978)). Requiring employers to implement an accommodation policy is not likely a "substantial" impairment of an employment contract and the requirement furthers the City's interest in protecting the rights of employees who are breastfeeding in the workplace. Therefore, the bill could withstand a freedom of contract challenge.

The bill allows the Commission to award an aggrieved person back pay, reinstatement, compensatory damages and reasonable attorney's fees. CCB 18-0276, p. 10, lines 10-18. The City does not have the authority to create a private cause of action, nor does it have the authority to provide these remedies. *See McCrory Corp. v. Fowler*, 319 Md. 12, 20 (1990). Section 16-25 (B) must therefore be removed from the bill.

Subject to the above amendment, the Law Department could approve the bill for form and legal sufficiency.

Sincerely, 

Ashlea H. Brown
Assistant Solicitor

cc: Andre Davis, City Solicitor
Karen Stokes, Director, Mayor's Office of Government Relations
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