Insight

IN-DEPTH DISCUSSION

JUNE 8, 2016

Pre- and Post-Partum Protection: Colorado Enacts A Pregnant Workers Fairness Act

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States and municipalities around the country are increasingly providing more protection for pregnant employees. As recently as April 2016, San Francisco became the first municipality to enact fully paid parental leave for up to six full weeks.[1] More than a dozen states have passed laws protecting the rights of pregnant workers with respect to leaves, accommodations, and related issues.[2] Colorado has now joined the ranks.

On June 1, 2016, Governor John Hickenlooper signed Colorado House Bill 16-1438 ("the Act"), which enacts a number of amendments to the Colorado Anti-Discrimination Act ("CADA") related to the employment of pregnant women. The Act makes clear its intent to "protect pregnant women from being terminated from employment when they need a simple, reasonable accommodation in order to stay employed."[3]

The Act Requires Reasonable Accommodations for All Health Conditions "Related to" Pregnancy

The Act states that an employer "shall" provide reasonable accommodations for any "health conditions related to pregnancy or the physical recovery from childbirth." Like the CADA generally, it applies to all employers, regardless of the number of employees.[4]

The Act therefore expands similar protections under federal law. For example, the Americans with Disabilities Act ("ADA") requires accommodation (and prohibits discrimination) only for "pregnancy-related conditions that constitute a disability or for limitations resulting from the

1 *See* Paid Parental Leave Ordinance http://sfgov.org/olse/paid-parental-leave-ordinance; *see also* Michelle Barrett Falconer and Sebastian Chilco, *Bonding by the Bay: San Francisco Mandates Paid Parental Leave*, Littler Insight (Apr. 21, 2016).

2 *See* Joseph P. Harkins et al., *The Heavy Burden of Light Duty: Young v. UPS*, Littler Insight (Mar. 31, 2015).

3 H.B. 16-1438, § 1(a).

4 § 24-34-401(3), C.R.S.

interaction of the pregnancy with an underlying impairment."[5] While conditions like gestational diabetes or pregnancy-induced sciatica could qualify, pregnancy, alone, cannot.

Under the Colorado Act, however, accommodation is required so long as the condition is "related to" pregnancy or a condition following childbirth. No related disability is necessary beyond the fact of pregnancy itself. For example, an employee who has difficulty sitting for extended periods of time because of her pregnancy may require an accommodation under the Colorado Act, even if she would not be afforded such an accommodation under the ADA.

The Act provides a number of possible accommodations for employers to consider. They include more frequent or longer break periods; more frequent restroom, food, and water breaks; acquisition or modification of equipment or seating; limitations of lifting; temporary transfer to a less strenuous or hazardous position, if available; job restructuring; light duty, if available; assistance with manual labor; or modified work schedules. These accommodations would be deemed reasonable so long as the employer is not required to hire new employees, discharge an employee, transfer or promote an employee, create a new position, or provide leave beyond that provided to similarly situated employees. Of course, these possible accommodations echo many accommodations endorsed by the Equal Employment Opportunity Commission to accommodate pregnant workers under the ADA and the Pregnancy Discrimination Act ("PDA"), 42 U.S.C. § 2000e(k).[6]

But employers must be careful to consider other, or different, accommodations beyond those provided in the Act or similar federal law. The Act requires employers to engage in the interactive process, and prohibits requiring an applicant or employee to "accept an accommodation that the applicant or employee has not requested or an accommodation that is unnecessary for the applicant or the employee to perform the essential functions of the job."[7] The determination must be based on the needs of the individual employee.

Employers should also consider requests for accommodations in light of other federal laws. For example, a request for leave may implicate the Family and Medical Leave Act ("FMLA"), which permits 12 weeks of leave: (1) for the birth and care of the employee's newborn child; (2) for the placement of a child with the employee through adoption or foster care; (3) to care for the employee's spouse, son, daughter, or parent with a serious health condition; or (4) to take medical leave when the employee is unable to work because of a serious health condition.[8] While the Act specifically prohibits *requiring* leave as an accommodation if other accommodations are available, refusing a request for leave that is less than the FMLA requirement could be interpreted as unreasonable under the Act.

Employers should also carefully consider accommodations provided to non-pregnant employees. The Act includes a rebuttable presumption that similar accommodations provided to other classes of employees do not impose an undue hardship. Perhaps more importantly, the U.S. Supreme Court recently held, in *Young v. United Parcel Service, Inc.,* 135 S. Ct. 1338 (2015), that the PDA permits claims based on the denial of an accommodation related to pregnancy under the familiar Title VII burden-shifting framework of *McDonnell-Douglas*. Therefore, a failure to accommodate a pregnant worker may constitute disparate treatment under Title VII if the woman can show "she belongs to the protected class, that she sought accommodation, that the employer did not accommodate her, and that the employer did accommodate others 'similar in their ability or inability to work.'"[9] Employers should, therefore, be careful to permit pregnant workers accommodations that they have allowed other non-pregnant employees.

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5 *See, e.g.,* EEOC Enforcement Guidance: Pregnancy Discrimination and Related Issues, June 25, 2015, *available at* https://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm#IIB.

6 *See id.*

7 H.B. 16-1438, § 3(a)(IV).

8 *See* 29 U.S.C. § 2612(a).

9 *Id.* at 1354.

Limits on the Employer's Duty to Accommodate

Of course, the applicant or employee must still be able to perform the "essential functions" of the position. Employers should carefully consider job descriptions to ensure they accurately reflect these functions.

A requested accommodation also need not pose an "undue hardship" on the employer. Under the Act, an "undue hardship" includes familiar concepts like the nature and cost of the accommodation, the overall financial resources of the employer, the overall size of the employer's business, and the accommodation's effect on expenses, resources, or operations of the employer. Of course, these concepts very closely mirror undue hardship considerations under the ADA, 29 C.F.R. § 1630.2(p)(2). Federal law will likely provide helpful benchmarks in these considerations.

Prohibition of Adverse Action

The Colorado Act also prohibits "adverse action" against employees or applicants who request or use a reasonable accommodation "related to pregnancy, physical recovery from childbirth, or a related condition."[10]

The Act expansively defines "adverse action" to include those actions that a "reasonable employee would have found . . . materially adverse, such that it might have dissuaded a reasonable worker from making or supporting a charge of discrimination."[11] This appears to expand the general CADA definition of an unfair employment practice, which states that it is an unfair employment practice "to refuse to hire, to discharge, to promote or demote, to harass during the course of employment, or to discriminate in matters of compensation, terms, conditions, or privileges of employment."[12]

Notices

Finally, the Act requires employers to provide notices of the rights established. Employers must post the notice in the workplace. They must provide notice to new employees at the start of employment, and to current employees within 120 days of the Act's effective date, August 10, 2016.

Recommended Actions

- Employers should contact their employment counsel for guidance on the impact the Act will have on their current policies and requests for accommodations.
- Employers should also consider taking the following actions:
- Review anti-discrimination, benefits, leave of absence, light duty, and accommodation policies and handbooks to make necessary changes to ensure they are compliant with the Act and related federal pregnancy protections.
- Review offer letters to ensure that essential functions accurately reflect job duties and that the notification of rights is provided.
- Draft a notice to current employees of the rights under the Act.
- Review and revise anti-discrimination posters to ensure they meet the requirements of the Act.
- Train managers and human resources professionals on rights and responsibilities including the duty to accommodate restrictions related to pregnancy, childbirth, or lactation.
- Establish procedures to evaluate and implement requests for pregnancy accommodations.
- Take pregnancy discrimination complaints seriously and take steps to protect employees who complain.

10 HB 16-1438, § 3.

11 *See id.*

12 § 24-34-402(1)(a), C.R.S.