A Timely Analysis of Legal Developments

ASAP®

October 8, 2013

New York City Law Provides Reasonable Accommodation for Pregnancy, Childbirth, and Related Conditions

By David Wirtz, Barbara Gross, and Stefanie Kastrinsky

Updated on December 23, 2013

On October 2, 2013, Mayor Michael Bloomberg signed into law an amendment to the New York City Human Rights Law (NYCHRL) that requires employers with four or more employees to provide reasonable accommodations for pregnancy, childbirth, and related medical conditions, unless the employer can prove that the accommodation would cause an undue hardship. The law takes effect 120 days from enactment, on January 30, 2014.[1]

Background

Federal and New York State Law

Prior to the passage of the amendment to the NYCHRL, pregnant employees in New York City were protected under a patchwork of federal, New York State, and local anti-discrimination laws, but none clearly required that employers provide reasonable accommodations to pregnant employees. Such employees cannot seek workplace accommodations from their employers under the federal Americans with Disabilities Act (ADA) or under the disability provisions of the New York State Human Rights Law because pregnancy, in and of itself, is not considered a disability under these laws.[2] Only pregnancy-related or childbirth-related *impairments or complications* constitute disabilities under these laws.

The Federal Pregnancy Discrimination Act and the New York State Human Rights Law require an employer to treat pregnant women the same as non-pregnant employees.[3] But here, again, the laws only require that employers grant a pregnant employee maternity leave or other accommodations to the same extent that they grant leaves or other accommodations to any other *temporarily* disabled employee. Thus, if a non-impaired, pregnant employee cannot perform one or more of the essential functions of her job without an accommodation, the employee cannot assert a federal or New York State claim if the employer terminates her due to her inability to perform the job.

1 *See* New York City Local Law Int. No. 974-A, *available at*: http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=1241612&GUID=505FEA48-8362-46CB-88CF-A1BDE9B9084E&Options=ID|Text|&Search=974-A (last visited October 7, 2013); N.Y.C. Admin. Code § 8-107(22).

2 29 CFR Appendix to § 1630.2(h); N.Y. Exec. L. § 292 (21).

3 42 U.S.C. § 2000(e)(k); *Bond v. Sterling, Inc.*, 997 F. Supp. 306, 309 n.1 (N.D.N.Y. 1998) ("the [New York State Human Rights Law] provides the same protections as does the Federal Pregnancy Discrimination Act"

New York City Law

In general, the NYCHRL provides greater protections to individuals with disabilities than federal or New York State law. NYCHRL Section 8-102(16)(a) broadly defines "disability" as any physical, medical, mental, or psychological impairment, or a history or record of such impairment. While the current New York City Commission on Human Rights interprets the NYCHRL as including pregnancy within the definition of disability—which would require New York City employers with four or more employees to accommodate pregnant workers—the Commission's interpretation has not been universally accepted. Per the Legislative Findings and Intent set forth in Section 1 of the pregnancy accommodation amendment to the NYCHRL, the New York City Council received reports that not all employers were accommodating pregnant employees, and in some instances pregnant employees were being terminated or suspended for requesting workplace accommodations. The Council also recognized that even an employee's otherwise healthy pregnancy may require an accommodation, such as frequent bathroom breaks, and that the stress resulting from a failure to obtain a reasonable accommodation could adversely affect a pregnant woman's health. Other examples of reasonable accommodations that appear in the Legislative Findings include "breaks to facilitate increased water intake, periodic rest for those who stand for long periods of time, and assistance with manual labor."[4] Additionally, the Council found, New York City women are the primary or co-breadwinners in nearly two-thirds of families, and single mothers head 34.2% of all households with children and over 82% of single-parent households.[5]

What Is New in New York City?

Under the amendment to the NYCHRL, a woman who is pregnant or has given birth is entitled to reasonable accommodation due to the pregnancy, childbirth, or a related medical condition so that she can perform "the essential requisites of the job." It is unlawful for an employer to refuse to provide such reasonable accommodation when the employee's pregnancy, childbirth, or related medical condition is known, or should have been known, by the employer, unless the employer can prove that the accommodation would cause an "undue hardship in the conduct of the [employer's] business."[6] Additionally, if the employer believes that the employee could not with reasonable accommodation "satisfy the essential requisites of the job," the employer must raise and prove this as an affirmative defense to a claim of discrimination.

The pregnancy accommodation amendment to the NYCHRL is consistent with the current "reasonable accommodation" requirements for disabled employees under the NYCHRL. Unlike the federal ADA and the New York State Human Rights Law, courts have held that there are no accommodations that are "unreasonable" under the broader NYCHRL if they do not cause undue hardship.[7] Undue hardship is an affirmative defense that an employer is obligated to plead and prove.[8] Thus, as a practical matter, whatever accommodations a pregnant employee now requests in New York City must be granted unless the employer is prepared to prove that doing so would be an undue hardship.

New Posting and Notice Requirement

The law also requires New York City's Human Rights Commission to create a written notice of employees' rights under the NYCHRL pregnancy accommodation amendment, which must be provided to new employees upon hire and to existing employees within 120 days of the effective date (*i.e.*, by May 30, 2014).[9] The notice may also be "conspicuously posted" at an employer's place of business in areas accessible to employees.[10]

---

4 *See* New York City Local Law Int. No. 974-A, *available at*: http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=1241612&GUID=505FEA48-8362-46CB-88CF-A1BDE9B9084E&Options=ID|Text|&Search=974-A.

5 *See* New York City Council, Committee on Civil Rights, Committee Report of the Governmental Affairs Division, September 23, 2013, at 5-6, *available at*: http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=1241612&GUID=505FEA48-8362-46CB-88CF-A1BDE9B9084E&Options=ID|Text|&Search=974-A.

6 Factors identified as contributing to the "undue hardship" analysis for pregnancy, childbirth, or related medical conditions are identical to those applicable to a determination of accommodation of a "disability" and include, but are not limited to, the nature and cost of the accommodation, the overall financial resources of the employer, the number of employees, the effect on expenses and resources, and the impact the accommodation would have on the employer's operations. N.Y.C. Admin. Code § 8-102(18).

7 For a criticized, but so far binding, decision of the First Appellate Department, *see Phillips v. City of New York et al.*, 66 A.D. 3d 170, 182, 884 N.Y.S. 2d 369, 378 (1st Dep't. 2009) ("there is no accommodation (whether it be indefinite leave time or any other need created by a disability) that is categorically excluded from the universe of reasonable accommodation. And unlike the ADA, there are no accommodations that may be 'unreasonable' if they do not cause undue hardship."); *see also, Forgione v. City of New York,* 2012 U.S. Dist. LEXIS 130960, *26-27 (E.D.N.Y. 2012) (citing *Phillips* for the foregoing propositions).

8 N.Y.C. Admin. Code § 8-107(15)(b).

9 N.Y.C. Admin. Code § 8-107(22)(b).

10 *Id.*

Trend?

Eight states have enacted comparable pregnancy accommodation provisions.[11] Federal legislation on the topic, entitled the "Pregnant Workers Fairness Act," has been introduced in both houses of Congress and is now in committee.[12]

The federal bills would provide pregnant women with more protection than what is called for under the NYCHRL pregnancy accommodation law. In addition to requiring that employers make reasonable accommodations for pregnant employees and job applicants, the federal proposals would also prohibit employers from taking three additional actions. First, employers would be prohibited from denying employment opportunities to a job applicant or employee, if the denial were based on the need for the employer to make reasonable accommodations for pregnancy, childbirth or related medical conditions.[13] Second, the federal proposals would make it unlawful to force job applicants or employees to accept a particular accommodation.[14] (Here, it appears that the legislation is intended, like the New York law, to prohibit employers from forcing pregnant women to take leaves.)[15] The third prohibition would make it unlawful for an employer to require an employee to take leave under any leave law or policy (*e.g.*, the Family and Medical Leave Act (FMLA)) if another reasonable accommodation could be provided.[16]

Littler will continue to monitor developments regarding the federal bills as well as the notice to be provided by New York City's Commission on Human Rights under the pregnancy accommodation amendment to the NYCHRL.

Update: *The New York City Human Rights Commission had made a written notice employers must provide to their employees under the new law available on its website: http://www.nyc.gov/html/cchr/html/publications/pregnancy-employment-poster.shtml. The new poster is available in English, Chinese, Haitian Creole, Italian, Korean, Russian, and Spanish. We recommend that employers distribute the poster as the notice to their new employees starting January 30, 2014 and to existing employees no later than May 30, 2014. In addition, employers may, but are not required to, "conspicuously post" the poster at their place of business in areas accessible to employees.*

David Wirtz and Barbara Gross are Shareholders and Stefanie Kastrinsky is an Associate in Littler Mendelson's New York City office. If you would like further information, please contact your Littler Attorney at 1.888.Littler, info@littler.com, Mr. Wirtz at dwirtz@littler.com, Ms. Gross at bgross@littler.com, or Ms. Kastrinsky at skastrinsky@littler.com.

11 Alaska, California, Connecticut, Hawaii, Illinois, Louisiana, Maryland, and Texas. In addition, several states have recently introduced comparable legislation, including New Jersey and Pennsylvania.

12 S. 942, 113th Cong. (2013); H.R. 1975, 113th Cong. (2013).

13 S. 942, 113th Cong. § 2(2) (2013); H.R. 1975, 113th Cong. § 2(2) (2013).

14 S. 942, 113th Cong. § 2(3) (2013); H.R. 1975, 113th Cong. §2(3) (2013).

15 N.Y. Exec. L. 296(1)(g) (it is an unlawful discriminatory practice "[f]or an employer to compel an employee who is pregnant to take a leave of absence, unless the employee is prevented by such pregnancy from performing the activities involved in the job or occupation in a reasonable manner.").

16 S. 942, 113th Cong. § 2(4) (2013); H.R. 1975, 113th Cong. §2(4) (2013). Currently, some employers require pregnant employees to use their leave entitlement under the FMLA rather than provide a workplace accommodation. As a result, many pregnant employees use all or most of their FMLA leave before their children are even born, leaving them without job-protected time-off following childbirth. *See* National Women's Law Center and A Better Balance, *It Shouldn't Be a Heavy Life: Fair Treatment for Pregnant Workers*, at 17, *available at* http://www.nwlc.org/resource/it-shouldnt-be-heavy-lift-fair-treatment-pregnant-workers.