

February 7, 2014

New Jersey Employers Face New Pregnancy Accommodation Requirements

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On January 21, 2014, New Jersey Governor Chris Christie signed the Pregnant Worker's Fairness Act (PWFA) after nearly unanimous support in the State Assembly and Senate. The PWFA, which took effect immediately, applies to all New Jersey employers and amends the New Jersey Law Against Discrimination (LAD) to include pregnancy as a protected category. In addition to prohibiting discrimination on the basis of pregnancy, the PWFA requires an employer to provide reasonable accommodations to pregnant employees who request accommodation upon the advice of their physician unless undue hardship on the business operations of the employer would result.

Background and Summary of the Law

The Act is based upon legislative findings that pregnant women are "vulnerable" to discrimination based upon reports "that women who request an accommodation that will allow them to maintain a healthy pregnancy, or who need a reasonable accommodation while recovering from childbirth, are being removed from their positions, placed on unpaid leave, or fired."

The PWFA defines "pregnancy" as "pregnancy, childbirth, or medical conditions related to pregnancy or childbirth, including recovery from childbirth."¹ The law prohibits an employer from treating an employee "who the employer knows, or *should know* is affected by pregnancy" less favorably than a non-pregnant person whose ability or inability to work is similar to that of the pregnant employee.²

The amended LAD expressly provides several examples of reasonable accommodation an employer must provide under the law:

- Bathroom breaks;
- Breaks for increased water intake;
- Periodic rest;
- Assistance with manual labor;
- Job restructuring or modified work schedules; and

1 N.J.S.A. 10:5-12(s).

2 *Id.* (emphasis added).

- Temporary transfers to less strenuous or hazardous work.³

The law expressly prohibits an employer from providing accommodations or leave for pregnant employees that are less favorable than those provided to non-pregnant employees similar in their ability or inability to work.⁴ The PWFA likewise expressly provides that it is not intended to increase or decrease an employee's rights to paid or unpaid leave under existing law.⁵

As with its provisions regarding disability and religious accommodation, the amended LAD allows an exception to the accommodation requirement if the requested accommodation would cause an "undue hardship" on the business.⁶ The factors for determining whether an undue hardship exists include:

- The overall size of the employer's business with respect to the number of employees, number and type of facilities, and size of budget;
- The type of the employer's operations, including the composition and structure of the employer's workforce;
- The nature and cost of the accommodation needed, taking into consideration the availability of tax credits, tax deductions, and outside funding; and
- The extent to which the accommodation would involve waiver of an essential requirement of a job as opposed to a tangential or non-business necessity requirement.⁷

These are the same factors considered in determining whether an accommodation for a disabled employee is an undue hardship.⁸ Given the recent enactment, there is no regulation or case law specifically whether and under what circumstances certain accommodations requested by a pregnant employee would be an undue hardship.

Recommendations

- Consider each request for accommodation carefully as it requires a fact-specific inquiry to determine whether the request would pose an undue hardship on the business. Unlike accommodating a disability (which can have an uncertain duration), accommodating a pregnancy will usually be fixed in duration because, by definition, a person cannot be pregnant forever. Although "recovery" from childbirth is covered under the new law, that "recovery" period is not likely to be spent on the job.
- Be flexible and creative when assessing the requested accommodation and which job duties are essential. For example, consider transferring a pregnant employee to a different position for a limited time that may have less strenuous physical demands.
- Update handbooks and policies regarding anti-discrimination to expressly prohibit discrimination on the basis of pregnancy.
- Revise accommodation forms and any policies regarding requests for accommodation to reflect the changes in the LAD.

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3 *Id.*

4 *Id.*

5 *Id.*

6 *Id.*

7 *Id.*

8 See N.J.A.C. § 13:13-2.5(b)(3).