A Timely Analysis of Legal Developments

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New Protections for Pregnant Employees Set to Take Effect in the District of Columbia

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Employers in the District of Columbia will soon be required to provide reasonable workplace accommodations to employees whose ability to perform the functions of their positions are limited as a result of pregnancy, childbirth, related medical conditions, or breastfeeding. The Protecting Pregnant Workers Fairness Act of 2014 (the "Act"), passed by the DC Council last year and currently under Congressional Review, is slated to become effective on March 3, 2015. The DC Council's actions follow in the steps of recent guidance issued by the Equal Employment Opportunity Commission on accommodations for pregnancy-related impairments.[1]

Coverage and Requirements of the Act

The Act applies to all employers in the District of Columbia, regardless of size. The Act requires employers to engage in the interactive process with any employee requesting or "otherwise needing" a reasonable accommodation on the basis of a pregnancy- or childbirth-related condition unless doing so would create an undue hardship upon the employer. The burden of establishing an "undue hardship" is on the employer and requires a showing of significant difficulty in the operations of the business or significant expense to the employer.

- Accommodations that should be considered under the Act include:
- More frequent or longer breaks
- Time off to recover from childbirth
- The acquisition or modification of equipment or seating
- The temporary transfer to a less strenuous or hazardous position or other job restructuring such as providing light duty or modified work schedule
- Having the employee refrain from heavy lifting
- Relocating the employee's work area
- Providing private, non-bathroom space for expressing breast milk

1 For additional coverage of coverage of recent pregnancy accommodation developments, *see* Margaret Hart Edwards and Danielle A. Fuschetti, *EEOC Enforcement Guidance on Pregnancy Discrimination Adds ADA Duties of Reasonable Accommodation*, Littler ASAP (July 16, 2014); Steven E. Kaplan, *Supreme Court Agrees to Hear Appeal in Young v. UPS*, Littler's Workplace Policy Update (July 3, 2014).

In connection with the interactive process, employers may require the employee to provide a health care provider certification to the same extent it is required for other temporary disabilities.

The Act specifically prohibits employers from refusing to make reasonable accommodations without a showing of undue hardship and from taking adverse employment actions against an employee who requests or uses a reasonable accommodation. Further, employers are prohibited from requiring an employee to accept an unnecessary accommodation or to take leave if a reasonable accommodation can be provided instead.

Notice Requirements

Upon the effective date, all employers are required to post and maintain in a conspicuous place a notice of rights in both English and Spanish regarding employees' right to needed reasonable accommodations pursuant to the Act. Employers must also provide written notice of employees' rights to all new employees at the start of employment, to existing employees within 120 days after the effective date of the Act, and to any employee who notifies the employer of her pregnancy or other conditions covered by the Act within 10 days of the notification. If an employer fails to post notice of rights, a civil penalty of $50 may be assessed for each day that the employer fails to post the notice, not to exceed $250, unless the penalty is willful.

Enforcement and Penalties

The Act is administered by the Department of Employment Services ("DOES"). Any aggrieved employee must first exhaust her administrative remedies by filing a complaint with DOES. DOES can issue a variety of remedies to employees—such as back pay, reinstatement, and reasonable attorney's fees and an award to the District for the costs of investigating and remedying a violation of not more than $500 for each day that the violation continues. Civil penalties of $1,000 for the first offense, $1,500 for the second offense and $2,000 for the third and each subsequent offense may be assessed. Employers may appeal an adverse determination to the Office of Administrative Hearings. Only after administrative remedies have been exhausted may an employee bring a civil action. DOES is directed to issue rules to implement the provisions of the act within 60 days of the effective date.

What Should Employers Do?

- All District of Columbia employers should review and modify their accommodation policies and procedures to ensure there is a process in place to comply with accommodation requests of pregnant employees and those with pregnancy- and childbirth-related conditions.
- Consider specifically how these new requirements may overlap with current rights of employees under other laws, such as the Americans with Disabilities Act and the DC Family and Medical Leave Act, thus potentially requiring modification of policies related to those laws.
- Prepare a written notice of an employee's right to a needed accommodation related to pregnancy, childbirth, related medical conditions or breastfeeding as required by the Act, and update handbooks and new-hire notifications with the same. Ensure that the policies are provided to all existing employees and new hires.
- Prepare and post a separate notice of rights under the Act or post the written notice. Although DOES has been directed to promulgate implementing rules, it is unclear whether they will be preparing a poster.
- Educate and train managers on identifying and responding to accommodation requests. Ensure that all managers and supervisors are aware of the Act's accommodation and notice requirements.

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