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What to Expect with Expecting Employees

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On Jan. 21, Gov. Chris Christie signed legislation amending New Jersey's Law Against Discrimination (LAD) to provide protections against discrimination for pregnant employees. In addition to making pregnancy a protected characteristic under the LAD, the amendment expressly requires that an employer provide reasonable accommodation to an employee based upon pregnancy, childbirth or medical conditions related to pregnancy or childbirth, including recovery from childbirth, when the employee requests the accommodation based on the advice of her physician.

New Jersey's recent amendment to the LAD is part of a legislative trend that is steadily gaining momentum. For example, in the past two years, California, Maryland and New York City have all passed similar pregnancy accommodation laws, and several other jurisdictions, including cities and municipalities, have passed, are considering or will soon be considering comparable legislation.

At the same time, the Equal Employment Opportunity Commission (EEOC) issued enforcement guidance on pregnancy discrimination in July 2014. The guidance explains the EEOC's interpretation of several statutes related to pregnancy and states that, under federal law, the EEOC believes employers are required to provide reasonable accommodations to pregnant employees to the same extent they provide accommodations to nonpregnant employees. Around this same time, the Fourth Circuit issued an opinion in Young v. UPS, holding that UPS was not required to assign a pregnant employee light duty work, despite other nonpregnant employees receiving that accommodation. The United States Supreme Court is set to hear the case, which could shape the landscape for pregnancy accommodation requirements under federal law, particularly the Pregnancy Discrimination Act (PDA).

LAD's Pregnancy Amendment

The recent amendment to the LAD represents a significant departure from the existing federal pregnancy and disability discrimination statutes, including the PDA and the Americans with Disabilities Act (ADA). The PDA generally requires only that an employer treat pregnant women the same as nonpregnant employees. The PDA, however, does not expressly require that employers provide reasonable accommodation for employees who are pregnant or who are experiencing pregnancy-related conditions. Likewise, the ADA specifically excludes pregnancy from those conditions that would be considered "disabilities" entitling someone to a reasonable accommodation (although medical conditions and/or complications related to pregnancy may be considered disabilities requiring accommodation). Overall, courts have generally interpreted the PDA and ADA as mandating only that employers treat a pregnant employee as they would any other employee with a short-term, nonwork-related medical condition.

The Jan. 21 amendments to the LAD, which apply to all New Jersey employers, specifically prohibit employers from treating female employees the employer knows, or should know, are affected by pregnancy, less favorably than nonpregnant employees with similar abilities to work. The new law includes in its definition of "pregnancy," "childbirth, or medical conditions related to pregnancy or childbirth, including recovery from childbirth," and prohibits employers from refusing to hire, discriminating in the terms and conditions of employment, or terminating the employment of a woman on the basis of her pregnancy.

Importantly, under the amended LAD, employers must also provide a pregnant employee with a reasonable, pregnancy-related accommodation upon request. The law, however, requires that an employee's request for a pregnancy-related accommodation be "based on the advice of her physician." Examples of accommodations include bathroom breaks, breaks for increased water intake, periodic rest, assistance with manual labor, job restructuring or modifying work schedules, and temporary transfer to less strenuous work. These accommodations must be provided unless the employer can demonstrate an undue hardship on its business operations. Accordingly, New Jersey employers can now expect that they will be required to engage in a timely and good-faith interactive process with a pregnant employee requesting accommodation similar to that already required when addressing a request for accommodation from a disabled employee.

The LAD states that when considering whether an accommodation constitutes an undue hardship, employers should consider the following factors:

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

Employers may also not provide workplace accommodations and paid/unpaid leave to a pregnant employee in a manner less favorable than the same accommodations provided to nonpregnant employees. Further, the law contains a retaliation provision and expressly provides that employers shall not penalize employees in the terms, conditions or privileges of their employment for requesting an accommodation.

EEOC Enforcement Guidance

In July 2014, the EEOC issued enforcement guidance on pregnancy discrimination for the first time since 1983. The guidance is the EEOC's response to the rising number of claims regarding pregnancy discrimination filed with the EEOC and in the courts. It explains the EEOC's interpretations of the PDA and ADA as they relate to pregnant workers.

As noted by the EEOC, the PDA provides that pregnant women have the right to be treated the same as others who are "similar in their ability or inability to work." Therefore, according to the EEOC, if a woman is temporarily unable to perform her job due to a medical condition related to pregnancy or childbirth, her employer must treat her in the same way as it treats any other temporarily disabled employee. For example, under the EEOC's enforcement guidance, the employer may have to provide light duty, alternative assignments, disability leave or unpaid leave to pregnant employees if it does so for other temporarily disabled employees. Other reasonable accommodations of pregnancy-related disabilities "might include allowing a pregnant worker to take more frequent breaks, to keep a water bottle at a work station, or to use a stool [or] altering how job functions are performed[.]"

As noted in the enforcement guidance, employers should keep in mind that, under the ADA, pregnancy itself is not a disability as defined in the statute. However, some pregnant employees may have impairments related to their pregnancies that qualify as disabilities under the ADA. Such employees may be entitled to reasonable accommodations under the ADA for the limitations resulting from their pregnancy-related conditions that constitute a disability under the statute.

In its enforcement guidance, the EEOC recommends that employers "state explicitly" in any written accommodation policy that reasonable accommodations may be available to individuals with temporary impairments, including those related to pregnancy. It also suggests that employers develop a process for considering accommodation requests and train managers to recognize reasonable accommodation requests made by employees with pregnancy-related disabilities

Young v. UPS

The United States Supreme Court recently granted certiorari to review Young v. United Parcel Service, 707 F.3d 437 (4th Cir. 2013), cert. granted, 134 S.Ct. 2898 (2014). The issue for the court to decide is whether, and in what circumstances, an employer that provides work accommodations to nonpregnant employees with work limitations must provide work accommodations to pregnant employees who are "similar in their ability or inability to work."

In Young, the Fourth Circuit held that the PDA does not require employers to offer light-duty work to pregnant employees with work restrictions, even if light-duty work is available for certain categories of nonpregnant employees. The plaintiff in Young was unable to lift heavy packages due to her pregnancy and argued that her employer, UPS, was required to accommodate her by putting her on light-duty work that it offered to certain disabled workers and those injured on the job. The Fourth Circuit disagreed, stating that the

plaintiff was treated the same as the general category of employees who were unable to lift as a result of an off-the-job injury but who were not disabled under the ADA.

The Supreme Court is set to hear argument in the Young case on Dec. 3. The holding of the Fourth Circuit appears inconsistent and contrary to the EEOC's enforcement guidance. The court's decision will impact the persuasiveness of the enforcement guidance and will determine whether employers are required to provide accommodations, under the federal law, to pregnant employees to the same extent as those employees who are "similar in their ability or inability to work." Accordingly, this case has the potential to define the landscape of how courts handle pregnancy accommodation issues for years to come.

Nonetheless, given the new requirements under the LAD, New Jersey employers must now engage in a timely and good-faith interactive process with pregnant employees to identify and implement measures that would allow the pregnant employee to perform the essential functions of the job and that would not present an undue hardship to the operation of the employer's business. New Jersey employers would do well to update their posters, policies and handbooks and provide training to managers and human resources personnel on the LAD's new requirements, including the duty to accommodate pregnancy. In addition, employers should review the effect of the new law on their alternative work arrangements, restricted/light-duty programs, and other benefits and policies. •

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