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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

NJ's New Pregnancy Law And How It Affects Employers

Law360, New York (January 28, 2014, 5:20 PM ET) -- On Jan. 21, 2014, Gov. Chris Christie signed legislation requiring employers in New Jersey to provide accommodations to female employees who are "affected by pregnancy," regardless of whether those employees are "disabled" and whether the requested accommodations are necessary for the employees to perform the essential functions of their jobs.

The newly-enacted law obligates employers to provide pregnant employees with special treatment and comfort-based accommodations that are unavailable to other employees, including nonpregnant employees who are disabled. This development reflects an impactful milestone in the evolution of women's rights in the workplace and the latest step in a trend that may eventually sweep across all employers in the United States.

New Jersey's Pregnant Worker's Fairness Act ("PWFA") — an amendment to the New Jersey Law Against Discrimination ("NJLAD") — expressly bans pregnancy discrimination and imposes new workplace accommodation requirements on employers. The PWFA is effective immediately and applies to all employers in New Jersey, except federal employers.

New Jersey's enactment of the PWFA is part of a legislative trend that is steadily gaining momentum. In the past 18 months, California, Maryland and New York City have passed similar pregnancy accommodation laws. New York City's version of the law takes effect on Jan. 30. Several other jurisdictions are considering, or will soon be considering, comparable legislation too. In fact, the Philadelphia City Council passed a nearly identical ordinance in December 2013, which has since been submitted for mayoral approval. A federal version of the PWFA was introduced in the Senate in May 2013, however it has since stalled in committee. Several other states — including Alaska, Connecticut, Hawaii, Illinois, Louisiana, Michigan, New Hampshire and Texas — already require some type of pregnancy accommodation, albeit not to the extent required under the New Jersey law.

The PWFA represents a departure from the existing federal pregnancy and disability discrimination statutes, the Pregnancy Discrimination Act ("PDA") and the Americans with Disabilities Act ("ADA"). The PDA prohibits employers from treating pregnant employees any differently than nonpregnant employees. The PDA — nor, until now, the LAD —however, does not require that employers provide reasonable accommodations 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 related to pregnancy may be included, such as gestational diabetes). Courts have interpreted the PDA and ADA as mandating only that employers treat a pregnant employee as they would any other employee with a short-term, non-work-related, medical condition.

New Jersey’s law goes significantly further in the protections it affords to pregnant employees. The ADA and PDA apply only to employers with 15 or more employees. The NJLAD has no such minimum employee requirement and therefore the PWFA protects many more employees of small employers. More significantly, the PWFA creates a private right of action for pregnancy discrimination against an employer even if the employer does not know the employee is pregnant or “affected” by “pregnancy, childbirth or medical conditions related to pregnancy or childbirth, including recovery from childbirth.” Under the PWFA, an employer may be liable if it treats, for any employment-related purpose, “a woman employee that the employer knows, or should know, is affected by pregnancy in a manner less favorable than” a similarly-situated nonpregnant employee. Neither the PDA nor the ADA contains such a “should know” standard and the PWFA does not define what it means to be “affected by pregnancy.” It is unclear how these vague standards will be applied in cases under the PWFA.

What is clear is that employees need not be “disabled” or otherwise unable to perform any aspect of their job to be entitled to an accommodation under the PWFA. All that is required is an employee request for an accommodation “for needs related to the pregnancy ... based on the advice of her physician.” The requested accommodation may be one that removes an obstacle to the employee’s performance of her job or one that simply addresses “needs related to the pregnancy," another fuzzy term. Accommodations may include a modification or restructuring of the employee’s primary responsibilities. Additional potential accommodations listed in the statute include providing bathroom breaks, breaks for increased water intake, periodic rest, modified work schedules, assistance with manual labor, job restructuring or modified work schedules and temporary transfers to less strenuous or hazardous work. Unlike an earlier draft of the legislation, however, the PWFA as enacted omits a requirement to provide a leave of absence “whenever accommodation is not feasible.” The accommodations available under the PWFA are those “in the workplace.” The new law does not affect an employee’s entitlement to paid or unpaid leave.

There are other limits on an employer’s obligation to grant an employee’s request for an accommodation. As with the ADA, an employer may deny a request that imposes an “undue burden” on the employer. While the PWFA sets a high standard for denying an accommodation based on undue burden, an accommodation first must be “reasonable.” The PWFA requires an employee to base her request “on the advice of her physician,” which suggests the presentation of a doctor’s note is required. Under the ADA and NJLAD, if there exists more than one reasonable accommodation for an employee’s disability, the employer may choose the accommodation that is less expensive or less burdensome. The same sensible approach should apply under the PWFA.

By requiring that employers provide accommodations, and potentially job modifications, to pregnant employees who are not disabled, New Jersey now extends privileges to employees affected by pregnancy that are unavailable to other employees, including many disabled employees. Employers with operations in New Jersey — like those in California, Maryland, New York City and the other jurisdictions mentioned earlier — should revisit their existing reasonable accommodation policies to ensure that they address accommodations for healthy, pregnant employees requesting comfort-based accommodations. Employers should train human resources and benefits employees on the new requirements to ensure that pregnant employees and those experiencing issues associated with childbirth are being afforded accommodations as required under the PWFA.

Although the concept is not specifically addressed in the PWFA, the obligations imposed by the law reinforce the need for employers to actively and effectively engage in the "interactive process" with employees requesting accommodations. New Jersey courts long-ago borrowed the interactive process concept from federal courts interpreting the ADA and applied it to require employers to engage in the interactive process under the NJLAD. In the ADA/NJLAD context, the employer and employee are expected to engage in a dialog regarding reasonable accommodations that would allow the employee to perform the essential functions of her job. In the PWFA context, the dialog should focus on what reasonable workplace accommodation would effectively address the pregnancy-related need identified by the employee and her physician.

It is also important to note that, from a litigation perspective, the plaintiff's burden of proof on a failure to accommodate claim under the PWFA is much lighter than the burden of proof on an ADA or a NJLAD disability claim. Under the PWFA, a plaintiff need not show that she is "disabled." She also is not required to demonstrate that the accommodation would have allowed her to perform the essential functions of her job. Instead, a PWFA plaintiff must prove that she has a medically-supported need for an accommodation, that the requested accommodation is "reasonable," that she was able to perform all of the essential functions of her job, with or without a reasonable accommodation, that the employer was aware of her request for an accommodation, and that the employer denied her request.

If the plaintiff establishes these elements of her claim, then the employer has the burden to show that the requested accommodation created an "undue burden" on business operations. The PWFA requires consideration of at least the following factors: (1) the overall size of the employer's business with respect to the number of employees, number and type of facilities, and size of budget; (2) the type of operations, including the composition and structure of the employer's workforce; (3) the nature and cost of the accommodation needed, taking into consideration the availability of tax credits, tax deductions and outside funding; and (4) the extent to which the accommodation would involve waiver of an essential requirement of a job as opposed to a tangential or nonbusiness necessity requirement. The ADA's undue hardship analysis is essentially the same, with the exception of the PWFA's fourth factor. See 42 U.S.C. § 12111(10)(B)(i-iv); see also N.J.A.C. 13:13-2.5(b)(3)(i-iv) (listing same factors to assess undue hardship in a disability case).

New Jersey's Pregnant Worker's Fairness Act is just the latest example of significant legislative and administrative actions in New Jersey addressing women's health and safety issues. Other recent developments in this area include:

- The passage of the New Jersey Security and Financial Empowerment Act ("NJ SAFE Act"), which permits employees to take a protected, unpaid leave of absence to address circumstances resulting from domestic violence or sexually violent offenses. That law, which took effect on Oct. 1, 2013, provides victims of domestic violence and their family members the right to take 20 days of unpaid leave within the year following an incident of domestic violence or a sexually violent offense. The NJ SAFE Act also creates a private right of action for employees against employers.

- The August 2013 amendment to the NJLAD prohibiting retaliation against an employee for requesting from another employee, or former employee, information regarding job titles or compensation where the purpose of the inquiry is to assist in an investigation into discriminatory treatment regarding pay, compensation or benefits.

- The Jan. 6, 2014, implementation of the amendment to the New Jersey Equal Pay Act requiring that New Jersey employers inform employees of their “right to be free from gender inequity or bias in pay, compensation, benefits or other terms or conditions of employment” under state and federal anti-discrimination statutes and imposing specific notice and posting requirements and deadlines.

For employers with operations in New Jersey, the recent spate of new employee-protective legislation may signal that now is the time to revisit or revamp employee handbooks and policies and retrain HR personnel on new legal developments. With respect to the PWFA, employers should consider training managers and HR professionals regarding:

- The need to engage in the interactive process with a pregnant employee requesting an accommodation to address pregnancy, childbirth or medical conditions relating to pregnancy or childbirth — regardless of whether the employee is disabled;

- The steps to follow to make sure the interactive process is productive and effective, including discussing accommodation options with the employee, considering the advice of the employee’s physician, and documenting both of these steps as well as the employer’s decision; and

- The range of potential accommodations under the PWFA, including the broad scope of the law.

—By James P. Walsh, Jr., and Sean P. Lynch, Morgan Lewis & Bockius LLP

James Walsh is a partner in Morgan Lewis & Bockius' Princeton, N.J., office and is a member of the firm's labor and employment practice.

Sean Lynch is an associate in Morgan Lewis & Bockius' Princeton, N.J., office and is a member of the firm's labor and employment practice.