

What To Know About NY's New Pregnancy Accommodation Law

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On Oct. 21, 2015, New York Gov. Andrew Cuomo signed the Protect Women from Pregnancy Discrimination bill, which requires employers to provide reasonable accommodations for pregnant employees. (The law is effective Jan. 19, 2016.) With the new law, New York joins a steadily increasing number of states and cities that require employers to provide accommodations to pregnant employees. In most cases, these laws are more expansive than federal law. Private employers should take this opportunity to review and update their policies and practices to conform to the current state of the law.



Gabrielle Levin

Pregnancy Accommodation Requirements

The Protect Women from Pregnancy Discrimination bill amends the New York State Human Rights Law to define a “pregnancy-related condition” as a disability and requires employers to provide reasonable accommodations for pregnancy-related medical conditions, unless the accommodation would place an undue burden on the employer.

For some time, it was unsettled whether pregnancy was a “disability” under the NYSHRL.[1] The New York State Division of Human Rights had held that pregnancy was a disability under the NYSHRL and required employers to provide reasonable accommodation to pregnant employees.[2] But some courts held otherwise, finding that pregnancy was not a disability under New York state law and refusing to require employers to accommodate uncomplicated, healthy pregnancies.[3]

The Protect Women from Pregnancy Discrimination bill clarifies that employers must provide reasonable accommodations for pregnant employees. The bill amends the NYSHRL to make it “an unlawful discriminatory practice” for an employer to refuse to provide reasonable accommodations to the known “pregnancy-related conditions” of an employee, unless such accommodations would cause an undue hardship to the employer.[4] The bill defines “pregnancy-related condition” as follows:

a medical condition related to pregnancy or childbirth that inhibits the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques; provided, however, that ... the term shall be limited to conditions which, upon the provision of reasonable accommodations, do not prevent the complainant from performing in a reasonable manner the activities involved in the job or occupation sought or held.[5]

When an employee requests pregnancy-related accommodations, she is required to provide the employer with any medical information needed to verify the existence of a pregnancy-related condition, should the employer request it.[6]

As with any instance in which an accommodation is requested by a disabled employee, employers must engage in an individualized deliberative process to investigate an employee's request for accommodation and determine its feasibility.[7] In 2014, the New York Court of Appeals clarified that this interactive process is not an official requirement under the NYSHRL, but merely "one factor to be considered in deciding whether a reasonable accommodation was available for the employee's disability at the time the employee sought accommodation." [8]

New York state law also requires employers to provide accommodations to breastfeeding employees. An employer must provide reasonable unpaid break time or permit an employee to use paid break time or meal time each day to express breast milk for her nursing child for up to three years following child birth.[9] Employers must also make reasonable efforts to provide a room or other location, in close proximity to the work area, where an employee can express milk in privacy.[10] Employers are prohibited from discriminating against an employee who elects to express breast milk in the workplace.[11]

For employers with employees located in New York City, the New York City Human Rights Law (NYCHRL) contains what are arguably even more expansive accommodation requirements. While the NYSHRL requires employers to accommodate a pregnancy-related medical condition, the NYCHRL makes it "an unlawful discriminatory practice" for any private employer to refuse a reasonable accommodation to an employee for "pregnancy, childbirth or related medical condition." [12]

Thus, under the NYCHRL, employers must provide reasonable accommodations for an employee's pregnancy or childbirth, regardless of whether the employee has a pregnancy-related medical condition. Examples of reasonable accommodation include bathroom breaks, breaks for water intake, periodic rest for those who stand for long periods of time, and assistance with manual labor. Under the NYCHRL, an employer may legally deny accommodations for two possible reasons. First, if the employee "could not, with reasonable accommodation, satisfy the essential requisites of the job," [13] and second, if providing accommodations would place an undue burden on the employer.[14]

Other State and City Laws

Beyond New York, since late 2013, multiple states, cities and Washington, D.C., have all added pregnancy accommodation requirements. For example, Delaware, Hawaii, Illinois, Minnesota, Nebraska, New Jersey, North Dakota, Rhode Island and West Virginia all mandate that private employers provide reasonable accommodations to pregnant employees, regardless of whether they have a technical disability or not, unless doing so would pose an undue burden on the employer.[15] California requires employers to offer accommodations for pregnancy-related conditions upon the advice of a health care provider.[16] For medical conditions that require the employee to take a leave of absence, the employer must grant California-based employees at least four months of leave.[17]

Connecticut imposes a requirement that private employers make reasonable efforts to transfer pregnant employees to temporary positions if the current position could cause injury to the employee or the fetus.[18] Similarly, Louisiana deems it "an unlawful employment practice" for any private employer with more than 25 employees to deny temporary transfers to pregnant employees who request a less strenuous or hazardous position for the duration of their pregnancy based on the advice

of a physician.[19] However, Louisiana imposes a limitation that the transfer is only required when it can be reasonably accommodated and clarifies that “no employer shall be required ... to create additional employment which the employer would not otherwise have created, nor shall such employer be required to discharge any employee, transfer any employee with more seniority, or promote any employee who is not qualified to perform the job” in order to accommodate the transfer.[20]

Maryland offers a hybrid of these approaches, requiring private employers with at least 15 employees to work with pregnant employees to explore all possible means of accommodation for pregnancy-related disabilities.[21] Maryland also mandates that upon request, employers must provide pregnant employees a transfer to a less hazardous or strenuous job if the employer already has a practice of providing similar transfers to other temporarily disabled employees.[22] Even absent such a practice, the employer may be required to provide the transfer if the employee’s health care provider recommends the transfer and providing one would not require the employer to “creat[e] additional employment that ... would not otherwise have been created, discharge[e] any employee, transfer[] any employee with more seniority than the employee requesting the accommodation, or promot[e] any employee who is not qualified to perform the job.”[23]

A number of cities have also instituted pregnancy accommodation requirements. In 2014, Philadelphia, Central Falls, Rhode Island, and Providence, Rhode Island, amended their city codes to mandate reasonable accommodations for pregnant employees as long as they do not place an undue burden on the employer.[24] D.C. similarly passed a bill that requires employers to engage in a good faith interactive process to determine reasonable accommodations for pregnant employees unless the accommodation would impose an undue hardship.[25]

Federal Law

Federal law requires that all leave policies must treat pregnant women the same as nonpregnant employees “similar in their ability or inability to work.”[26] Federal law thus arguably imposes less stringent requirements on employers than the state and city laws discussed above, particularly in those cases where an employer does not as a matter of general policy accommodate temporarily disabled workers.

In March 2015, the U.S. Supreme Court issued its decision in *Young v. United Parcel Service Inc.*, 135 S. Ct. 1338 (2015), which addressed a private employer’s obligation to accommodate pregnant employees under federal law. The Supreme Court rejected *Young*’s argument that employers must provide pregnant workers the same accommodation as employees impaired by nonpregnancy conditions.[27] Instead, the court held that a pregnant worker who wishes to prove a disparate-treatment claim with indirect evidence may do so using the burden-shifting framework established by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).[28]

Under this framework, the employee must prove that she is a member of a protected class (women who can become pregnant), that she requested an accommodation from her employer because of her pregnancy, that the employer refused to provide an accommodation, and that the employer actually provided accommodations to others who were similarly unable to perform their duties without accommodations.[29]

If the plaintiff can establish a prima facie case using this framework, the burden shifts to the employer to prove that the refusal to provide accommodations was based on a legitimate, nondiscriminatory purpose.[30] The employer’s purpose must be more than just inconvenience or increased expense.[31]

If the employer provides a legitimate, nondiscriminatory reason for denying accommodations, the burden then shifts back to the employee, who may show that the employer's proffered reasons were pretextual.[32] The Supreme Court suggested that one way to show pretext is to provide sufficient evidence that the employer's policies impose a significant burden on pregnant women and the employer's reasons are not sufficiently strong to justify that burden.[33]

In another pregnancy-related change to federal law, the Patient Protection and Affordable Care Act amended the Fair Labor Standards Act to impose a requirement that employers subject to the FLSA "provide ... a reasonable break time for an employee to express breast milk for her nursing child for one year after the child's birth each time such employee has need to express the milk." [34] The employer must also "provide ... a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk." [35] Under this provision of the FLSA, as amended, an employer is not required to compensate an employee receiving reasonable break time for breastfeeding-related purposes." [36] Employers subject to the FLSA with less than 50 employees are not subject to the breastfeeding provision if it would impose an "undue hardship." [37] The provision does not preempt state laws that provide greater protections. [38]

Practical Tips for Employers

- Do not assume that compliance with federal law is sufficient. Pregnancy accommodation requirements now vary by state (and/or city), and in many cases the employer's burden may exceed what is required under federal law.
- Review and update human resources policies so that they provide for pregnancy accommodation as required by applicable law.
- Ensure that supervisors and managers are properly informed and trained on pregnancy accommodation requirements and anti-retaliation policies.
- Consider additional employee training on how to handle accommodation requests in light of changes to state law.
- Make sure appropriate notice of the applicable federal, state and city laws are made available to employees, as appropriate. Many laws include notice requirements. For example, Section 8-107(22)(b)(i) of the NYCHRL requires that employers disseminate or conspicuously post a written notice developed by the New York City Commission on Human Rights on the rights of pregnant workers to be free from discrimination in relation to pregnancy, childbirth and related medical conditions. Check governmental websites (like nyc.gov) for notices to post and/or provide to employees and update all new hire orientation materials to include the required notices.
- Employers should remain mindful that in certain cases, other federal laws (e.g., the Americans with Disabilities Act) may be implicated.

—By Gabrielle Levin and Leesa Haspel, Gibson Dunn & Crutcher LLP

Gabrielle Levin is a partner in Gibson Dunn's New York office. Her practice focuses on representing

corporate clients in employment, securities and general litigation matters. She regularly defends employers in employment cases in New York courts. Leesa Haspel is a junior associate in Gibson Dunn's New York office.

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[1] N.Y. Exec. Law § 296(1)(a).

[2] See, e.g., *Hardy v. Pathmark Stores Inc.*, New York State Division of Human Rights, Case No. 10117709 (July 17, 2008); *Stack v. State of New York & New York State Division of State Police*, New York State Division of Human Rights, Case No. 1202468 (Feb. 8, 2007).

[3] See *Krause v. Lancer & Loader Group LLC*, 965 N.Y.S.2d 312, 322 (N.Y. Sup. Ct. 2013) (holding that failure to demonstrate that a normal pregnancy caused an "impairment" negated its classification as a disability).

[4] N.Y. Exec. Law § 296(3)(a)-(b).

[5] *Id.* § 292 (21-f).

[6] *Id.* § 296(3)(c).

[7] See *Phillips v. City of New York*, 884 N.Y.S.2d 369, 373 (1st Dep't 2009).

[8] *Jacobsen v. New York City Health & Hospitals Corp.*, 11 N.E.3d 159, 169 (N.Y. 2014).

[9] N.Y. Labor Law § 206-c.

[10] *Id.*

[11] *Id.*

[12] N.Y.C. Human Rights Law § 8-107(22)(a).

[13] *Id.*

[14] *Id.* § 8-102(18).

[15] Delaware Code Ann. tit. 19, § 711(a)(3)(b); Hawaii Code R. § 12-46-107(c); 775 Illinois Comp.Stat. § 5/2-102(J)(1); Minnesota Stat. § 181.9414; Nebraska Rev. Stat. § 48-1107.02(2)(d); New Jersey Stat. Ann. § 10:5-3.1(b); North Dakota Cent. Code § 14-02.4-03(2); Rhode Island Gen. Laws § 28-5-7.4(a)(1); West Virginia Code § 5-11B-2(1).

[16] California Gov't Code § 12945(a)(3)(A).

[17] *Id.* § 12945(a)(1).

[18] Connecticut Gen. Stat. § 46a-60(7)(e).

[19] Louisiana Rev. Stat. § 23:342(4).

[20] Id.

[21] Maryland Code Ann. § 20-609(d).

[22] Id. § 20-609(e)(1).

[23] Id. § 20-609(e)(2).

[24] Central Falls, Rhode Island, Code § 12-5(c)(1); Phila., Pa., Code § 9-1128(1); Providence, Rhode Island, Code § 16-57(c)(1)(E).

[25] Protecting Pregnant Workers Fairness Act, D.C. Act 20-458 (2014).

[26] 42 U.S.C.S. § 2000e(k) (2015).

[27] Young, 135 S. Ct. at 1349.

[28] Id. at 1353.

[29] Id. at 1354.

[30] Id.

[31] Id.

[32] Id.

[33] Id.

[34] 29 U.S.C.S. § 207(r)(1)(A) (2015).

[35] Id. § 207(r)(1)(B).

[36] Id. § 207(r)(2).

[37] Id. § 207(r)(3).

[38] Id. § 207(r)(4).
