

Employment Law

MONTHLY

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February 2014

EDITOR-IN-CHIEF

Vito A. Gagliardi, Jr.
973.889.4151
vagagliardi@pbnlaw.com

EMPLOYMENT LAW ATTORNEYS

Phillip C. Bauknight
Frank A. Custode
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NEW JERSEY EXPANDS PROTECTION RACKET

By Suzanne E. Peters

Late last month, New Jersey Governor Chris Christie signed legislation amending the New Jersey Law Against Discrimination, *N.J.S.A. 10:5-12* (the "NJLAD"). Pursuant to the amendments, New Jersey employers must provide workplace accommodations to any employee who is "affected by pregnancy," even if the employee is not "disabled" and the accommodation is not necessary for the employee to perform the essential functions of her job. The NJLAD was further amended to prohibit an employer from retaliating against an employee who requests information from other employees in connection with an investigation of the employer's possible discriminatory treatment concerning pay, compensation, bonuses or other compensation and benefits. With these changes, the NJLAD -- which was already more expansive than almost all other states' anti-discrimination laws -- provides New Jersey employees even greater protection from workplace discrimination.

I. The NJLAD

Prior to the new legislation, the NJLAD prohibited an employer from discriminating against an employee because of that employee's "race, creed, color, national origin, ancestry, age, marital status, civil union status, domestic partnership

status, affectional or sexual orientation, genetic information, sex, gender identity or expression, disability or atypical hereditary cellular or blood trait." An employer could not discriminate against an individual in compensation or in the terms, conditions or privileges of his employment based on his status as a member of a protected class. Similarly, an employer could not refuse to hire a job applicant or fire an employee based on his being a member of a protected class. Although New Jersey courts have interpreted the NJLAD to prohibit employers from discriminating against employees based on their pregnancies, "pregnancy" was not listed as a protected class under the NJLAD.

II. The Amended NJLAD

A. Greater Protection For Pregnant Employees

Based on its belief that "pregnant women are vulnerable to discrimination in the workplace in New Jersey," the Legislature amended the NJLAD specifically to include "pregnancy" in its list of protected attributes. Notably, pregnancy is defined as "pregnancy, childbirth, or medical conditions related to pregnancy or childbirth, including recovery from childbirth." Accordingly, there should be no doubt that the NJLAD now specifically prohibits employers from discriminating against an employee with respect to the terms and conditions of her employment because she is pregnant, refusing to hire an applicant based her pregnancy, or firing an employee due to her pregnancy.

The law, however, goes further than merely adding another protected class. Indeed, it now specifically prohibits an employer from treating any employee that the "employer knows, or should know is affected by pregnancy" in a manner less favorable than non-pregnant employees with similar work abilities or inabilities. As such, even if an employer does not definitively know that a female employee is pregnant, it could face liability if it should have known that she was "affected by pregnancy." Notably, "affected by pregnancy" is undefined in the statute. One wonders, then, whether expecting fathers are now a protected class.

The amended NJLAD also requires the employer of an employee "affected by pregnancy" to make available to that employee "reasonable accommodation in the workplace." The

statute lists several examples of reasonable accommodations, including: (1) bathroom breaks; (2) breaks for increased water intake; (3) periodic rest; (4) assistance with manual labor; (5) job restructuring or modified work schedules; and (6) temporary transfers to less strenuous or hazardous work. The employee need not be "disabled" or otherwise unable to perform any aspect of her job in order to be entitled to any of these accommodations. Instead, the employee must only request the accommodation "for needs related to the pregnancy" that are "based on the advice of her physician."

Even if the employee requests an accommodation based on the advice of her physician, an employer would not be required to provide such accommodation if it can demonstrate that providing the accommodation would impose "undue hardship" on its business operations. The statute provides factors to be considered when determining whether the accommodation would constitute an "undue hardship," including: (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 the employer's 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 non-business necessity requirement.

Regardless of whether an employer is required to provide an accommodation, it is illegal for an employer to penalize or retaliate against an employee for either requesting or using the accommodation.

B. Enhanced Protection For Inquiring Employees

The NJLAD also was amended to prohibit an employer from penalizing or retaliating against any employee for requesting certain information from another employee or former employee of the employer. Specifically, an employee may request the following information: (1) job title; (2) occupational category; (3) rate of compensation, including benefits; (4) gender; (5) race; (6) ethnicity; (7) military status; and (8) national origin. An employee only is protected under the statute, however, if the employee requests this

information in order to investigate the employer's potential discriminatory treatment concerning pay, compensation, bonuses or other compensation or benefits.

Notably, the law does not require an employee to whom an inquiry is made to disclose the requested information. Regardless of whether the employee or former employee agrees to provide the information, it is illegal for an employer to take reprisals against any employee who requests the information, so long as the request is made in conjunction with an investigation.

III. What The Amendments Mean For Employers

The amended NJLAD now provides greater protection to pregnant employees by granting them privileges that are unavailable to other employees, including disabled employees. Employers would be wise to review their policies regarding reasonable accommodations to ensure that such policies are up to date and adequately afford pregnant employees -- including those "affected by pregnancy" -- the accommodations that are now legally required.

Once a pregnant employee requests an accommodation, employers should ensure that they actively engage in the interactive process in order to determine what reasonable workplace accommodation would effectively address the employee's physician's recommendation. By doing so, employers reduce the risk of liability.

Finally, in light of the new protections for employees "affected by pregnancy" as well as those employees who may be investigating potential discriminatory practices of the employer, employers must train their managers and supervisors to ensure that they are up to date on these legal developments and can respond appropriately to any accommodation or information request.

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