New Jersey Law Now Prohibits Discrimination Against Breastfeeding Employees

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The New Jersey Legislature recently amended the New Jersey Law Against Discrimination (NJLAD) to include protections for employees who are breastfeeding. This change makes breastfeeding a protected act under the law, prohibiting employers from firing or discriminating against employees because they breastfeed. The law requires New Jersey employers to allow breaks during the day for employees to nurse or express milk, and requires employers to provide a private room for these activities.

Employers in New Jersey must navigate both federal and state law related to breastfeeding employees as stipulated in the federal Fair Labor Standards Act (FLSA). With the increase in legislative focus in this area in New Jersey, employers should review both the NJLAD and the FLSA to ensure that they are compliant from both a state and federal perspective.

The Federal Fair Labor Standards Act (FLSA)

As of 2010, the FLSA provided that all employers covered under the FLSA must provide reasonable break time and space for a nursing mother to express her milk. 29 U.S.C. 207(r)(1).

Employers, with fewer than 50 employees, may be exempt from this requirement if it would "impose an undue hardship by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business." 29 U.S.C. 207(r)(3).

The following are some specific guidelines outlined by the Department of Labor:

- A bathroom is not sufficient.
- The space must be free from the intrusion of others walking in.
- The space must be shielded from view.
- The space must have at least a chair and table/counter top, and should have an electrical outlet.

- A space may be temporarily used for this purpose, but it must always be available to the nursing employee when she needs it.

New Jersey's Prohibition on Discrimination and Accommodation Requirement

On January 8, 2018, New Jersey Governor Chris Christie signed into law amendments to the NJLAD, so that the NJLAD now includes breastfeeding employees in the category of protected individuals. N.J.S.A. 10:5-12. The NJLAD contains a broad list of categories of employees that merit special protection under the law, to safeguard against discrimination by employers, and other entities, ultimately making it unlawful for employers to discriminate in any way against employees who are breastfeeding.

As noted above, the amendments also state that employers must provide reasonable accommodations for lactation purposes to breastfeeding employees. The NJLAD states that employers must provide break time for lactation purposes, and a "suitable room or other location with privacy" for lactation. The state law expressly provides that the room cannot be a toilet stall. Additionally, the law states the space must be "in close proximity to the work area." The law provides an exception only if such reasonable accommodation is an undue hardship on the business operations of the employer.

Comparing the NJLAD and FLSA

Compared to the FLSA, the amended NJLAD is more broadly applicable, as it covers all employers regardless of their number of employees. Under both laws, discrimination is unlawful against protected categories of employees, regardless of the number of employees. The NJLAD provides an exception for undue hardship, but allows this exception for all employers, and not solely those employers with fewer than 50 employees. Neither employee protection requires employers to compensate employees for the time spent during lactation breaks, and in both instances, employers cannot discriminate if employees use standard paid break time for lactation purposes.

It is worth noting that pregnant employees were previously covered as a protected category under the NJLAD. The NJLAD also already specified requirements for reasonable accommodations for pregnant women including requirements for accommodating bathroom breaks, time for periodic rest, assistance with manual work, and other work or schedule changes, when these accommodations are requested based on medical advice.

What does this mean for employers now?

First, we recommend ensuring that your policies, and on-the-ground practices, line up with the amendments to the NJLAD. This should include revising your policies, and any handbooks in which they are included. This provides a good opportunity for discussing these topics, and the related laws and requirements, with management-level employees. Conversations with employees should include the revised NJLAD, and discuss the implications of the inclusion of breastfeeding employees as a protected category.

Second, use this as a reminder to shore up all policies and processes related to employees returning from maternity leave who require space for lactation purposes. Although the FLSA requirements have existed for many years, employers have been slow to act on them, particularly if they have not had any issues in the past. Employers who currently do not have any employees requesting a space for lactation purposes at this time should determine what space would be appropriate for

lactation purposes and confirm that the space would meet the requirements of both the NJLAD and the FLSA, so that a plan of action is ready to launch when it is needed.

All employers should consult legal counsel if there are any questions about ensuring conformity with both state and federal legal requirements.