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IN PRACTICE

EMPLOYMENT

Pregnancy Is Now a Protected Category Under the LAD

Amendment creates new accommodation requirements for employers

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In January, New Jersey amended its Law Against Discrimination (LAD) to expressly include pregnancy as one of its protected categories. Approved P.L. 2013, c.220 (codified at N.J.S.A. § 10:5-12). The amendment also contains a new requirement that employers consider reasonable accommodations for pregnant employees, irrespective of whether or not there are any medical disabilities associated with the pregnancy.

New Jersey is following a national trend toward increasing the protection and accommodation requirements for pregnant employees. Alaska, California, Connecticut, Hawaii, Illinois, Louisiana, Maryland, Texas, New York City and Philadelphia have also enacted laws specifically targeting discrimination against pregnant employees. President Obama lent his voice to this trend in his State of the Union address, calling for Congress "to do away with workplace policies that belong in a *Mad Men* episode," and to recognize that women "deserve…to have a baby without sacrificing [a] job." State of the Union Address (Jan. 28, 2014).

The Law Prior to the Amendment

Prior to the 2014 amendment, pregnancy was not a "protected category" under the LAD, and the statute did not mandate reasonable accommodations for pregnant employees. Rather, an accommodation obligation arose only where a pregnancy caused or was associated with medical complications that triggered the accommodation requirements for employees with disabilities.

In *Gerety v. Atlantic City Hilton Casino Resort*, 184 N.J. 391 (2005), the New Jersey Supreme Court examined the permissible boundaries of a pregnancy discrimination claim. Defendant Hilton terminated Christina Gerety after her pregnancy leave exceeded the maximum 26 weeks of medical leave for any employee, whether male or female, provided by company policy. Gerety alleged that this policy had a disparate impact on pregnant employees in violation of the LAD. However, in a close decision, four of the seven justices disagreed. The court held that the LAD did not require an employer to extend Gerety's leave beyond 26 weeks to accommodate her pregnancy, because the company "treats its pregnant employees no differently than comparable non-pregnant employees in need of extended medical leave." In reaching its decision, the court also noted that:

> Policy arguments may be advanced for mandating statutorily that employers provide for the possibility that pregnant employees may require enhanced leave to cover the panoply of medical needs that may arise during pregnancy. That, however, does not justify this Court's imposition of such a requirement on employers under the mantle of the LAD. To do so would constitute legislating a new minimum medical leave requirement. That we will not do.

The dissent in *Gerety* noted that pregnancy only affects women, and a facially neutral policy could have a disparate impact on women. Therefore, it opined that "an employer must reasonably accommodate the women in its workforce by extending leave for pregnancy when such leave is necessary for health reasons unless the employer can demonstrate that business necessity prevents that accommodation."

Shortly after *Gerety*, the Appellate Division held in *Larsen v. Twp. of Branchburg* that pregnancy, standing alone, is not afforded special protection by the LAD. Docket No. A-0190-05T2,

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2007 N.J. Super. Unpub. LEXIS 2808 (Jan. 22, 2007). Geralyn Marie Larsen, a patrol officer in the Branchburg Police Department, became pregnant. Although she had a healthy pregnancy, her doctor provided a note restricting her to light duty. The township did not have a light-duty policy for police officers. Accordingly, Larsen went on an unpaid leave of absence and rejected the township's offers to transfer her to jobs that did not include any police duties. Larsen eventually filed a complaint alleging claims under the LAD for disability discrimination, perceived-disability discrimination and gender discrimination.

The Appellate Division noted, in its Larsen decision, that the LAD defined a disability to include "physical disability, infirmity, malformation or disfigurement which is caused by bodily injury, birth defect or illness." On the other hand, it found that "[a] normal pregnancy, absent complications, is not a [disability]." Similarly, Larsen's gender discrimination claim failed because the township applied its "no-light-duty" policy equally to all police officers, and (consistent with the Gerety decision) she was not entitled to preferential treatment because of her pregnancy.

Thus, under *Gerety* and *Larsen*, viable claims for pregnancy discrimination generally arose only when the pregnancies were associated with medical disabilities. Women who had healthy pregnancies without medical complications were not entitled to preferential treatment under the LAD.

The 2014 Amendment

Senators Loretta Weinberg, Fred Madden, Pamela Lampitt, Gordon Johnson, Benjie Wimberly and Shavonda Sumter, along with several co-sponsors, introduced Senate Bill *S2995* on Sept. 30, 2013. The bill engendered immediate support from several interest groups and moved rapidly through the legislature.

The proposed bill amended the LAD to explicitly include pregnant women as a new protected class. *S. 2995*, 215th Leg., 2nd Sess. (N.J. 2014) (as introduced by Senate, Sept. 30, 2013). The bill prohibited employers from treating them in a manner less favorable than employees not affected by pregnancy, but similar in their ability or inability to work. The bill also required employers to make reasonable accommodations for pregnancy-related needs when the employee, with the advice of her physician, requests the accommodation. Likewise, the bill prohibited employers from penalizing pregnant employees in the terms, conditions or privileges of employment for using accommodations or for taking leave required by their pregnancy. Finally, the proposed bill included language that would allow for additional leave time if the employer could not find accommodations for the employee consistent with the medical restrictions.

The Senate Labor Committee reviewed the bill and suggested certain clarifications and limitations. *S. 2995*, 215th Leg., 2nd Sess. (N.J. 2014) (as reported by Senate Labor Comm., Nov. 7, 2013). For example, the Labor Committee specified that accommodations required for pregnant employees focus on workplace accommodations, such as bathroom breaks, assistance with manual labor and modified work schedules. The Labor Committee also removed the proposed language mandating additional paid or unpaid leave for pregnant employees, and clarified that leave afforded to pregnant employees "shall not be provided in a manner less favorable than…leave provided to other employees not affected by pregnancy but similar in their ability or inability to work." It likewise added language stating that the bill is not intended to otherwise increase or decrease employees' rights under applicable law to paid or unpaid leave.

In addition, the Labor Committee's amendments state that an employer is not required to provide an accommodation if it can demonstrate that the accommodation would cause "undue hardship" on its business operations. The factors considered in determining whether an accommodation would cause an undue hardship include the overall size of the employer's business, number of employees and size of budget, the type of operations and number of facilities, the nature and cost of the accommodation needed, and the extent to which the accommodation would involve an essential job requirement versus a tangential job function.

Following the Labor Committee's amendments, the lgislature passed the bill. It became law effective on Jan. 21.

Implications Employers

The LAD now specifically prohibits any discrimination against pregnant employees in the terms and conditions of employment. While most companies already have policies in place shielding women from gender discrimination, the amendment to the LAD has enhanced that protection to include any discrimination caused by a pregnancy.

In addition, the LAD now requires that employers consider reasonable accommodations for employees who are pregnant—*irrespective* of whether or not their pregnancy involves medical complications. The amendment identifies types of workplace accommodations employers should consider, specifically identifying as examples: breaks, assistance with manual labor jobs, job restructuring or modified work schedules, and temporary transfers to less strenuous or less hazardous work.

While New Jersey employers now must consider accommodations (if requested) for all pregnant employees, the amendments to the LAD seem to follow the Gerety decision in that they do *not* require employers to provide additional or increased leaves of absence to pregnant employees. In fact, the statute is clear that it does not increase or decrease an employee's right to paid or unpaid leave in connection with a pregnancy. Instead, employers should treat pregnant employees the same as other employees with "similar ability or inability to work."

Given the increasing attention on pregnancy discrimination and the recent amendments to the LAD, employers should scrutinize their policies that might affect pregnant employees. Proactive planning and focused training are the keys to keeping in compliance with this law. ■