New York City Acts to Further Protect Pregnant Employees, but State and Federal Measures Lag

By Geoffrey A. Mort

I. Introduction

Congress passed the Pregnancy Discrimination Act (PDA) in 1978, amending Title VII of the Civil Rights Act of 1964 to explicitly prohibit discrimination on the basis of pregnancy. In the roughly 35 years since passage of the PDA, courts repeatedly have interpreted the statute to provide "pregnancy-blind" equality, but not special treatment, for pregnant employees. Thus, under the PDA—as well as the New York State Human Rights Law (HRL)—on-the-job accommodations and leaves of absence are only required to the extent they are available to similarly situated, non-pregnant employees.[1] That the PDA included no entitlement to post-birth leave and even prevented women from obtaining workplace accommodations during their pregnancy led some commentators to conclude that the PDA "provide[d] very limited protection."[2]

The era of unavailability of reasonable accommodations for pregnant employees in New York City ended in October 2013, when Mayor Bloomberg signed a law amending the New York City Human Rights Law (CHRL) and requiring that such accommodations employers provide.[3]

II. The New City Law

Specifically, the 2013 amendment makes it unlawful for an employer to refuse to provide reasonable accommodations for an employee for conditions related to pregnancy, childbirth or related medical conditions.[4] The purpose of an accommodation, as with the federal Americans with Disabilities Act (ADA), is to permit the employee to perform "the essential requisites of the job." An employer is only permitted to decline to provide an accommodation to a pregnant employee if it can demonstrate that the accommodation would impose an undue hardship on its business or that the employee could not perform the essential functions of the job even with a reasonable accommodation.[5] The amendment also requires employers to give employees and new hires written notice of their right not to be discriminated against on the basis of pregnancy, childbirth or a related medical condition. The notice is to be developed by the New York City Commission on Human Rights (CCHR).[6]

Unlike the law passed earlier in 2013 prohibiting discrimination in hiring on the basis of being unemployed and several other recent measures, the new City pregnancy accommodation law is not the first statute in the country providing individuals with a private right of action if they are the object of this newly recognized form of discrimination. Eight states have already have enacted similar pregnancy accommodation statutes, and several others, including New Jersey, have introduced them.

Prior to passage of the accommodations amendment to the CHRL, the City statute prohibited pregnancy discrimination and also mandated the provision of accommodations to disabled employees, which it essentially defined as those employees with a physical, psychological or mental impairment or a record of having had one. Although the CCHR interpreted the CHRL as including pregnancy in its definition of disability, many courts did not agree. Further, a number of employers did not provide accommodations to pregnant employees, and some even suspended or discharged pregnant employees who sought accommodations. The ambiguity in the CHRL prior to the accommodations amendment that caused some employers to believe they had no obligation to accommodate pregnant employees has, obviously, been resolved by the new law.

The accommodations amendment is similar to the reasonable accommodation requirement for employees with disabilities under the ADA, HRL, and pre-amendment CHRL. Notably, however, and in contrast to the ADA and HRL, courts have generally ruled that there are no accommodations for disabled employees under the CHRL that are *per se* unreasonable[7] short of those that impose an undue hardship on an employer. Extending this principle to the accommodations amendment, employers will now be required to provide whatever accommodation a pregnant employee seeks unless it can prove that the requested accommodation will pose an undue hardship. One can, therefore, reasonably expect an increase, perhaps substantial, in litigation over the undue hardship issue in coming years.

What kinds of reasonable accommodations are pregnant employees likely to request once the new law goes into effect on January 30, 2014? Even healthy pregnancies are likely to give rise to requests for such accommodations as frequent bathroom breaks, periodic rest periods for pregnant employees whose jobs require them to stand for long periods of time, breaks to facilitate increased water intake, assistance with manual labor or limitations on the weight of objects that one must lift, and perhaps leave for a period of disability arising from childbirth. With the possible exception of very small employers, it may be difficult to successfully argue that any of these accommodations are so costly, disruptive or otherwise problematic that they genuinely present an undue hardship for an employer.

III. New York State and Federal Legislation

Efforts in both the New York State Legislature and in Congress to address the issue of reasonable accommodations for pregnant women have to date proven less successful. Protections for pregnant employees similar to those in the City accommodations amendment were included in the Women's Equality Act (WEA) promoted by Governor Cuomo in early 2013. Due to a number of factors, including its broad scope, the WEA floundered in the legislature, failing to pass in the Senate. It is currently unclear whether and when (and in what form) the bill will be reintroduced.

Another measure emanating from the State Legislature is a bill that originated in the Investigations and Government Operations Committee entitled "[A]n act to amend the executive law, in relation to requiring the provisions of reasonable accommodations for pregnant women."[8] The Pregnancy Accommodation bill,[9] introduced in January 2013, is considered to be more expansive than the WEA because it does not include the concept that an accommodation must allow an employee to perform the "essential functions" of her job. The bill addresses the undue hardship issue, discussed above, by stating that "pregnancy is only temporary, and pregnancy accommodations are often less costly to employers since additional equipment is usually unnecessary."[10] No action has yet been taken on the bill in committee, and its future is considered to be uncertain.

The Pregnant Workers Fairness Act (PWFA),[11] which was introduced in both houses of Congress and is now in committee, is the proposed federal legislation on pregnancy accommodation. In several respects, the PWFA provides pregnant employees with more protection than even the City law. For example, under the PWFA, employers would be prohibited from denying job opportunities to an employee or applicant as a way of avoiding making a reasonable accommodation, or from compelling an employee to accept a particular accommodation. Perhaps not surprisingly, there is considerable skepticism—notwithstanding that the bill has 101 co-sponsors—about whether the PWFA has a realistic chance of passing in the House of Representatives.

IV. Conclusion

Because no anti-discrimination law applicable to New York has to date required that pregnant employees be provided with reasonable accommodations, New York City employers will be confronting a changed legal landscape at the outset of 2014. They will need to be certain that their managers and supervisors are aware of the new law and that their policies comply with it.

In this regard, the CCHR intends to develop and implement training programs both for employers and others.[12] The reach of these programs, however, is uncertain, and it may well be many months or longer before most female employees are aware of their rights under the new law. In the interim, employers will bear the responsibility for advising their employees of their right to reasonable accommodations during pregnancy and discussing with them in good faith what particular accommodation is most suitable for both. Nonetheless, the accommodations amendment represents a significant achievement for advocates of enhanced rights for pregnant employees in New York City and, its supporters hope, sets a precedent for similar legislation in Albany.

Endnotes

1. *See Mazzella v. RCA Global Communications, Inc.*, 642 F. Supp.1531 (S.D.N.Y. 1986).
2. Rachael Langston, "Post-Partum Problems and Emerging Solutions: The Evolution of Working Women's Post-Birth Rights," *The Summit For Workers' Rights 2013 Annual Convention*, June 26-29, 2013, Denver, CO.
3. N.Y.C. Admin. Code § 8-107(22).
4. *See id.*
5. *See* David Wirtz, *et al.*, "New York City Law Provides Reasonable Accommodation for Pregnancy, Childbirth, and Related Conditions," Littler Publications (October 9, 2013), http://www.littler.com/publication-press/publication/new-york-city-law-provides-reasonable-accommodation-pregnancy-childbir (citing New York City Local Law Int. No. 974-A).
6. Jerika Morris, "New York City Increases Protections for Pregnant Employees," *Hofstra Labor & Employment Law Journal Official Blog*, n.12 (October 10, 2013), http://thelejer.wordpress.com/2013/10/07/new-york-city-increases-protections-for-pregnant-employees/.
7. *Phillips v. City of New York*, 66 A.D.3d 170, 182 (1st Dep't 2009).
8. S. 1479 (NY 2013).
9. *Id.*
10. *Id.*
11. Pregnant Workers Fairness Act, H.R. 1975/S. 942, 113th Congressional Session (2013).
12. Morris, *supra* note 6, n.14.

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