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Nev. Pregnancy Accommodations: What Employers Should Know

By **Laura Jacobsen**

Law360, New York (July 10, 2017, 11:37 AM EDT) -- During the 2017 legislative session, the Nevada Legislature enacted the Nevada Pregnant Workers' Fairness Act. The notice provisions of the act were effective as of June 2, 2017, while the other substantive provisions of the law will not become effective until Oct. 1, 2017. While this might appear on the surface to be something that only Nevada-based employers should be aware of, this law applies to any employer with 15 or more employees in Nevada. Therefore, it is important for national companies who have a Nevada presence or are considering expansion into the state to be up to speed on the provisions of this legislation.



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Effective now, Nevada employers are required to provide written or electronic notice to employees of their right to be free from discriminatory or unlawful employment practices pursuant to NRS 613.335 and the Nevada Pregnant Workers' Fairness Act, and that female employees have the right to a reasonable accommodation for a condition of the employee relating to pregnancy, childbirth or a related medical condition. Employers must provide this notice at three separate junctures. First, the notice must be provided to all new employees. Second, it must be posted in a conspicuous place that is available to all employees. Third, the notice must again be provided to any pregnant employee within 10 days of her notifying her immediate supervisor of her pregnancy. Because of the short deadline for notification of any pregnant employee, it is critical that supervisors are educated so that the employee is notified within that 10-day window.

Effective Oct. 1, 2017, the act will provide employees and applicants with the right to a reasonable accommodation for a condition relating to pregnancy, childbirth or a related medical condition, and the right to be free from discriminatory or unlawful employment practices based upon the employee's request for or use of a reasonable accommodation.

The act defines covered conditions to include any physical or mental condition related to pregnancy, childbirth or a related medical condition, including (1) nursing, (2) recovering from pregnancy or childbirth, (3) post-partum depression, and (4) loss or end of pregnancy and recovery therefrom.

Example accommodations include: (1) modified equipment or seating; (2) revised break schedules; (3) nonbathroom private space for nursing mothers to express breast milk; (4) assistance with manual labor if manual labor is not among the employee's primary work duties; (5) light duty authorization; (6) transfer to a less strenuous or hazardous position; and (6) a

restructured position or modified work schedule. For applicants, it may be necessary to modify the application process or the manner in which things are customarily carried out in order to afford the applicant a full opportunity for employment.

This legislation should sound familiar to employers. This is because the act institutes a framework which is similar to the Americans with Disabilities Act. For example, if an employee requests an accommodation, the act explicitly requires the employer to undergo a good-faith interactive process to determine an effective, reasonable accommodation for the employee. Similarly, an employer may request an explanation from the employee's physician concerning the physician's specific accommodation recommendation.

Further, an employer need not provide the requested accommodation if it would impose an undue hardship. Under the burden-shifting framework contemplated by the act, the employee bears the burden to establish a prima facie case that she requested an accommodation and her employer refused to provide it. Then, the burden shifts to the employer to provide that the requested accommodation would impose an undue hardship on the employer. In order to prove an undue hardship, the employer would have to demonstrate that the accommodation is significantly difficult or expensive to provide, taking into consideration: (1) the nature and costs of the accommodation; (2) the overall financial resources of the employer; (3) the overall size of the business with respect to the number of employees and the number, type and location of available facilities; and (4) the effect of the accommodation on the expenses, resources and operations of the employer. However, evidence that the employer provides a similar accommodation to a similarly situated employee or applicant would create a rebuttable presumption that the accommodation does not impose an undue hardship on the employer.

There are other provisions of the act that will certainly present new challenges for employers. Employers will be surprised to learn that it is now unlawful to require an employee or applicant to accept an accommodation she did not request or that she does not choose to accept. It is also unlawful to require an employee to take leave as an accommodation if there is a different accommodation available that would allow the employee to continue to work. One provision of the law that has created some confusion is the law's definition of prohibited adverse employment actions to include transfer to another position, even though it elsewhere recommends transfer to less strenuous or hazardous position as an example accommodation. (There are some important exemptions from these requirements for bona fide occupational qualifications and for employers who are contractors licensed under NRS Chapter 624.) Consequently, employees now have significantly more power to determine the proper accommodation, and employers should tread lightly if the employee chooses not to accept an alternative accommodation that better suits the needs of the employer.

There are other important differences from federal law. While the federal Fair Labor Standards Act already requires Nevada employers to provide break time and a nonbathroom space for nursing mother to express breast milk for a period of one year following the child's birth, the act expands upon that requirement because it requires Nevada employers to offer the same accommodation, but without any limit to the time period for which that accommodation must be provided.

The law also expands upon current Nevada law which requires an employer to provide paid or unpaid leave to pregnant employees to the same extent that the employer provides paid or unpaid leave for sickness or disability. Under the act, equivalent leave must be provided not just to pregnant employees, but to any employee for a condition relating to pregnancy, childbirth or a related medical condition.

As many of these provisions have already gone into effect, and the rest will follow shortly in October, it is important for companies doing business in Nevada to ensure they fully understand

these new regulations and how they differ from federal requirements, and that they are taking the necessary steps towards full compliance.

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