



DELAWARE

EMPLOYMENT LAW LETTER

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PREGNANCY DISCRIMINATION

Pregnant pause, part 2

by Lauren Russell

As we reported in our July 2014 issue, the Delaware General Assembly proposed legislation that would add pregnancy as a protected characteristic under the Delaware Discrimination in Employment Act (DDEA). (See "Pregnant pause: General Assembly, EEOC ponder pregnancy bias" on pg. 1.) Since then, Senate Bill (SB) 212 has passed the General Assembly and been signed into law by Governor Jack Markell. The new law, which went into effect on September 9, imposes significant obligations on Delaware employers. Like all provisions of the DDEA, SB 212 applies to Delaware employers with four or more employees.

Unlawful conduct

SB 212 reflects draft legislation championed by the National Women's Law Center. Similar laws have been passed in other states, including New Jersey most recently. The purpose of Delaware's statute is to codify the Equal Employment Opportunity Commission's (EEOC) July 2014 guidance on pregnancy discrimination at the state level.

SB 212 defines "pregnancy" broadly to include pregnancy, childbirth, or "a related condition, including, but not limited to, lactation." The statute generally prohibits discrimination on the basis of pregnancy and requires employers to accommodate pregnant employees.

Importantly, SB 212's definition of "reasonable accommodation" is broader than the definition provided by the Delaware Persons with Disabilities Employment Protection Act (DPDEPA). SB 212 notes that employers' duty to accommodate pregnant employees is *not* limited to employees with disabilities. Instead, it extends to "known limitations of a person related to pregnancy, childbirth, or a related condition."

The new law provides a list of accommodations, including "time off to recover from childbirth, or break time and appropriate facilities for expressing breast milk." That provision should be particularly concerning to employers that are not subject to the Family and Medical Leave Act (FMLA) or the Fair Labor Standards Act (FLSA). Under Delaware law, those employers may now be required to provide employees with unpaid leave after childbirth or breaks to express breast milk.

SB 212 makes it unlawful for an employer to "require an employee to take leave under any leave law or policy of the employer if another reasonable accommodation can be provided [for] the known limitations related to the pregnancy of the employee." That prohibition provides employees significant control over which reasonable accommodations are provided. Under the Americans with Disabilities Act (ADA), employers are not required to grant employees the accommodation of their choosing unless it is the only reasonable accommodation available. The amendments to the DDEA suggest that an employee may reject leave as an accommodation and insist on her preferred accommodation.

Additional posting requirements

The DDEA has been amended to include additional posting requirements. As always, employers are

required to "conspicuously" display a copy of the Delaware Department of Labor's (DDOL) antidiscrimination poster. However, employers are now required to "provide notice of the right to be free from discrimination in relation to pregnancy[,] . . . including the right to reasonable accommodation" under the following circumstances:

- At the commencement of employment;
- Within 120 days of SB 212's effective date; and
- Within 10 days of receiving notice that an employee is pregnant.

The notice obligation is in addition to the traditional posting requirement, and it is not clear what the notice must include.

Bottom line

SB 212's amendments to the DDEA are significant and extend beyond employers' obligations under Title VII of the Civil Rights Act of 1964. Employers are advised to consult their attorneys to ensure that their policies and practices are consistent with the amendments.

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