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OUR INSIGHTS

Colorado Expands Anti-Discrimination Act With Pregnant Workers Fairness Act

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Published Date: June 3, 2016

On June 1, 2016, Colorado Governor John Hickenlooper signed into law Colorado's Pregnant Workers Fairness Act. The act, which becomes effective on August 10, 2016, amends the Colorado Anti-Discrimination Act (CADA) and requires employers to accommodate medical conditions and limitations stemming from pregnancy that may not separately qualify as disabilities under the Americans with Disabilities Act (ADA). In addition, the act imposes new posting and notification requirements for employers. Also, unlike the ADA, which applies only to employers with 15 or more employees, CADA and the new act apply to all employers, even those with only 1 employee.

Colorado is the 17th state to enact this kind of legislation. Employers should take this opportunity to review and update their policies and practices to conform to the new requirements.

Reasonable Accommodation Requirement

Under the ADA, a healthy or normal pregnancy is not considered a disability. Only pregnancy-related or childbirth-related *impairments* or *complications* constitute disabilities under the ADA.

However, under the new act, employers will be required to engage in a "timely, good-faith, and interactive process" with employees (or applicants) experiencing "health conditions related to pregnancy or the physical recovery from childbirth" to determine effective reasonable accommodations.

Examples of reasonable accommodations that may be covered under the new act include transfer to a light duty position (if available), longer or more frequent breaks, easier access to water, modified work schedules, assistance with manual labor, and alternate seating arrangements while on the job. Notably, employers may not require employees to take leave if they can provide another reasonable accommodation for the employee's pregnancy, physical recovery from childbirth, or related condition.

Undue Hardship Analysis

The act uses the "undue hardship" ADA legal framework with which employers are familiar. As a result, employers are only expected to provide reasonable accommodations if such accommodations do not impose an

undue hardship. The act defines undue hardship as “an action requiring significant difficulty or expense to the employer.” The relevant factors used to determine whether an accommodation would impose an undue hardship include: the nature and cost of the accommodation; the employer’s overall financial resources; the overall size of the employer’s business (the number of employees and the number, type, and location of available facilities); and the accommodation’s effect on expenses and resources or on the employer’s operations. Practically speaking, however, establishing an undue hardship has been difficult for an employer under the ADA and will likely be difficult for an employer to show under this new act.

Retaliation and Adverse Employment Actions

The act also prohibits employers from taking adverse actions or denying employment opportunities to applicants or employees who request or utilize an accommodation. The new law broadly construes adverse action as any “action where a reasonable employee would have found the action materially adverse, such that it might have dissuaded a reasonable worker from making or supporting a charge of discrimination.” This standard for adverse action under the statute for claims of retaliation is lower than the standard for adverse action in claims of discrimination. As a result, employers should be aware that any adverse action after an employee requested an accommodation *may* be considered retaliation, even if the action did not have a true retaliatory basis.

Notice Requirements

Employers have until December 8, 2016 to provide current employees with written notice of their new rights. Additionally, employers will be responsible for providing written notice to all new hires at the start of their employment. Finally, employers must post a written notice in a conspicuous place in an area accessible to employees.

Damages Available to Employees Under the New Act

Employees bringing a failure to accommodate claim under the act may be awarded damages under CADA. Since January of 2015, based on an amendment to CADA, an employee bringing a lawsuit under CADA is eligible to recover compensatory damages, punitive damages, and attorneys’ fees. CADA adopts the mandatory caps on combined compensatory and punitive damages found in the federal Civil Rights Act of 1991. The amount of damages available is tied to the number of employees employed by the employer. For example, if an employee has a successful CADA claim against an employer with 501 or more employees, the combined recovery for compensatory and punitive damages may not exceed $300,000.

Next Steps for Employers

To prepare for the August 10, 2016 effective date of the new act, employers should consider taking the following actions:

- Update accommodation policies and employee handbooks to include detailed information about the process for employees to request pregnancy-related accommodations.
- Revisit job descriptions to ensure that essential functions listed are a true reflection of job duties.

- Draft a written notification to send to current employees of their rights under the act once it takes effect.
- Incorporate the written notification of rights into relevant new hire materials to disseminate on or before August 10, 2016.
- Prepare the written notification of rights that will be posted in a conspicuous place accessible to all employees.
- Train human resources personnel, supervisors, and managers on the new accommodation provisions and anti-retaliation measure.
- Remain mindful that in certain cases, a pregnancy related “health condition” could cross over into a “disability” under the ADA.
- Design a system for periodic review of pregnancy accommodation procedures to ensure compliance and encourage continuous improvement.

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