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What Employers Need to Know About the New York City Pregnancy Accommodation Enforcement Guidance

By **Richard I. Greenberg**, **Daniel J. Jacobs**, **Joseph J. Lynett** and **Ellen M. Bandel**

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The New York City Commission on Human Rights has released enforcement guidance on the New York City Pregnant Workers Fairness Act identifying five categories of potential violations and emphasizing the need to engage in cooperative dialogue to reach accommodation. The Act, passed in 2013 and codified in the New York City Human Rights Law, protects against discrimination and mandates reasonable accommodations based on pregnancy, childbirth, or related medical condition. For a review of the Act's statutory requirements as they relate to pregnancy accommodations, see our article, Employers Must Provide Pregnancy-Related Accommodations under New York City Law.

Key sections of the "Legal Enforcement Guidance on Discrimination on the Basis of Pregnancy" are reviewed below.

Definitions

- *"Pregnancy"* is defined broadly to include not only "being pregnant," but also "symptoms of pregnancy, including, without limitation, nausea, morning sickness, dehydration, increased appetite, swelling of extremities, and increased body temperature."
- *"Related Medical Condition"* is also defined broadly to include "the state of seeking to become pregnant"; medical conditions related to or caused by pregnancy or childbirth, such as infertility, gestational diabetes, pregnancy-induced hypertension, preeclampsia, post-partum depression, miscarriage, or lactation; or recovery from childbirth, miscarriage, and termination of pregnancy.
- *"Cooperative Dialogue"* is defined as "the process by which an employer engages with an employee in an open problem-solving conversation based on the employee's request for an accommodation or the belief that an employee might benefit from an accommodation...[that] involves consideration of a proposed accommodation or alternative accommodation for an employee's pregnancy, childbirth, or related medical condition while allowing them to perform the essential requisites of the job without creating an undue hardship on the employer." (This is similar to the interactive process associated with disability accommodations.)

Compliance Obligations, Violations of NYCHRL

The Guidance lists five categories of potential violations: (1) failure to provide reasonable accommodations, (2) disparate treatment, (3) disparate impact, (4) retaliation, and (5) failure to provide the required notice. The Guidance also reviews

Meet the Authors

Richard I. Greenberg
Principal
New York

212-545-4080
GreenbeR@jacksonlewis.com

Daniel J. Jacobs
Principal
New York

212-545-4049
JacobsD@jacksonlewis.com

Joseph J. Lynett
Principal
White Plains

914-872-6888
Joseph.Lynett@jacksonlewis.com

retaliation, and (3) failure to provide the required notice. The Guidance also reviews employers' compliance obligations under the NYCHRL's pregnancy discrimination and reasonable accommodation requirements.

1. Failure to Provide Reasonable Accommodations

Employees may request accommodations based on pregnancy, childbirth, or related medical condition even if their medical condition does not amount to a disability. Further, under the NYCHRL, employers have accommodation obligations under this employee category regardless of whether and to what degree other non-pregnant employees are accommodated.

The Guidance categorizes the following "types" of accommodations and provides general and fact-specific examples:

- *Minor accommodations, schedule modifications, and alternative positions/assignments* – Examples include minor changes in work schedules, adjustments to uniform requirements or dress codes, and additional water or snack breaks.
- *Leave related to childbirth, followed by reinstatement to the employee's original job or to an equivalent position* – Employers may request only medical documentation for leave requests beyond six weeks for a vaginal delivery and eight weeks for a caesarian section.
- *Accommodations related to lactation/expressing breast milk* – Employers generally cannot limit the amount of time for this process (unless they can establish the time needed presents an undue hardship). Employers also generally *must provide a clean and private area, other than a bathroom, and must provide a refrigerator to store breast milk in the workplace. Significantly, the Guidance also requires that employers permit employees to "express milk at their usual work station ... so long as it does not create an undue hardship for the employer, regardless of whether a coworker, client, or customer expresses discomfort."*
- *Accommodations related to abortions, miscarriages, and fertility treatments* – Examples include unpaid leave to recover and flexible scheduling to account for additional appointments related to the procedure or experience. Employers may request documentation.

The Guidance outlines a detailed process for employers' obligations with respect to the "cooperative dialogue." The process includes:

- First, employers have an *affirmative obligation to initiate* a cooperative dialogue with an employee under these two circumstances: (1) when the employer learns (directly or indirectly) that an employee requires a reasonable accommodation due to pregnancy, childbirth, or related medical condition, or (2) when an employee has not requested an accommodation, but the employer knows that her work performance has been affected or that her work behavior may result in an adverse employment action *and* the employer has a reasonable basis to believe the issue is related to pregnancy, childbirth, or related medical condition.
- Second, employers must *engage in a cooperative dialogue,* communicating in good faith with the employee in an open and expeditious manner, whether in person, by phone, or by electronic means (*e.g.,* email). The Guidance prohibits employers from challenging the validity of an employee's accommodation request, but urges employers to understand the need for the employee's request and the ways in which the request could be accommodated. Factors the Commission will consider in determining whether an employer "engaged in a cooperative dialogue in good faith" include: (1) whether the employer has a written policy for requesting this type of accommodation; (2) whether the employer's response to the employee's request was timely, in light of the urgency of the request; (3) whether the employer attempted to explore the existence and feasibility of alternative accommodations or alternative positions; and (4) whether the employer attempted to obstruct or delay the cooperative dialogue or intimidate or deter the employee from requesting the accommodation. *The Commission does not expect or require employers to provide the specific accommodation requested by an employee,* as long as they propose reasonable alternatives that meet the employee's specific needs or address the limitation at issue.
- Third, employers must formally *conclude the cooperative dialogue.* The

Ellen M. Bandel
Associate
New York

212-545-4000
Ellen.Bandel@jacksonlewis.com

Commission says the cooperative dialogue is ongoing unless and until: (1) a reasonable accommodation will be provided; or (2) there is either no accommodation available that will not cause an undue hardship or that no accommodation will allow the employee to perform the essential requisites of the job. The Guidance notes that an employer should notify the employee promptly in writing of the determination. Since an employee's condition may change over time, employers may be obligated to engage in cooperative dialogue multiple times during the course of an employee's pregnancy.

In limited circumstances, employers may request medical documentation as part of the cooperative dialogue. Such requests may be made only: (1) if the employee is requesting time away from work, including for medical appointments, *other than* the six-to-eight-week period following childbirth for recovery from childbirth, and then only if the employer requests verification from other employees requesting leave-related accommodations for other reasons; or (2) if the accommodation request entails working from home on an intermittent or a longer-term basis. Moreover, while an employer may request additional documentation if the employer believes the initial documentation provided is insufficient, the employer cannot speak directly to the employee's medical provider unless the employee provides consent to do so.

The Guidance states that "failure to engage in a cooperative dialogue with an employee prior to denying a request for accommodation may be tantamount to a failure to accommodate."

Employers who are unable to provide a reasonable accommodation have affirmative defenses (demonstrate by a preponderance of the evidence):

- *Undue hardship,* based on the factors as specified under the NYCHRL.
- *Essential requisites of the job,* meaning the employee would not be able to satisfy the essential requisites of her job even with an accommodation. The employer also must be able to demonstrate that (1) there were no comparable positions available, and (2) a lesser position or an unpaid leave of absence were not acceptable to the employee or would pose an undue hardship.

2. Disparate Treatment

The Guidance identifies and provides examples of three circumstances that may give rise to a violation of the NYCHRL based on disparate treatment:

- *Treating individuals less well because of their pregnancy* – Examples of violations include: not hiring someone who is otherwise qualified because she is pregnant, or suspending vacation and sick time accrual to an employee on leave to recover from childbirth but not doing so for employees on temporary disability leave.
- *Maintaining policies that single out pregnant individuals* – Examples of violations include: refusing to hire pregnant individuals for specific positions, or refusing to consider them for certain promotions because the positions involve working with hazardous chemicals.
- *Engaging in conduct rooted in stereotypes or assumptions regarding pregnancy* – Examples of violations include: not offering a promotion to a pregnant employee who is otherwise qualified based on the assumption that she likely will decide not to return to work after childbirth, or not assigning a pregnant employee to a new project after learning she is pregnant based on a concern that the employee will be distracted by the pregnancy.

3. Disparate Impact

The Commission also will evaluate neutral policies or practices that may have a

disparate impact on individuals who are pregnant or perceived to be pregnant. It likely will scrutinize light duty policies (*i.e.,* policies that permit workers to be moved to "light duty" for on-the-job injuries only), which the Commission view as having a disparate impact on pregnant employers unless the employer can demonstrate the policy bears "a significant relationship to a significant business objective of the covered entity or does not contribute to the disparate impact."

4. Retaliation

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The Guidance indicates that requesting a reasonable accommodation and engaging in the cooperative dialogue are both protected activities, and therefore any adverse employment action based on such activity constitutes retaliation under the NYCHRL.

5. Failure to Provide Notice Regarding Pregnancy Protections

Reiterating existing requirements, the Guidance states that failure to provide all employees with written notice of their right to be free from discrimination in relation to pregnancy, childbirth, and related medical conditions (by using the Commission's "Pregnancy and Employment Rights" poster or some other means of notice) constitutes a violation of the NYCHRL. An employer also may post the notice in their place business in an area accessible to all employees.

Best Practices

The Guidance concludes with "best practice" suggestions for employers.

First, employers should maintain and distribute (to all employees) a written policy informing employees about the cooperative dialogue process that includes information on how to request an accommodation and explains what a cooperative dialogue looks like.

Second, when an employee notifies the employer of a pregnancy, the employee should be given a copy of the policy *and* be reminded of the availability of accommodations.

Third, consistent with the guidance on the City's Stop Credit in Employment Act and others, employers also should maintain a detailed log that documents all efforts to initiate, engage in, and conclude the cooperative dialogue with an employee.

Jackson Lewis attorneys are available to assist your organization with compliance with these employer obligations in New York City as well as in the other states and localities with similar laws.

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