Portfolio Media. Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

# What To Expect When Your Employees Are Expecting: Part 2

*Law360, New York (May 13, 2014, 4:12 PM ET)* -- This is the second article in a two-part series regarding pregnancy discrimination and accommodation. In the first installment of the series, we addressed the U.S. Equal Employment Opportunity Commission's heightened enforcement activity and the various federal laws that prohibit discrimination based on pregnancy and its related medical conditions.

We also discussed recent case law highlighting the success of the EEOC and plaintiffs' bar in using the federal laws to impose affirmative obligations on employers to afford accommodations to pregnant workers. In the second part of our series, we address the Affordable Care Act, which requires employers to provide lactation breaks to nonexempt employees as well as the burgeoning number of state and local laws that impose reasonable accommodation requirements on employers.

We conclude with practical advice for employers, the steps an employer should take to ensure unbiased and lawful treatment of pregnant workers and how to best avoid legal claims in the area of employment law.

**The Affordable Care Act: Lactation Breaks**

The Affordable Care Act amended Section 207 of the Fair Labor Standards Act to require employers to provide nonexempt employees with reasonable time to express breast milk for a period of up to one year after that employee has given birth. The employee is permitted to take a reasonable amount of time as needed. Lactation break time need not be paid.

The ACA's Nursing Mother Amendment, as it is known, also requires employers to provide an employee with a private place to express breast milk, describing this location as, “a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk.” Notably, this location does not need to exist solely as a lactation room, but it must be available and private when the employee needs it. The ACA does not explain what

constitutes “private,” leaving an employer to determine the means to ensure that the room is free from intrusion when in use.

Section 215(a)(3) of the FLSA prohibits an employer from retaliating against an employee because she has filed a complaint involving the Nursing Mother Amendment, or Section 207(r). An employer who violates the FLSA is subject to penalties that may include payment of unpaid minimum wages and/or overtime or lost wages and liquidated damages. In the case of Section 215, employment, reinstatement or promotion may be ordered. A willful violation can trigger fines and criminal penalties. Attorney’s fees are also available.

There have been only a limited number of cases addressing the ACA’s Nursing Mother Amendment. In the case of Salz v. Casey’s Marketing Co., the court held that there was no private right of action for claimed violations of Section 207(r). In Salz, plaintiff alleged her employer came under new ownership and installed a video camera in the office she had used for her lactation breaks. She noticed it one day while her breast was exposed. The employee claimed she had not been informed about the camera’s presence and, when she complained about it, she was told to cover the camera with a plastic bag before she expressed milk. The plaintiff did so, but she remained uncomfortable and as result was physically unable to express her milk. The employee claimed that after she complained to her employer, he retaliated by finding constant fault in her work.

The plaintiff ultimately quit her job and sued the company alleging both a violation of Section 207(r) for failing to provide private space in which to express breast milk and a violation of Section 215 for retaliation. The court found no private right of action under Section 207(r), dismissing that claim and holding that employees should file claims with the U.S. Department of Labor. The court declined to dismiss the retaliation claim, holding that “once an employer discriminates or discharges an employee in relation to an employee’s complaint about the employer’s express breast feeding policy, they have violated not only Section 207(r), but also Section 215(a)(3).”

The Eleventh Circuit became the first appellate court to interpret the nursing mother provisions of the FLSA. In Miller v. Roche Surety & Casualty Co., the court affirmed dismissal of the employee’s claims as a matter of law and held that the employer neither denied the employee nursing breaks nor retaliated against her for requesting breaks in violation of the FLSA. The court did not address the issue of the existence of a private right of action.

The plaintiff worked for Roche, a bail bond surety company in Florida. After her pregnancy, Miller was free to take the nursing breaks as needed, as well as a one-hour lunch break. Her break time was not counted or timed and she was never criticized for taking a break. Miller chose to express breast milk in her own office, and she taped folders to her office window for privacy. On one occasion, contemplating having to spend a day working at a remote location, Miller sent an email to Roche’s president inquiring as to a location where she could use her breast pump. Sometime after sending the email, Miller was terminated. She sued, claiming Roche had not given her a time and place to express breast milk in violation of Section 207(r), and that it violated Section 215(a)(3) when it terminated her employment after she asked for a time and place to do so.

The Eleventh Circuit ultimately rejected these claims. As to the Section 207(r) claim, the court held that Miller's own testimony established that she had been given necessary breaks in a private location, at her leisure and without criticism. The court rejected the retaliation claim as well since the email requesting a location off-site did not constitute a "complaint" for purposes of the FLSA.

**State and Local Preganancy Laws**

Given the perceived gaps in the federal law, including the fact that many employers do not offer accommodation to pregnant workers, and a general perception that the Pregnancy Discrimination Act is inadequate to guard against unfair treatment of pregnant workers, many state and local legislators have stepped in to afford these individuals greater rights than may be enjoyed under federal law.

Ten states and two cities have new laws which require accommodations for pregnant employees and prohibit discrimination on the basis of pregnancy or related medical conditions. These states include Alaska, California, Connecticut, Florida, Hawaii, Illinois, Louisiana, Maryland, New Jersey and Texas. The cities include both Philadelphia and New York.

***New Jersey***

New Jersey Gov. Chris Christie signed New Jersey's Pregnant Worker's Fairness Act ("PWFA") into law on Jan. 21, 2014. The PWFA is an amendment to the New Jersey Law Against Discrimination ("NJLAD"). Although pregnant women were afforded some protection under the preamended version of NJLAD, the new law further extends and clarifies these protections.

The law specifically adds pregnancy to the list of protected classes and requires employers to provide reasonable accommodations "to pregnant women and those who suffer medical conditions related to pregnancy and childbirth, such as bathroom breaks, breaks for increased water intake, periodic rest, assistance with manual labor, job restructuring or modified work schedules and temporary transfers to less strenuous or hazardous work." An employer may not penalize an employee for requesting a pregnancy-related accommodation and must ensure that it does not treat such employees any less favorably that those employees who seek accommodation for other non-pregnancy related conditions.

The new law does not require an accommodation if it would cause an undue hardship to the business. A number of factors are considered in the undue hardship inquiry including: (1) the overall size of the employer's business with respect to the number of employees, number and type of facilities, and size of budget; (2) the type of the employer's operations, including the composition and structure of the employer's workforce; (3) the nature and cost of the accommodation needed, taking into consideration the availability of tax credits and deductions and/or outside funding; and (4) the extent to which accommodation would involve waiver of an essential requirement of a job as opposed to a tangential or nonbusiness necessity requirement.

The PWFA does not specify the duration of leave available to an employee. Accordingly, additional leave

beyond that required by the federal FMLA or New Jersey's Family Leave Act must be considered.

***Connecticut***

Connecticut was one of the first states to pass legislation providing pregnant employees with reasonable accommodations. The Connecticut Fair Employment Practices Act ("CFEPA") provides various protections for pregnant employees. Under the law, it is a discriminatory practice for an employer to terminate a woman's employment because of her pregnancy, to refuse to grant her a reasonable leave of absence for disability resulting from her pregnancy, to fail or refuse to reinstate the employee to her original job or to an equivalent position with equivalent pay upon return.

With regard to accommodations, Connecticut law requires an employer with three or more employees to make a reasonable effort to transfer a pregnant employee to a more suitable temporary position, so long as three factors are met: (1) the other position is available; 2) the employee gives written notice of her pregnancy to her employer; and (3) the employer or pregnant employee reasonably believes that continued employment in the current position may cause injury to the employee or the fetus.

If an employer rejects an employee's request for transfer, the employee can appeal this decision. Notably, because the CFEPA also requires that an employer reinstate an employee after her pregnancy-related disability ends, the employee can request this transfer without worrying that she would not be allowed to return to her previous position.

The CFEPA requires that the employee provide written notice to her employer in order to receive accommodation. This places a lesser burden on employers than the New Jersey law, where the employer must provide accommodation when an employer knows or "should know" that an employee is pregnant.

***Philadelphia***

Philadelphia Mayor Michal Nutter signed the Fair Practices Ordinance: Protections Against Unlawful Discrimination into law as an amendment to the Philadelphia Code on Jan. 20, 2014. The amendment explicitly classifies discrimination based on pregnancy, childbirth or a related medical condition as sex-based discrimination. It requires that an employer provide reasonable accommodation to an employee based on pregnancy, childbirth or a related medical condition, and it prohibits retaliation against an employee who exercised their rights under the law.

The law requires employers to provide reasonable accommodations related to pregnancy, childbirth or a related medical condition so long as the employee requests such accommodations and the accommodations will not place an "undue hardship" on the employer. The amendment defines "reasonable accommodation" as an accommodation "that can be made by an employer in the workplace that will allow the employee to perform the essential functions of the job." Such accommodations can include "restroom breaks, periodic rest for those who stand for long period of time, assistance with manual labor, leave for a period of disability arising from childbirth, reassignment

to a vacant position and job restructuring."

An employer may deny an accommodation because of "undue hardship." The factors considered include: (1) the nature and cost of the accommodations; (2) the overall financial resources of the employer's facility involved in the provision of the reasonable accommodations; (3) the overall financial resources of the employer; and (4) the type of operations (meaning, geographic isolation or composition of the workforce).

An employee who successfully brings a cause of action under the new amendment would be entitled to a full panoply of legal and equitable relief including compensatory and punitive damages, injunctive relief and attorney's fees.

***New York City***

On Oct. 2, 2013, former New York City Mayor Michael Bloomberg signed a bill requiring the majority of New York City employers — those with four or more employees — to provide reasonable accommodations to pregnant workers. The bill broadened the New York City Human Rights Law ("NYCHL") and amended the New York City Administrative Code when it became effective on Jan. 30, 2014.

The new law prohibits employers from refusing to provide a reasonable accommodation to an employee due to her pregnancy, childbirth or related medical condition, provided that such employee's pregnancy, childbirth or related medical condition is known, or should have been known, to the employer. The reasonable accommodation must allow the employee to perform the "essential requisites" of the job. Examples of accommodation include bathroom breaks, leave of absence, breaks to facilitate increased water intake, periodic rest and assistance with manual labor.

As with the Philadelphia and New Jersey laws, New York City employers can deny an accommodation if it would place an "undue hardship" on the employer. The factors that an employer can consider in making this assessment include: (1) the nature and cost of the accommodation; (2) the overall financial resources of the facility involved in the request; (3) the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility; and (4) the geographic separateness, administrative or fiscal relationship of the facility in question.

Additionally, New York City employers can raise an affirmative defense to an employee's discrimination case where the employer can show that, even with reasonable accommodation, the employee could not satisfy the "essential requisites" of her job.

**Practical Advice**

Given the pace at which the EEOC is pursuing its agenda to remedy perceived discrimination against pregnant workers and the increased focus of private plaintiffs and state and local lawmakers, it makes preeminent sense for employers to take a proactive approach in this area. What follows are a few steps

that employers should take to ensure compliance under the various federal, state and local laws in this area.

- Employers should evaluate their company policies and workplace practices to ensure that they have a nondiscrimination policy specifically referencing pregnancy, and that the policies are compliant with all state and federal laws particularly in the areas of accommodation, leaves of absence and breaks;
- Train managers on these policies to ensure that they understand their obligations, including understanding what constitutes discrimination, the obligations to provide statutory leave and the need for accommodation.
- Train both supervisory and non-supervisory staff to refrain from all inappropriate comments to pregnant workers, even if staff believes that their comments are well-meaning. These comments include remarks about an employee's size or appearance, or assumptions about the employee's desire to return to work.
- Ensure that all benefits are equally available to pregnant and nonpregnant workers, including personal leave and education leave.
- Understand leave laws and ensure that all leaves are administered correctly. For example, an employee does not need to specifically reference the Family Medical Leave Act or applicable state law to be entitled to a leave.
- Understand that many pregnancy-related conditions may require reasonable accommodation under federal or state law. Managers must understand that there are no magic words to request an accommodation and they must be prepared to engage in the interactive process with the employee and consider a host of potential accommodations.
- Before an employee returns to work, consider the need for a private space for lactation breaks and how you will handle such requests.

An employer that knows the law, crafts its policies carefully and trains its staff will go a long way to avoiding future legal problems when dealing with pregnant employees.

—By Linda B. Dwoskin and Mari C. Stonebraker, Dechert LLP

*Linda Dwoskin is an associate in Dechert's Philadelphia office.*

*Mari C. Stonebraker is an associate in Dechert's New York office.*