

## **What Every New Jersey Business Should Know about Maternity Protections in the Garden State**

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New Jersey guarantees pregnant women and new mothers some of the most expansive rights and benefits found throughout the United States. As such, it is important for New Jersey business owners to be aware of the duties that they owe to this segment of their workforce, and to ensure that their workplace policies are consistent with the applicable laws. This is not always a straight-forward task. Because the relevant protections and benefits derive from a variety of sources of both federal and state legislation, it can be challenging for employers to understand the obligations that they have to their employees who are pregnant or who have recently given birth. The purpose of this article is to serve as a starting point for Garden State business owners as they evaluate their workplace policies and consider what changes may be necessary.

### **General Workplace Policies**

Under both federal and New Jersey law, it is illegal to discriminate against an employee because she is pregnant. At the federal level, the Pregnancy Discrimination Act (PDA), an amendment to Title VII of the Civil Rights Act of 1964 (Title VII), provides that employers of 15 or more employees, may not discriminate against women, “because of or on the basis of pregnancy, childbirth or related medical conditions.”<sup>1</sup> Similarly, a 2014 amendment to the New Jersey Law against Discrimination, (NJLAD) known as the New Jersey Pregnant Worker’s Fairness Act (NJPWFA), also provides that it is illegal for an employer to discriminate on the basis of pregnancy or childbirth, or any related condition.<sup>2</sup> Specifically, the NJPWFA states that that employers who know or “should know” that an employee is “affected by pregnancy” must treat the employee the same as her cohorts who are not pregnant. Importantly, the NJPWFA, like all provisions of the LAD, is applicable to all New Jersey employers regardless of the size of their workforce.

In view of the PDA and the NJPWFA, employers may not base any employment decision on the fact that an employee is pregnant, or intends to become pregnant. Stated differently, it is impermissible for an employer to decline to hire a candidate

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<sup>1</sup> 42 U.S.C.A. §2000e(k)

<sup>2</sup> N.J.S.A. 10:5-12(s)

because she is pregnant, or to treat an employee differently in terms of pay, job assignments, promotions, layoffs, etc., simply because she is pregnant. Employers who engage in such practices expose themselves to discrimination-related claims.

Further, business owners who offer health insurance to their employees, must pay particular attention to the nature of the coverage offered. Consistent with the PDA and the NJPWFA, all plans must cover medical expenses associated with pregnancy just as they would any other medical condition. This means a higher deductible cannot be charged for pregnancy and pregnancy-related medical conditions. Additionally, under the Affordable Care Act (“ACA”), employers with 50 or more employees are required to provide health insurance plans that cover pregnancy, maternity and newborn care-related medical services at no cost to the employee.<sup>3</sup> Employers who fail to comply with their obligations under the ACA, may be subject to federal penalty.

### **Workplace Accommodations**

Separately, business owners should be aware of their potential obligation to provide employees who are pregnant with certain reasonable workplace accommodations. Although a normal pregnancy, in and of itself, does not fall within the meaning of the term “disability” as defined by the Americans with Disabilities Act (ADA) or the NJLAD, under the NJPWFA, Garden State employers have an obligation to provide a reasonable accommodation to employees experiencing a normal pregnancy when the request is “based upon the advice of her physician.”

The NJPWFA states that potential reasonable accommodations may include “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.” Importantly, however, the statute also makes clear that employers are not required to provide a reasonable accommodation if they can demonstrate that doing so would cause an “undue hardship” on their business operations. The statutory factors to be considered when “determining whether an accommodation would pose undue hardship” include:

- the overall size of the employer's business with respect to the number of employees, number and type of facilities and size of budget;

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<sup>3</sup> 42 U.S.C. 300gg-6(a)

- the type of the employer's operations, including the composition and structure of the employer's workforce;
- the nature and cost of the accommodation needed, taking into consideration the availability of tax credits, tax deductions and outside funding; and
- the extent to which the accommodation would involve waiver of an essential requirement of a job as opposed to a tangential or non-business necessity requirement.

Additionally, the NJPWFA states that any workplace accommodation or period of protected leave afforded to a pregnant employee as a reasonable accommodation must not be “provided in a manner less favorable than accommodations or leave provided to other employees not affected by pregnancy but similar in their ability or inability to work.”

To date, it appears that no New Jersey court has had the opportunity to issue a published decision offering interpretive guidance for employers as to their obligations under the NJPWFA. As such, when considering an employee’s request for a pregnancy-related workplace accommodation, it is prudent for an employer to address the request no differently than it would a request for a disability-related accommodation.

### **Leaves of Absence**

New Jersey business owners with more than 50 employees must also be mindful of their obligations to employees of childbearing age under the Family and Medical Leave Act (FMLA) and the New Jersey Family Leave Act (NJFLA).

Under the FMLA, employers are required to provide all eligible employees (those who have worked for the employer for at least 12 months for at least 1,250 hours) up to 12 weeks of unpaid leave each year for the birth and care of a newborn child of the employee, the placement with the employee of a child for adoption, to care for an immediate family member’s serious health condition or for the employee’s own serious health condition within a 12-month period.<sup>4</sup>

Separately, under the NJFLA, employers are required to provide eligible employees (worked for the employer for at least 12 months for at least 1,000 hours), up to 12 weeks of unpaid leave each year to care for a newly born or

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<sup>4</sup> 29 U.S.C. 2612

adopted child, or a family member who has a serious health condition within a 24 month period.<sup>5</sup>

An employee may be eligible for FMLA before she delivers if she is suffering from a pregnancy-related condition that qualifies as a serious health condition under the FMLA. After an employee gives birth, her leave can qualify as both FMLA and NJFLA leave. Under the NJFLA regulations, when leave is taken for a purpose that qualifies under both statutes, the employee's periods of leave run concurrently.<sup>6</sup> By way of illustrating the interplay between the FMLA and the NJFLA, the NJFLA regulations explain that an eligible employee could, for example, take four weeks of FMLA prior to delivery for her pregnancy-related medical condition, followed by another six weeks of FMLA to recover from childbirth. The eligible employee's 10 weeks of leave would count against her FMLA entitlement only, and the employee would still have her full 12-week entitlement under the NJFLA to care for her newly born child.

### **Paid Leave**

Business owners should be aware that an employee may be entitled to New Jersey Temporary Disability Benefits (NJTDB) for any six week period of time that she is unable to work because of pregnancy or childbirth.<sup>7</sup> Generally, the NJTDB applies to all businesses. An employee is eligible for NJTDB if she has worked at least 20 weeks in the State of New Jersey or earned at least \$8,400 within the year prior to the commencement of her pregnancy or childbirth-related disability. A claimant is entitled to benefits in the amount of 2/3 of her average weekly wages or up to the maximum weekly amount payable set for calendar year.<sup>8</sup> The maximum weekly amount payable for 2017 is \$633.

Employees may also be also be entitled to an additional six weeks of pay under the New Jersey Family Leave Insurance Law (NJFLI) to bond with a newly born child within the first 12 months after the child's birth.<sup>9</sup> Notably, New Jersey is one of only three states in the United States that offers such paid benefits.<sup>10</sup> Any employee who is covered under the New Jersey Unemployment Compensation law and who has worked for at least 20 weeks in the State of New Jersey or earned at

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<sup>5</sup> N.J.S.A. 34:11B-4

<sup>6</sup> N.J.A.C. 13:14-1.6

<sup>7</sup> N.J.S.A. 43:21-29

<sup>8</sup> See Temporary Disability Insurance Program, LWD.DOL.STATE.US, (Last visited April 28, 2017) [http://lwd.dol.state.nj.us/labor/forms\\_pdfs/tdi/WPR-117\(1-17\).pdf](http://lwd.dol.state.nj.us/labor/forms_pdfs/tdi/WPR-117(1-17).pdf)

<sup>9</sup> N.J.S.A. 43:21-39

<sup>10</sup> See State Family and Medical Leave Laws, NATIONAL CONFERENCE OF STATE LEGISLATURES (Last visited April 28, 2017) <http://www.ncsl.org/research/labor-and-employment/state-family-and-medical-leave-laws.aspx>

least \$8,400 within the year prior to the commencement of her pregnancy or childbirth-related disability is entitled to benefits.<sup>11</sup> As with NJTDB, a NJFLI claimant is entitled to 2/3 of her average weekly wages for a maximum weekly amount of \$633 in 2017.

An employee who first receives NJTDB for her own-pregnancy related condition, may, thereafter, receive NJFLI benefits for a total of 12 weeks of compensation.

### **Post-Maternity Leave**

Finally, once a woman gives birth, employers that must comply with the ACA have an obligation to support a mother's efforts to breastfeed her newborn. Specifically, all employer-sponsored health insurance plans (with the exception of grandfathered plans) are to provide breastfeeding support and counselling services and equipment for the duration of breastfeeding, including the cost of a breast pump.<sup>12</sup> Additionally, the ACA amended Section 7 of the Fair Labor Standards Act to require employers to provide nonexempt employees with "reasonable break time . . . to express breast milk for her nursing child for one year after the child's birth each time such employee has need to express the milk and a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public."<sup>13</sup> Employers must ensure that they comply with this break accommodation requirement to the same degree they accommodate employees who require breaks for other medical conditions.

### **Conclusion**

New Jersey employers have significant obligations to support their female employees who are pregnant and who have recently given birth. Because the relevant sources of law are complex, and at times overlapping, it is recommended that employers consider consulting experienced counsel before making any changes to their workplace policies and when handling specific employee situations.

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<sup>11</sup> See Your Guide to Family Leave Insurance in New Jersey, LWD.DOL.STATE.NJ.US (Last visited April 28, 2017) [http://lwd.dol.state.nj.us/labor/forms\\_pdfs/tdi/WPR-119%20\(1-16\).pdf](http://lwd.dol.state.nj.us/labor/forms_pdfs/tdi/WPR-119%20(1-16).pdf)

<sup>12</sup> See Breastfeeding Benefits, HEALTHCARE.GOV (Last visited Feb. 23, 2017), <https://www.healthcare.gov/coverage/breast-feeding-benefits>.

<sup>13</sup> 29 U.S.C. § 207(r) (2017)