Two New Louisiana Employment Laws: Pregnancy Accommodations and Limiting the Use of Criminal History in Hiring

Insights
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While Louisiana has not typically been at the forefront of introducing concepts into employment law, the state legislature recently acted on two topics that have been seeing increased interest from state and local governments across the country over the last several years: **accommodating pregnant employees** with pregnancy-related limitations and limiting the use of an **applicant's criminal history** in hiring. The background check limitations are straight forward, but the new pregnancy accommodation law presents significant room for interpretation. Both new laws take effect on August 1, 2021, so the time is now for Louisiana employers to understand your compliance obligations.

Pregnancy Accommodation Law

Some states began enacting pregnancy accommodation laws several years ago to patch a perceived hole in federal laws prohibiting workplace discrimination because of pregnancy. The federal Pregnancy Discrimination Act contains no explicit requirement that employers accommodate pregnancy-related limitations. Instead, it simply requires that employers treat pregnant employees the same as those who were similar in their inability to work. The Americans with Disabilities Act (ADA), meanwhile, requires accommodation of some, but not all, pregnancy-related restrictions. As such, some pregnant employees with pregnancy-related limitations are not entitled to accommodations under federal law. In response, 29 states have enacted pregnancy accommodation laws. Now included on that list is Louisiana.

The Basics

Act No. 393 of the 2021 Regular Session amended the Louisiana Employment Discrimination Law's prohibition on pregnancy discrimination to include a general duty to reasonably accommodate an employee's physical limitations caused by pregnancy. This law applies to all employers with 25 or more employees in Louisiana, and becomes effective August 1, 2021.

Previously, the Employment Discrimination Law required employers to provide some specific accommodations to pregnant employees – including leaves of absence or transfer to a less strenuous position where it could be reasonably accommodated. But these requirements were limited in scope and there was no general duty to provide any other individual reasonable

limited in scope and there was no general duty to provide any other individual reasonable accommodation. Act No. 393 expands the law by defining an unlawful employment practice as "to fail or refuse to make reasonable accommodations for an applicant or employee with [pregnancy-related limitations] unless the employer can demonstrate the accommodation would pose an undue hardship on the operation of the business of the employer."

The law provides a new posting obligation requiring all covered employers to post a notice of new workplace rights by December 1, 2021. It is anticipated that the Louisiana Department of Labor will create a poster for this purpose.

Specific Accommodations to be Considered

Importantly, rather than only relying on the general and sometimes vague concept of "reasonable accommodation" which has been interpreted on a case-by-case basis, Louisiana's new law sets out specifically required accommodations that are arguably broader than the reasonable accommodation obligation under the ADA. The Act gives the following non-exhaustive list of required accommodations:

- providing scheduled and more frequent or longer compensated break periods;
- providing more frequent bathroom breaks;
- providing a private place, other than a bathroom stall, for the purpose of expressing breast milk;
- modifying food or drink policy;
- providing seating or allowing the employee to sit more frequently if the job requires the employee to stand;
- providing assistance with manual labor and limits on lifting;
- temporarily transferring the employee to a less strenuous or hazardous vacant position, if qualified;
- providing job restructuring or light duty, if available;
- acquiring or modifying equipment or devices necessary for performing essential job functions; or
- modifying work schedules.

New Law Creates Vexing Concerns

The immediately apparent problem with expressly including these as reasonable accommodations is that does not seem to take into account to whether providing such an accommodation would be removing an essential job function. In fact, unlike the ADA, there is no requirement in the Louisiana law that a pregnant employee be able to perform all the essential functions of the job.

For example, read literally, providing lifting assistance to an employee whose job is to lift and move boxes could be a reasonable accommodation. If an employee cannot lift more than five pounds due

boxes could be a reasonable accommodation. If an employee cannot lift more than five pounds due to a pregnancy-related limitation, the employer may have to assign someone else to perform all lifting involving more than five pounds – even where that function occupies 95% of the employee's job.

While employers are able to refuse an accommodation request if it poses an "undue hardship" on the operations of the business, this would be an employer's burden to prove. And while the Act also notes that an employer is not required to create a new position for the employee as an accommodation (including a light duty position), it remains to be seen if employer with significant resources can prove that allowing an employee to perform 5% of their job poses an undue hardship.

Background Check Use

The use of criminal history in a hiring decision has been a common practice throughout the country. The EEOC has long held the position that using criminal history in hiring has a disparate impact on certain racial minorities thereby violating Title VII in the absence of a job-related reason. Thus, it would be lawful to exclude from consideration for a bank teller position an applicant with a conviction for theft, but it might not be lawful to exclude the same employee from a position driving heavy equipment. The EEOC has also taken the position that using arrest records is per se discriminatory.

In addition to these interpretations of federal laws, many state and local jurisdictions began directly regulating the use of criminal history. Believing that requiring an applicant to disclose their criminal history on an application unfairly excluded those with minor or years' old convictions, many jurisdictions enacted "Ban the Box" laws. These laws make it unlawful to inquire about criminal history on an employment application (literally banning the use of "yes" and "no" boxes alongside questions inquiring about past criminal convictions). The laws allowed consideration of criminal history only after the applicant had been offered a job.

Louisiana Joins the Crowd

Act 406 is the first Louisiana law directly regulating the use of criminal history in hiring.

- It explicitly prohibits an employer from considering an applicant's arrest if the arrest did not result in a conviction.
- If an applicant *has* been convicted of a crime, the law requires the employer in making its employment decision to consider whether an applicant's criminal history/record has a direct and adverse relationship with the specific duties of the job that may justify denying the applicant the position, considering all of the following:
    - The nature and gravity of the offense or conduct;
    - The time that has elapsed since the offense, conduct, or conviction; and
    - The nature of the job sought.

These requirements are similar to the EEOC's guidance on using criminal history, so this process should not be new for most employers. However, Title VII and the EEOC's authority extends only to employers with 15 or more employees. The new Louisiana law applies to any employer without regard to number of employees.

Notably, the law does not contain a provision establishing a penalty or a civil cause of action for its violation. At this point in time, it is uncertain whether applicants who feel aggrieved will have any recourse in the courts. Regardless, you should take steps to comply with the new law – which also takes effect on August 1, 2021 – so that you steer clear of any violations.

Conclusion

As a result of these two new employment law obligations, you should review your hiring and human resources policies and protocols to ensure you are in compliance. We will monitor developments related to these new laws and provide updates as warranted, so make sure you are subscribed to Fisher Phillips' Insight System to get the most up-to-date information sent directly to your inbox. If you have questions, contact your Fisher Phillips attorney, the author of this Insight, or any attorney in our New Orleans office.

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