

EXPECTING A BIG CHANGE: NEVADA'S NEW PREGNANT WORKERS' FAIRNESS ACT

Insights

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The state legislature recently enacted the Nevada Pregnant Workers' Fairness Act (NPWFA) to expand the scope of protection for employees and applicants. The NPWFA is based on the federal Pregnancy Discrimination Act (PDA), and is also strongly influenced by the American with Disabilities Act (ADA). It applies to employers in the state with 15 or more employees, as well as to state and local governments. Although many portions of the Act are not effective until October 1, 2017, the notice provisions took effect on June 2. If you are not yet familiar with this new law, the time to educate yourself is now.

HOW IT DIFFERS FROM FEDERAL LAW

Most employers are familiar with the federal Pregnancy Discrimination Act (PDA), which bans discrimination based on pregnancy, childbirth, or related medical conditions. In general, the PDA does not require employers to provide a reasonable accommodation if they do not provide the same accommodation to the majority of other non-pregnant employees. In the 2015 case of [*Young v. United Parcel Service*](#), the U.S. Supreme Court held that an employee can provide a violation of the PDA by showing that she belongs to a protected class, she sought an accommodation, the employer did not accommodate her, and the employer accommodated other similarly situated employees.

Most employers are also familiar with the ADA. However, the ADA often does not come into play with pregnant employees, because pregnancy itself does not qualify as a disability. Instead, the ADA would only protect pregnant

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employees and applicants in certain situations, such as if the mother develops pregnancy-related medical complications.

The new Nevada law, however, expands the scope of protection for employees and applicants beyond what it currently provided at the federal level by virtue of the ADA or PDA. Specifically, the NPWFA incorporates standards for reasonable accommodations analogous to those of the ADA.

NEW LAW REQUIRES REASONABLE ACCOMMODATIONS

Under the new law, employers cannot take an adverse action against an employee, refuse to provide a reasonable accommodation to an employee or applicant, or deny an employment opportunity to an otherwise qualified employee or applicant for a discriminatory reason. In addition, employers cannot require an employee or applicant to accept an accommodation that she either declines or did not request. Nor can employers require an employee to take leave from employment if a reasonable accommodation is available.

However, it is not unlawful for employers to treat an employee less favorably if a bona fide occupational qualification (BFOQ) justifies it. Thus, the new Nevada law provides employers with the BFOQ defense found under the PDA, which requires employers to establish a direct relationship between pregnancy and the ability to perform the pertinent job.

INTERACTIVE PROCESS REQUIRED

If an employee requests an accommodation, she and the employer must engage in a timely, good faith, and interactive process to determine an effective, reasonable accommodation. The main focus of this process is to ensure the employee has equal employment opportunities, such as the ability to perform the essential function of the position and to have the same benefits and privileges available to other employees. Likewise, for an applicant, the main focus is to ensure that the application process permits her to be considered for employment.

TYPES OF REASONABLE ACCOMMODATIONS

Under the NPWFA, a reasonable accommodation may include, but is not limited to:

- Modifying equipment or providing different seating;
- Revising break schedules, which may include revising the frequency or duration of breaks;
- Providing space in an area other than a bathroom for expressing breast milk;
- Providing assistance with manual labor if it is incidental to the primary work duties;
- Authorizing light duty;
- Temporarily transferring the employee to a less strenuous or hazardous position; or
- Restructuring a position or providing a modified work schedule.

However, employers are not required to take the following actions as reasonable accommodations: creating a new position that the employer would not have otherwise created, unless the employer has or would do so to accommodate other classes of employees; or discharging any employee, transferring any employee with more seniority, or promoting any employee who is unqualified to perform the job, unless the employer has or would do so to accommodate other classes of employees.

An employer may require an employee to provide an explanatory statement from the employee's physician concerning the specific accommodation that the physician recommends.

UNDUE HARDSHIP

If an employee or applicant makes a prima facie showing that she requested a reasonable accommodation and the employer refused to provide or attempt to provide the accommodation, the burden of proof shifts to the employer to show that providing the accommodation would impose an "undue hardship."

The definition of an undue hardship is similar to its definition under the ADA. To prove an undue hardship under the

NPWFA, the employer must show that the accommodation is significantly difficult to provide or expensive due to, but not limited to, the following factors:

- The nature and cost of the accommodation;
- The overall financial resources of the employer;
- The overall size of the business of the employer with respect to the number of employees, and the number, type, and location of the available facilities; and
- The effect of the accommodation on the expenses and resources of the employer or the effect of the accommodation on the operations of the employer.

If there is evidence the employer provides or would be required to provide a similar accommodation to a similarly situated employee or applicant, there is a rebuttable presumption that the accommodation does not impose an undue hardship.

ENFORCEMENT

A violation of the NPWFA constitutes an unlawful employment practice under NRS Chapter 613. Any employee or applicant injured by such a practice is authorized to file a complaint with the Nevada Equal Rights Commission (NERC). After the NERC adjudicates the complaint, the employee or applicant is entitled to seek redress through a private lawsuit in a district court.

LACTATION BREAKS

In a separate law, covered in [another Legal Alert](#), the Nevada Legislature enacted specific protections for nursing mothers. This separate law requires employers to provide nursing mothers with a child under 1 year of age with: (1) reasonable break time, with or without compensation, for the employee to express breast milk as needed; and (2) a place, other than a bathroom, that is reasonably free from dirt or pollution, protected from the view of others, and free from intrusion by others.

As discussed above, under the NPWFA, employees are entitled to request a reasonable accommodation of a place, other than a bathroom, in which to express breast milk. This

raises an open question of whether employees can argue that they are entitled to a more expansive lactation break, framed as a request for a reasonable accommodation, beyond the requirements of the separate law.

For example, an employee theoretically may request to express breast milk for a child over one year of age or for an amount of time that seems excessive. However, employers can likely rely on the requirements for lactation breaks from the separate law to provide guidance on what is considered reasonable. Thus, if employers are already complying with the separate law, they can demonstrate that they are acting in good faith to provide requisite protections to employees. Further, employers can limit the unreasonableness of an employee's request by demonstrating an undue hardship.

Moving forward, employers should be aware of these overlapping laws and expect legal disputes to arise in the future over how they intersect. For example, employers with at least 15 employees but fewer than 50 employees will face a particular predicament. The separate law for nursing mothers exempts employers who have fewer than 50 employees and can demonstrate an undue hardship; however, the NPWFA requires employers with at least 15 employees to provide reasonable accommodations. Therefore, an employer who is normally exempt from the stringent requirements of the separate law may still need to provide a similar accommodation under the NPWFA, as long as the accommodation does not impose an undue hardship.

EXEMPTION FOR CONTRACTORS

Employers who qualify as contractors under NRS Chapter 624 are not subject to certain requirements of the NPWFA. In particular, contractors do not need to grant an employee's request for a reasonable accommodation to provide a place, other than a bathroom, to express breast milk if the employee works at a construction job site located over three miles from the employer's regular place of business. Additionally, contractors are not subject to the prohibitions against requiring an employee to take leave from employment or accept an accommodation, if the employee's work duties include manual labor.

NOTICE PROVISIONS

Although most provisions of the NPWFA take effect on October 1, 2017, there is an important part of the NPWFA that has already taken effect. Starting June 2, 2017, Nevada employers must provide employees with notice of the NPWFA. The notice may be electronic or in writing, and it must include the following information:

- Employees have the right to be free from discriminatory or unlawful employment practices pursuant to NRS 613.335 and sections 2 to 8, inclusive, of the NPWFA; and
- A female employee has the right to a reasonable accommodation for a condition relating to pregnancy, childbirth, or a related medical condition.

Employers must post this notice in a conspicuous place at their place of business, in an area accessible to employees. It also must be provided to a new employee at the beginning of employment, and within 10 days to any employee who notifies her immediate supervisor that she is pregnant.

ACTION NEEDED

The notice provisions of the NPWFA require immediate attention. If you have not already done so, you should provide your employees with notice informing them of the NPWFA. A written copy of this notice should be posted conspicuously in your workplace as soon as possible. You should also consider including this notice in the handbook you distribute to new employees, and give a copy of the notice to employees who notify their immediate supervisor of their pregnancy.

You should also consider the individual needs of your company when determining whether printing out copies of the notice, sending the notice via email, or uploading the notice on your company's intranet would be the most efficient method of distribution. Finally, you should consider asking your employees to confirm in writing that they have read and understood the notice. We have prepared a sample notice, which we are happy to provide to clients upon request.

To prepare for compliance with the rest of the law by October 1, 2017, you should review your policies and handbooks to acknowledge the existence of the NPWFA and to ensure that proper procedures are in place for employees and applicants. Employers who are already familiar with the

PDA and ADA will find that they are similar in nature to the NPWFA, which will render substantial changes in language unnecessary. However, it is important to remember that the Nevada law expands the scope of protection for employees and applicants beyond what it currently is on the federal level.

For more information, please contact any attorney in the [Las Vegas](#) office of Fisher Phillips at (702) 252-3131.

This Legal Alert provides an overview of a specific Nevada state law. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.