Colorado Pregnancy Accommodation Bill Passes

Insight — 5/11/2016

The Colorado legislature passed House Bill 16-1438 requiring Colorado employers to engage in an interactive process to assess potential reasonable accommodations for applicants and employees for conditions related to pregnancy and childbirth. The bill, expected to be signed into law by Governor Hickenlooper, will ensure that employers engage in the interactive process, provide reasonable accommodations to eligible individuals, prohibit retaliation against employees and applicants that request or use a pregnancy-related accommodation, and provide notice of employee rights under this law. Once signed by the Governor, the new law will go into effect on August 10, 2016.

Pregnancy-Related Workplace Accommodations

This law will add a new section, section 24-34-402.3, to the Colorado Anti-Discrimination Act, making it an unfair employment practice for you to fail to provide a reasonable accommodation for an applicant for employment, or an employee, for health conditions related to pregnancy or physical recovery from childbirth, absent an undue hardship on your business. You also may not deny employment opportunities based on the need to make a pregnancy-related reasonable accommodation.

Interactive Accommodation Process

You will need to engage in a "timely, good-faith, and interactive process" with the applicant or employee to determine effective reasonable accommodations.

Examples of reasonable accommodations include but are not limited to:

- more frequent or longer breaks
- more frequent restroom, food and water breaks
- obtaining or modifying equipment or seating
- temporary transfer to a less strenuous or hazardous position, if available (with return to the current position after pregnancy)
- light duty, if available
- job restructuring
- limiting lifting
- assistance with manual labor, or
- modified work schedules.

In engaging in this process, you need to be sure to document your good-

faith efforts to identify and make reasonable accommodations because doing so can negate punitive damages if an individual sues you for failure to make a pregnancy-related accommodation. You may require that the employee or applicant provide a note from her health care provider stating the need for a reasonable accommodation.

No Forced Accommodations or Leave

Under the new law, you may not force an applicant or employee affected by pregnancy-related conditions to accept an accommodation that she has not requested, or that is unnecessary to perform the essential function of her job. Similarly, you may not require a pregnant employee to take leave if there is another reasonable accommodation that may be provided. As stated in the legislative declaration for the bill, the intent is to keep pregnant women employed and generating income so forcing pregnant women to take time off during or after their pregnancy generally is not permitted.

Analyzing Undue Hardship Of Accommodations

Reasonable accommodations may be denied if they impose an undue hardship on your business. That requires an analysis of the following factors in order to decide whether the accommodation would require significant difficulty or expense:

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

Broad Definition of “Adverse Action” in Retaliation Prohibition

The new law prohibits you from taking adverse action against an employee who requests or uses a reasonable accommodation for a pregnancy-related condition. An adverse action is defined very broadly as “an action where a reasonable employee would have found the action materially adverse, such that it might have dissuaded a reasonable worker from making or supporting a charge of discrimination.” This approach harkens to the NLRB's use of a “chilling effect” on employee rights as a basis for unfair labor charges. By not limiting an adverse action to concrete actions, such as a termination, demotion, pay reduction, or similar actions, the broad definition opens the door to a wide range of employer responses that could be deemed retaliation.

Notifying Employees of Their Rights

If signed into law, you will have until December 8, 2016 (120 days from the effective date) to provide current employees with written notice of their rights under this provision. Thereafter, you also must provide written notice of the right to be free from discriminatory or unfair employment practices

under this law to every new hire at the start of their employment. You also have to post the written notice in a conspicuous place at your business in an area accessible to employees.

What To Do Now

With enactment almost certain, prepare now to comply with this new pregnancy accommodation requirement. A checklist of action items includes:

- Review and update job descriptions to designate essential functions of each job.
- Update your accommodation policies and handbook to include pregnancy-related accommodations and information on how employees may request such an accommodation.
- Train your supervisors, managers, and human resources department on the new accommodation requirements and the anti-retaliation provision.
- Prepare written notifications of employee rights to send to current employees no later than December 8, 2016.
- Include the written notification of rights in your onboarding materials so that after December 8, 2016, all new hires receive the notice.
- Post the written notification of rights in a conspicuous place accessible to employees, such as your lunch room bulletin boards, intranet, or wherever other required employment law posters are posted.

If you have questions about this bill, please contact me at MDDawson@hollandhart.com or the Holland & Hart employment attorney with whom you typically work.
