



# Recent LAD Amendments Solidify Protections for Pregnancy-Related Conditions in the Workplace

by Ciera Logan



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With prominent U.S. companies gaining recent exposure for unlawfully denying pregnant employees accommodations, it is time employers take stock and confirm their employee policies align with recently added state law protections for pregnant employees.

**P**regnant employees represent a crowded set of legal schemes employers should be aware of. Pregnant employees implicate the Family and Medical Leave Act (FMLA), the Pregnancy Discrimination Act, the Americans with Disabilities Act (ADA), and New Jersey's Law Against Discrimination (NJLAD). A pregnant employee is entitled to 12 weeks of protective leave for the birth of a child under the FMLA,<sup>1</sup> is protected from pregnancy discrimination under the Pregnancy Discrimination Act,<sup>2</sup> and is permitted certain accommodations for pregnancy-related conditions qualifying as a disability under the ADA.<sup>3</sup> Additionally, the NJLAD provides pregnant employees a specific list of reasonable accommodations in the workplace and prohibits retaliatory actions against a pregnant employee for seeking an accommodation.<sup>4</sup> Notably, as will be described below, the New Jersey Legislature recently expanded the NJLAD twice with newly minted protections.

This article will highlight the NJLAD's recent amendments reinforced by case law. As will be described below, the recent amendments to the NJLAD impose rights for pregnant employees beyond those given to other employees similarly situated in their inability to work. This article will also explore best practices for employee policies, accommodation discussions with affected employees, and appropriate training for staff expected to lead these discussions.

### **NJLAD Solidifies Protection of Pregnant Employees**

The NJLAD prohibits discrimination in the workplace and prohibits employers from discriminating against employees based on, among other things, race, creed, color, national origin, nationality, ancestry, age, marital status, sex, or gender.<sup>5</sup>

In 2014, the New Jersey Legislature amended the NJLAD to expressly prohibit discrimination against pregnant women, dubbing pregnancy a protected characteristic. Legislative history reveals employers discriminate against and deny accommodations to pregnant employees while recovering from childbirth and these employees are subsequently removed from their position, placed on unpaid leave, or terminated.

Under the amendment to the NJLAD, now called the Pregnant Worker's Fairness Act (PWFA), employers are prohibited from treating employees affected by pregnancy less favorably than persons not affected by pregnancy.

The Legislature sought to "combat this form of discrimination by requiring employers to provide reasonable accommodations to pregnant women and those who suffer medical conditions related to pregnancy and childbirth."<sup>6</sup>

Under the amendment to the NJLAD, now called the Pregnant Worker's Fairness Act (PWFA), employers are prohibited from treating employees affected by pregnancy less favorably than persons not affected by pregnancy.<sup>7</sup> The PWFA further requires employers offer affected employees reasonable accommodations based on the advice of the employee's physician, as long as the accommodations do not create an undue hardship for the employer.

As a result, the NJLAD now requires an employer of a "woman affected by pregnancy" to make available "reason-

able accommodation in the workplace, 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...based on the advice of her physician."<sup>8</sup>

The employer, however, is not required to read the employee's mind, and the employee must actually request an accommodation or it must be clear the employee is in need of such an accommodation.<sup>9</sup>

New Jersey is not the only state providing these protections. Other states, such as California,<sup>10</sup> Maryland,<sup>11</sup> and Louisiana,<sup>12</sup> have also extended their accommodation requirements to pregnant workers.

### **Breastfeeding as a Protected Characteristic Under the NJLAD**

On Jan. 8, 2018, the NJLAD was further amended to add breastfeeding as a protected characteristic under the law. This amendment prohibits an employer from discriminating or retaliating against an employee the employer knows, or should know, is either breastfeeding or expressing milk for her infant child.<sup>13</sup>

Like the amendment mentioned above, an employer is required to provide reasonable accommodations, unless it would result in an undue hardship on the employer. The amendment lists reasonable accommodations such as providing the affected employee with a reasonable break time each day and a suitable room or other location with privacy located in close proximity to the work area. The amendment specifically provides that a toilet stall will not suffice as a private area.

### **Recent Case Law Affirms Protections for Pregnant Employees**

While it will take more time for courts to test the constraints of the

NJLAD's recent amendments, it is clear that, at least initially, courts are erring on the side of employees.

In *Ologundudu v. Manorcare Health*,<sup>14</sup> the plaintiff-employee alleged unlawful termination and failure to accommodate under the NJLAD against her employer. The defendant-employer terminated the plaintiff when she was found sleeping during her break—her fatigue, she argued, was a direct result of her pregnancy. The employer filed a motion for summary judgment. The court, however, denied the employer's motion, finding the plaintiff-employee could prove a *prima facie* case of unlawful termination and that the "manifestation of [p]laintiff's pregnancy was the direct cause of her termination."

Concerning the employer's failure to accommodate claim, the court stated that pregnant employees are not required to anticipate all symptoms that might impact their work, consult a doctor, or preemptively seek accommodations before those side effects manifest. Interestingly, the court found that acquiring a doctor's suggestion of the appropriate accommodations may not always be required.

In *Roopchand v. Complete Care*,<sup>15</sup> the plaintiff-employee claimed her termination for insubordination (she refused to wash windows) was pretextual, and that her employer retaliated against her for seeking a reasonable accommodation for her high-risk pregnancy. The trial court granted summary judgment in favor of the defendant-employers; the Appellate Division reversed, concluding the plaintiff made a *prima facie* claim for pregnancy discrimination sufficient to survive summary judgment.

Importantly, the cases cited above did not conclude the defendant-employers violated the law, but only that the plaintiffs stated a *prima facie* case. As such, these cases are not necessarily a good indicator of how courts may apply the recent NJLAD's amendments.

### What Should Employers Do?

Employers should take stock of employee policies and knowledge.

While case law is scant, what is known for sure is employers must examine their policies and determine whether the policies affecting non-pregnant employees have a disparate impact on pregnant employees. As such, it is recommended employers reexamine light-duty policies to determine whether they have a disparate impact on pregnant employees.

Some questions to consider: Are non-pregnant employees provided with accommodations that are not given to pregnant employees? Does the policy effectively force pregnant employees into exhausting their leave time?

Keep in mind that if an employer provides employees who have temporary disabilities with modified job duties, limited duty or alternative work assignments, the employer must provide the same to pregnant employees who are temporarily unable to perform their regular job duties.<sup>16</sup>

Knowledge is also key to a successful program.

Employers should ensure employees who are administering the policies have adequate knowledge and are aware of the changing landscape of the NJLAD. Managers and supervisors should be trained in how to respond to accommodation requests from pregnant employees, whether it be through regular training from in-house (or outside) counsel, automatic alerts from counsel to employees tasked to administer the policy following a change in law, or regular training in an outsourced company training format.

Remember that the employer is required to engage in the interactive process in good faith. This does not permit an employee to pick and choose her preferred accommodation, and any accommodation cannot cause the employer an undue burden. However,

an employer must be ready to appropriately respond if put to task to defend a decision not to accommodate.

All of an employer's steps in its decision making process should be clearly documented. As always, employers should consult with counsel before denying affected employees for an accommodation. ◊

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### Endnotes

1. 29 CFR § 825.100.
2. 42 U.S.C. § 2000e(k).
3. 42 U.S.C. § 12181 *et seq.*
4. N.J.S.A. 10:5-12(s).
5. N.J.S.A. 10:5-12.
6. N.J.S.A. 10:5-3.1(b).
7. N.J.S.A. 10:5-12(s).
8. N.J.S.A. 10:5-12(s).
9. *Conneen v. MBNA America Bank, N.A.*, 334 F.3d 318, 332 (3d. Cir. 2003).
10. Gov. Code, §§ 12926, subd. (r)(1)(A), 12940, subd. (a), 12945.
11. MD Code State Govt. § 20-609.
12. LA Rev. Stat. § 23:342.
13. N.J.S.A. 10:5-12(s).
14. *Ologundudu v. Manorcare Health*, 2017 WL 6450705 (Dec. 8, 2017).
15. *Roopchand v. Complete Care*, 2017 WL 3297466 (App. Div. Aug. 3, 2017).
16. <https://www.nj.gov/oag/dcr/downloads/fact-Pregnancy-le.pdf>.