Published on *The National Law Review* https://natlawreview.com

Colorado Anti-Discrimination Act: New Pregnancy Provision Taking Effect in August

Article By:

Gillian McKean Bidgood

On August 10, 2016, a new pregnancy provision of the Colorado Anti-Discrimination Act ("CADA") will take effect. While the CADA had previously been interpreted as prohibiting pregnancy discrimination and requiring accommodations for pregnancy, the new provision strengthens and clarifies those protections. Indeed, the amendment will require more of employers and will make it easier for plaintiffs to prevail than federal anti-discrimination law. This greater pregnancy protection, combined with the fact that the CADA was amended in 2013 to allow successful plaintiffs to collect compensatory and punitive damages (remedies previously unavailable under the CADA), make it more likely that employers will face lawsuits under the CADA. Accordingly, employers need to be especially careful to comply with the new amendment.

Accommodation

The bill requires an employer to provide reasonable accommodations to an applicant or employee for health conditions related to pregnancy or the physical recovery from childbirth under the following conditions: (1) an accommodation is necessary to perform the essential functions of the job, (2) the employee has requested an accommodation, and (3) the accommodation would not impose an undue hardship on the employer. As in the disability context, once an employee requests an accommodation, the employee and employer are required to engage in an interactive process. Importantly, an employer may also require a note from a licensed healthcare provider before providing an accommodation.

While accommodations are to be tailored to the employee, the bill does give examples of reasonable accommodations, including, more frequent or longer break periods, more frequent restroom and refreshment breaks, limitations on lifting, light duty, and modified work schedule. An employer is not required to create a new position or hire additional employees to provide a requested pregnancy accommodation. However, if an employer provides or is required to provide a particular accommodation to another group of employees, the bill creates a rebuttable presumption that the same accommodations for a pregnant employee would not impose an undue hardship on the employer.

Employers should also note that to preserve a pregnant employee's ability to work, the bill prohibits an employer from requiring an employee to accept an accommodation that has not been requested

or is not necessary. Similarly, the bill prohibits an employer from requiring an employee to take leave if the employer can provide another reasonable accommodation.

Adverse Action

The bill also prohibits taking adverse action against an employee who requests or uses a pregnancy accommodation. Significantly, the bill prohibits more employment practices than other sections of the CADA. Other sections of the CADA specifically make it improper to "refuse to hire, to discharge, to promote or demote, to harass during the course of employment, or to discriminate in matters of compensation, terms, conditions, or privileges of employment . . . " For pregnancy, adverse action is defined 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." Accordingly, the bill likely covers a broader range of conduct than the other sections of the CADA.

Notice

To help educate employees about their rights under the new law, the bill requires employers to give new employees notice of their rights under this section at the start of employment. Further, employers are required to give current employees notice by December 8, 2016. Moreover, employers are required to post a notice in the workplace (along with the other employment law posters).

Although the bill does not provide a remedy for an employer's failure to provide notice to existing or new employees, employers should comply with those provisions.

Remedies

Before filing a lawsuit, an employee who believes she has suffered an adverse action or improperly denied an accommodation under the new bill must file a charge with the Colorado Civil Rights Commission within six months of the conduct. Once the employee has exhausted the administrative remedies, she may sue for back pay (up to two years reduced by what the employee could have earned with reasonable diligence), front pay, compensatory damages, and punitive damages.

Action Plan

In anticipation of the new bill taking effect on August 10, 2016, employers should:

- Review all job descriptions to ensure that they clearly identify the essential functions of each job.
- Review handbooks and policies to ensure that they clearly define the procedures for an employee to request a pregnancy-related accommodation.
- Draft the required notice of rights for distribution to current employees on or before December 8, 2016.
- Draft the required notice of rights for distribution to new employees.
- Update on-boarding policies and procedures to include providing the required notice of rights.

- Review the accommodations provided to other classes of employees to understand the accommodations that may be presumed reasonable for pregnancy-related accommodations.
- Train the employee or employees who will respond to pregnancy-related accommodation requests on the requirements of the bill.
- Train managers on the requirements of the new bill, including the prohibitions on taking adverse actions against employees who request or use accommodations and the prohibitions on requiring employees to accept accommodations that are unwanted or unnecessary.
- Update employment law postings to include a notice of rights under the bill.

National Law Review, Volume VI, Number 154