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NYC Proposes Rules Concerning Discrimination Based on Pregnancy, Childbirth or Related Conditions

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The New York City Commission on Human Rights (Commission) recently issued proposed rules concerning discrimination and accommodation obligations based on an employee's pregnancy, childbirth or related medical conditions under the New York City Human Rights Law (NYCHRL). These proposed rules describe what the Commission believes to be employers' obligations under the NYCHRL and provide many examples of behaviors the Commission believe to be in violation of the law. Employers may submit comments on the proposed rules before a public hearing is held on November 12.

Employers should become familiar with these proposed rules as they provide guidance on how the Commission will enforce the NYCHRL and create new avenues for potential liability.

Examples of Prohibited Behavior Based on Pregnancy, Childbirth or Related Medical Condition

Under the NYCHRL, employers may not "treat an [employee] less well" than other employees based on their actual or perceived pregnancy, childbirth or related medical condition. The proposed rules provide examples of behavior the Commission believes is discriminatory based on an employee's pregnancy, childbirth or related medical conditions. These examples include: (1) unlawful treatment based on assumptions or stereotypes; (2) policies or practices that facially discriminate against employees based on pregnancy, childbirth or a related medical condition; and (3) policies or practices that have a disparate impact on pregnant employees.

Unlawful Treatment Based on Assumptions or Stereotypes

The proposed rules explain that employers violate the NYCHRL if they treat employees based on assumptions or stereotypes concerning pregnancy, childbirth, or related medical conditions. Employers cannot make decisions based on assumptions about how pregnant employees should behave, their physical capabilities, or what is or is not healthy for a fetus. The proposed rules provide the following examples of behaviors the Commission believes violate the NYCHRL:

- An employer refuses to hire someone otherwise qualified for a job because the applicant is pregnant and the employer assumes they will likely miss too much work after childbirth.
- An employer jokes about a pregnant individual's weight gain, and responds to that individual's complaints about the jokes by stating that pregnancy is making the individual overly sensitive and emotional.
- A manager fails to intervene after overhearing several employees call their coworker a "cow" after the coworker uses the office lactation room.
- An employer decides not to assign an employee to a new project after learning they are pregnant because the employer is concerned that the worker will be distracted by the pregnancy.

Policies That Facially Discriminate Against Employees

Employers also may not implement policies or practices that are facially based on pregnancy, childbirth or a related medical condition. Examples of such policies or practices provided by the Commission in the proposed rules include:

- An employer has a policy of refusing to hire pregnant individuals for, or place current employees in, specific positions because the positions involve working with hazardous chemicals.
- An employer requires all pregnant employees to take leave at a certain month in their pregnancy.
- An employer's policy requires medical clearance from pregnant employees to perform certain job duties when medical clearance is not required for other employees.
- An employer has a policy of not hiring female job applicants of childbearing age out of fear that they may be or will become pregnant.

These examples, and other examples contained in the rules concerning an employer's ability to request medical documentation from employees based on pregnancy, childbirth or related medical conditions appear, at times, to contradict other obligations employers have under New York State law. New York Labor Law (NYLL) Section 206-b forbids employers in factory or mercantile establishments (*e.g.,* retailers) from knowingly employing a female within four weeks after she has given birth *unless* that employee provides (1) a written statement expressing her desire for earlier employment; and (2) a written opinion of a qualified physician that she is physically and mentally capable of discharging her duties of employment. If an employer subject to NYLL 206-b is located in New York City, they must be careful in addressing employee requests to return to work within four weeks of giving birth as employers cannot comply with both the requirements of NYLL 206-b and the proposed rules as the proposed rules are currently written.

Disparate Impact on Pregnant Employees

Employers also may not implement facially neutral policies that have a disparate impact on employees based on pregnancy, childbirth or a related medical condition under the proposed rules. The Commission states that if a facially neutral policy is alleged to have a disparate impact on employees based on pregnancy, childbirth, or a related medical condition, the employer may be liable unless the employer can prove that (1) the policy bears a significant relationship to a significant business objective; or (2) the policy does not contribute to the disparate impact. Examples of policies that the Commission believes would have a disparate impact include:

- A policy that permits light duty assignments only for on-the-job injuries, but fails to provide pregnant employees such light duty assignments as a reasonable accommodation.
- An employer with a policy that limits all employees to three 15-minute breaks without any exceptions, and does not give employees who need to express breast milk enough time to express their milk.

Reasonable Accommodation Obligations Based on Pregnancy, Childbirth or Related Medical Condition

The NYCHRL requires that employers provide reasonable accommodations to employees based on pregnancy, childbirth or related medical conditions. This requirement is separate and apart from the employer's obligation to provide a reasonable accommodation to employees because of a disability. The employer has an obligation to provide a reasonable accommodation if it knew, or should have known, of an employee's pregnancy, childbirth, or related medical condition and the accommodation would not create an undue hardship on the employer. An employer has knowledge of an employee's pregnancy, if any agent of the employer, such as a first line manager, knows about the employee's condition.

The proposed rules would clarify the burden the employers must meet to show that a requested accommodation is not reasonable – under the

NYCHRL any requested accommodation is presumed reasonable unless the employer can show it would cause undue hardship. The employer need not provide the specific accommodation requested by the employee so long as the employer proposes reasonable alternatives that meet the specific needs of the individual and that specifically address the condition at issue.

When Does an Employer's Reasonable Accommodation Obligation Begin

Employers are obligated to engage in a cooperative dialogue with an employee concerning reasonable accommodations when the employer knows or should know that the employee requires an accommodation because of pregnancy, childbirth, or a related medical condition. When an employee has not requested an accommodation, the employer has an affirmative obligation to initiate the cooperative dialogue if the employer (1) has knowledge that an employee's work performance has been affected or their behavior at work could lead to an adverse employment action; and (2) has a reasonable basis to believe the issue is related to pregnancy, childbirth or related medical condition.

The Commission instructs employers to be sensitive in commencing the cooperative dialogue with employees. Employers should initiate the cooperative dialogue in a way to invite the employee to feel comfortable to request an accommodation, such as asking if there is anything going on with the employee or reminding the employee of the various types of support available, including accommodations. If the employer initiates the cooperative dialogue, but the employee does not reveal that they are pregnant or have a related medical condition, the employee can still reveal their pregnancy or related medical condition and initiate a cooperative dialogue at a later time.

Cooperative Dialogue Obligations

To satisfy an employer's obligation to engage in a cooperative dialogue with an employee concerning the employee's need for a reasonable accommodation, the proposed rules provide that the employer must (1) engage in a cooperative dialogue to determine the employee's specific needs related to their pregnancy, childbirth or related medical condition; (2) identify potential accommodations that may address those needs; and (3) take into account the difficulties that such accommodations may pose for the employer.

The Commission will consider various factors to determine if an employer acted in good faith when engaging in a cooperative dialogue with an employee including:

- Whether the employer has a written policy for employees about how to request accommodations based on pregnancy, childbirth or a related medical condition;
- Whether the employer responded to the request in a timely manner in light of the urgency of the request;
- Whether the employer tried to explore the existence and feasibility of alternative accommodations or alternative work assignments; and
- Whether the employer tried to block or delay the cooperative dialogue or in any way intimidate or deter the employee from requesting the accommodation.

The cooperative dialogue must continue until (i) a reasonable accommodation is reached; or (ii) the employer reasonably concludes that (A) all available accommodations will cause an undue hardship to the employer, or (B) no accommodation exists that will allow the employee to perform the essential requisites of the job. Once the employer reaches a conclusion, either to offer an accommodation or decides it cannot make an accommodation, the employer must promptly notify the employee of the determination *in writing*.

Examples of Reasonable Accommodations

The proposed rules contain a number of examples of accommodations that the Commission deems would rarely pose an undue hardship on an employer:

- Minor or temporary modifications to work schedules;
- Adjustments to uniform requirements or dress codes;
- Additional water or snack breaks;

- Allowing an individual to eat at their work station;
- Extra bathroom breaks or additional breaks to rest; and
- Minor physical modifications to a work station, including the addition of a fan or a seat.

The proposed rules contain additional examples of ways employers can accommodate various needs based on pregnancy, childbirth or related medical conditions:

- A pregnant employee tasked with lifting boxes in a supermarket requests lighter duty. The employer may reasonably accommodate them with a temporary assignment to a position at the bakery counter.
- A post-partum employee who needs physical therapy to address a complication of childbirth may be reasonably accommodated by letting them adjust their lunch hour so that they may attend treatment appointments.
- An employee who is undergoing infertility treatment requests time off to attend medical appointments related to the infertility treatment. While an employer must reasonably accommodate these requests, the employer may also request medical documentation to confirm that the time off is for treatment related to infertility.
- An employee who had an abortion requested several days off for the procedure and recovery. The employer may reasonably accommodate the employee by allowing them to use available leave time.
- An employee's doctor advises them to stay on bed rest due to complications with their pregnancy. The employee asks their employer for permission to work remotely and provides a medical note confirming the need to stay on bed rest due to pregnancy complications. The employer allows the employee to work remotely while on bed rest.

Examples of Accommodation Violations

Similarly, the proposed rules set forth examples of behavior the Commission believes would violate an employer's obligations to provide a reasonable accommodation to an employee based on pregnancy, childbirth or a related medical condition:

- An employer refuses to grant modifications to work schedules, requests for temporary shift assignments, or additional breaks to a pregnant individual, even though doing so would not pose an undue hardship.
- An employer prohibits employees who need to express breast milk from pumping at their normal work stations, even if the employees prefer to pump at their work stations and it does not pose an undue hardship on the employer.
- A store refuses to provide a stool to a pregnant employee who works as a cashier and needs to take breaks from standing as an accommodation, even though providing the stool does not pose an undue hardship on the store.
- An employer tells an employee needing to express breast milk to use the restroom, even though providing a legally-mandated lactation room would not pose an undue hardship.
- An employer refuses to allow an employee to adjust their work schedule to attend a medical appointment to provide a semen sample for their partner's *in vitro* fertilization procedure.
- An employee experiences a miscarriage and gives their employer a medical note requesting time off for recovery. The employer refuses, though doing so would not pose an undue hardship.
- An employer denies an accommodation to a pregnant Muslim employee to work through their lunch hour during Ramadan because the employer does not think the employee should fast while pregnant.

Lactation Accommodations

Employers also have an obligation to provide accommodations to employees who need to express milk during the work day. These obligations include providing a lactation room (which cannot be a bathroom) for employees to use during the work day. The lactation room must be in close proximity to the employee's work area and contain (1) an electrical outlet; (2) a chair; (3) a surface on which to place a breast pump and other personal items; and (4) have nearby access to running water. The employee must also have access to a refrigerator

suitable for breast milk in close proximity to the employee's work area.

The proposed rules provide a number of alternatives to employers if it would be an undue hardship to provide a lactation room to employees. The employer must engage in a cooperative dialogue with the employee to identify alternative accommodations that will meet the employee's need to express breast milk. The Commission provides a number of examples of potential solutions for employers:

- If the employer designates a room to be exclusively used for lactation, the employer must ensure the room is shielded from view and has a lock, or if a lock is not possible, a "Do Not Disturb" or similar sign is placed on the door.
- If the employer cannot provide a dedicated lactation room, the employer must make a multi-purpose room available unless doing so would be an undue hardship. If a multi-purpose room is used as a lactation room, it cannot be used for other purposes while it is being used as a lactation room. Employers must also communicate to other employees, through a sign or otherwise, when the room is being used as a lactation room.
- If an employer cannot provide a dedicated or multi-purpose room as a lactation room, the employer must still engage in a cooperative dialogue with the employee to discuss options. The employer and employee may then agree that the employee may use a restroom as an accommodation of last resort.
- If an employee has a mobile job such that they would not have daily access to an employer's lactation room, the employer must still engage in a cooperative dialogue with the employee to determine how best to meet the employee's needs, which includes ensuring the employee has adequate equipment, space and time for pumping breast milk while mobile.
- If an employee wishes to express breast milk at their usual workspace and it does not impose an undue hardship, the proposed rules state that employers should allow this as an alternative.

If an employer is able to provide some but not all of the requirements for a lactation room, the proposed rules discuss ways in which an employer may still meet their obligations under the NYCHRL:

- If providing a refrigerator would be an undue hardship, the employer must discuss alternative options such as providing a cooling device and ice packs.
- If an employer cannot provide a lactation room with an electrical outlet, an employer may offer to provide an extension cord or other alternative power source.
- If, because of the mobile nature of the employee's work, an employer cannot provide a lactation room for its employee, the employer may give the employee portable privacy screens, agree to allow the employee to pump in the employer-provided vehicle between site visits, and provide sanitizing wipes and a cooler to store breast milk.
- If an employer's office space does not have infrastructure to provide a lactation room nearby running water, the employer may offer sanitizing wipes and towels, and instruct its employees where the closest source of running water is, such as an office kitchen or bathroom.

Required Lactation Policy

Employers must have a written policy that informs employees of their right to express breast milk at work. The policy must:

- Specify how an employee may submit a request for a lactation room;
- Require that the employer respond to a request for a lactation room as quickly as possible, but no later than five business days;
- Provide a procedure to be followed when more than one employee needs to use a lactation room at the same time;
- Explain that the employer shall provide reasonable break time for an employee to express breast milk in accordance with NYLL Section 206-c, which requires that employers provide reasonable unpaid break time or permit an employee to use paid break time or meal time each day to allow an employee to

express breast milk for her nursing child for up to three years following child birth; and
- States that if providing all aspects of a lactation room required by law would create an undue hardship, the employer will engage in a cooperative dialogue with the employee.

The lactation policy must be distributed to *all* employees when they start their employment, even employees who are or identify as male. Employers also should provide a copy of the policy to employees who return from parental leave.

Discrimination Based on Sexual or Reproductive Health Decisions

The NYCHRL also prohibits employers from discriminating against employees based on sexual or reproductive health decisions. The proposed rules contain examples of behavior the Commission believes would violate the NYCHRL:

- An employer repeatedly chastises an employee for pursuing in vitro fertilization treatment, which the employer believes is not "natural."
- An employer repeatedly denigrates an employee who is undergoing treatment related to his infertility, joking about how the employee cannot get his wife pregnant.
- A supervisor avoids meetings with one of the employees on their team after learning the employee sought preventative treatment for the human immunodeficiency virus (HIV).
- An employer fires an employee after learning that the employee had an abortion.
- Multiple employees openly treat their coworker with disgust after learning that the coworker is receiving treatment for a sexually transmitted infection. The employer is aware of this conduct but does nothing to address it.
- An employee advises a supervisor that their partner is pregnant with their fourth child. The supervisor begins to routinely tell the employee they should have had a vasectomy and emails them links to doctors who specialize in the surgery.

Employer Notice Obligations

Employers must provide written notice about their right to be free from discrimination based on pregnancy, childbirth or related medical condition. The proposed rules provide employers can comply with this obligation by: (1) conspicuously posting the notice in its place of business in an area accessible to employees, which may include on a company intranet; or (2) providing the notice to new employees at the start of employment and to all other employees who have not otherwise received notice. Employers may use the notice of rights available on the Commission website to satisfy their obligation to provide notice.

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