Sills Cummis & Gross P.C.

# Client Alert Employment & Labor

## New Jersey Supreme Court Explains Requirements Law Imposes on Employers with Pregnant or Breastfeeding Employees

On March 9, 2021, the New Jersey Supreme Court issued its first opinion in a case concerning the New Jersey Pregnant Workers Fairness Act ("PWFA") and took the opportunity to remind employers of the breadth of the PWFA, the ways employers may run afoul of the law, and what employers must do when denying pregnant or breastfeeding employees accommodation on the basis of claimed undue hardship on the employer.

### The PWFA

Signed into law in 2014 by Governor Christie, the PWFA makes pregnancy and breastfeeding protected characteristics under New Jersey's Law Against Discrimination (the "LAD"). Thus, employers may not discharge or otherwise discriminate against employees because they are pregnant or breastfeeding, just as employers may not discharge or otherwise discriminate against employees because of their race, religion, national origin, etc. The PWFA also requires employers to provide reasonable accommodations to pregnant or breastfeeding employees upon request, unless the accommodation would be an *undue hardship* to business operations.

### The *Delanoy* Case

The case before the Supreme Court, *Delanoy v. Township of Ocean*, involved a pregnant police officer. The Township's police department maintained two policies for officers needing light duty, one applicable to pregnant officers and a separate one applicable to non-pregnant, injured officers. For non-pregnant officers, return to full duty was dependent on a doctor's projected return date, while the policy for pregnant officers required a return to full duty within 45 days of her expected due date. Moreover, while both policies required officers to use all of their accumulated leave as a condition of light duty, the police chief had discretion to waive the accumulated-leave-exhaustion requirement for non-pregnant officers, but not for pregnant officers.

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The Supreme Court unanimously held that the Township's policies were facially discriminatory, constituting unfavorable treatment of pregnant employees. Accordingly, the officer did not need to prove that any policy was applied to her in a discriminatory way. She only needed to prove that she suffered damages caused by the discriminatory policies.

## Three Kinds of Violations of the PWFA

The Supreme Court used the *Delanoy* case to discuss the ways employers may run afoul of the PWFA. Specifically, the Court identified three potential violations of the PWFA (and, by extension the LAD): (i) unequal or unfavorable treatment of a pregnant or breastfeeding employee; (ii) failure to provide a reasonable accommodation; and (iii) illegal penalization of an employee who requests or uses an accommodation.

A pregnant or breastfeeding employee may sue under the LAD and PWFA for any one, or any combination, of these three causes of action, and may recover damages as well as attorneys' fees.

## Employers Must Prove that an Accommodation Is an Undue Hardship

The PWFA requires employers to provide reasonable accommodations for pregnant and breastfeeding employees, which may take many forms, including increased bathroom breaks, extra rest breaks, or a modified schedule. However, an employer need not grant any accommodation that would be an undue hardship on its business operations. Critically, the PWFA makes clear, and the Supreme Court reiterated, that the burden is on the employer to prove that an accommodation would be an undue hardship. The PWFA provides a non-exhaustive list of factors to be considered in determining what constitutes an undue hardship:

- The overall size of the employer's business with respect to the number of employees, number and type of facilities, and size of budget;
- The type of the employer's operations, including the composition and structure of the employer's workforce;
- The nature and cost of the accommodation needed, taking into consideration the availability of tax credits, tax deductions, and outside funding; and
- The extent to which the accommodation would involve waiver of an essential requirement of a job as opposed to a tangential or non-business necessity requirement.

In *Delanoy*, the employee police officer reported that her pregnancy prevented her from carrying a gun or defending herself on patrol, and her employer asserted that carrying a gun is an essential function of her job. The Supreme Court explained that the last factor—whether an accommodation waives an essential job requirement—is not a disqualifier even if true. An employee's temporary inability to perform an essential job function does not automatically constitute an undue hardship. Rather, it is just one factor to consider among all of the employer's circumstances in determining whether or not an accommodation is an undue hardship.

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## Other Federal and State Laws in New Jersey and New York

Federal law, principally Title VII of the Civil Rights Act of 1964, prohibits discrimination against pregnant and breastfeeding employees and requires the provision of reasonable accommodations. Moreover, for employers in New York, both state and city law provide protections and impose requirements that, like the PWFA, may be broader than under federal law. Employers must comply with federal, state, and local laws in their treatment of employees, including pregnant and breastfeeding employees.

## Key Takeaways

Employers should ensure that their policies treat pregnant and breastfeeding employees requiring light duty or other accommodations equally and as favorably as non-pregnant/non-breastfeeding employees requiring similar accommodations, both as written and as applied. Moreover, employers should exercise caution before denying any accommodation requested by a pregnant or breastfeeding employee and should carefully consider the relevant factors before deciding that a requested accommodation would be an undue hardship. An interactive process/cooperative dialogue with the employee is a necessary and indispensable step in an employer's consideration of any requested accommodation. Employers should also ensure that pregnant and breastfeeding employees who request or use accommodations do not suffer any retaliation or harassment as a result.

Attorneys in our Employment and Labor Law Practice Group are available to advise employers on crafting non-discriminatory policies and on responding to accommodation requests from pregnant and breastfeeding employees.

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