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## STATUS UPDATE

FACEBOOK'S LAWYERS GRAPPLE WITH PRIVACY FEARS AND GOING MOBILE

BY REBEKAH MINTZER

PLUS: MICROSOFT'S SMITH ON NSA SPYING • TOP IP CASES: WE PICK 'EM

## IS YOUR COMPANY ACCOMMODATING?

Pregnancy is not a disability, but may require similar adjustments. [BY KATHARINE PARKER AND JACQUELYN WEISMAN]

**ALTHOUGH PREGNANCY IS NOT TYPICALLY** viewed as a disability, employers must nevertheless provide reasonable accommodations to pregnant employees under a number of new and proposed state and local laws. The New York City Council recently passed such a law through an amendment to the New York City Human Rights Law. Similar legislation is pending in New York state, New Jersey and Philadelphia. In Maryland a similar law took effect in October of last year. At the federal level, the Equal Employment Opportunity Commission has indicated in its Strategic Enforcement Plan that pregnancy discrimination is one of its key enforcement priorities, characterizing “accommodating pregnancy-related limitations” as a “developing issue.”

Why all the attention to this topic now, nearly 35 years after the passage of the federal Pregnancy Discrimination Act (“PDA”)? Part of the explanation is that the percentage of women in the workforce has increased dramatically—from 29 percent in 1950, to 43 percent in 1980 to 47 percent in 2012. Needless to say, many of these women become pregnant during their employment.

Another part of the explanation is that women are entitled to only 12 weeks of unpaid job-protected leave with active employee medical coverage under the federal Family and Medical Leave Act in connection with their pregnancy. This leads many women to work as long as possible up to the birth of their child in order to use the bulk of their leave afterward and minimize the loss of income and subsidized medical benefits.

Consequently, more and more women are requesting various accommodations to allow them to work during pregnancy. These include working from home to avoid long commutes, reducing or eliminating travel (especially in the last trimester) and eliminating tasks requiring lifting or other extreme exertion. Many women also



ask for extra breaks during the day, and for a seat if their jobs involve standing.

Employers have been grappling with these requests, trying to balance the needs of the employees against operational demands—all against the backdrop of developing statutory law that, depending on the jurisdiction, may or may not require accommodation.

### States and Cities Step Up

The PDA prohibits employers from making hiring and firing decisions or providing different benefits based on an employee’s pregnancy. But while this much is clear, courts interpreting the PDA have disagreed on the extent to which employers must accommodate workers who, though not necessarily disabled, are limited in their ability to work as a result of their pregnancies. In response to these uncertainties, several states and localities have filled in the gaps with new laws that expressly require employers to provide reasonable accommodations to

pregnant workers. In New York City, then-Mayor Michael Bloomberg signed an amendment that requires employers with four or more employees to provide a reasonable accommodation to an employee based on the needs of her pregnancy, childbirth or a related medical condition.

The obligation extends beyond the pregnancy-related disability. The employer must also assist the employee in maintaining a healthy pregnancy. The law provides, however, that any “reasonable accommodation” must not impose an undue hardship on the employer. But the employer bears the burden of proving that a given accommodation would impose an undue hardship, and the amendment recommends an evaluation that considers, among other factors: (i) the nature and cost of the accommodation; (ii) the overall financial resources of the facility or facilities involved in the request (the number of employees at the facility, the impact of the accommodation on the

facility's operation); (iii) the financial resources of the employer and size of the business, and the number, type and location of its facilities.

The law took effect in January and also requires that employers provide written notice of the right to be free from discrimination based on pregnancy or related conditions.

of the bill's 10 sections met resistance, however, employers should watch for its reintroduction.

Other states and localities seem poised to follow suit. Last September a reasonable accommodation bill was introduced in Philadelphia. Two months later the New Jersey State Senate unanimously approved a simi-

Courts disagree on how much employers must accommodate workers

**LIMITED IN THEIR ABILITY TO WORK AS A RESULT OF THEIR PREGNANCIES.**

States such as California, Connecticut, Illinois and, recently, New Mexico also require some form of reasonable accommodation for pregnancy, childbirth or a related medical condition. More such laws are pending. In New York state, the proposed Women's Equality Act would create protections that parallel those offered by the new New York City law. Earlier this year, the New York State Assembly voted to pass the bill, but it did not get the necessary Senate approval. As only one

lar bill, which will now go before the state's General Assembly. Like the New York City law, New Jersey's would not require accommodations that impose an undue hardship on the employer, nor would it require employers to provide pregnant employees with additional paid or unpaid leave.

#### Implications for Employers

Given this rapidly developing area of the law, employers should continue to monitor developments—not just at



KATHARINE PARKER

the federal level, but also at the state and local levels. Some proactive steps could be taken right now, such as:

- Including mention of "pregnancy" as a protected characteristic in a company's equal employment opportunity policy.

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■ Including a procedure for requesting reasonable accommodations of disability (including pregnancy-related disability) in the company's employee handbook.

■ Training managers about the company's leave policies, including leave for pregnancy and childbirth, and the basic requirements of the Family and Medical Leave Act (or similar applicable state and local laws).

■ Training managers to have conversations with pregnant employees on topics such as the due date for the baby, planned work coverage during the employee's absence, travel or other restrictions during the pregnancy, expectations during the employee's leave and expectations for her return—and any needs the employee may have upon return (such as breaks for nursing).

Finally, though the extent to which employers must legally accommodate pregnant workers still varies by jurisdiction, employers can consider adopting a policy providing accommodations that would not necessarily be legally required, but would help support and retain talent. Even small accommodations can make a big difference to employees.

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*Katharine Parker is a partner in the labor and employment law department and cohead of the employment law counseling and training and government regulatory compliance and relations groups at Proskauer Rose. Jacquelyn Weisman is an associate in Proskauer's labor and employment law department.*

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