Expecting Accommodations: Best Practices for Accommodating Pregnant Employees
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Over the last 10 years, city councils, state legislatures, the U.S. Congress and the U.S. Supreme Court have been called upon to mandate greater workplace accommodations for pregnant employees with pregnancy-related conditions. Indeed, employers should now expect to see requests for these accommodations and should be training management/human resources on how to engage in an interactive process with expecting employees.

Background

Without a doubt, protections against pregnancy discrimination are not new. The 1978 Pregnancy Discrimination Act (PDA) amended Title VII of the Civil Rights Act of 1964 to include prohibitions against discrimination on the basis of pregnancy (past, current or potential), childbirth or related medical condition. As a result, employers may not refuse to hire a woman because of her pregnancy, if she is able to perform the essential functions of her job. An employer is prohibited from requiring a pregnant employee to undergo additional medical clearances not required of other employees. An employer violates the PDA by treating a female employee with young children less favorably than a male employee with young children when deciding on work opportunities. Likewise, the EEOC notes that an employer violates the PDA by denying a promotion to a mother of a newborn with a disability due to concerns she would require significant time off for the child's care, or that the child's medical condition would impose high health-care costs.

These anti-discrimination measures also include accommodations. If an employee is unable to perform her job due to pregnancy related conditions, her employer must treat her the same as other disabled workers (i.e. providing light duty, disability leave, etc). In 2015, the U.S. Supreme Court weighed in on pregnancy discrimination and Title VII discrimination in the case *Young v United Parcel Services, Inc.*[1] After a pregnant delivery driver was advised by her doctor to avoid heavy lifting, she asked her employer to accommodate the lifting restriction. Her request was denied despite the fact light duty work was available to workers injured on the job. The employee brought a claim alleging pregnancy discrimination and the court confirmed that a pregnant worker may indeed show disparate treatment if an employer denies her request for accommodation while accommodating non-pregnant employees with similar restrictions. Specifically, if an employee can prove:

(1) She belongs to a protected class;
(2) She sought an accommodation;
(3) The employer did not accommodate her; and,
(4) The employer accommodated others "similar in their ability or inability to work,"

then an employer has the burden to offer a legitimate, nondiscriminatory reason for denying the accommodation. This reason must be more than an employer's claim that it is more expensive or less convenient to add pregnant women to the categories of those whom the employer accommodates. Once the employer proffers a legitimate, nondiscriminatory reason, the employee must establish that the employer's reason is pretextual.

It should be noted that the court did not specifically indicate that employers must offer light duty to all pregnant employees, but simply confirmed *Young* may be able to successfully prove disparate treatment if this employer made light duty available to other similarly situated non-pregnant employees.

State Level Protection

[1] 135 S.Ct. 1338 (2015)

Lobbyists and advocacy groups across the nation claim that although the Pregnancy Discrimination Act prohibits overt discrimination, pregnant employees are still being denied accommodations and, as a result, are being forced out of their jobs. These groups have pushed for expanded protections and accommodations for pregnant employees. As of 2018, the U.S. Department of Labor data shows that 42 of the 50 states now have state-level protection against pregnancy discrimination. The states that have no specific laws are: Wyoming, Wisconsin, Utah, North Dakota, North Carolina, Indiana, Georgia, and Florida.[2]

Consistent with the *Young v United Parcel Services* holding, many states require employers to provide employees who have pregnancy or childbirth related limitations with the same treatment and benefits provided to employees with any other temporary disability. These states are Alaska, Arizona, Hawaii, Louisiana, Maine, Massachusetts, Missouri, Montana, New Hampshire, New Mexico, Oklahoma, Pennsylvania, and South Dakota.

For example, in 2012, California expanded the ADA's reasonable accommodations to include pregnancy-related conditions such as severe morning sickness, preeclampsia, gestational diabetes and post-partum depression. California's Pregnancy Disability Leave (PDL) law not only requires all employers with five or more employees to allow four months of job protected maternity leave, but it also requires employers to offer reasonable accommodations as needed. Moreover, California's protections do not include an exception for undue hardship on the business.

City-Level Protection

At the city level, the New York City Council passed the New York City Pregnant Workers Fairness Act, which, as of January 2014, requires city employers to provide pregnant women, as well as those with medical conditions related to recent childbirth with whatever reasonable accommodations are necessary for them "to stay healthy". These accommodations include modifications to work duties or work schedule, such as light duty, help with lifting, temporary transfer to a less physically demanding position, rest/water breaks, time off, and changes to a work environment in order to avoid toxins. Cities such as Philadelphia, Pittsburgh, Providence, R.I., and Central Falls, R.I., have similar laws at the municipal level.

EEOC Charge Data

So, has all of this increasing regulation and legislation been accompanied by increasing litigation or EEOC Charges?

The table below shows EEOC Charge data for pregnancy discrimination claims for the past eight years.[3]

	FY 2010	**FY 2011**	**FY 2012**	**FY 2013**	**FY 2014**	**FY 2015**	**FY 2016**	**FY 2017**
Receipts	4,029	3,983	3,745	3,541	3,400	3,543	3,486	3,174
Resolutions	4,130	4,590	4,225	3,580	3,221	3,439	3,762	3,781
Resolutions By Type								
Settlements	522	584	463	436	356	405	393	355

[2] Available online at https://www.dol.gov/wb/maps/3.htm, March 2018.
[3] Available online at https://www.eeoc.gov/eeoc/statistics/enforcement/pregnancy_new.cfm, March 2018.

	12.6%	12.7%	11.0%	12.2%	11.1%	11.8%	10.4%	9.4%
Withdrawals w/Benefits	253	271	267	233	260	270	298	285
	6.1%	5.9%	6.3%	6.5%	8.1%	7.9%	7.9%	7.5%
Administrative Closures	691	709	620	578	585	626	671	654
	16.7%	15.4%	14.7%	16.1%	18.2%	18.2%	17.8%	17.3%
No Reasonable Cause	2,484	2,822	2,698	2,154	1,899	1,954	2,259	2,312
	60.1%	61.5%	63.9%	60.2%	59.0%	56.8%	60.0%	61.1%
Reasonable Cause	180	204	177	179	121	184	141	175
	4.4%	4.4%	4.2%	5.0%	3.8%	5.4%	3.7%	4.6%
Successful Conciliations	67	89	68	87	53	71	62	77
	1.6%	1.9%	1.6%	2.4%	1.6%	2.1%	1.6%	2.0%
Unsuccessful Conciliations	113	115	109	92	68	113	79	98
	2.7%	2.5%	2.6%	2.6%	2.1%	3.3%	2.1%	2.6%
Merit Resolutions	955	1,059	907	848	737	859	832	815
	23.1%	23.1%	21.5%	23.7%	22.9%	25.0%	22.1%	21.6%
Monetary Benefits (Millions)*	$14.7	$13.9	$14.3	$17.0	$14.4	$14.8	$15.5	$15.0

Where states, counties, cities and towns have their own laws prohibiting discrimination and expanding Title VII protections, many also have agencies responsible for enforcing those laws. These state and local agencies are called Fair Employment Practices Agencies. The data in the pregnancy discrimination table below reflects charges filed with EEOC *and* the state and local Fair Employment Practices Agencies around the country that have a work sharing agreement with the commission.[4]

For now, there is no clear upward trend in pregnancy discrimination charges. In fact, it appears to be the opposite insofar as most charges brought are dismissed with a finding of no reasonable cause. However, it should be noted that municipal government employees — those who would be most affected by the aforementioned regulations on city employers — often have particular procedures to follow before filing a

[4] Available online at https://www.eeoc.gov/eeoc/statistics/enforcement/pregnancy.cfm, March 2018.

charge with the EEOC. As the private sector is included in new laws, the numbers may reflect a more noticeable increase in charges.

The good news is that these regulations and legislation are largely just an expansion of laws that employers are already well-versed in handling. The bottom line is simple: Employers should treat pregnant employees the same way they would treat any other employee with a condition or disability that affected the employee's ability to perform the essential functions of their job. For example, an employee who cannot travel for long distances or for long periods of time, or who needs more frequent bathroom breaks, or who needs a stool because she cannot stand for eight hours a day due to her pregnancy should be treated the same as an employee who needs these same accommodations due to diabetes.

Proactive Steps for Employers

Even before an employee requests or requires an accommodation, employers can take proactive steps to avoid allegations of pregnancy discrimination.

1. **Employers can review local and state laws.** Congress has not enacted or amended any federal legislation in 40 years, but, with the recent uptick in state legislation, this may actually make it more difficult for multi-state employers to develop a one-size fits all policy. Pay particular attention to areas where state law provides tighter guidelines than federal law, such as applicability to smaller companies or guidance on when an employer may require medical certification for accommodations.

2. **A written job description outlining the essential functions of each job and emphasizing the physical requirements will assist managers in considering accommodations and modifications to the role.** Likewise, an employer can encourage a pregnant employee to discuss the written job description with her physician and then return with any feedback on tasks that might affect her pregnancy and accommodations that might help her continue working. Employers have also found that obtaining a medical opinion in this informal way allows employers to accommodate individual employees without setting blanket policies or precedents.

3. **Employers can ensure managers are trained on the interactive process.** With pregnancy discrimination in particular, employers run the risk of discriminating by assuming an employee can perform a particular job or by telling an employee what she cannot do as a result of her pregnancy. Rushing to suggest an accommodation or, worse, prematurely suggesting an employee take unpaid FMLA leave may come across as discrimination under the Americans with Disabilities Act based on a perceived disability. Managers should understand the need to get creative and empower the employee to determine what will best allow her to continue working.

4. **An internal audit can assess the available light duty work and if light duty work is being offered to injured employees.** Employers may choose to create a list or data bank to be readily available, if a pregnant employee requires accommodation or job modification.

5. **As with other anti-discrimination laws, employers should *be mindful to avoid retaliation***. Employees should never be penalized — with a reduction in hours, transfer, exclusion from training opportunities, denial of a promotion, or termination — because she exercised her rights with respect to accommodations and leave.

Summary

In summary, expect to offer some type of accommodation to pregnant employees. Knowing what additional obligations state and municipal laws may place upon your business and then handling such accommodations as you would any other need for accommodation under the ADA will ensure to minimize your risk of a pregnancy discrimination claim.

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