# Pregnancy Discrimination: Are Your Managers Due for Training?

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## The Water Has Broken

2016 has been a fertile year for the Equal Employment Opportunity Commission ("EEOC") in its pursuit of combatting pregnancy discrimination. This week, the EEOC took the opportunity at the White House United State of Women Summit to emphasize *again* its focus on protecting the rights of women in the workplace. In doing so, the EEOC released new resource documents explaining pregnant workers' rights under federal law ("Legal Rights for Pregnant Workers under Federal Law" and "Helping Patients Deal with Pregnancy-Related Limitations and Restrictions at Work").

These additional resource documents come on the heels of the following significant settlements recovered by the EEOC across the country since the beginning of the year:

- May 27, 2016 – $55,000 settlement by Nashville-based medical transport company. The EEOC's lawsuit alleged the company refused to accommodate an emergency technician who presented a doctor's note indicating her pregnancy restricted her from lifting patients greater than 200 pounds without assistance. The EEOC charged that the company maintained an unlawful policy of refusing to accommodate female employees with lifting restrictions due to pregnancy, while providing comparable accommodations to non-pregnant employees. The company had removed the employee from the work schedule, told her she could not work because of her pregnancy, and forced her to take unpaid leave. The company had, however, at the same time allowed non-pregnant employees to use a power cot to lift patients.

- May 19, 2016 - $45,000 settlement by Indiana office product and service store. The EEOC's lawsuit alleged the company fired an employee after she told her manager about her pregnancy. The EEOC asserted that the employee's final task was to train a new employee. After finishing the training, she was fired on the next business day. The company then immediately hired another new employee. Neither new employee was pregnant.

- May 3, 2016 - $66,000 settlement by Arizona bar. The EEOC's lawsuit alleged the bar fired a bartender because she was pregnant. One of the owners was recorded on audiotape saying, "There's going to be a whole number of people that I would be offending by allowing a pregnant person to be behind the bar. They might look at it as the owner's a f---ing idiot…they're letting a girl that's pregnant that could get injured behind the bar bartending right now. How irresponsible are those guys?"

- February 22, 2016 - $22,500 settlement by Georgia staffing company. The EEOC's lawsuit alleged the company failed to hire a pregnant applicant for a temporary job assignment at a warehouse where she "could get hurt."

- February 17, 2016 - $85,000 settlement by Texas pharmaceutical company. The EEOC's lawsuit alleged the company's owner made negative remarks about two pregnant employees' pregnancies, and fired both employees (a pharmacist and a pharmacy technician) after one started making visits to her doctor, and the other asked to switch her days off to see her doctor.

- January 25, 2016 - $50,000 settlement by South Carolina nursing center. The EEOC's lawsuit alleged the nursing center failed to accommodate a nurse whose underlying medical condition was exacerbated during her pregnancy after she stopped taking medication to avoid possible side effects to her unborn child. The nurse's normal pregnancy symptoms (fatigue and nausea) were also exacerbated by her underlying medical condition. After being placed on bed rest for 3 weeks, the nurse was fired because of her absences.

- January 25, 2016 - $35,000 settlement by North Carolina residential and commercial moving company. The EEOC's lawsuit alleged the company fired a packer at its Durham facility based on the business manager's belief that the job was unsafe for her. The Company's owner also allegedly told the crew leader not to allow the pregnant employee to work any longer because of her size, and made a remark that she "looked terrible."

In Florida, the Department of Justice ("DOJ") is also getting in on the action. On May 25, 2016, the DOJ filed a lawsuit against the Palm Beach County School Board alleging a female Assistant Principal was discriminated against when the Principal reduced her responsibilities after she announced her intention to become a mother. The complaint alleges, when the employee went on maternity leave, the Principal reassigned her to a lower salary position, reduced her hours, and filled her former position with a male employee whom she had previously trained.

In fiscal year 2015, the EEOC received 3,543 charges of pregnancy discrimination nationwide, and obtained $14.8 million in monetary benefits through pre-litigation settlements and conciliation. The 2016 activity makes it clear that these numbers are likely to climb, and the EEOC's focus is not going to subside anytime soon.

**Federal Law**

Under Title VII of the Civil Rights Act, employers having fifteen (15) or more employees are prohibited from discriminating against employees because of their sex. In 1978, Congress passed the Pregnancy Discrimination Act ("PDA") which amended Title VII to expressly include pregnancy as a component of sex discrimination.

In 2015, the United States Supreme Court held in *Young v. United Parcel Services, Inc.*, 135 S. Ct. 1338 (2015), that employers are required to accommodate pregnant employees under the PDA the same as other employees who are similarly situated in their ability or inability to work. For example, if an employer accommodates non-pregnant employees with lifting restrictions, it must similarly accommodate pregnant employees with lifting restrictions.

Under the Americans with Disabilities Act ("ADA"), a healthy or normal pregnancy is not considered a disability. However, pregnancy-related *impairments* or *medical condition*s may constitute disabilities under the ADA thereby triggering the employer's obligation to engage in the interactive process to determine effective reasonable accommodations. A condition meets the definition of "disability" when it "substantially limits" one or more major life activities (*e.g.*, lifting, standing, sitting, walking, reaching, bending, eating, sleeping, or

concentrating). Under the expansive protection of the ADA Amendments Act of 2008 ("ADAAA"), the operation of major bodily functions (*i.e.*, the neurological, musculoskeletal, endocrine, and reproductive systems) is included in major life activities that may be affected by pregnancy related impairments. Some examples of qualifying disabilities include cervical insufficiency, anemia, sciatica, carpal tunnel syndrome, preeclampsia, gestational diabetes, abnormal heart rhythms, swelling, especially in the legs, due to limited circulation, and depression.

Accordingly, employers must remember that accommodation obligations to pregnant workers may be triggered under either the PDA, the ADA, or both.

**State Law**

Effective July 1, 2015, the Florida Civil Rights Act ("FCRA") – also applicable to employers having fifteen (15) or more employees -- was amended to expressly prohibit pregnancy-based discrimination in employment. This amendment codified the 2014 ruling of the Florida Supreme Court in *Delva v. The Continental Group, Inc.*, 137 So. 3d 371 (Fla. 2014), in which the Court held that pregnancy discrimination is subsumed in the FCRA's explicit prohibition against discrimination based on an individual's sex.

While the FCRA does not include an explicit accommodation requirement, seventeen (17) states across the country have such accommodation provisions. Most recently, Colorado passed the Pregnant Workers Fairness Act which becomes effective on August 10, 2016. The law requires employers to accommodate medical conditions and limitations stemming from pregnancy that may not separately qualify as disabilities under the ADA. The law also contains certain posting and notice requirements for employers.

**EEOC Guidance**

The EEOC's intention to pursue its longstanding policy of eliminating overt pregnancy discrimination and subtle discriminatory practices has been evident for the past two years. On July 14, 2014, the EEOC issued a comprehensive Enforcement Guidance on Pregnancy Discrimination and Related Issues ("Guidance"), accompanied by a Question and Answer document and a Fact Sheet for Small Businesses. The Guidance sets out the fundamental PDA non-discrimination requirements, and also explains the intersection of the ADA and the circumstances under which employers may have to provide light duty, or other reasonable accommodations, for pregnant workers.

The Guidance concludes with a section on "Best Practices" which outlines various proactive measures employers can take to decrease complaints and avoid pregnancy-related PDA and ADA violations. This section is recommended reading for all Human Resources and management personnel.

**Employers' Accommodation Obligations**

The *Young* decision and the EEOC's Guidance make it clear that employers are obligated under the PDA to accommodate pregnant employees – where they give accommodations to non-pregnant employees with similar limitations – in order to allow them to do their regular job safely. As explained above, additional accommodation obligations may also be triggered under the ADA.

Employers should have a written accommodation policy in place, as well as a process for promptly considering reasonable accommodation requests. Such requests should be granted where appropriate. Examples of reasonable accommodations include temporary transfer to a light duty position (if available), altered break and work schedules (*e.g.*, breaks to rest or use the restroom), permission to sit or stand, ergonomic office furniture, shift changes, elimination of marginal job functions, and permission to work from home. If a particular accommodation requested by an employee cannot be provided, the

employer should explain why, and offer to discuss the possibility of providing an alternative accommodation.

**What's at Risk?**

An employee who prevails on a pregnancy discrimination and/or failure to accommodate claim may recover compensatory damages, punitive damages, and attorneys' fees. In 2014, a California jury awarded an AutoZone employee a jaw-dropping $185 million in punitive damages, and more than $870,000 in compensatory damages for back pay, front pay, and emotional distress. The defendant raised legal motions challenging the verdict, but the case is believed to have settled at the Judge's urging after a hearing on those motions.

In addition, where the EEOC pursues the matter on behalf of an employee, the employer may also be obligated to distribute new non-discrimination policies to its employees, post notices about the lawsuit and employee rights at its facilities, provide training to its employees, maintain records of any complaints of discrimination, and provide periodic compliance reports to the EEOC.

**Recommendations**

Before your business finds itself on the wrong side of a pregnancy discrimination claim, consider whether your managers are due for training. In light of continued enforcement activity by the EEOC and the DOJ, be sure to take proactive measures to ensure compliance with federal and state law which provides protection to pregnant employees. In particular, employers should:

- Ensure your non-discrimination policy expressly includes pregnancy as a prohibited basis upon which to make employment decisions.
- Be attuned to paternalistic notions and educate management that employment decisions cannot be based on what they think is in the best interests of the pregnant employee.
- When faced with a pregnant employee's request for accommodation, consider how the company treats non-pregnant employees similar in their ability or inability to work.
- Be aware of the intersection between the ADA and pregnancy-related limitations.
- Be prepared to engage in the interactive process about reasonable accommodation.
- Review and update accommodation policies and employee handbooks to ensure they do not limit accommodations to non-pregnant employees.

Additionally, multi-state employers should be aware of state and local law in each jurisdiction in which their employees work as accommodation requirements may be more expansive in other states and localities.

If you have any questions or would like guidance or training regarding sex and/or pregnancy discrimination issues or other general employment law matters, please contact Jessica M. Farrelly, Esq. in the firm's Employment Law Practice Group.