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New Pregnancy Laws Deliver More Protections for Moms to Be … Along with Some Challenges for Employers

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For many years, laws have been in place to protect women from discrimination and harassment in the workplace, and to create equal employment opportunities. As the number of women in the workforce has grown, savvy employers have gone beyond those legal obligations, affirmatively developing strategies to attract and retain talented female employees. Many employers now offer part-time schedules, work sharing, virtual offices, or other arrangements designed to provide work-life balance and recognize familial obligations.

Despite this, many women leave the workforce when they become pregnant, either by choice, or because the physical effects of their pregnancies make it difficult (or impossible) for them to perform their jobs. This results not only in a loss of income for those employees, but a loss of the skills of trained, experienced workers for the employer — particularly if those women do not return to work after their pregnancies. Interestingly, while roughly 75% of women with children 6 to 17 years old were working in 2013, only 57% of mothers with infants were employed, suggesting that many women do not immediately return to work after having children. While this is undoubtedly due in part to the challenges of juggling work and pre-school aged kids, it may also be caused by the difficulty of returning to work after an extended leave.

To address these challenges, both state and federal governments have focused renewed attention on employment issues affecting pregnant women and working mothers. Many employers are concerned that recent legislation and interpretations of existing law have tipped the scales too far, creating significant — and sometimes unreasonable — burdens on their businesses. Nonetheless, employers must navigate this new landscape and put in place mechanisms to comply with changing requirements.

The Federal Landscape

To understand the developments in the law, employers must first understand the already complex web of existing legislation on these topics. Several federal statutes address these issues, including the Pregnancy Discrimination Act (PDA), which was adopted in 1978 as an amendment to existing anti-discrimination laws. That law prohibits employers from discriminating against workers based on pregnancy, pregnancy-related conditions, or childbirth. For example, an employer cannot discharge, refuse to hire, or take other adverse action against a woman because she is pregnant. An example would be an employer that chooses not to hire a pregnant woman because it assumes that she will be less available or less devoted to her work after her child is born. The PDA does not require special treatment for pregnant workers, but rather requires employers to treat them the same as other employees.

An amendment to the Fair Labor Standards Act (FLSA), which was adopted in 2010 when the Affordable Care Act was signed into law, did create a special benefit for mothers. Though the FLSA is mainly concerned with regulating minimum wages and overtime compensation, the 2010 amendment includes a provision requiring employers to provide unpaid break time for nursing mothers to express breast milk. (Many states have companion laws that also require the provision of a private, non-bathroom area for this purpose.)

The Family and Medical Leave Act (FMLA), enacted in 1993, is also important for pregnant workers. That law requires employers to grant up to 12 weeks of unpaid leave to qualifying employees for the birth and care of a child, among other things (including serious health conditions of oneself or a family member). Many states have comparable or even more generous laws. As a result, employees of mid-sized and large employers are generally able to take time off to deliver a baby and care for their newborn, and must be returned to

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the same or an equivalent position at the end of their leave. Though FMLA leave is generally unpaid, employees are often eligible for disability benefits and/or able to use accrued vacation pay during their leave. However, because maintaining a job open for up to 12 weeks can create a significant burden for employers, small employers (those with fewer than 50 workers) are not subject to the FMLA.

In contrast, the Americans with Disabilities Act (ADA) applies to employers with as few as 15 workers. Under this law, employers must offer reasonable accommodations to workers who are disabled within the meaning of the law. Employees who are disabled by pregnancy-related conditions fall under the protection of the ADA. As result, like other disabled workers, a woman disabled by pregnancy may be eligible for adjustments to her work schedule (such as reduced hours or time off to attend medical appointments); changes to her work environment (such as limiting standing, or exposure to potentially hazardous substances); modification of her non-essential job duties (such as eliminating heavy lifting or travel); or leaves of absence (such as for required bed rest).

It is what the ADA does *not* do, however, that has led to extensive debate. Specifically, the ADA does not treat pregnancy itself as a disability. Therefore, while an employee who has severe morning sickness, gestational diabetes, or another disability arising from pregnancy may be entitled to reasonable accommodations, the ADA does not extend the same protections to women with healthy pregnancies. A non-disabled pregnant worker has generally been subject to the same requirements as a non-disabled, non-pregnant worker; and like her non-pregnant peers, is subject to discharge (or, more often, goes out on disability leave) if her pregnancy makes her unable perform certain aspects of her job.

Developments in Federal Law

Federal lawmakers have considered, but not yet adopted, legislation to address accommodations for healthy pregnant workers. The Pregnant Workers Fairness Act (PWFA) was reintroduced in both the Senate and the House of Representatives on May 14, 2013, and has been assigned to committee. If adopted, the PWFA would require employers to offer reasonable accommodations to job applicants or employees for limitations caused by pregnancy, childbirth, or related medical conditions, unless doing so would cause undue hardship. It would also prohibit them from: 1) denying employment opportunities based on the need to make such accommodations; 2) requiring job applicants or employees to accept an accommodation they choose not to accept; or 3) requiring employees to take leave if other reasonable accommodations can be provided. The Senate version of the bill is currently being considered by the Senate Committee on Health, Education, Labor, and Pensions, while the House version of the bill is currently before the House Subcommittee on Workforce Protections.

Even though the ADA does not apply to non-disabled workers, and the PWFA has not been adopted, recent guidance from the Equal Employment Opportunity Commission (EEOC) comes very close to creating an accommodation requirement for healthy pregnancies. In enforcement guidance issued in July, the EEOC set forth its position on various provisions of the PDA. Among other issues, the EEOC addressed that of women with healthy pregnancies who are nonetheless unable to perform all of the duties of their jobs as a result of the pregnancy. Interpreting the PDA expansively, the EEOC concluded that although the PDA does not require an employer to offer reasonable accommodations to a healthy pregnant worker with limitations, it must treat her the same as it would treat a worker who, because of a disability, is similarly limited.

For example, imagine a business that employs outside sales people, who typically must travel extensively to meet with potential customers, about 10% of which are far enough away to require air travel. Typically, a healthy pregnant employee would be held to the same expectations as her peers, and if she was unable to fly to her accounts for several months due to her pregnancy, the employer could arguably remove her from the position, as it would any other worker who was unable to perform his or her job duties.

Now imagine that a male sales representative has been diagnosed with emphysema, and advised by his doctor not to fly because air pressure changes trigger his condition. Under the ADA, the employer must determine whether flying is an essential function of his job, or whether it can reasonably accommodate that employee by eliminating the air travel portion of his job (such as by assigning those accounts to another representative, or by allowing the employee to manage those accounts by phone, e-mail or video conference) without undue hardship to its business. If the employer accommodates that disabled worker by eliminating his air travel duties, under the EEOC's interpretation of the PDA, it would be required to grant the same accommodation to healthy pregnant workers in the same jobs. Declining to extend the same accommodations to healthy pregnant workers as are offered to disabled workers could, according to the EEOC, establish unequal treatment based on pregnancy.

By treating disabled workers as appropriate comparators to women with healthy pregnancies, the EEOC guidelines arguably import a reasonable accommodation requirement into the PDA. This interpretation has stirred strong reactions from employers and commentators, many of whom believe the EEOC has attempted to expand the protections affected

by Congress rather than merely interpreting them. However, the EEOC's guidance is not binding upon the courts, and the United States Supreme Court is expected to address these issues, and the EEOC's interpretation of the PDA, in the coming year. Until then, employers are left in the difficult position of deciding whether or not to amend their policies and practices to comply with the EEOC's interpretation.

The State of the States

Not all employers are faced with this uncertainty. Some states have already resolved the issue for them. Because employers are bound by both the federal law and the laws of the states in which their workers are employed, their obligations can vary by state. Several states, including New York and New Jersey, have adopted legislation in recent months that expressly requires employers to offer reasonable accommodations to women with healthy pregnancies.

For example, a 2014 amendment to the New Jersey Law Against Discrimination (NJLAD) added pregnancy to the list of protected categories, making clear that an employee cannot be treated less favorably because she is pregnant or has given birth. The amendment also establishes that covered pregnant employees are entitled to reasonable accommodations in order to perform their jobs and function comfortably in the workplace, much like the reasonable accommodation requirements in place for disabled employees under both the ADA and the NJLAD. Appropriate accommodations may include providing bathroom breaks, breaks for increased water intake, periodic rest, modified work schedules, assistance with manual labor, and temporary transfers to less strenuous or less hazardous work.

Employers may deny requests for accommodations related to pregnancy or childbirth (as they may in the case of disability) if they would impose an undue burden on the employer, considering such factors as the nature and cost of the accommodation and the size and resources of the employer. The NJLAD also specifies that "the extent to which the accommodation would require waiving an essential requirement of a job as opposed to a tangential or non-business necessity requirement" is a factor to be considered in determining whether the accommodation would pose an undue hardship. The NJLAD does not provide for any additional paid or unpaid leave for affected employees. However, to the extent employers provide paid or unpaid leave to employees for other purposes, they must make such leave available to employees affected by pregnancy, childbirth or related medical conditions.

New York and several other states have adopted similar legislation, and others have proposed laws pending. Employers in those states are, or may soon be, required to offer reasonable accommodations to pregnant women, regardless of how the federal law develops. For employers with multi-state operations, they may, in the interest of uniformity, choose to adopt a policy providing for such accommodations even in states where they are not required. However, with a substantial portion of the workforce now made up of women of child-bearing age and mothers, these requirements can place a significant burden on employers, particularly in industries that tend to attract a disproportionate number of women, and those that require extensive travel or manual labor.

What's an Employer to Do?

If there is one thing that is clear, it is that issues relating to pregnant women and nursing mothers are a significant focus of developing law at both the state and federal level. How should employers, especially those with multi-state operations, respond to the recent developments?

- First, as in most cases, knowledge is power. Employers must be aware of the applicable laws in every state in which they do business, and stay abreast of changes. State and federal department of labor websites, legal journals, employment law blogs and Twitter accounts, and other inexpensive resources can help in-house attorneys and human resources professionals stay abreast of major developments affecting their businesses.
- Second, training is critical. Employers cannot expect supervisors to be aware of changes in the law unless they are trained accordingly. Last year, a supervisor asked by a healthy pregnant employee to change that employee's job duties or hours may have responded that she was subject to the same standards and requirements as everyone else. This year, that supervisor must be trained to refer such requests to human resources or in-house counsel for further analysis and response. The complex and ever-changing web of federal and applicable state laws relating to pregnancy and parenthood must be carefully considered in every employment action. Where accommodation requirements apply, there are very few simple, one-size-fits-all answers.
- Third, employers should carefully review their policies and practices to ensure that they are up to date with applicable laws, and repeat that process periodically or when significant changes in the law occur. Outdated or incorrect policies can mislead both employees and supervisors, and serve as evidence of unlawful practices.

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