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Pregnancy bias remains common across industries: what employers should know

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Forty years ago, the Pregnancy Discrimination Act (PDA) was passed, yet the Equal Employment Opportunity Commission (EEOC) still receives more than 3,500 pregnancy bias charges each year. The New York Times recently published a report exposing widespread workplace pregnancy discrimination. The EEOC enforces multiple laws that affect pregnancy in the workplace, namely the PDA, the Americans with Disabilities Act Amendments Act (ADAAA), and the Family and Medical Leave Act (FMLA) along with various state laws. This article focuses on the PDA.

What is pregnancy discrimination?

According to the EEOC, "[p]regnancy discrimination involves treating a woman (an applicant or employee) unfavorably because of pregnancy, childbirth, or a medical condition related to pregnancy or childbirth."

In 2015, the U.S. Supreme Court ruled the PDA establishes that pregnancy discrimination is a violation of Title VII of the Civil Rights Act of 1964. The PDA provides that employers must treat pregnant women the *same* for "all employment-related purposes as other persons not so affected but similar in their ability or inability to work." *Young v. United Parcel Service, Inc.*

Basic info on pregnancy discrimination lawsuits

An employee or job applicant asserting a disparate treatment claim under the PDA has the same burden of proof as one claiming disparate treatment based on sex under Title VII. Tthrough direct or indirect (circumstantial) evidence. she must prove the employer had discriminatory intent.

To show disparate treatment through indirect evidence, the individual must use the traditional *McDonnell-Douglas* framework. First, she must establish a prima facie (or minimally sufficient) case by showing the employer's actions inferred they were based on discriminatory reasons. Then the employer gets a chance to provide a legitimate, nondiscriminatory basis for taking the action. The reason can't be rooted in convenience or expense.

To establish a claim for the denial of a reasonable accommodation constituting disparate treatment under the PDA, the individual must show (1) she is a member of a protected class, (2) she sought an accommodation, (3) the employer refused to accommodate her, and (4) it did accommodate others with a similar ability or inability to work. If the employer offers an apparently legitimate, nondiscriminatory explanation for its actions, the employee may then show the proffered reasons are pretextual (or a cover-up for discrimination). The PDA doesn't require you to give preferential treatment to pregnant employees.

Do's and don'ts for Texas employers

Have a written policy. You fare better when you have a written policy. When putting together a policy, you should consider what type of benefits, if any, will be offered; whether time off is offered and whether it will be paid; and what, if any, accommodations will be offered. Be careful that the policy isn't discriminatory in its application.

Be prepared to disregard written policy. If an employee states her pregnancy is anything other than normal, she may require additional accommodations. She may be able to get an accommodation under the ADAAA if the source of her problem at work is a pregnancy-related medical condition that meets the definition of a disability. If

the pregnant employee needs an accommodation to do her regular job because of a disability, you must give her one, without reducing her pay, unless doing so would involve significant difficulty or expense. It's best to avoid letting a first-line manager handle the situation. It's worth seeking legal counsel to remain in compliance.

Talk with employee. You should talk with pregnant employees about your pregnancy and work policies. There is nothing illegal about talking with them as long as you don't have a discriminatory purpose for doing so.

Don't be condescending. You don't need to protect pregnant employees. Even well-intentioned discriminatory treatment can be unlawful. Remember, you can't make changes to an employee's job based on your assumptions about what she needs or wants.

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