

Questions—And Answers

Accommodations under the Pregnancy Discrimination Act

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A fundamental requirement of the Pregnancy Discrimination Act (PDA) is that female employees “affected by pregnancy, childbirth, or related medical conditions *shall be treated the same ... as other persons not so affected*” who have otherwise similar work abilities.¹ Accommodating female employees who may be covered by the PDA, however, is not that simple and may be fraught with uncertainty, risk, and potential for liability. Indeed, the Equal Employment Opportunity Commission (EEOC) issued new guidance on July 14, 2014, updating employers on how to stay compliant when managing pregnant employees. (See also the Federal Regulations Update in this issue of *Employment Relations Today*.) Although much of the guidance mirrors the requirements that have been in place since the enactment of the 2008 Americans with Disabilities Act Amendments Act (ADAAA), there still remains potential for confusion. This Q&A addresses questions to help clarify employer accommodation requirements under the PDA.

WHEN IS AN EMPLOYER REQUIRED TO FOLLOW THE PDA?

The PDA applies to all employers with 15 or more employees. The text of the PDA, enacted in 1978, expanded the definition of the protected class “because of sex” or “on the basis of sex” under Title VII of the Civil Rights Act of 1964 to include pregnancy, childbirth, and related medical conditions. This meant that an employer could not discriminate against an employee or applicant on the basis of her sex—in hiring, firing, promotions, pay, trainings, and the like—and pregnancy, childbirth, and related medical conditions were now included under Title VII’s protections.

DOES THE EMPLOYER HAVE TO PAY AN EMPLOYEE WHO TAKES LEAVE DUE TO PREGNANCY OR A RELATED MEDICAL CONDITION?

If an employer offers paid sick leave to its employees, then it cannot be denied to an employee on the basis of her pregnancy or pregnancy-related medical condition. An employer is not obligated to provide any additional paid sick leave to an employee simply because she is pregnant so long as the employer treats the pregnant employee the same as an employee who is not pregnant. Of course, an employer cannot *force* an employee to take paid leave simply because she is pregnant or suffering from a related medical condition. Further, laws other than the PDA (such as the Family Medical Leave Act, or FMLA) may provide additional leave (though not necessarily paid ones) in the event of pregnancy or related medical conditions.

DO THE PDA REQUIREMENTS APPLY TO MEDICAL CONDITIONS RELATED ONLY TO CURRENT PREGNANCIES OR PAST ONES AS WELL?

The PDA requires an employer to give the same treatment to female employees who are pregnant or dealing with related medical conditions as that which is given to employees who have similar abilities or inabilities to work. Current, past, and even *potential* pregnancies (or related medical conditions) are covered under the PDA. This means that an employer cannot refuse to hire a currently pregnant applicant, or take other adverse employment action such as firing or demotion against a currently pregnant employee, *if the pregnancy was a motivating factor* in the decision. Similarly, an employer cannot fire an employee after the pregnancy or related medical condition is over on the basis of the past pregnancy or medical condition. Additionally, an employer cannot refuse to allow employees who may become pregnant to work in positions that may expose them to certain chemicals out of concern for potential pregnancies. The employer cannot make decisions about the employment of a pregnant or potentially pregnant employee because it is trying to act "in her best interest." Essentially, the PDA does not permit employment decisions to be made because of the pregnancy or related medical conditions.

It is also important to note that under the PDA, pregnancy-related medical conditions include lactation, treatment for infertility, high blood pressure, diabetes, and back pain, among others. This means, for example, that an employee who is breastfeeding cannot be discriminated against due to her breastfeeding schedule. In other words, she cannot be forced to take leave or be docked pay or have any other adverse employment action taken against her. Similarly, a diabetic employee may need to keep water at her

workstation or be given additional breaks to manage her condition—even if these measures are generally prohibited by the employer.

HOW IS THE EMPLOYER SUPPOSED TO KNOW AN EMPLOYEE IS PREGNANT OR SUFFERING FROM A RELATED MEDICAL CONDITION?

The best way to know if an employee is pregnant or suffering from a related medical condition is to encourage open communication with employees and make clear the employer's commitment to nondiscrimination against those employees who are or may become pregnant or who have pregnancy-related medical issues. Although asking an employee or applicant whether she is pregnant or planning to become pregnant is not prohibited, such questions could open the door to an allegation that the employer discriminated against the employee on the basis of her pregnancy or pregnancy-related conditions. Such proof of knowledge of a pregnancy, if coupled with a close-in-time adverse employment action against that same employee or applicant, can work against the employer's favor.

WHAT ACCOMMODATIONS IS AN EMPLOYER REQUIRED TO GIVE A PREGNANT EMPLOYEE OR ONE WITH PREGNANCY-RELATED MEDICAL CONDITIONS?

The PDA requires an employer to provide the *same* benefits of employment to women affected by pregnancy or related conditions that it provides to all other employees with similar abilities or disabilities to work. This could include reduced or light duty, leave, and medical benefits. This means that an employer who grants alternative assignments or disability or unpaid leave to other, nonpregnant employees with similar disabilities to work must also do so for pregnant employees. This could be problematic for an employer who, for example, has a policy that permits light-duty benefits only to an employee with on-the-job injuries. Because pregnancy is obviously not an on-the-job injury, it would not normally qualify for light duty in that circumstance; however, the *source* of an impairment is irrelevant under the PDA. If light duty would be appropriate for a nonpregnant employee similarly able or unable to work, then light duty would be appropriate for a pregnant employee who is able or unable to work in that same fashion. Light-duty benefits cannot be refused to a woman who is pregnant or suffering from pregnancy-related medical conditions based on the *source* of her impairment.

As for granting leave, an employer must grant leave under the same terms, conditions, and policies for leave it would grant to any other, nonpregnant employee who was similarly unable to work. This includes the same length of permissible leaves and the same allowance for returning to

work that is granted to an employee who is not suffering from pregnancy or pregnancy-related conditions. As previously noted, an employer may not force a pregnant employee or one with a related medical condition to take a leave, provided she can still perform her job.

Further, the terms and conditions under which an employer provides health benefits to an employee for nonpregnancy-related medical issues must be the same as those applied to health benefits provided to a female employee who is pregnant or is suffering from pregnancy-related conditions.

Accommodations that an employer may be familiar with based on requirements of the Americans with Disabilities Act (ADA) or its 2008 amendments are *not* required necessarily by the PDA. If an employee who is pregnant or has pregnancy-related medical issues, however, suffers from a condition that would otherwise qualify as a disability under the ADA/ADAAA, then she would likely be entitled to a reasonable accommodation from her employer—just as any other employee would for the same condition. Example conditions are diabetes, carpal tunnel syndrome, or depression. These conditions qualify as disabilities under the ADAAA even though they are often temporary in nature when due to pregnancy. Because these impairments qualify under the ADAAA, the employee who suffers from them may be entitled to reasonable accommodation by an employer; the root cause of these conditions is irrelevant to whether it should be accommodated.

Examples of some of the accommodations an employer should make for a pregnant employee or one with pregnancy-related conditions include:

- ❑ Allowing more frequent breaks or a modified work schedule for a pregnant employee.
- ❑ Reassigning certain job functions (e.g., lifting or climbing) to nonpregnant employees when a pregnant employee is unable to perform those functions.
- ❑ Permitting a pregnant employee to work remotely or by telecommuting when possible.
- ❑ Buying additional equipment or relocating an employee's workstation to make the space more accommodating of the pregnant employee's physical needs.
- ❑ Extending leave provided to an employee who is pregnant or dealing with pregnancy-related medical conditions.

An employer may deny a reasonable accommodation to an employee only if those accommodations would impose an "undue hardship" on the employer.² An undue hardship is defined as a significant difficulty or expense incurred by the employer in making the accommodation. Generally, proof of an undue hardship is a high burden to meet, and

employers often find it difficult to successfully argue against making a reasonable accommodation.

HOW LONG DOES AN EMPLOYER HAVE TO KEEP AN EMPLOYEE'S JOB OPEN IF SHE IS ON LEAVE ON ACCOUNT OF PREGNANCY OR A RELATED MEDICAL CONDITION?

An employer needs to treat a pregnant employee's leave in the same way it would for another nonpregnant employee who is on leave by virtue of a similar inability to work. For example, if an employer has a policy of granting one year of leave, that is the amount of leave granted for any employee—pregnant or not. The PDA does not require any specific amount of leave or put any limitation on the amount of leave granted to an employee who is pregnant or suffering from pregnancy-related medical conditions.

For employers with 50 or more employees, the FMLA also applies. Under the FMLA, employees are allowed up to 12 weeks of unpaid leave for medical reasons including birth and taking care of a newborn. Leave granted under the FMLA may be in addition to leave granted under an employer's regular leave policies, but an employer may choose to have an employee use her paid sick leave concurrently with a portion of the 12-week FMLA leave. Your state may provide additional unpaid leave for similar reasons, and an employer should be sure to check those regulations.

IS IT EVER OK TO TERMINATE AN EMPLOYEE WHO IS PREGNANT OR SUFFERING FROM A RELATED MEDICAL CONDITION?

It is impermissible to terminate (or take any adverse employment action against) an employee because of her pregnancy or related medical condition. If, however, the reason for termination is not based on the employee's prior, current, or future pregnancy, or any pregnancy-related condition from which the employee may suffer, it may be permissible to terminate the employment of a pregnant employee. An employer should do so with caution. Well-documented performance issues may form the basis for termination, but an employer should be careful that the issues are not being caused by the pregnancy or any related medical conditions.

WHAT IS AN APPROPRIATE POSITION OR WORKER TO USE AS A COMPARATOR TO AN EMPLOYEE WHO IS PREGNANT OR HAVING RELATED MEDICAL ISSUES?

Under the PDA, an employee may compare herself to a nonpregnant employee who has similar abilities or inabilities to work when evaluating

whether she is being treated the same in terms of employment benefits. As the EEOC's July 14, 2014, guidance suggests, an employee may also use an ADAAA-accommodated employee who has been accommodated for similar issues as those faced by a pregnant employee or one managing pregnancy-related conditions. For an employer, this means that an employee who is pregnant or suffering from pregnancy-related medical conditions may need to be treated the same as an employee with impairments for which the ADAAA requires a reasonable accommodation.

Much of the current confusion over the EEOC guidance stems from this distinction. The PDA does not require an employer to make a reasonable accommodation to an employee who is pregnant or suffering from pregnancy-related medical conditions, but if an employee who is pregnant or suffering from a pregnancy-related medical condition is unable to work in a way that is similar to that of an ADAAA-accommodated employee, the pregnant employee *may* need to be treated the same as that ADAAA-accommodated employee in whatever modification—e.g., work schedule, work conditions, or leave of absence—the employer granted to the ADAAA-accommodated employee.

NOTES

1. Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (emphasis added).
2. 42 U.S.C. § 12112(b)(5)(A); 29 C.F.R. § 1630.9.

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