Portfolio Media. Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

What To Expect When Your Employees Are Expecting: Part 1

Law360, New York (May 12, 2014, 2:14 PM ET) -- More than 35 years ago, Congress passed the Pregnancy Discrimination Act ("PDA"), which amended Title VII of the Civil Rights Act to clarify that the prohibition on sex discrimination included discrimination on the basis of pregnancy, childbirth and related medical conditions. Despite the length of time in which the PDA has been in force, pregnancy discrimination remains a hot-button topic today.

The U.S. Equal Employment Opportunity Commission has announced that the investigation and pursuit of pregnancy bias claims would be one of its national priorities in its "Strategic Enforcement Plan: FY 2013 - 2016," and the commission's enforcement activity bears this out. The EEOC received 3,541 charges in FY 2013 and recovered a staggering $17 million for pregnancy bias claims last year.

As a result of this heightened enforcement activity, employers need to pay close attention to their obligations to pregnant employees. Not only does the PDA prohibit discrimination on the basis of pregnancy, but plaintiffs, the EEOC and the courts are increasingly looking to the act, in addition to other federal, state and local laws, as a source of affirmative rights to be accorded to pregnant workers. For example, courts are now grappling with the question of whether the PDA and the Americans with Disabilities Act require employers to offer reasonable accommodation during pregnancy.

The Affordable Care Act imposes on employers the obligation to provide lactation breaks to nonexempt employees and the Family and Medical Leave Act affords eligible pregnant workers the right to 12 weeks of job-protected leave. In addition, to remedy what many perceive as gaps in the federal law, many state and local legislatures are passing laws at a frenetic pace granting expansive rights to accommodation for pregnant workers.

Part one of this two-part series will address the federal laws that govern the employment of pregnant workers, including the PDA, ADA and FMLA as well as some recent cases applying these laws.

Part two of this series will discuss the ACA's lactation break requirements and the burgeoning number of

state and local laws that impose a reasonable accommodation obligation on employers. It will conclude with some practical advice on how to ensure unbiased and lawful treatment of pregnant workers and avoid legal claims in this area.

Pregnancy Discrimination Act

Title VII, as amended by the PDA, prohibits discrimination against employees or job applicants on the basis of pregnancy, childbirth or related medical conditions and requires that women affected by such conditions "be treated the same for all employment-related purposes ... as other persons not so affected but similar in their ability or inability to work." 42 U.S.C. Section 2000e(k).

Like all other nondiscrimination statutes, this means that employers are prohibited from refusing to hire, taking any adverse employment action against or otherwise treating women less favorably because they are pregnant. Or, as some courts have colorfully stated: "Employers can treat pregnant women as badly as they treat similarly affected but nonpregnant employees." Genovese v. Harford Health and Fitness Club Inc., No. WMN-13-217 (D.Md. June 7, 2013) (citing Troupe v. May Dep't Stores Co., 20 F.3d 734, 738 (7th Cir. 1994))

The PDA prohibits pregnancy-based discrimination in any of the terms or conditions of employment.

There have been a number of recent PDA cases claiming that the employer has acted adversely toward its employees or applicants because of pregnancy or related conditions. As a group, they illustrate the scope of the PDA's coverage and the myriad of ways employers are alleged to "mistreat" their pregnant employees. Employers are advised to review these opinions to learn what not to say and do.

Several decisions have affirmed the obvious principle that lactation is a pregnancy-related condition protected by the PDA and that evidence of an employer's denial of an appropriate location to express breast milk is relevant to a finding of pregnancy discrimination.

See EEOC v. Houston Funding II Ltd., 717 F.3d 425, 428 (5th Cir. 2013) (Reversing grant of summary judgment to the employer and holding that a termination because of the need for lactation breaks was discrimination in violation of the PDA.) Martin v. Canon Business Solutions Inc., No. 11-cv-02565 (D. Colo. Sept. 10, 2013) (Denying employer's motion for summary judgment on FMLA and PDA claims).

Upon her return from leave for childbirth, the employer removed customer accounts and denied the employee a place to express milk. "The plaintiff's access to facilities to express breast milk is relevant to whether [the d]efendant discriminated against her based on her pregnancy.")

See also Ames v. Nationwide Mutual Insurance Co., No. 12-3780, 2014 WL 961020 (8th Cir. March 13, 2014) (Affirming summary judgment for employer on a PDA claim. The employee quit her job after being denied immediate access to lactation rooms, but had not followed employer's published procedures to obtain such access and had not discussed employer's suggested alternatives.)

The recent cases also highlight a seemingly endless array of comments and actions that are claimed to be evidence of pregnancy bias. For example, the case of EEOC v. The WW Group, d/b/a Weight Watchers International Inc., No. 12-11124 (E.D. Mich. Dec. 2, 2013) dealt with Weight Watcher's policy that required applicants for any group leader or receptionist positions to be at "goal weight."

The applicant was told not to apply for a position because she was over her goal weight, a fact which was true, but only because she was pregnant. The court denied Weight Watchers' motion for summary judgment, finding there was a question of fact regarding whether the application of the policy to the applicant constituted pregnancy discrimination.

In Hitchcock v. Angel Corps Inc., 718 F.3d 733 (7th Cir. 2013), the plaintiff was a client services supervisor for Angel Corps, a nonmedical home care agency. The plaintiff's role was to assess client needs and perform admissions. When she informed her supervisor of her pregnancy, the supervisor asked Hitchcock whether she was "quitting" after she gave birth, directed her to decide as soon as possible and then began to significantly increase Hitchcock's workload.

Approximately two weeks later, Hitchcock was fired. She recounted what sounded like a scene from the movie Psycho. Hitchcock, ironically, had visited the home of a new client. While there, the son expressed his "vehement" refusal to allow any medical agency to come into his home, told Hitchcock that his mother refused all nourishment and then refused to let Hitchcock beyond his mother's bedroom door. Looking around the son who blocked the door, the plaintiff saw brown stains on the mother's pillow and could not discern if she was breathing. Hitchcock returned to the office and recounted the bizarre scene. The agency called 911 and, in the meantime, Hitchcock completed an admission for the mother. A subsequent investigation revealed that the mother had been dead for several days before Hitchcock had arrived.

Angel Corps terminated the plaintiff's employment because she completed a full admission for a dead client and because her actions allegedly compromised the client's health and safety. The company could not explain how plaintiff compromised the health of a client who was already dead. Hitchcock sued under the PDA. The court denied the employer's motion for summary judgment, finding that the employer offered shifting and implausible reasons for the termination, coupled with the supervisor's discriminatory comments.

PDA and "Reasonable Accommodation"

One of the more intriguing issues under the PDA is whether employers must offer reasonable accommodation to pregnant employees under it. While the PDA is commonly interpreted to prohibit employers from taking adverse actions against pregnant women, it is not generally read so expansively as to require employers to provide reasonable accommodation to pregnant women, unless the employer also provides such accommodation to nonpregnant employees with temporary conditions.

The recent case of Young v. United Parcel Service, 707 F.3d 437 (4th Cir. 2013), which may soon be before the U.S. Supreme Court, is instructive. Plaintiff Peggy Sue Young was a part-time delivery driver.

UPS defined a driver's essential functions as the ability to lift packages of up to 70 pounds. During her pregnancy, Young's doctor imposed a 20-pound lifting restriction and, as a result, UPS took the position that she was unable to perform the essential function of her job.

UPS denied Young's request for a light-duty assignment pursuant to its collective bargaining agreement. The CBA allowed employees to perform light-duty work, but only if they were injured on the job or suffered from an impairment cognizable under the ADA.

Under UPS policy and its collective bargaining agreement, a pregnant employee was permitted to keep working as long as she was able to perform the job's essential functions, but she was ineligible for light-duty work for any limitation arising solely as a result of her pregnancy. Young took FMLA leave and when such leave expired she went on an unpaid leave of absence. She also sued UPS under the ADA and PDA. The district court granted summary judgment to UPS on both claims and the Fourth Circuit affirmed.

Under the ADA, the Fourth Circuit applied the preamended version of the PDA to find the plaintiff was not disabled and, therefore, not entitled to an accommodation — but it is the analysis of the law itself that is so interesting. Looking at the PDA claim, Young's contention was that UPS' policy violated the PDA's command to treat pregnant employees the same "as other persons not so affected but similar in their ability or inability to work." In other words, the appropriate comparators were not the body of workers, both pregnant and not, who were denied light-duty work, but all those who had similar limitations.

The Fourth Circuit disagreed, finding that the UPS policy was pregnancy-blind. "Such a policy is at least facially a 'neutral and legitimate business practice,' and not evidence of UPS' discriminatory animus toward pregnant workers." The Fourth Circuit rejected Young's argument that the PDA altered the traditional Title VII analysis, stating that "such an interpretation would … imbue the PDA with a preferential treatment mandate that Congress neither intended nor enacted."

See also Lara-Woodcock v. United Air Lines Inc., No. 1:12-cv-02423 (N.D. Ill. Nov. 20, 2013) (Granting summary judgment for employer and finding that light-duty policy applicable only to work-related injuries was pregnancy blind and that failure to apply it to the plaintiff was not violation of PDA)

Young has appealed to the Supreme Court, and the court has called for the Solicitor General to file a brief outlining the government's position. While the Supreme Court has not yet decided whether to grant certiorari, the fact that it asked for the government's position suggests that it may be interested in deciding this case.

The Sixth Circuit, when confronted with a policy similar to that of UPS, came to the opposite conclusion. Latowski v. Northwoods Nursing Center, No. 12-2408, 2013 (6th Cir. Dec. 23, 2013), involved a certified nursing assistant who had worked for the employer for a year when she announced she was pregnant.

Once aware of her pregnancy, Northwoods' management requested a doctor's note stating the plaintiff was under no work restrictions. The doctor imposed a 50-pound lifting restriction, however, and

Northwoods then forced Latowski to "resign." Commenting on her work restrictions, several of Latowski's supervisors stated that Latowski's "belly would be in the way of her work," and that the company did not want to be liable for any harm that might come to Latowski's unborn child if she continued to work. Northwoods had a light-duty policy similar to the one at UPS, affording the opportunity for light-duty work only to those employees who had been injured on the job. Latowski filed a claim under the PDA, ADA and FMLA. Summary judgment was granted in favor of Northwoods on all claims. The Sixth Circuit affirmed on the ADA and FMLA claims, but reversed the decision under the PDA.

On the PDA claim, the Sixth Circuit found there to be genuine issues of fact regarding whether the various comments played a role in the decision to terminate Latowski's employment and it found the light-duty policy to be discriminatory. The Sixth Circuit addressed the difference between a traditional sex discrimination claim and one under the PDA and held that while Title VII generally requires a plaintiff to prove that a proposed comparator is "similarly situated in all respects," the PDA requires only that the proposed comparator be similarly situated to the plaintiff in "his or her ability or inability to work." The court further found that a policy of not accommodating otherwise qualified workers because the injury was not work-related was "so absurd" that it was a pretext for discrimination.

Americans with Disabilities Act

The issue of accommodating pregnant workers typically arises in the context of the ADA. Given the now-expansive definition of disability, many pregnancy-related medical conditions will fall within the scope of the ADA, triggering the statutory obligation to accommodate. Disability is defined in part as "a physical or mental impairment which substantially limits a major life activity." 42 U.S.C. Section 12102(1). A normal pregnancy, without complications, is not now and has never been an impairment, and thus it is not a disability. See 29 C.F.R pt. 1630, App. §1630.2(g)-(h); EEOC's Questions and Answers on the Final Rule Implementing the ADAAA, Q. 23; Serednyj v. Beverly healthcare, LLC, 656 F.3d 540 (7th Cir. 2011).

Even if pregnancy itself is not a disability, however, its related medical conditions may be. Prior to the passage of the Americans with Disabilities Act Amendments Act ("ADAAA"), short-term impairments were not "substantially limiting" and therefore, they did not meet the definition of disability. This meant that pregnancy-related conditions, such as gestational diabetes or high-blood pressure, which by their nature were short-term, were never disabilities.

The ADAAA, however, which was passed for the express purpose of expanding the definition of disability, changed this rule. Temporary and short-term impairments can be substantially limiting, notwithstanding the fact that they may last for less than six months, 29 CFR Section 1630.2(j)(1), and "a pregnancy-related impairment that substantially limits a major life activity is a disability." 29 C.F.R. Pt. 1630, App. Section 1630.2(h).

The limited number of courts that have confronted the issue agree. See, e.g., Latowski, supra. (acknowledging that a pregnancy-related condition, such as a potentially higher risk of miscarriage could be an impairment that forms the basis of an ADA claim); Mayorga v. Alorica Inc., No. 12-21578-civ (S.D. Fla. July 25, 2012) (the plaintiff stated plausible claim for relief under the ADAAA because her

pregnancy-related complications constituted a disability).

Thus, where an employee suffers from a pregnancy-related impairment, such condition may fall within the definition of a disability and require the employer to provide an accommodation, unless doing so would constitute an "undue hardship." 42 U.S.C. Section 12112(b)(5)(A).

An accommodation has always been broadly defined as "any change" in the work environment or in the way things are customarily done that enables a disabled individual to enjoy equal employment opportunities. See 42 U.S.C. 12111(9); 29 C.F.R. Section 1630.2(o). In the pregnancy setting, these requests may include leaves of absence, job reassignment, light-duty work or job modifications, such as permitting an employee to sit, etc. The the EEOC's webpage regarding pregnancy discrimination provides additional details here.

The courts have just begun to discuss the types of accommodations that may be required for pregnancy-related impairments, but all indications are that the list of accommodations will be expansive. See Alexander v. Trilogy Health Services LLC, No. 1:11-cv-295 (S.D. Ohio Oct. 23, 2012) (denial of leave of absence to treat preeclampsia violated reasonable accommodation provisions of ADA); Wonasue v. University of Maryland Alumni Association, No. 8:11-cv-03657 (D. Md. Nov. 22, 2013) (denial of request to work from home made by an employee with pregnancy complications may constitute violation of the ADA).

Family and Medical Leave Act

The Family and Medical Leave Act generally provides eligible employees with the right to take up to 12 weeks of job-protected, unpaid leave to care for a new child. 29 U.S.C. Subsection 2611(2), (4). The FMLA also entitles employees to take unpaid medical leave for their own serious health condition. The definition of "serious health condition" includes an inability to work arising out of pregnancy or for prenatal care. 29 C.F.R. Section 825.115(b).

A qualified employee may also take "intermittent" leave under the FMLA for a serious health condition, which means taking leave on an occasional basis in increments as small as one hour. FMLA regulations explicitly state that a pregnant employee "may take leave intermittently for prenatal examinations or for her own conditions, such as for periods of severe morning sickness." 29 C.F.R Section 825.202(b)(1)

Pregnant workers who are denied time off that they need for pregnancy-related reasons, or who are punished for taking time off, may state a claim under the FMLA. 29 U.S.C. Section 2615(a)(1)-(2); 29 C.F.R. Section 825.220(c). See Martin, supra. (the company's efforts to discourage employee from taking leave, such as removing employee from major accounts and giving bad performance reviews, constitutes actionable interference with FMLA rights); Alexander v. Trilogy Health Services LLC (the employer violated the FMLA when pregnant employee gave adequate notice of need for leave but was denied leave rights).

Conclusion

With the EEOC's increased enforcement activity in this area, and the courts increased willingness to read statutory rights broadly, it is more important than ever for employers to understand applicable pregnancy laws as well as the obligations they impose with regard to pregnancy and its related medical conditions.

Part two in this series will address the issue of lactation breaks and state and local laws governing pregnancy bias and accommodation. It will conclude with some practical advice on how to ensure unbiased and lawful treatment of pregnant workers and avoid legal claims in this area.

—By Linda B. Dwoskin and Mari C. Stonebraker, Dechert LLP

Linda Dwoskin is an associate in Dechert's Philadelphia office.

Mari C. Stonebraker is an associate in Dechert's New York office.