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INSIGHT: What to Expect When Your Employees Are Pregnant or New Parents

BY LINDA B. DWOSKIN AND RHIANNON DICLEMENTE

Forty years ago Congress amended Title VII to clarify that the prohibition on sex discrimination included discrimination on the basis of pregnancy, childbirth, or related-medical conditions. Thus was born the Pregnancy Discrimination Act (PDA).

Despite the substantial length of time in which the PDA has been in force, pregnancy discrimination and accommodation remain hot topics at both the federal and state levels.

If there were any doubt regarding the interest of the Equal Employment Opportunity Commission ("EEOC") in this area, one need look no further than its charge statistics and recent litigation. The Commission received 3,174 charges in FY 2017 and recovered a staggering $15 million for pregnancy bias claims during this same period. While the number of charges is actually down from FY 2016, the amount of litigation remains high.

This litigation activity paints a clear picture of the Commission's expansive view not only of the protections against discrimination afforded to pregnant employees, but also of an employer's affirmative obligation to accommodate pregnancy-related medical complications. In the last two (2) months alone, the EEOC has filed eight new PDA cases:

- *EEOC v. Rainbow USA, Inc.*, C.A. No. 2:18-cv-09007 (E.D. La. 2018), contending that company terminated a manager just days after the company learned of her pregnancy-related restrictions. Initially, the company suspended the manager indefinitely, then 2 days later, terminated her employment. Filed Sept. 28th.
- *EEOC v. A Plus Care Solutions*, C.A. No. 1:18-cv-01188 (W.D. Tenn. 2018), alleging that A Plus required female employees to sign a pregnancy policy during orientation which terminated their employment at the fifth month of pregnancy. In 2017 A Plus modified this policy to require female employees to relieve A Plus from workplace injuries incurred during pregnancy. Filed Sept. 27th.
- *EEOC v. Life Care Centers of Amer., Inc.*, C.A. No. 2:18-cv-01411 (W.D. Wash. 2018), involved a company that refused to provide light duty to a pregnant Certified Nurse Assistant (CNA) because it only provided light duty to those injured on the job. EEOC alleges that refusal to provide light duty to a pregnant employee when similarly abled non-pregnant employees are able to get light duty violated Title VII. Filed Sept. 25th.
- *EEOC v. Nix Hosp. Sys., LLC*, C.A. No. 5:18-cv-01004 (W.D. Tex. 2018), claiming that the hospital violated Title VII, as amended by the PDA, by refusing to accommodate the employee's pregnancy-related medical restrictions and instead immediately placed her on leave. The employee had applied for two open desk positions which would have allowed her to work even with her medical restrictions. Non-pregnant employees injured on the job with medical restrictions were granted light duty. Filed Sept. 25th.
- *EEOC v. Comm. Care Health Network, Inc.*, C.A. No. 2:18-cv-03008 (D. Ariz. 2018), alleging that the company offered Patricia Pogue a job, only to rescind the offer one week later after Pogue informed the company that she was pregnant. The company asked why Pogue did not disclose the pregnancy during the interview process. Filed Sept. 21st.
- *EEOC v. The Glenridge on Palmer Ranch*, C.A. No. 8:18-cv-2340 (M.D. Fla. 2018), claiming that the Glenridge managers encouraged Michelle Fredericks to apply for an open position as dining room supervisor, but before she applied, a manager sent a text asking when

she planned on having another baby because ''with this position it doesn't leave a lot of time off for long period of time.'' Fredericks did not interview and another woman was given the job who was believed unlikely to get pregnant. Filed Sept. 21st.

■ *EEOC v. Walmart Stores East, LP*, C.A. 3:18-cv-783 (W.D. Wis. 2018), claiming that Walmart had a robust light duty program that allowed workers with lifting restrictions to be accommodated, but Walmart deprived a class of pregnant workers of the opportunity to participate in its light duty program. Filed Sept. 21st.

■ *EEOC v. Rocco's Pub*, C.A. No. 2:18-cv-00133 (N.D. Ga. 2018) alleging that Pub violated federal law when its owner demoted Amber Collard from bartender to a lower paying server job even though Collard's pregnancy did not affect her ability to perform the job of bartender. EEOC stated that ''a pregnant woman's physical appearance alone is never a sufficient reason for taking an adverse employment action against her and depriving her of income.'' Filed Aug. 14th.

In addition, state and local governments across the country continue to expand protections against discrimination and provide for accommodation to pregnant workers.

Given the EEOC's continued focus on pregnancy-related litigation and the general emphasis over the last year on gender issues in the workplace, employers should work hard to understand their myriad obligations.

This article will discuss recent developments in these areas under both federal and state law, as well as developing issues around lactation breaks. It will then conclude with practical advice regarding how best to deal with these challenging issues, ensuring the equitable treatment of employees while minimizing legal risk.

I. THE LEGAL LANDSCAPE

Issues of pregnancy discrimination and accommodation sit at the heart of what affectionately can be called the ''Bermuda-triangle'' of federal employment law: the PDA, 42 U.S.C. § 2000e(k); the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* (''ADA''); and the Family and Medical Leave Act, 29 U.S.C. § 2601 *et seq.* (''FMLA''). Each law imposes individual, yet overlapping obligations with regard to pregnant employees.

Continuing with the ''Bermuda Triangle'' analogy, no employer wants to venture into this territory unless fully armed with the knowledge of how to ensure nondiscriminatory treatment and how best to evaluate and afford reasonable accommodation, lest it risk serious consequences—such as high damage awards and public shaming. Interesting recent case developments in this area are discussed below.

A. THE PREGNANCY DISCRIMINATION ACT

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 pregnancy, childbirth, or related medical 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. § 2000e(k)

1. The scope of coverage under the PDA is broad

While actual pregnancy is clearly protected pursuant to the PDA, the EEOC has stated, and the courts generally have affirmed the sensible principle that lactation also qualifies for protection from discrimination. *See* EEOC, Enforcement Guidance: Pregnancy Discrimination and Related Issues (June 25, 2015), avail. at https://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm (stating that ''[b]ecause lactation is a pregnancy-related medical condition, less favorable treatment of a lactating employee may raise an inference of unlawful discrimination''). *See also Hicks v. City of Tuscaloosa*, 870 F.3d 1253 (11th Cir. 2017); *Paulson v. Tidal*, 2018 BL 251441, No. 16-cv-9049, (S.D.N.Y. 7/16/2018); *Grewcock v. Yale New Haven Health Services*, 293 F.Supp.3d 272 (D. Conn. 2017); *but see Frederick v. N.H., Dep't of Health and Human Services*, 2017 BL 151150, (D.N.H. 2015) (PDA does not include breastfeeding); *Falk v. City of Glendale*, 2012 BL 158663 (D. Colo. 2012) (Title VII does not cover breastfeeding).

Even the termination of a pregnancy has been held to be within the PDA's scope of coverage.

For example, the recent case of *DeJesus v. Florida Central Credit Union*, 2018 BL 375531, No. 8:17-cv-2502, (M.D. Fla. 10/11/2018) involved an elective abortion. Plaintiff Elena DeJesus was a bank teller at Florida Central Credit Union (''FCCC''). On Nov. 1, 2016, she discovered that she was pregnant. DeJesus scheduled an elective abortion on Nov. 10th, and received approval for the absence from her supervisor, Ms. Irizarry. DeJesus was absent for the procedure in the morning and then remained out of work for the afternoon to recover. Six days later, the branch manager Minerva Villanueva called DeJesus into her office and told her she was terminated, stating that ''the medical procedure was not an appropriate excuse for her absence.'' Denying the FCCC's motion to dismiss, the Court held that ''Title VII protects women from discrimination based on their choice to have an abortion.'' *Id.*

Recent cases also highlight the varied array of comments and actions that courts consider to be proof of discriminatory animus, and they serve as an important reminder of what an employer should not say or do.

The case of *Fassbender v. Correct Care Solutions, LLC*, 890 F.3d 875 (10th Cir. 2018) is illustrative of seemingly innocuous comments undermining an employer's ability to terminate an employee for admitted violation of its conduct rules.

Correct Care Solutions (''CCS'') was a healthcare services company that contracted with prisons to provide inmate care. Plaintiff Alena Fassbender was a certified medication aide at a detention center in Kansas. CCS had a no-fraternization policy which broadly forbid undue familiarity between CCS employees and inmates, including the prohibition on sharing personal information with inmates and taking inmate correspondence out of the detention center. Fassbender's employment was terminated for violating this policy; she admittedly had taken an inmate's letter home and not disclosed the fact for more than two days, and the letter included personal information that was believed to have come from Fassbender.

Fassbender argued, however, that she was actually terminated because she was pregnant in violation of the PDA, and she pointed to various comments made by her supervisor Carrie Thompson. At this same time, there were 2 other pregnant employees reporting to Thompson. When Thompson learned of Fassbender's pregnancy, she was alleged to have remarked: ''What, you're pregnant too?'' When she learned of the second employee's pregnancy she was alleged to have stated: ''Are you kidding me? ... I don't know how I'm going to

be able to handle all of these people being pregnant at once.'' For the third employee, she stated: ''I have too many pregnant workers. I don't know what I am going to do with all of them.'' Apparently, Thompson was frustrated and angry when she made these comments.

CCS argued that Thompson's comments were innocuous, and nothing more than routine frustration related to scheduling, and it pointed to the two pregnant co-workers who did not face any adverse employment actions. The court disagreed, and despite Fassbender's admitted policy violation, it reversed the district court's grant of summary judgment to CCS on the PDA claim, holding that the comments were evidence of discriminatory animus. *Id*. *See also Grewcock*, 283 F.Supp.3d at 280 (denying employer's motion for summary judgement on plaintiff's PDA claim and finding discriminatory animus because supervisor yelled at plaintiff for nursing in the bathroom in violation of company policy, and entered plaintiff's office unannounced in order to catch her nursing.)

It is not just a supervisor's comments, however, that can be problematic.

In *Scheidt v. Flr. Covering Assoc., Inc.*, No. 16-cv-5999, 2018 BL 354410 (N.D. Ill. 9/28/2018) plaintiff Michelle Scheidt was an administrator for Floor Covering Associates (''FCA''), a company that provided floor covering and installation services. FCA had terminated Scheidt's employment when she did not return to work following an FMLA leave related to her pregnancy. FCA disputed her contention that it had approved a longer leave of absence. Scheidt alleged that FCA violated the PDA (in addition to the FMLA and ADA), and in support of her claim she alleged that she was treated differently by her supervisor after becoming pregnant. Scheidt informed her supervisor of the pregnancy in November, 2013. After this date, the supervisor allegedly moved Scheidt to an office in which a vent from the bathroom released exhaust and fumes, she was no longer allowed to stay late or work on weekends to make up time missed for medical appointments, and her supervisor was no longer friendly toward her. The court held that this evidence could support a finding of discriminatory animus and denied the employer's motion for summary judgment. *Id*. at *11-12.

2. The PDA and accommodation.

While the PDA prohibits discrimination on the basis of pregnancy, childbirth or related medical conditions, it also requires employers to accommodate pregnancy, childbirth and related medical conditions, so long as the employer accommodates others who are similar in their ability or inability to work. The scope of an employer's obligations in this area was addressed in the Supreme Court's opinion in *Young v. UPS*, 135 S.Ct. 1338 (2015), which set forth a new standard by which to evaluate accommodation claims under the PDA.

At the heart of this case was Peggy Young, a driver for UPS, who became pregnant and was advised by her health care provider not to lift more than 20 pounds early in her pregnancy. Although UPS accommodated needs for light duty for several groups of workers—those injured on the job, those protected by the ADA, and those who lost their commercial drivers' licenses because of medical or other reasons—the company refused to accommodate pregnant workers. Instead, UPS moved Peggy Young, as a pregnant worker, onto unpaid leave for the last six months of her pregnancy despite her desire and ability to work; as a result she lost a paycheck and her UPS-provided health insurance.

Young sued UPS for violating the PDA, which states that ''women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work.''

Prior to the *Young* decision, the lower courts disagreed about the meaning of this clause. In Peggy Young's case, the Fourth Circuit Court of Appeals held that the PDA did not require UPS to accommodate her or any pregnant workers because UPS' accommodation policy was ''pregnancy blind'' and Young had not demonstrated that the company was motivated by an intent to harm pregnant women.

The Supreme Court disagreed with the Court of Appeals, vacated the appellate court decision and revived Peggy Young's case. It held that when an employer accommodates workers who are similar to pregnant workers in their ability or inability to work, it cannot refuse to accommodate pregnant workers who need it simply because it ''is more expensive or less convenient'' to do so. The Court also held that when an employer's accommodation policies impose a ''significant burden'' on pregnant workers that outweighs the employer's justification for these policies, this is evidence of discrimination. Given the fact that UPS accommodated three separate classes of individuals, the Court asked: ''Why, when an employer accommodated so many, could it not accommodate pregnant women as well?''

The *Young* opinion altered the landscape for pregnancy accommodation claims in three important ways. First, the Court made clear that a plaintiff can prove a *prima facie* case of a discriminatory failure to accommodate if she shows: (1) that she was pregnant; (2) that she sought accommodation; (3) that the employer did not accommodate her; and (4) that the employer did accommodate others ''similar in their ability or inability to work.'' The Court emphasized that this does not mean that a pregnant worker must identify a nearly identical coworker that the employer accommodated. Instead, she need only show that the employer accommodated one or more other individuals who were not pregnant but who had similar limitations in their ability to work.

Second, the Court offered some clarification about how an employer may and may not defend an accommodation policy after the pregnant worker has set forth her *prima facie* case. When the pregnant worker has made this showing, the employer may then come forward with a ''legitimate, nondiscriminatory'' reason for the difference in treatment. Importantly, the Court emphasized that an employer assertion that it ''is more expensive or less convenient to add pregnant women to the category of those'' who are covered by the accommodation policy does not constitute a legitimate, nondiscriminatory reason for the difference in treatment.

Third, the Court set out a new way in which a pregnant employee may prove that the employer's legitimate reason is actually a pretext. A plaintiff may show ''that the employer's policies impose a significant burden on pregnant workers, and that the employer's 'legitimate, nondiscriminatory' reasons are not sufficiently strong to justify the burden.'' The Court offered one example of how to make this showing based on the facts before it, namely, that a plaintiff may show a sig-

nificant burden by presenting evidence that the employer ''accommodates a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers.'' The Court also noted that when an employer has multiple policies for accommodating limitations arising out of causes other than pregnancy, this may suggest that it does not have strong reasons for failing to accommodate pregnant workers too.

Many cases since *Young*, have found PDA violations for an employer's failure to accommodate, particularly when these employers have granted the same accommodations for others.

A recent example is the case of *Hicks v. City of Tuscaloosa, supra*. Plaintiff Stephanie Hicks had been a police officer working on a specialized narcotics squad of the Tuscaloosa Police Department. She was demoted to a patrol position eight days after returning from maternity leave. Patrol officers were required to wear protective bullet-proof vests, which had to be fitted snugly around the chest to ensure the officer's safety. Hicks' doctor told her that the compression of a properly fitting vest would reduce her milk supply and put her at risk of a breast infection, recommending that she be given alternate duties while she breastfed her baby.

The Department denied her request for a desk assignment, telling her she could go on patrol with a larger vest or with no vest at all. Forced to choose between breastfeeding and wearing essential protective gear, Hicks resigned and sued. She alleged a violation of the PDA, among other claims, for the failure to accommodate. The case went to trial and the jury found in favor of Hicks.

The Department appealed the verdict arguing that it had no legal obligation under the PDA to offer ''special accommodations'' for breastfeeding. The court disagreed that Hicks needed to be given anything ''special,'' and it let the verdict stand.

First, the court held that breastfeeding clearly was covered by the PDA. *Id*. Second, the court found that Hicks ''was not asking for a special accommodation, or more than equal treatment – she was asking to be treated the same as 'other persons not so affected but similar in their ability or inability to work' as required by the PDA.'' The appellate court was careful to note that the PDA does not require any ''special accommodations'' only for pregnant women or new mothers, nor must employers provide special accommodations for breastfeeding. In this case, other employees with temporary injuries were given ''alternative duty,'' and Hicks merely requested the same.

The jury had found that the Department's refusal to provide certain accommodations previously afforded to other employees amounted to discrimination against Hicks, and the Eleventh Circuit agreed. *Id*. *See also Legg v. Ulster City*, 820 F.3d 67 (2nd Cir. 2016) (Reversing district court grant of judgment as a matter of law for defendant. Plaintiff police officer denied light duty assignment under policy allowing light duty only for those injured on the job. While this was legitimate reason, witness testimony was inconsistent as to why policy existed, plus evidence showed substantial burden); *but see Durham v. Rural/Metro Corp.*, No. 4:16-cv-01604, 2018 BL 371411 (N.D. Alabama 10/9/2018) (granting employer's motion for summary judgment. Plaintiff denied requested accommodation of light duty due to pregnancy complications. Light duty only for on-the-job injuries, not for other classes of workers, distinguishing *Young*.)

B. THE AMERICANS WITH DISABILITIES ACT

The issue of whether an employer must accommodate a pregnant worker also arises in the context of the ADA. Disability is defined in part as ''a physical or mental impairment which substantially limits a major life activity.'' 42 U.S.C. § 12102(1). A normal pregnancy, without complications, is not now and has never been an impairment, and thus is not a disability. *See* 29 C.F.R. pt. 1630, App. 1630.2(g)-(h). *See also Scheidt v. Floor Covering Assoc., Inc., supra*. (collecting cases); *Wadley v. Kiddie Academy Int'l, Inc.*, No. 17-05745, 2018 BL 284314 (E.D. Pa. 6/19/2018) (''Pregnancy alone is not a disability under the ADA.'')

Even if pregnancy itself is not a disability, however, its related complications and 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, 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 C.F.R. § 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. 1630.2(h). The number of courts considering pregnancy complications and medical conditions as disabling is growing. *See Hostettler v. The College of Wooster*, 895 F.3d. 844 (6th Cir. 2018) (post-partum depression and separation anxiety are disabilities); *Wadley v. Kiddie Academy Int'l, Inc., supra*. (high-risk pregnancy where plaintiff prone to urinary tract infections may be disabling); *Moore v. CVS Rx Servs., Inc.*, 142 F.Supp.3d 321, 344 (M.D. Pa. 2015)(holding that round-ligament syndrome and postpartum depression constitute disabilities under the ADA), *aff'd*, 660 F.App'x. 149 (3d Cir. 2016); *but see Scheidt*, 2018 BL 354410, at *7 (plaintiff's allergies which developed during pregnancy were not disabilities since did not substantially limit major life activity.)

If a pregnancy complication or related medical condition is found to be disabling, the employer must provide a reasonable accommodation, unless doing so would constitute an ''undue hardship.'' 42 U.S.C. § 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. § 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.

Recent court cases addressing accommodations in the pregnancy context demonstrate the generally expansive view of this obligation. The case of *Hostettler v. The College of Wooster, supra*, a surprising opinion, is illustrative of the breadth of accommodation required and the peril faced by employers who are generous to pregnant workers but do not grant all requested accommodations. Heidi Hostettler was a newly hired HR generalist at the College of Wooster. In this full-time role,

she helped managers with discipline and discharge issues, participated in recruiting, designed training programs, and answered phone calls and emails. Hostettler was open about her pregnancy during the interview process. The College not only hired her when she was four months pregnant, but offered her 12 weeks of unpaid leave under the FMLA after her delivery, despite the fact that Hostettler was not qualified for such leave.

Hostettler took her leave at the beginning of February, 2014 for the full 12 weeks. Unfortunately, she was suffering from severe postpartum depression and separation anxiety and was unable to return as scheduled in April, 2014. Hostettler did not actually return until late May, 2014 and she was unable to work the scheduled 40 hours/week. Her physician requested and the College approved Hostettler's return on a reduced schedule of 5 half-days per week through June 30, 2014, at which time the College required updated medical documentation. Hostettler submitted this documentation in July, requesting a continued reduced schedule through September, 2014. The next day, the College terminated her employment because she was unable to return to work on a full-time basis. She sued, claiming violation of the ADA, among other things. The district court granted the College's motion for summary judgment holding that the reduced schedule was not a reasonable accommodation since full-time presence was an essential function of the HR generalist job. The Court of Appeals reversed.

On the issue of whether Hostettler was disabled, the Sixth Circuit initially held that Hostettler was ''plainly'' disabled as a result of her postpartum depression and separation anxiety. *Id*. at 853. It went on to address whether the request for a reduced schedule was a reasonable accommodation. The College argued that the position was a full-time job and 40 hours/week was an essential function of this position. The Court held, however, that there were disputed issues of fact on this point because Hostettler and her colleague testified that she was able to complete all of her tasks in less than 40 hours. ''Full time presence at work is not an essential function of a job simply because an employer says it is.'' *Id*. at 857.

The court went on to state: ''An employer cannot deny a modified work schedule as unreasonable unless the employer can show why the employee is needed on a full-time schedule; merely stating that anything less than full-time employment is per se unreasonable will not relieve an employer of its ADA responsibilities.'' *Id*. *See also Mosby-Meachem v. Memphis Light, Gas & Water Division*, 883 F.3d 595 (6th Cir. 2018) (Affirming district court denial of employer's motion for judgement as a matter of law or for new trial. Jury verdict in favor of in-house attorney on ADA reasonable accommodation claim. Employer had denied plaintiff's request to work from home for 10 weeks while she was on bedrest due to pregnancy complications, on ground that attendance was essential job function. Court determined that jury verdict was supported by evidence that plaintiff could perform all duties while at home, despite job description to the contrary.)

C. THE FAMILY AND MEDICAL LEAVE ACT

The FMLA generally provides eligible employees with the right to take up to 12 weeks of job-protected, unpaid leave to care for a new child, and for their own serious health condition. 29 U.S.C. § 2612. The definition of ''serious health condition'' includes an inability to work arising out of pregnancy or for prenatal care. 29 C.F.R. § 825.115(b). FMLA regulations explicitly state that a pregnant employee ''may take leave intermittently for prenatal examinations or for her own conditions, such as for period of severe morning sickness. 29 C.F.R. § 825.202(b)(1).

Pregnant workers who are denied time off needed for pregnancy-related reasons, or who are punished for taking time off, may state a claim for interference with FMLA rights or retaliation. 29 U.S.C. § 2615(a)(1)-(2); 29 C.F.R. § 825.220(c). *See Hicks v. City of Tuscaloosa, supra*. (Affirming district court denial of City's motion for judgment as a matter of law. Jury verdict for plaintiff on FMLA claim. Evidence included supervisor's derogatory comments about Hicks' use of FMLA leave.)

D. STATE AND LOCAL LAWS REGARDING PREGNANCY DISCRIMINATION AND ACCOMMODATION

In addition to the non-discrimination protections and accommodation rights afforded to employees under federal law, there are now twenty-three (23) states, the District of Columbia and four (4) cities that have passed laws explicitly granting pregnant employees the right to workplace accommodations. Although the details of the laws vary from state to state, they share a core principle: a pregnant worker with a medical need for accommodation should not be pushed out of work when she can be reasonably accommodated without imposing an undue hardship on the employer. Some of these state and local laws are addressed below.

1. NEW JERSEY

The New Jersey Law Against Discrimination, N.J.S.A. 10:5-12, requires employers to treat women, who the employer knows or should know are pregnant, no less favorably than nonpregnant employees in their terms, conditions and privileges of employment. Pregnancy is defined as ''pregnancy, childbirth, or medical conditions related to pregnancy or childbirth, including recovery from childbirth.''

Moreover, employers must provide pregnant employees with a reasonable accommodation upon request. The law requires that an employee's request be ''based on the advice of her physician.'' Examples of accommodations include bathroom breaks, breaks for increased water intake, periodic rest, assistance with manual labor, job restructuring or modifying work schedules, and temporary transfer to less strenuous work. These accommodations must be provided absent undue hardship. Further, the law provides that employers shall not penalize employees in the terms, conditions or privileges of their employment for requesting an accommodation. The law applies to all employers of any size in the state and protects employees regardless of tenure and number of hours worked. N.J.S.A. 10:5-5.

2. NEW YORK STATE AND NEW YORK CITY

The New York State Human Rights Law (''NYSHRL'') was amended in 2016 to define a ''pregnancy-related condition'' as a disability. More specifically, the NYSHRL makes it ''an unlawful discriminatory practice'' for an employer to refuse to provide reasonable accommodations to the known ''pregnancy-related conditions'' of an employee, unless such accommodations would cause an undue hardship to the employer. N.Y. Exec. Law § 296(3)(a)-(b). An employee requesting pregnancy-related accommodations, must provide the employer with any medical information needed to verify the existence of a pregnancy-

related condition, should the employer request it. *Id*. at § 296(3)(c). As with any instance in which an accommodation is requested by a disabled employee, employers must engage in an interactive process to investigate an employee's request for accommodation and determine its feasibility. This process is not an official requirement under the NYSHRL, but merely one factor to be considered in deciding whether a reasonable accommodation was available for the employee's disability at the time the employee sought accommodation.'' *Jacobsen v. New York City Health & Hospitals Corp.*, 11 N.E.3d 159, 169 (N.Y. 2014).

New York City contains an even more expansive accommodation requirement. The New York City Human Rights Law (''NYCHRL'') makes it ''an unlawful discriminatory practice'' for any private employer to refuse a reasonable accommodation to an employee for ''pregnancy, childbirth or related medical condition.'' N.Y.C. Human Rights Law § 8-107(22)(a). Examples of reasonable accommodation include bathroom breaks, breaks for water intake, periodic rest for those who stand for long periods of time, and assistance with manual labor. Under the NYCHRL, an employer may legally deny accommodations for two reasons. First, if the employee ''could not, with reasonable accommodation, satisfy the essential requisites of the job,'' *Id*., and second, if providing accommodations would place an undue burden on the employer. *Id*. at § 8-102(18).

3. PHILADELPHIA

The Philadelphia Fair Practices Ordinance explicitly classifies discrimination based on pregnancy, childbirth, or a related medical condition as sex discrimination. The law requires employers to provide reasonable accommodation so long as the employee requests it and the accommodations will not place an ''undue hardship'' on the employer. ''Reasonable accommodation'' is defined as an accommodation ''that can be made by an employer in the workplace that will allow the employee to perform the essential functions of the job.'' Such accommodations can include ''restroom breaks, periodic rest for those who stand for long period of time, assistance with manual labor, leave for a period of disability arising from childbirth, reassignment to a vacant position, and job restructuring.'' Phila. Code 9-1128. The law also prohibits retaliation.

II. LACTATION BREAKS

A. THE PATIENT PROTECTION AND AFFORDABLE CARE ACT

At the federal level, the provision of lactation breaks is governed by the Patient Protection and Affordable Care Act (''PPACA''). Enacted in March, 2010, this law amended Section 7 of the Fair Labor Standards Act (''FLSA'') to require an employer to provide ''nonexempt'' employees with reasonable break time to express breast milk. 29 U.S.C. § 207(r)(1). The break time obligation does not apply for ''exempt'' employees such as employees classified as executive, professional, or administrative under the FLSA (although there may be state law obligations).

The Nursing Mother Amendment, as it is called, requires employers to provide ''reasonable break time for an employee to express breast milk for her nursing child for 1 year after the child's birth each time such employee has need to express the milk.'' Employers must provide ''a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk.'' *See* 29 U.S.C. § 207(r)(1)(B).

Employers are not, however, required to create a permanent, dedicated nursing space. Rather, a space temporarily created or converted into a space for expressing milk or made available when needed by the nursing mother is sufficient—provided that the space is shielded from view, and free from any intrusion from co-workers and the public. If the space is not dedicated to the nursing mothers' use, it must be available when needed in order to meet the statutory requirement. Under no circumstances may the dedicated space be a bathroom. *See* U.S. DOL, Fact Sheet #73: Break Time for Nursing Mothers Under the FLSA (revised April 2018), https://www.dol.gov/whd/regs/compliance/whdfs73.htm.

If there is no available, legally compliant unused space, the employer may provide access to a space normally used for other things (such as a manager's office or a storage area). Such spaces are referred to as ''flexible spaces'' and the federal Department of Health and Human Services (''DHHS'') has posted a list of examples, such as a dressing room, partitioned area, or a closet or storage area. *See* U.S. DHHS, Breastfeeding Support: Time and Space Solutions, (June 19, 2014), https://www.womenshealth.gov/breastfeeding/employer-solutions/commonsolutions/solutions.html. In any case, the location provided must be functional as a space for expressing breast milk, meaning, as Federal regulations indicate, that it ''contain a place for the nursing mother to sit, and a flat surface, other than the floor, on which to place the pump.'' *See* Reasonable Break Time for Nursing Mothers, 75 F.R. 80073-01 (2010). The regulations also state that employers may include a range of additional features, such as access to electricity, sinks, and refrigerators. While such additional features are not required, they may decrease the amount of break time needed by nursing employees to express milk.

Employers with fewer than 50 employees are not subject to the FLSA break time requirement if compliance with the provision would impose an ''undue hardship.'' Whether compliance would be an undue hardship is determined by looking at the difficulty or expense of compliance for a specific employer in comparison to the size, financial resources, nature, and structure of the employer's business.

Under the FLSA, nursing breaks are unpaid. However, where employers already provide compensated breaks, an employee who uses that break time to express milk must be compensated in the same way that other employees are compensated for break time. In addition, the FLSA's general requirement that the employee must be completely relieved from duty or else the time must be compensated as work time applies.

The law prohibits retaliation. Under Section 15(a)(3) of the FLSA, it is a violation for any person to ''discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.'' Accordingly, any employee who is ''discharged or in any other manner discriminated against'' because, for instance, she has filed a complaint, may file a retaliation complaint with the WHD, or may file a private cause of action seeking appropriate remedies including, but not

limited to, employment, reinstatement, lost wages and an additional equal amount as liquidated damages. At least one court has held that an employee may bring a lawsuit for lost wages under the Nursing Mothers Amendment to the FLSA. *See Lico v. TD Bank*, 2015 BL 173013 (E.D.N.Y. 2015) (where the employee had lost time from work as a result of the employer's failure to comply with the law); *but see Ball v. Ohio Ambulance Solutions LLC*, (N.D. Ohio 2015) (there is no private right of action for retaliation claims arising under the Break Time provision).

B. STATE AND LOCAL LAW REGARDING LACTATION BREAKS

As discussed above, while some breastfeeding employees may not be covered under the FLSA, they may be protected under related state laws. To date, twenty-nine (29) states, as well as the District of Columbia and Puerto Rico, have laws that prohibit discrimination against breastfeeding employees and require accommodations for breastfeeding in the workplace. *See* Nat'l Conf. of State Legs., Breastfeeding State Laws (updated July 9, 2018), available at http://www.ncsl.org/research/health/breastfeeding-state-laws.aspx#State. The relevant laws in Pennsylvania, New Jersey, and New York, are discussed below.

1. PHILADELPHIA

While the Commonwealth of Pennsylvania has yet to pass any laws at the state level specifically for nursing mothers in the workplace, Philadelphia has such a law. In 2014, Philadelphia amended its Fair Practices Ordinance to require employers to reasonably accommodate an employee's need to express breast milk as long as the accommodation does not impose an ''undue hardship'' on the employer. Reasonable accommodations include: providing unpaid break time, allowing an employee to use paid break, mealtime, or both to express milk, and providing a private, sanitary space that is not a bathroom. Phila. Code § 9-1103(m). The law applies to businesses with one or more employees, and covers all employees—expanding previously enacted federal protections under the FLSA, which requires break time only for nonexempt nursing mothers to express breast milk.

2. NEW YORK

New York State not only mandates break time, but the New York law also prohibits discrimination against breastfeeding mothers. New York Labor Law § 206-c (2007) states: ''An employer shall provide reasonable unpaid break time or permit an employee to use paid break time or meal time each day to allow an employee to express breast milk for her nursing child for up to three years following child birth. The employer shall make reasonable efforts to provide a room or other location, in close proximity to the work area, where an employee can express milk in privacy. No employer shall discriminate in any way against an employee who chooses to express breast milk in the work place.''

The New York law expands protections beyond those of the FLSA, since it applies to all public and private employers in the state (regardless of the size of the business), as well as all employees, regardless of whether such employee is exempt or non-exempt. Further, the New York law requires an employer to provide a reasonable break time to nursing mothers for up to three years following childbirth, as opposed to just one year. Employers must also provide advance written notification of the provisions of Labor Law § 206-c to employees either individually or generally, such as through an employee handbook.

3. NEW JERSEY

Effective January 8, 2018, New Jersey law also protects breastfeeding employees who wish to pump at work. Under the new amendments to the New Jersey Law Against Discrimination (''LAD''), N.J.S.A. § 10:5-12, it is illegal to discriminate against or to treat an employee differently on the basis of breastfeeding status. It is also unlawful for an employer to harass, to make derogatory comments about, or to interfere with an employee or to permit others to do these things because the employee breastfeeds or chooses to express breast milk at work. An employee may not be penalized in any terms, privileges or conditions of employment for requesting or using workplace accommodations to express milk that are provided by the LAD.

The LAD applies to all employers in New Jersey regardless of size, including private or state and local government employers, employment agencies and labor unions. Under the LAD, all employers are required to reasonably accommodate breastfeeding employees by providing them reasonable break time each day and a suitable room or other location to express breast milk (unless the employer can demonstrate that a specific accommodation would be an undue hardship on its business operations). Like the FLSA, the law requires a private room or other location for the employee to express milk; however, under the LAD, the area must be ''in close proximity'' to the employee's work area. Further, unlike the FLSA, the New Jersey law covers all employees, and does not restrict an employee's right to pumping breaks to any specific number of months or years after the birth of the child.

III. PRACTICAL GUIDANCE

Issues involving pregnancy discrimination and accommodation are challenging, since they involve multiple federal, state and local laws. No matter the difficulty, however, employers must be proactive in this area to understand their obligations and ensure legal compliance.

- Employers should review policies and practices to ensure that they have a nondiscrimination policy specifically referencing pregnancy, and that the policies are compliant with all state and federal laws particularly in the areas of accommodation, leaves of absence and breaks.
- Training of all staff. Managers must understand their obligations, including the need to provide statutory leave and other accommodations, and all employees must understand and refrain from the types of comments and actions that can show discriminatory animus.
- Understand leave laws and ensure that all leaves are administered correctly. For example, an employee does not need to specifically reference the FMLA or applicable state law to be entitled to a leave. Do not automatically terminate an employee who reaches the end of an FMLA leave and cannot return.
- Understand that many pregnancy-related conditions may require reasonable accommodation under federal or state law. Managers must understand that there are no magic words to request an accommodation and they must be prepared to engage in the interactive process and consider a host of potential accommodations.

■ Before an employee returns to work, consider the need for a private space for lactation breaks and how you will handle such requests.

An employer that knows the law, crafts its policies carefully and trains its staff will go a long way to avoiding future legal problems when dealing with pregnant employees.

Author Information

Linda Dwoskin is Special Counsel in Dechert's labor and employment group based in the firm's Philadelphia office. Her practice includes both litigation and counseling on a wide variety of employment and labor matters, including all forms of discrimination, sexual harassment, disability claims and the Family and Medical Leave Act. With regard to the counseling function, Ms. Dwoskin designs and conducts training programs nationwide for national and multi-national organizations concerning all aspects of U.S. employment law, and she conducts internal workplace investigations involving sensitive topics and high-level managers. She can be reached at linda.dwoskin@dechert.com.

Rhiannon DiClemente is an associate in Dechert's labor and employment group based in the firm's Philadelphia office. She represents clients across the spectrum of labor and employment matters, including wrongful termination, employment discrimination, and breach of contract actions, and advises employers on compliance issues under various labor and employment laws, helping clients to conform their workplace practices and procedures to current law. She can be reached at rhiannon.diclemente@dechert.com.