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What To Do If Your Employee Is Due

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The U.S. Equal Employment Opportunity Commission (EEOC) issued a list of priorities for strategic enforcement in 2012. Among its national priorities: "accommodating pregnancy-related limitations under the Americans with Disabilities Act Amendments Act (ADAAA) and the Pregnancy Discrimination Act (PDA)." So what can you, as an employer, do to avoid a pregnancy bias lawsuit? Here are some practical tips.

First, avoid a claim before a candidate even becomes an employee. Do not refuse to hire an otherwise qualified candidate because she is pregnant. In a case from New York, a company interviewed an applicant multiple times and gave her positive feedback. However, the company decided not to hire her after the president of the company learned she was pregnant. The woman filed a pregnancy discrimination lawsuit and the company settled for $90,000.[1]

Second, when a current employee becomes pregnant or has a baby, do not treat her differently from similarly-situated non-pregnant employees. In a case out of Colorado, a new mother failed to meet sales quotas. However, she was disciplined earlier and more often than some of her male coworkers who were similarly failing to meet their sales quotas. The court found this could be evidence of pregnancy discrimination.[2]

Third, keep an open dialogue with your pregnant employee. If she has physical restrictions, accommodate her if you can. The Supreme Court of the United States will be hearing a case soon to definitively decide this issue-whether you, as an employer, have to accommodate a pregnant employee's physical restrictions the way you would an employee who had a condition under the Americans with Disabilities Act (ADA).

The Sixth Circuit Court of Appeals, which covers Ohio, Kentucky, Tennessee, and Michigan, is one court that found an employer should accommodate a pregnant employee's physical restrictions. In a case before the court, a certified nursing assistant became pregnant and was placed on a 50-pound weight-lifting restriction by her doctor. The employer fired the employee and said its policy was to only accommodate restrictions resulting from work-related injuries and therefore, the employer could not accommodate her 50-pound restriction. However, there was also evidence that the nurse's managers made several comments, including that her "belly would be in the way" at work and they did not want anything to happen to her baby. The court found

that based on these comments, the policy was merely pretext for discriminatory animus against pregnant women and it violated the PDA.[3]

The Fourth Circuit Court of Appeals, which covers Maryland, North Carolina, Virginia, and West Virginia, decided a similar case the other way. In that case, a pregnant UPS employee was placed on a 20-pound weight-lifting restriction. UPS drivers are required to lift 70 pounds. UPS decided that, due to her weight restrictions, the employee could not perform essential functions of her job. UPS allowed workers to temporarily work light duty and if they were injured at work or had a condition under the ADA. Thus, pregnant women were ineligible for this light duty work. The employee, therefore, took unpaid leave during her pregnancy. The Fourth Circuit Court of Appeals found this policy to be pregnancy-blind because it did not target only pregnant women. The court found no discrimination had occurred.[4] This case has been appealed to the United States Supreme Court.

The final tip for employers: after an employee has a baby, the employee is eligible for leave under the Family Medical Leave Act. Non-exempt employees are also eligible for lactation breaks. Firing an employee because she is lactating or expressing breast milk constitutes pregnancy discrimination.[5] However, an employer may set up policies and procedures on how employees conduct lactation breaks. For example, Nationwide Mutual Insurance Company had lactation rooms available at their offices, but new mothers had to fill out paperwork to gain access to the lactation rooms. One new mother did not follow this procedure and was denied access to the room. She quit her job. The court found that Nationwide did not discriminate against her because she did not follow the policy. [6]

More guidance is developing from case law and the EEOC on the best ways for employers to address employee pregnancy issues. As these issues develop, the employment attorneys at Weston Hurd are available to give advice and address your concerns.

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[1]*Equal Employment Opportunity Commission v. Benhar Office Interiors LLC*, No. 1:14-cv-00574, (S.D.N.Y).
[2]*Martin v. Canon Bus. Solutions, Inc.,* 2013 U.S. Dist. Lexis 129008 (D. Colo. Sept. 10, 2013).

[3]*Latowski v. Northwoods Nursing Ctr.,* 549 Fed.Appx. 478 (6th Cir. 2013).
[4]*Young v. UPS*, 707 F.3d 437 (4th Cir. 2013).
[5]*EEOC v. Houston Funding II, Ltd.,* 717 F.3d 425 (5th Cir. 2013).
[6]*Ames v. Nationwide Mut. Ins. Co.,* 747 F.3d 509 (8th Cir. 2014).

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