The New And Evolving Standard For Accommodating Pregnant Employees

Insights
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When the U.S. Supreme Court issued a March 2015 decision creating a new standard for how employers should accommodate pregnant employees, retailers took notice. After all, approximately 50% of retail employees are female, and in some retail lines such as clothing, women make up more than 75% of the workforce. Pregnancy is a common occurrence in the industry, and employers want to know how to comply with the law.

But the decision seems to have raised more questions than it answered. There remains confusion among employers about the law, who often receive mixed messages from different sources on how to comply with the new Supreme Court standard. Now, with the benefit of almost two years of lower court decisions, retailers stand on much more solid ground in knowing how best to work with their pregnant employees.

Background: New Standard Created By The SCOTUS
The Pregnancy Discrimination Act contains a provision unique in employment law. It requires employers to treat women affected by pregnancy, childbirth, or related medical conditions "the same for all employment-related purposes ... as other persons not so affected but similar in their ability or inability to work." For many years, courts routinely held that employers were not required to provide transitional or light duty work to pregnant employees as long as they limited their light duty program to employees who suffered on-the-job injuries.

All that changed when the Supreme Court rejected this bright line rule in the 2015 case of *Young v. United Parcel Service*. Instead of a bright line, the SCOTUS concluded that denying light duty accommodations to pregnant employees while providing them to others could be illegal. The standard created by the Court to make this determination: an employer would be found in violation of the law if its refusal placed an undue burden on pregnant employees that could not be justified by legitimate reasons. Additionally, the SCOTUS said that cost would not ordinarily constitute a legitimate reason.

This Supreme Court test is, like the Pregnancy Discrimination Act's requirements, unique. There is no prior workplace law utilizing a similar standard, leaving employers with several critical questions. What constitutes an "undue" burden on pregnant employees? If cost is not a legitimate reason, what is? And most importantly, must a workers' compensation light duty program extend to

pregnant employees who have pregnancy-related restrictions?

Retailers Puzzled By New Standard

In the immediate aftermath of this decision, many advisors told employers they should either open their workers' compensation light duty programs to pregnant employees, or eliminate the programs entirely. But this advice is not easy to follow in the retail industry.

Retail employees often have physical jobs that require them to perform functions such as scanning products at the register, squatting and bending to pick up objects, climbing to stock shelves, and carrying heavy objects for customers. Many stores have limited staff with no backup available to handle tasks that another employee cannot perform. Allowing employees to do less than their full jobs to accommodate physical restrictions creates real in-store difficulties.

But the physical nature of the job means that there will be on-the-job injuries no matter how well you implement your safety program. When employees are injured, the likelihood of their fully recovering to their pre-injury physical abilities is increased dramatically if they return to work quickly. A swift return to work also reduces the cost of claims, making these light duty and transitional programs rightly important.

But opening up these programs to employees with pregnancy-related physical limitations will unquestionably increase costs, especially because about 10% of pregnancies result in physical limitations. The additional costs a retailer would incur to accommodate all pregnancy-related restrictions would be high. Thus, the common advice provided to retailers – "if you accommodate anyone with non-pregnancy-related limitations, you should accommodate all pregnancy-related limitations" – ignited a difficult cost-benefit analysis.

Courts Provide Guidance On 3 Main Issues

Employers were hopeful that as pregnancy discrimination cases wound through the court systems in the wake of the SCOTUS decision, judges would provide answers to their questions. These decisions have now finally started coming and are beginning to shape the law. In a nutshell, the developing trend favors the rights of pregnant employees over the rights of employers.

Issue No. 1 – Inconsistent Treatment

The first hurdle an employee must pass to maintain a pregnancy discrimination claim is to show that she asked for accommodations, her employer denied them, and that the employer provided accommodations to non-pregnant individuals with similar limitations. The courts have made this hurdle very simple for plaintiffs to overcome.

An employee can prove she requested an accommodation simply by showing that she notified her employer that pregnancy-related limitations interfered with her job. The request does not have to arise directly out of a pregnancy, and could also arise from a pregnancy-related complication such as a lactation issue. For example, a court recently held that a female police officer who was unable to wear a bulletproof vest due to lactation concerns satisfied the accommodation standard when she requested a desk job.

At this juncture, the courts will not consider the reasonableness of the requested accommodation, or the impact of the requested accommodation on the workplace. If an employer accommodated an employee's limitations arising from a workplace injury but did not accommodate the plaintiff's similar limitations, the plaintiff would be found to have carried her burden.

In another recent case, a district court accepted as comparators two other pregnant women who were allegedly treated "better" than the plaintiff. This makes little logical sense, as it would seem that no inference of discrimination could be derived from demonstrating differing treatment among members of the same protected class. But this case demonstrates how hostile some courts are to perceived unfair treatment of pregnant employees.

Issue No. 2 – Legitimate Reasons

Once the employee clears this hurdle, the employer must explain its reasoning for denying the requested accommodation if it hopes to win the legal claim. Perhaps the most troubling aspect of the *Young* decision was the statement that financial cost, a motivator in almost every business decision, would not ordinarily be considered a legitimate justification for rejecting the accommodation.

Unfortunately, few cases have directly addressed what qualifies as a legitimate reason. In one, the court ruled that a statutory mandate that required a police department to continue the employment of any officer injured in the line of duty need not extend to pregnant police officers. In another, it was deemed sufficient when a government agency lacked funds to spend for the requested accommodation (maternity uniforms).

Retailers should understand that they might run into legal trouble if they simply state that the refusal to accommodate a pregnant employee is based on the fact that their light duty program is being limited to employees injured on the job. Given recent decisions, this will likely not be enough to survive a pregnancy discrimination claim.

Issue No. 3 – Comparator Analysis

The final step in the analysis requires the plaintiff to show that the employer has accommodated a large percentage of non-pregnant employees but denied accommodations for a high percentage of pregnant employees, and that whatever legitimate reason provided for the accommodation denial is not sufficient. This step does not require the employee to prove that an employer has denied an accommodation to several pregnant employees.

As one court explained, if the employer only had two pregnant employees and denied an accommodation to both, it has denied 100% of the pregnant employees' requests for accommodation. More troubling is a recent case from the 2nd Circuit Court of Appeals, where the court concluded that an employer's policy of providing light duty work to employees injured on the job but not to pregnant employees was sufficient evidence for the plaintiff to be able to proceed to a jury trial.

Conclusion: What Should Retailers Do?

One of the main takeaways from these cases is that judicial hostility toward employers who refuse to provide light duty accommodations to pregnant employees is real. As one district judge recently noted, "no pregnant woman should, in 2016, be fired for being unable to lift more than 30 pounds." These cases are consistent with the national mood, as a paid maternity leave law has been proposed and supported to a certain extent by Republicans and Democrats alike.

Retailers that limit accommodations of temporary impairments to employees injured on the job need to examine how they would defend against a pregnancy discrimination claim. If you plan to ask a jury to agree that excluding pregnant women from your light duty program is justified, you need to articulate your reasons in a way that a jury can understand and agree with.

If members of the jury learn that these reasons were first articulated only after a lawsuit was filed, chances they will accept them are slight. So it behooves any retailer in this position to make a decision about the scope of its light duty program and, if that decision is to continue the limitation, clearly articulate rationales for the decision that amount to something more than money.

Finally, the law in this area is certainly less than well-settled. While the *Young* decision does not necessarily mandate that pregnant women be included in any light duty program, you should be prepared for inevitable litigation if you limit light duty to employees injured on the job. You should be committed to fighting for a favorable decision, but be warned: it will not be easy.

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