



## 5 Legal Issues From Conception To Birth And Beyond

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Most employers are generally aware of the prohibitions against pregnancy discrimination under Title VII and the Pregnancy Discrimination Act and the leave rights of new mothers. But they may not be as familiar with the often overlapping legal issues that may arise before, during and after pregnancy under the Americans with Disabilities Act and its amendments, the Family Medical and Leave Act, and the Fair Labor Standards Act.

Some of these childbirth-related rights also affect men and individuals other than biological parents. Here is a rundown of some issues that may be overlooked.

### **Accommodations for Employees Undergoing Infertility Treatments**

The Americans with Disabilities Act Amendments Act's definition of "physical impairment" includes conditions that affect reproductive functioning, and reproduction is also considered a "major life activity." Because infertility may render both male and female employees "disabled," they may be entitled to reasonable accommodations for infertility treatments or procedures. Under some circumstances, they may qualify for FMLA leave as well.

### **Accommodations During Pregnancy**

Routine doctors' visits are not normally covered under the FMLA, which provides employees who have a "serious health condition" with up to 12 weeks of leave. However, "serious health condition" includes any period of "incapacity due to pregnancy" or "prenatal care." This means employees must be granted leave even for routine prenatal care visits with their health care providers (which include not only medical doctors but also midwives, nurse practitioners and physicians' assistants).

### **Discrimination against Pregnant Employees**

Employers may not refuse to hire, fire or otherwise discriminate against an employee because she is pregnant. Additionally, employees who are temporarily unable to perform their job duties because of a pregnancy-related condition must be treated the same as any other temporarily disabled employee.

Employers must strike a balance between being sensitive to requests for accommodation by pregnant employees and at the same time, avoiding assuming that expectant mothers cannot or do not want to maintain their full workload and responsibilities because of their pregnancy or a related complication. Employers should be very careful about changing a pregnant employee's job duties or status unless the modification is specifically requested by the employee.

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### **Birth and Bonding FMLA Leave**

Employees may only take intermittent or reduced-schedule leave to bond with a new baby with their employer's approval. Otherwise, such leave must be taken as a continuous block. Conversely, employers may not require FMLA-eligible employees who are taking birth and bonding leave to work on a part-time or intermittent basis.

### **Break Time and Space for Expressing Milk**

The FLSA provides that for up to one year after a child's birth, a nursing mother must be provided a "reasonable break time" to express milk "each time such employee has need to express the milk." Employers must also provide a place for expressing milk (or pumping) that is shielded from view and free from intrusion from coworkers and the public.

If they haven't already, employers should start thinking about potential locations for nursing mothers to express milk even if they don't currently employ any pregnant individuals or new mothers. As legally required milk expression breaks are a relatively new concept, employers may want to consider addressing them in employees' training to ensure not only that nursing mothers have the facilities they need but also that other employees are sensitive to their situation and their privacy.

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