State Pregnancy Accommodation Laws Can Be a Trap for the Unwary Retailer: 7 Steps to Compliance

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Given that the retail workforce is 57% female, chances a retailer will have pregnant employees at any given time is high. The CDC warns women, "Physical demands at work could increase your chances of miscarriage, preterm birth, or injury during pregnancy." It also publishes a chart of the "Provisional Recommended Weight Limits for Lifting at Work During Pregnancy" that suggests pregnant women lift no more than 36 pounds infrequently with a repetitive lifting limit of at most 18 pounds – even with no complications. When pregnancy complications are present, doctors often restrict the individual's lifting to only a few pounds and advise against frequent bending, stooping, climbing, or other physical exertion – common tasks for a retail employee. The question then is, how should a retailer respond to a pregnant employee's notification she cannot do one or more of her job duties because of her pregnancy? Today, that answer often depends on the state law where the employee is located. This insight will provide an overview and a seven-step plan for retailers to ensure compliance.

The History of Accommodating Pregnant Employees

In 1978, Congress amended Title VII to add the Pregnancy Discrimination Act in response to a Supreme Court decision holding that sex discrimination did not include discrimination on account of pregnancy. The law required 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…." The Americans with Disabilities Act (ADA) had not been enacted and generally employers only accommodated or provided light duty to employees who had work related injuries to reduce the cost of worker's compensation. Courts routinely held employers did not have to treat pregnant employees the same as those with occupational injuries, only the same as those with non-occupational injuries. Pregnant employees were not provided light duty, but instead put on leave or even discharged.

After the passage of the ADA, pregnant employees sought to be accommodated both under the statute directly and claiming the right to be treated equally to employees with disabilities. These efforts were rebuffed by the courts for many years. The PDA simply did not require the application of a different federal law to a group of workers not directly covered by it and pregnant women generally were concluded not to have disabilities due to the limited duration of pregnancy.

In 2008, Congress amended the ADA. Significantly, it eliminated the consideration of the duration of a condition as an element of determining if an individual had a disability. After this change, pregnant employees with complications limiting their activities, such as a lifting restriction, could be considered disabled and covered under the statute. Nevertheless, and particularly in the retail sector, pregnant employees were often unable to identify accommodations that would allow them to perform their job. Instead they sought to remove the duties that exceeded their restrictions and courts properly rejected these attempts.

Then, seven years ago, the U.S. Supreme Court concluded that an employer who accommodated a substantial amount of employees' physical limitations but did not accommodate employees' physical limitations arising from pregnancy might be violating the Pregnancy Discrimination Act (*Young v. UPS*). But the Court also found the PDA did not mandate employers accommodate pregnancy related restrictions in the absence of a practice of accommodating other employees. Thus, employers were left to determine their obligations on a case-by-case basis with some concluding they were obligated to accommodate pregnancy related restrictions and some concluding they were not.

Given the difficulty of the analysis, many employers simply defaulted to accommodating pregnancy restrictions to avoid the possibility of a claim. In the aftermath of that decision, I wrote about these issues as they related to the retail sector in an insight you can read here: *The New And Evolving Standard For Accommodating Pregnant Employees*. Five years since that article, the case law remains murky and federal law still does not guarantee pregnant employees the right to continue working with restrictions.

But while *Young* created a headache for employers, it also exposed the lack of a national law requiring employers accommodate pregnancy-related restrictions. Some federal legislators have attempted to enact such a standard without success. The Pregnant Workers Fairness Act, first introduced in Congress in 2012, would have obligated employers to accommodate pregnant employees in a similar manner to their accommodation obligation under the ADA. It did not pass. It has been reintroduced in Congress several times, including in 2021 when it passed the House, but it has never become law.

States Fill the Gap

Congress has not passed a permanent new national employment law since the Family and Medical Leave Act (FMLA) in 1993. Since that time, advocates of new workplace regulation have taken their ideas to state and local governments with significant success. One of those ideas that has caught on has been the concept of mandating employers accommodate the physical restrictions of pregnant employees. Thirty states now have pregnancy accommodation laws. The difficulty for retailers is that the obligations are not clear because the language of the various state statutes differ and, being that many of them were passed recently, there is little case law interpreting them.

For example, Louisiana passed its pregnancy accommodation law in 2021. It applies to employers with 25 or more employees in Louisiana. The Act sets out specifically required accommodations that

with 25 or more employees in Louisiana. The Act sets out specifically required accommodations that are arguably broader than the reasonable accommodation obligation under the Americans with Disabilities Act with the following non-exhaustive list, "… providing scheduled and more frequent or longer compensated break periods; providing more frequent bathroom breaks; providing a private place, other than a bathroom stall, for the purpose of expressing breast milk; modifying food or drink policy; providing seating or allowing the employee to sit more frequently if the job requires the employee to stand; providing assistance with manual labor and limits on lifting; temporarily transferring the employee to a less strenuous or hazardous vacant position, if qualified; providing job restructuring or light duty, if available; acquiring or modifying equipment or devices necessary for performing essential job functions; or modifying work schedules."

The immediately apparent problem with Louisiana's law is that by expressly including these as reasonable accommodations, it eliminates a consideration as to whether providing such an accommodation would be removing an essential function of the job. In fact, unlike the ADA, there is no requirement that a pregnant employee be able to perform all the essential functions of the job. Read literally, providing lifting assistance to an employee whose job is to lift and move boxes is a reasonable accommodation.

If an employee cannot lift more than five pounds, the employer would have to assign someone else to perform all lifting involving more than five pounds even were that 95% of the job. The employer would be able to refuse the accommodation if it posed an undue hardship on the operations of the business. But the concept of undue hardship is an employer's burden to prove. While the Act also notes that an employer is not required to create a new position for the employee including a light duty position, it remains to be seen if employer with significant resources can prove that allowing an employee to perform 5% of their job poses an undue hardship.

Many states have laws that are substantially different than Louisiana's. Indiana also passed a pregnancy accommodation law in 2021 applicable to businesses with 15 or more employees. But it requires only that an employer respond to an employee's written request for an accommodation within a reasonable amount of time and does not obligate the employer to provide an accommodation. New York's pregnancy accommodation law is of older vintage – in effect since 2016 – but is much simpler requiring employers make reasonable accommodations with no explication of what accommodations are reasonable. Utah's is similar to New York's in brevity, but also makes clear that the law does not prohibit discharging an employee who is "physically, mentally, or emotionally, unable to perform the duties required by that individual's employment."

Managing the Patchwork Regulation: Your 7-Step Plan

The easy response is to allow pregnant employees to continue to come to work and perform whatever tasks are within their restrictions while placing the duties they are unable to perform on their co-workers or hiring another employee to do the job. That tack would avoid lawsuits but could have a variety of negative outcomes such as poor morale among the co-workers who are picking up the slack. It is also expensive to pay an employee to do less than all their job.

The crux is that businesses should not be required to, and certainly do not want to, provide accommodations allowing an employee to perform significantly less than all the job's duties. But saying no to an accommodation request is the trigger for a legal claim. And properly getting to "no" in response to an accommodation request, whether on account of pregnancy, religion, or disability is not an easy process. The employer must gather information, understand the employee's job duties, communicate with the employee, envision potential workplace modifications, and know the law. It is not a job for front line managers.

There are seven steps every retailer should consider taking to get it right.

1. Develop and publish a pregnancy accommodation policy. Because there is at least a possibility an accommodation might be required under federal law as well as state, the policy need not be state-specific.
2. Identify all state laws with pregnancy accommodation posting requirements and distribute the posters to stores in those states.
3. Train managers to call HR before taking any action regarding a pregnant employee. This should not be limited to pregnant employees who are explicitly asking for an accommodation. It should include any problem with any pregnant employee because an attendance or performance issue caused by pregnancy may trigger an employer's duty to accommodate even if the employee does not ask.
4. Identify the expert who will handle the questions. This could be someone in Human Resources, a third-party administrator, or legal counsel.
5. If you communicate verbally, follow up with a writing memorializing the communication. Employers may defeat claims when an employee has failed or refused to participate in the process. Having the interactions documented is critical to this defense.
6. Do not develop one-size-fits-all responses. The decision is individual to both the employee and the store in which the employee works.
7. Communicate leave rights if there is no accommodation and the employee will need to be placed on leave.

Conclusion

We will continue to monitor the latest developments related to pregnancy accommodation laws, so you should ensure you are subscribed to Fisher Phillips' Insight system to gather the most up-to-date information. If you have questions, please contact the author of this Insight, your Fisher Phillips attorney, or any attorney in our Retail Industry Team.

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