Accommodating Pregnant Employees

Insights
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On November 16, 2015, a Texas-area franchise, signed a consent decree to pay $45,000 and furnish other relief to settle a pregnancy discrimination lawsuit filed by the U.S. Equal Employment Opportunity Commission ("EEOC"). In its lawsuit, the EEOC charged that the franchise violated federal anti-discrimination laws when it forced Brooke S. Foley to take unpaid leave after the franchise's owner/general manager received information that Foley might be pregnant. According to the EEOC, the franchise would not allow Foley to continue working unless she provided a doctor's release indicating that her pregnancy was not "high-risk." The lawsuit further alleged that when Foley failed to provide such a release, and after she and her mother complained that the franchise could not require her to do so, she was fired.

The EEOC lawsuit was filed after the March 25, 2015 landmark Supreme Court decision of *Young v. UPS*. In that case, Peggy Young, the plaintiff, worked for UPS as a pickup and delivery driver. When she became pregnant in 2006, her doctor restricted her from lifting more than 20 pounds during her first 20 weeks of pregnancy and 10 pounds for the remainder. UPS informed Young that she could not work because the company required drivers in her position to be able to lift parcels weighing up to 70 pounds. As a result, Young was placed on leave without pay and subsequently lost her employee medical coverage. Young claimed that her co-workers were willing to help her lift any packages weighing over 20 pounds and that UPS had a policy of accommodating other, non-pregnant drivers. At the time, UPS accommodated (1) drivers who were injured on the job; (2) drivers who lost their Department of Transportation certifications for a variety of reasons, including DUI; and (3) drivers who suffered from a disability under the Americans with Disabilities Act (the "ADA"). UPS argued that its decision not to provide an accommodation to Young was non-discriminatory because it followed a company policy that does not take pregnancy into account-a so-called "pregnancy-blind" policy. The Supreme Court disagreed and held that a pregnant woman may show discrimination by establishing that she asked her employer for an accommodation, her employer refused, and the accommodations were granted to other groups of employees who are "similar in their ability or inability to work." The Young decision tells employers across the country, including employers in Pennsylvania, that if they are accommodating most non-pregnant workers with injuries or disabilities, while refusing to accommodate most pregnancy workers who need it, the employers are likely violating the Pregnancy Discrimination Act by placing a significant burden on pregnant workers.

Individual pregnant workers, however, may still face uncertainty about their rights in the specific

contexts of their own workplaces. In fact, pregnant workers' rights also vary by zip code. Currently, in Philadelphia, the Philadelphia Fair Practices Ordinance has been amended to require city employers to provide "reasonable" workplace accommodations for pregnant employees, such as access to water and bathroom breaks. The Philadelphia Ordinance covers pregnancy, childbirth, and "related medical conditions."

Likewise, in Pittsburgh, the Pittsburgh City Code has been supplemented to specifically include reasonable accommodations due to pregnancy, childbirth, or related medical conditions. The Pittsburgh Code requires "reasonable accommodations" for pregnant women who work for the city or who work on city contracts and bans discrimination against pregnant employees. The ordinance cites examples of discrimination from around the state, including a supermarket cashier in central Pennsylvania who lost her job because she followed her doctor's orders to carry a water bottle and a pregnant security guard who was denied a request to sit down part of her shift in downtown Pittsburgh.

Pennsylvania may extend these protections statewide through the Pennsylvania Pregnant Workers Fairness Act (PPWFA), which would require a covered employer to make reasonable accommodations for pregnant workers and preventing employers from forcing women out on leave when another reasonable accommodation would allow them to continue working. The bill would also bar employers from denying employment opportunities to women based on their need for reasonable accommodations related to pregnancy, childbirth, or related medical conditions.

Given the Supreme Court's decision in Young, the EEOC's current enforcement position, the expansion of the ADA (such that shorter-term complications arising from pregnancy may qualify as a disability), the increasing number of local and statewide laws providing ADA-like accommodation protections for pregnant employees, employers in Pennsylvania should:

1. Review anti-discrimination, benefits, leave of absence, light duty, and accommodation policies to make necessary changes to ensure they are compliant with the law;
2. Train managers and human resources professionals on rights and responsibilities under the Pregnancy Discrimination Act (the "PDA"), the ADA, and other statutes that bear on pregnancy, specifically on the duty to accommodate restrictions related to pregnancy, childbirth, or lactation;
3. Evaluate whether a restrictive leave policy disproportionately impacts pregnant workers;
4. Take pregnancy discrimination complaints very seriously and protect employees who complain from retaliation;
5. Investigate pregnancy discrimination complaints promptly, thoroughly, and effectively, and take corrective action as necessary;
6. Have a process in place for expeditiously considering reasonable accommodation requests made by employees with pregnancy-related disabilities and for granting accommodations, absent undue hardship.

7. Ensure that business reason for employment actions are well-documented;
8. Make hiring, promotion and other employment decisions without regard to stereotypes or assumptions about women affected by pregnancy, childbirth, or related medical conditions; and
9. Disclose information about fetal hazards imposed by the working conditions to applicants and employees and accommodate resulting requests for reassignment, where feasible.

Additionally, keep in mind that Pennsylvania currently does not require state family and medical leave for employees of private sector employers, but that if an employer provides leave for temporary disabilities, it also must provide leave for pregnancy and pregnancy-related conditions. Likewise, if an employer has a policy that allows female employees to take time off following the birth of a child the same leave must be made available to male employees.