

A Battle for Reasonable Accommodation of Pregnant Employees Has Been Won . . . But the War Rages On

Aug 13 2014

Practice Area: Labor and Employment

Employers are aware that they must reasonably accommodate disabled employees. Most employers also are aware that they have some obligation to accommodate pregnant employees. However, the obligation to accommodate pregnant employees is not explicitly stated in the Pregnancy Discrimination Act ("PDA"). Rather, this obligation is "court-made".

Right now, all three branches of the federal government are trying to clarify and define these obligations. In the legislative branch, the pending Pregnant Worker's Fairness Act ("PWFA") seeks to include reasonable accommodation as a requirement under the PDA. However, the PWFA has stalled in Congress. Over in the judicial branch, the United States Supreme Court is considering whether the PDA requires employers to provide accommodations to pregnant employees to the same extent they provide them to disabled workers in *Young v. United Parcel Service*.

The EEOC Issues Guidance.

Because we cannot expect definitive action from either Congress or the Supreme Court any time soon, the Executive Branch—namely the Equal Employment Opportunity Commission ("EEOC")—has stepped in. On July 14, 2014 the EEOC issued a 35-page guidance document on reasonable accommodation of pregnant employees. Although EEOC guidance does not carry the force of law, it certainly offers a clear, if not restrictive, path for employers to establish a defensible position when addressing accommodation issues for pregnant employees. Recognizing that employers might shy away from 35 pages of guidance, the EEOC has issued a fact sheet and a Q & A document summarizing the guidance that they have issued.

The EEOC's guidance summarizes fundamental PDA requirements – that an employer may not discriminate against an employee based on pregnancy, childbirth, or related medical conditions; and that women affected by pregnancy, childbirth, or related medical conditions must be treated the same as other persons similar in their ability or inability to work. The guidance specifically addresses the following:

- The PDA covers not only current pregnancy, but discrimination based on past pregnancy and a woman's potential to become pregnant;
- Lactation is a covered pregnancy-related medical condition;
- When reasonable accommodation must be offered to pregnant employees;
- Suggested reasonable accommodations;
- Light duty for pregnant employees;
- Leave for pregnancy and related medical conditions as an accommodation;
- Employers cannot require pregnant workers to take leave if they remain able to perform their job duties;
- Parental leave (as opposed to medical leave for childbirth and recovery from childbirth) must be provided to similarly-situated men and women on the same terms; and
- Best practices to avoid pregnancy discrimination suits.

What Do I Do?

The push-and-pull between EEOC guidance, current court decisions, and pending legislation leaves employers in a state of flux and downright confusion. Until we receive clarification from at least one branch of government—either in the form of passage of the PWFA, a decision in *Young*, or revised EEOC regulations—employers should consider the following:

Do:

- Enter into the interactive process if accommodation is requested;
- Require documentation of medical need for accommodation;
- Accommodate lactation needs by providing break time and an appropriate secured, private space;
- Provide paternity leave to male employees if you also provide maternity leave;
- If you would offer a particular accommodation to a disabled employee, offer the accommodation to a pregnant employee seeking accommodation;
- Consider schedule modifications as an accommodation;
- Consider light duty as an accommodation;
- Include pregnancy in any written accommodation policy;
- Review your leave policies; and
- Review your light duty policies.

Don't:

- Ask about an employee's plans to have children;
- Ask about an employee's pregnancy status;
- Remove job duties of a pregnant employee if she has not provided medical certification of the need to do so; and
- Consider periods of absences or leave in hiring or promotion.

With the issuance of this EEOC guidance, employers will need to re-evaluate their accommodation and leave procedures.

von Briesen & Roper Legal Update is a periodic publication of von Briesen & Roper, s.c. It is intended for general information purposes for the community and highlights recent changes and developments in the legal area. This publication does not constitute legal advice, and the reader should consult legal counsel to determine how this information applies to any specific situation.