

EMPLOYMENT

FACT SHEET

The Pregnancy Discrimination Act and the Amended Americans with Disabilities Act: Working Together to Protect Pregnant Workers

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There's good news for those pregnant workers who need temporary job modifications to continue working without risk to themselves or their pregnancies. The Americans with Disabilities Act was amended in 2008 to expand protections for temporarily disabled workers. These amendments, coupled with the Pregnancy Discrimination Act, mean that employers must provide reasonable accommodations for many pregnant workers who need them.

In 1978, Congress passed the Pregnancy Discrimination Act (PDA) to protect pregnant workers from discrimination in the workplace. The PDA guarantees the right not to be treated adversely because of pregnancy, childbirth, or related medical conditions. It requires employers to treat pregnant employees at least as well as other employees "not so affected but similar in their ability or inability to work."¹ As the Equal Employment Opportunity Commission (EEOC) has explained, this means that "[a]n employer is required to treat an employee temporarily unable to perform the functions of her job because of her pregnancy-related condition in the same manner as it treats other temporarily disabled employees, whether by providing modified tasks, alternative assignments, disability leaves, leaves without pay, etc."

The ADAAA Enhances Workplace Protections for Pregnant Employees

This right gained new meaning in 2008, when the Americans with Disabilities Amendments Act (ADAAA) increased protections for workers with disabilities. The ADAAA significantly broadened the universe of disabilities for which employers are required to provide reasonable accommodation—that is, a modification or

adjustment that enables a person to do the core parts of his or her job. The ADAAA expanded the definition of "disability" to include temporary impairments³ and less severe impairments.⁴ Now even relatively minor impairments like a back injury that leaves someone unable to lift more than 20 pounds for several months or an impairment that causes shortness of breath when walking reasonable distances must be accommodated under the ADAAA.

What does the ADAAA have to do with pregnant workers? The ADAAA affects pregnant workers on-the-job rights in two important ways.

First, because the ADAAA expanded the definition of disability to reach temporary and less severe impairments, certain impairments resulting from pregnancy are now considered disabilities for which employers must provide reasonable accommodation, though pregnancy itself is not a disability covered by the ADAAA.⁵ Pregnancy-related impairments such as hypertension, gestational diabetes, severe nausea, and sciatica are disabilities covered by the ADAAA when they substantially limit a major life activity.⁶

Second, even if a particular pregnancy-related limitation is not a "disability" under the ADAAA because it arises

out of a normal, healthy pregnancy and is not considered to be an impairment, the PDA will often require the employer to accommodate the limitation. This is because the ADAAA requires employers to accommodate a wide range of temporary disabilities, and so many employees now covered under the ADAAA are “similar in their ability or inability to work” to employees who need job modifications because of pregnancy. The PDA says that pregnant workers must be treated as well as those temporarily disabled employees. In other words, the PDA’s equal treatment rule requires employers to make the same accommodations for limitations arising out of pregnancy that they would provide under the ADAAA to workers with similar limitations arising out of disability. These illustrations show how the PDA and the ADAAA interact:

- Maria works at the deli counter at a grocery store and occasionally has to assist with heavy lifting. When Maria became pregnant, her doctor advised that as a precautionary measure, Maria should avoid lifting more than 20 pounds. Under the ADAAA, an employer has a duty to accommodate an employee with a temporary back injury resulting in a 20-pound lifting restriction if it can do so without undue hardship.⁷ Under the PDA, the employer owes the same treatment to Maria because she is similar in her ability to work to an employee with a temporary back-injury: both employees are unable to lift more than 20 pounds. As a result, Maria is entitled to a reasonable accommodation such as reassignment of the occasional heavy lifting tasks, if the accommodation would not impose an undue hardship on the employer.
- Jane works as a cashier at a cafeteria. Late in her pregnancy, her doctor advises her that she should limit standing for long periods of time to avoid discomfort and potential complications. Under the ADAAA, an employer has a duty to accommodate an employee with a leg condition that precludes standing for more than two hours without significant pain.⁸ Under the PDA, the employer owes the same treatment to Jane because she is similar in her ability to work to an employee with such a leg condition: neither employee can stand for several hours at a time. Together, the PDA and the ADAAA entitle Jane to a reasonable accommodation, such as a stool to allow her to sit while working.

What Is a Reasonable Accommodation?

Under the ADA, reasonable accommodations are modifications or adjustments that enable a person to do the core parts of her job.⁹ For example, reasonable accommodations can include “job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, . . . and other similar accommodations.”¹⁰ Whether an accommodation is reasonable is determined on a case-by-case basis.¹ Relevant factors include the effectiveness of the accommodation in allowing the employee to perform her job and the cost or burden of an accommodation.¹² An employer must make a reasonable accommodation for a pregnant worker with a pregnancy-related impairment that rises to the level of a disability. An employer must also make a reasonable accommodation for a pregnant worker who is limited in her ability to work when the employer would accommodate a worker with a similar limitation arising out of a temporary disability.

What Types of Reasonable Accommodations Might Be Required for Pregnant Workers?

The below examples illustrate types of accommodations the PDA and/or the ADAAA can require employers to provide for pregnant workers.

Modified Work Schedules

Schedule modification as a reasonable accommodation “may involve adjusting arrival or departure times, providing periodic breaks, [and] altering when certain functions are performed.”¹³ For example, providing breaks to a worker regularly experiencing extreme nausea will be a reasonable accommodation if such breaks do not pose an undue hardship.¹⁴ Because pregnancy must be treated as well as temporary disability and because severe nausea can itself constitute a disability, modifying a pregnant worker’s schedule to have a later start time would be an appropriate accommodation absent undue hardship, if she experiences morning sickness that makes it difficult for her to work during the early morning hours.

Modified Workplace Policies

Modification of workplace policies can be a reasonable accommodation.¹⁵ For example, modifying a “no food or drink” policy for an employee with a disability who

has a medical reason for eating or drinking on the job will typically be a reasonable accommodation.¹⁶ This form of accommodation would be appropriate for a pregnant employee who experiences painful or potentially dangerous uterine contractions when she does not regularly drink water, because pregnancy must be treated as well as a temporary disability that similarly limits the employee's ability to work. In addition, the contractions themselves could constitute a disability entitled to accommodation.

Reassignment to a Vacant Position

An employee with a disability may be re-assigned to a different position if a position is available for which the individual is qualified and if the reassignment can be accomplished without undue hardship to the employer.¹⁷ If a pregnant employee's job required her to lift heavy objects frequently and her pregnancy rendered this impossible or dangerous, the pregnant employee would thus be entitled to temporary reassignment to a vacant job for which she was qualified that did not require heavy lifting, because the employer must treat pregnancy as well as it treats temporary disabilities that similarly affect ability to work. In addition, the factors making lifting dangerous for the particular worker could constitute a pregnancy-related impairment rising to the level of disability.¹⁸

Providing or Modifying Equipment

An employer must provide assistive equipment or devices as a reasonable accommodation, absent an undue hardship.¹⁹ Thus, absent an undue hardship, an employer would be required to provide a stool to a pregnant employee whose job typically requires her to stand and who has difficulty standing for long periods because of her pregnancy, both because the employer must treat pregnancy as well as it treats disability and because a pregnancy-related inability to stand for long periods might itself constitute a disability.²⁰

Job Restructuring

Restructuring a job can be a reasonable accommodation for an employee with a disability.²¹ This includes reassigning tasks that are not key to the employee's job that the employee is not able to perform because of a disability, or changing how or when a task is performed.²² The sort of accommodation would be appropriate, for example, if an employee was unable to climb ladders late in her pregnancy because of problems with balance and thus

was unable to perform occasional tasks that required her to climb a ladder, because the pregnancy-related limitation must be treated as well as a similar limitation arising out of disability. These occasional tasks could be reassigned to another employee, while the pregnant worker could instead be assigned other occasional tasks that did not require climbing ladders.

Light Duty

"Light duty" generally refers to work that is less demanding than normal job duties. It might also mean simply excusing an employee from performing those job functions that he or she is unable to perform because of impairment. Reassigning an employee to an available light duty position for which she is qualified can be a reasonable accommodation, if a reasonable accommodation will not allow an employee to continue to perform her usual job.²³ Moreover, an employer cannot refuse to assign an employee with a disability to an available light duty based on a rule that light duty positions are reserved for employees with on-the-job injuries.²⁴ For example, a police department that makes light duty positions available to officers injured on the job might be required to reassign a pregnant police officer to an available light duty position for which she were qualified if at some point during her pregnancy she were physically unable to perform her usual job duties due to a pregnancy, either because it would be required to make such an accommodation for a worker similarly unable to work because of disability, or because the worker's inability to perform her usual duties arose from a pregnancy-related impairment rising to the level of disability.

Enforcement of Employers' Obligations to Provide Accommodations to Pregnant Workers Who Need Them

Because the ADAAA is a relatively new law and courts have so far had little opportunity to interpret its provisions as they apply to pregnant workers, many employers remain unaware that they are often legally required to make reasonable accommodations for those pregnant workers who need them. Fortunately, the EEOC (the federal agency responsible for enforcing the PDA and the ADA) has identified accommodating pregnancy-related limitations under the ADAAA and the PDA as a strategic enforcement priority through 2016.²⁵ This important commitment will help ensure that employers and pregnant workers better understand the protections provided under law.

- 1 42 U.S.C. § 2000e(k).
- 2 29 C.F.R. Pt. 1604, App., Q&A 5.
- 3 29 C.F.R. § 1630.2(j)(1)(ix) ("The effects of an impairment lasting or expected to last fewer than six months can be substantially limiting within the meaning of this section."). By including temporary disabilities, Congress overturned previous court decisions applying the ADA's protections only to individuals with long-term or permanent conditions. See *Toyota Motor Mfg. v. Williams*, 534 U.S. 184, 185 (2002) ("The impairment's impact must . . . be permanent or long term.").
- 4 29 C.F.R. Pt. 1630, App., § 1630.2(j).
- 5 *Id.* § 1630.2(h).
- 6 *Id.* § 1630.2(h), (j)(1)-(3).
- 7 *Id.* § 1630.2(j)(1)(viii) ("someone with an impairment resulting in a 20-pound lifting restriction that lasts or is expected to last for several months is substantially limited in the major life activity of lifting").
- 8 *Id.* § 1630.2(j)(4) ("a person whose back or leg impairment precludes him or her from standing for more than two hours without significant pain would be substantially limited in standing").
- 9 ADA regulations define "reasonable accommodation" as: "(i) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or (ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable an individual with a disability who is qualified to perform the essential functions of that position; or (iii) Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities." 29 C.F.R. § 1630.2 (o)(1) (2012).
- 10 42 U.S.C. § 12111(9)(B); 29 C.F.R. § 1630.2(o)(2)(ii).
- 11 See, e.g., *Wernick v. Federal Reserve Bank of New York*, 91 F.3d 379, 385 (2d Cir. 1996) (holding that an employer must assess on a case-by-case basis whether a particular reasonable accommodation would cause undue hardship). See also EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ENFORCEMENT GUIDANCE: REASONABLE ACCOMMODATION & UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT, 2002 WL 31994335 at *4 (E.E.O.C. Guidance Oct. 17, 2002) [hereinafter "EEOC ENFORCEMENT GUIDANCE."]
- 12 *Id.* at *3-4.
- 13 *Id.* at Q. 22, *17-18.
- 14 *Id.* (describing an HIV-positive employee who must take medication that causes extreme nausea on a strict schedule and indicating that permitting a daily 45-minute break when the nausea occurs would be required unless such breaks posed an undue hardship).
- 15 42 U.S.C. § 12111(9)(B).
- 16 The EEOC provides the following example:

An employer has a policy prohibiting employees from eating or drinking at their workstations. An employee with insulin-dependent diabetes explains to her employer that she may occasionally take too much insulin and, in order to avoid going into insulin shock, she must immediately eat a candy bar or drink fruit juice. The employee requests permission to keep such food at her workstation and to eat or drink when her insulin level necessitates. The employer must modify its policy to grant this request, absent undue hardship.

EEOC ENFORCEMENT GUIDANCE, *supra* note 11, at Q.24, *19-20.
- 17 *Id.*; 29 C.F.R. § 1630.2(o)(2)(ii) (2012).
- 18 Cf., e.g., *EEOC v. HWCC-TUNICA, Inc.*, 2009 WL 2356077 (N.D. Miss. July 30, 2009) (denying employer's motion for summary judgment in case challenging employer's refusal to reassign a casino worker to a position in which she could remain seated as a reasonable accommodation of the employee's disability).
- 19 42 U.S.C. § 12111(9)(B); 29 C.F.R. § 1630.2(o)(2)(ii).
- 20 The EEOC has noted that if a cashier becomes fatigued easily because of lupus and, as a result, has difficulty standing during her shift, a stool is a reasonable accommodation: "This accommodation is reasonable because it is a common-sense solution to remove a workplace barrier being required to stand when the job can be effectively performed sitting down. This "reasonable" accommodation is effective because it addresses the employee's fatigue and enables her to perform her job." EEOC ENFORCEMENT GUIDANCE, *supra* note 11, at *3.
- 21 42 U.S.C. § 12111(9)(B).
- 22 EEOC ENFORCEMENT GUIDANCE, *supra* note 11, at Q.16, *14 (providing an example of reasonably accommodating an employee on a cleaning crew who has a prosthetic leg and cannot easily climb stairs by reallocating tasks, so the employee cleans a small kitchen and another employee sweeps steps).
- 23 EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, TECHNICAL ASSISTANCE MANUAL: TITLE I OF THE ADA § 9.4 (1992).
- 24 EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ENFORCEMENT GUIDANCE: WORKERS COMPENSATION AND THE ADA Q.28 (2000), <http://www.eeoc.gov/policy/docs/workcomp.html>; see generally *Office of the Architect of the Capitol v. Office of Compliance*, 361 F.3d 633, 641 (Fed. Cir. 2004) ("[T]he fact that a possible accommodation may conflict with an employer's workplace rules and policies does not necessarily mean that such an accommodation is not reasonable.").
- 25 EEOC Strategic Enforcement Plan FY 2013-2016, available at <http://www.eeoc.gov/eeoc/plan/sep.cfm>.