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EMPLOYMENT

FACT SHEET

Accommodating Pregnancy On the Job: Lessons from the Americans with Disabilities Act

June 2015

The Pregnant Workers Fairness Act (PWFA, S. 1512, H.R. 2654) would promote women's health, economic security, and equal opportunity by ensuring that employers provide reasonable accommodations for those workers who need temporary changes in job rules or duties because of pregnancy, childbirth, or a related medical condition. In other words, the PWFA treats limitations related to pregnancy or childbirth in the same way that the Americans with Disabilities Act (ADA) treats disability, requiring that employers provide reasonable accommodations if they can do so without undue hardship.

The Pregnancy Discrimination Act (PDA), passed in 1978, requires employers to treat pregnant workers as well as they treat other workers who are similar in their ability to work.[1] In *Young v. UPS*, the Supreme Court recently set out a test for determining when an employer who accommodates some non-pregnant workers with physical limitations must also accommodate those pregnant workers who need it.[2] It held that an employer that fails to accommodate pregnant workers violates the PDA when its accommodation policies impose a "significant burden" on pregnant workers that outweighs any justification the employer offers for those policies.[3] One way to show accommodation policies impose a significant burden on pregnant workers is by showing that an employer accommodates a large percentage of non-pregnant workers who need it, but fails to accommodate a large percentage of pregnant workers with similar needs.[4]

The *Young* decision is an important victory for pregnant workers, but the multi-step balancing test it sets out will still leave too many employers and employees confused about when exactly the PDA requires pregnancy accommodations.[5] The PWFA, in contrast, would provide a straightforward, unmistakable, and predictable rule that ensures reasonable accommodations are available to a pregnant worker based on her own situation and needs, whether or not she can identify a nonpregnant employee who has received the same accommodation, or show that a "large percentage" of nonpregnant workers were accommodated.

What is a "reasonable accommodation"?

The PWFA incorporates the ADA's definition of "reasonable accommodation." Under the ADA, reasonable accommodations are modifications or adjustments that enable a person to do the core parts of her job.[6] 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."[7] Whether an accommodation is reasonable is determined on a case-by-case basis.[8] Relevant factors include the effectiveness of the accommodation in allowing the employee to perform her job and the cost or burden to the employer of providing an accommodation.[9]

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What types of accommodation might be reasonable under the PWFA?

Ample experience and guidance under the ADA have helped make clear what constitutes a reasonable accommodation. The PWFA will ensure the same sorts of accommodations are available to workers with medical needs arising from pregnancy, childbirth, and related medical conditions, provided that such accommodations do not cause undue hardship for the employer.[10] Below, examples of reasonable accommodations under the ADA drawn from EEOC Guidance and court decisions illustrate some of the ways in which a reasonable accommodation requirement would be applied to 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."[11] 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 to the employer.[12] Likewise, 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.[13] 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.[14] This form of accommodation would also be appropriate for a pregnant employee who is at risk of painful or potentially dangerous uterine contractions if she does not regularly drink water.

Reassignment to a Vacant Position

An employee with a disability may be reassigned 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.[15] Under the PWFA, if a pregnant employee's job required her to lift heavy objects frequently and her pregnancy rendered this impossible or dangerous, it would similarly be a reasonable accommodation to reassign her temporarily to a vacant job for which she was qualified that did not require heavy lifting, absent undue hardship.[16]

Providing or Modifying Equipment

An employer must provide assistive equipment or devices as a reasonable accommodation to a person with a disability, absent an undue hardship.[17] Similarly, under the PWFA, an employer would be required to provide a stool to a pregnant employee whose job typically requires her to stand and whose doctor has advised her to avoid standing for long periodsin order to avoid potential pregnancy complications, unless providing the stool posed an undue hardship.[18]

Job Restructuring

Restructuring a job can be a reasonable accommodation for an employee with a disability.[19] This includes reassigning tasks that are not key to the employee's job and that the employee is not able to perform because of a disability, or changing how or when a task is performed.[20] The sort of accommodation would be appropriate, absent undue hardship, if an employee was unable to climb ladders late in her pregnancy because of problems with balance, for example, and thus was unable to perform occasional tasks that required her to climb a ladder. 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 with a disability 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.[21] 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.[22] Similarly, under the PWFA, an employer that makes light duty

positions available to employees injured on the job would be required to reassign a pregnant worker 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, absent any undue hardship to the employer.

What additional guidance does the PWFA provide regarding reasonable accommodations for pregnant workers?

The PWFA requires that within two years of its enactment, the EEOC must issue regulations setting out examples of reasonable accommodations for limitations related to pregnancy, childbirth, or related medical conditions. These regulations will outline accommodations that typically should be provided to a job applicant or employee affected by such limitations, unless in the employer's particular circumstances, the accommodation would impose an undue hardship. The examples will provide important, concrete guidance to employers and employees regarding the scope of the PWFA's protections.

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[1] 42 U.S.C. 2000e(k) (2012).
[2] 135 S. Ct. 1338 (2015).
[3] *Id.* at 1354.
[4] *Id.* at 1354-55.
[5] *Id.* at 1348.
[6] 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).
[7] 42 U.S.C. § 12111(9)(B); 29 C.F.R. § 1630.2(o)(2)(ii).
[8] *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."]
[9] EEOC ENFORCEMENT GUIDANCE *supra* note 8 at *3-4.
[10] In some instances, of course, the limitation experienced by the pregnant worker will itself constitute a disability under the ADA; in such instances, the worker is entitled to reasonable accommodations under current law. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ENFORCEMENT GUIDANCE: PREGNANCY DISCRIMINATION AND RELATED ISSUES, NO. 915.003 (Jul. 14, 2014), *available at* http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm. The PWFA, however, would ensure that all pregnant workers with a medical need for it are entitled to accommodation, whether the need arises from a pregnancy-related disability, or from pregnancy itself, a distinction that has often led to courts rejecting pregnant workers' ADA claims. .See, e.g., Lang v. Wal-Mart Stores East, L.P., No. 13-CV-349-LM, 2015 WL 898026 (D.N.H. Mar. 3, 2015) reconsideration denied, No. 13-CV-349-LM, 2015 WL 1523094 (D.N.H. Apr. 3, 2015) (finding that a pregnant worker who did not experience any complications during her pregnancy was not covered by the ADA because her lifting restrictions were not the result of a pregnancy-related disability).
[11] *Id.* at EEOC ENFORCEMENT GUIDANCE, *supra* note 7, at 5 Q. 22, *17-18.
[12] *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).
[13] 42 U.S.C. § 12111(9)(B).
[14] 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 5, at Q.24, *19-20.
[15] *Id.*; 29 C.F.R. § 1630.2(o)(2)(ii) (2012).
[16] *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).
[17] 42 U.S.C. § 12111(9)(B); 29 C.F.R. § 1630.2(o)(2)(ii).
[18] 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 8, at *3.
[19] 42 U.S.C. § 12111(9)(B).
[20] EEOC ENFORCEMENT GUIDANCE, *supra* note 8, at Q.16, *14 (providing an example of 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).
[21] EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, TECHNICAL ASSISTANCE MANUAL: TITLE I OF THE ADA § 9.4 (1992).
[22] 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.").