TEXAS YOUNG LAWYERS ASSOCIATION

PREGNANCY AND THE WORKPLACE: KNOW YOUR RIGHTS

A GUIDE FOR EMPLOYEES

PREGNANCY

AND

THE WORKPLACE:

KNOW YOUR RIGHTS

A Guide for Employees

The Texas Young Lawyers Association

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Introduction

Protections are expanding for pregnant and lactating women in the workplace. Understanding your rights if you are working and become pregnant is essential, not only to peace of mind while you await the birth of your child, but for a sense of security after your child is born. This guide is designed to help you understand your employer's legal obligations to pregnant employees from the hiring phase to their return to work after childbirth.

What Are My Employer's Obligations Toward Pregnant Employees?

Protections for pregnant workers vary from state to state. However, federal law prohibits workplace discrimination and obligates employers to accommodate certain medical conditions arising from pregnancy.

The Pregnancy Discrimination Act

The Pregnancy Discrimination Act ("PDA") prohibits a public, private or government contractor employer with fifteen or more employees from discriminating against an employee or applicant on the basis of pregnancy. Under the PDA, an employer may not make employment decisions because of pregnancy, childbirth, or related medical conditions. This means an employer cannot take certain actions, including: refusing to hire, firing, demoting, denying a promotion, or making any other decision that adversely affects an employee if pregnancy, childbirth or a related medical condition is a motivating factor in the decision.

The PDA also requires that employers treat women affected by pregnancy, childbirth or related medical conditions the same as other applicants or employees for all employment-related purposes, including receipt of benefits. Benefits such as health insurance must be provided for pregnancy-related conditions if benefits are provided for other medical conditions.

The PDA also prohibits employers from singling-out pregnancy-related conditions for special procedures to determine an employee's ability to work. This means employers cannot establish arbitrary rules requiring pregnant employees to remain on leave for a predetermined amount of time.

If an employee is temporarily unable to perform her job duties because of a pregnancy-related condition, she must be treated the same as any other temporarily disabled employee. An employer must hold open a job for a pregnancy-related absence for the same length of time as the job is held open for an employee on sick or disability leave for other medical conditions.

The PDA also protects employees from harassment because of pregnancy, childbirth, or a related medical condition. Harassment, that is severe or pervasive, or that affects an employment decision such as hiring, firing or promotion, could result in liability against an employer.

The Americans with Disabilities Act

The Americans with Disabilities Act (ADA) protects qualified individuals with a disability, including those persons regarded as having a disability, from discrimination in the workplace. The ADA also provides reasonable accommodations to qualified individuals with disabilities.

Pregnancy is not a "disability" under the ADA. Under the ADA, however, various pregnancy-related complications (*e.g.* gestational diabetes) may render an employee disabled for purposes of the Act. A pregnant employee is not a "qualified individual with a disability," unless she can perform the essential functions of the job with or without a reasonable accommodation. Where an employee can perform her job with accommodation, the ADA requires employers to work with the employee unless the employer can demonstrate that the accommodation would pose an undue hardship.

Reasonable accommodations for workers with a pregnancy-related disability can include job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment, adjustment or modification of examinations, training materials or policies, the provision of interpreters or readers, and making existing facilities readily accessible and usable by individuals with disabilities.

Although leave is not specifically mentioned as a reasonable accommodation, the EEOC and courts have taken the position that an employee may take leave as a reasonable accommodation under the ADA. The topic of reasonable accommodation can have important implications for pregnant employees, especially those with pregnancies that rise to the level of a "disability," who do not otherwise qualify for leave under the Family and Medical Leave Act (discussed below). Concern with having

to grant leave to women with high-risk pregnancies is no excuse for discriminatory treatment. The ADA also prohibits employers from denying employment opportunities to a job applicant or employee who is a qualified individual with a disability in order to avoid making reasonable accommodations.

Does My Employer Have To Provide Maternity Or Paternity Leave?

While some states have laws mandating “maternity” leave, there is no federally mandated “maternity” leave *per se*. The Family and Medical Leave Act (FMLA), however, permits eligible employees the right to take up to twelve weeks (and upwards of twenty-six weeks in some cases) of job-protected leave from work for certain “qualifying events.” The FMLA, however, does not require that the leave be paid. Consequently, employers may require their employees to utilize other types of leave such as paid time off (PTO), sick time or short term disability, which may be paid or unpaid depending upon the employer’s policies.

The FMLA only applies to employers with fifty or more employees within a seventy-five mile radius for twenty calendar weeks in the current or preceding calendar year are covered employers under the Act. The FMLA also covers public agencies, public and private elementary and secondary schools regardless of the number of employees.

For an employee to be eligible for FMLA leave, she must have been employed for the twelve months preceding the leave and worked at least 1,250 hours during those twelve months. The employee must also work at a worksite having at least fifty employees within a seventy-five-mile radius.

Qualifying pregnancy, maternity, and paternity-related events include:

- Birth and care of the employee’s newborn or adopted child;
- Placement of a child by the State for foster care;
- The need to care for the employee’s child with a serious health condition; and
- A serious health condition that makes the employee unable to perform the functions of her position.

FMLA can be taken on a continuous, intermittent or reduced schedule basis if the employer agrees. If the newborn child has a serious health condition or the mother has a serious health condition related to the birth of the child, the employer's agreement is not required.

Pregnancy, however, is not a serious health condition unless there are complicating serious medical or health conditions of the baby or mother that render the mother unable to work. In those limited cases, FMLA leave is available. Such serious health conditions include illnesses, injuries, impairments, or physical or mental conditions involving: (1) any period of incapacity due to pregnancy or prenatal care; or (2) absences attributable to pregnancy or chronic conditions, even if the employee or covered family member does not receive treatment from a health care provider during the absence (*i.e.* severe morning sickness).

Under the FMLA, employers are also prohibited from interfering with, restraining or denying the exercise or attempt to exercise any FMLA rights, including discouraging employees from taking leave; and imposing more stringent requirements on employees taking FMLA leave.

What Are My Obligations To My Employer If I Want To Take Leave For The Birth Of My Baby

Employees planning to take FMLA leave following childbirth or adoption should provide at least thirty days written notice to their employer prior to taking leave. In circumstances where such notice is not possible, the employee should provide notice of the need for FMLA leave as soon as possible.

Employees should also provide medical proof of the need for FMLA leave. Note, the employer may request second or third medical opinions at the employer's expense. A failure to provide a medical certification for the need for the FMLA leave could result in denial of leave. Employers may also require occasional "check-in" to verify the employee's FMLA status and intent to return to work.

Employees should also make arrangements to ensure that their benefits are not interrupted while on FMLA leave, and address issues regarding the use of accrued paid time off, sick leave, disability leave or other leave that the employer may require the employee exhaust prior to taking, or may run concurrently with, FMLA leave.

What Are My Employer's Obligations Once I Return From A Pregnancy-Related Leave?

Generally, at the conclusion of a qualified leave period the employer must reinstate the employee to her former or equivalent position, with the same terms and benefits. An equivalent position, for purposes of the FMLA, is nearly identical to the employee's former position in terms of pay, benefits, and working conditions, including privileges, prerequisites, and status. It must involve the same or substantially similar duties and responsibilities. The FMLA also prohibits employers from imposing rules restricting employees from returning to work for a predetermined time after childbirth.

Employers may not treat female employees with infants or young children less favorably than other employees. Doing so subjects employers to liability under Title VII. Additionally, under the ADA employers may not refuse to hire a person because he or she has a child with a disability out of concern that he or she would need more time off work or due to concerns about an increased cost of insurance.

Nursing and Lactating Employees

The Patient Protection and Affordable Care Act (ACA) amended Section 7 of the Fair Labor Standards Act (FLSA) to provide that certain employees receive breaks for the purpose of pumping breast milk at work. There is no requirement, however, that these breaks be paid.

The ACA's requirements concerning lactation apply to employers with fifty or more employees. Employers with fewer than fifty employees are exempt from coverage if they can establish that compliance would impose an undue hardship. Under the ACA, only non-exempt employees (those exempt from the overtime requirements of Section 7 of the FLSA) are entitled to the lactation protections afforded by the ACA. Stated differently, employees who qualify for an exemption from the FLSA's minimum wage and overtime provisions are not covered.

Under the ACA, employers are required to provide "a reasonable break time to express breast milk for their nursing child each time such employee has a need to express breast milk for one year after the child's birth." Additionally, employees are entitled to "a place, other than a bathroom, that is shielded from view and free from intrusion from co-workers and the public, which may be used by the employee to express

breast milk." Although an employer is not obligated to maintain a permanent, dedicated space for nursing mothers, the employer must take measures to ensure the employee's privacy. Suitable measures might include installing partitions, curtains, door locks, or signs that designate when the space is in unavailable.

What Should I Do If I Think My Employer Is Violating My Rights?

1. **Know Your Rights.** Employees should fully understand what they are entitled to and what employers are prohibited from doing under the law. The Equal Opportunity Employment Commission (EEOC) has an abundance of resources available on-line. This step may also require consultation with an attorney.

2. **Keep Good Documentation.** Employees should make requests and complaints related to pregnancy or leave in writing and document the employer's response. Include names, dates, and record as much detail concerning the situation or conversation as possible. Employees should also keep medical documentation concerning their pregnancy, childbirth or any serious health conditions of the employee or the child.

3. **Follow Your Employer's Policies for Making a Complaint.** Many employers have written policies in place for making a complaint or otherwise addressing pregnancy and leave related issues. Follow the employer's policy including the appropriate chain-of-command.

4. **File a Charge of Discrimination.** If the employee believes she is being discriminated against because of pregnancy, childbirth or a related medical condition, she should file a formal complaint called a Charge of Discrimination with the nearest EEOC office or similar state agency.

5. **Contact a Lawyer.** There are many lawyers who have experience representing pregnant employees in connection with securing or enforcing their rights. If an employee suspects that her rights have been violated, she should find a local attorney who practices in the area of employment discrimination to discuss the details of the situation.

For more information on employer obligations to pregnant and lactating workers and those with caregiving responsibilities, visit http://www.eeoc.gov/laws/types/pregnancy.cfm

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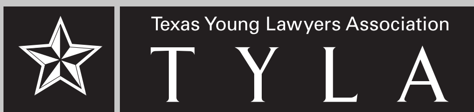

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A Guide for Employers

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Introduction

The U.S. workforce has changed significantly over the past forty years. For instance, Pew Research indicates 40% of households with children under the age of eighteen include mothers who are either the sole or the primary source of income, as compared to just 11% in 1960. The law has responded to these changes, expanding protections for pregnant and lactating women in the workplace. Understanding your obligations to pregnant workers is essential to minimizing liability. This guide is designed to help employers understand their basic legal obligations to pregnant employees, from notification of a pregnancy, to the employee's return to work after childbirth.

What Are My Obligations Toward Pregnant Employees?

Protections for pregnant workers vary from state to state. However, several federal laws prohibit workplace discrimination and obligate employers to accommodate certain medical conditions arising from pregnancy.

The Pregnancy Discrimination Act

The Pregnancy Discrimination Act ("PDA") prohibits a public, private or government contractor employer with fifteen or more employees from discriminating against an employee or applicant on the basis of pregnancy. Under the PDA, it is unlawful for an employer to make employment decisions because of pregnancy, childbirth, or related medical conditions. This means an employer cannot take certain actions, including: refusing to hire, firing, demoting, denying a promotion or making any other decision that adversely affects an employee if pregnancy, childbirth or a related medical condition is a motivating factor in the decision.

The PDA also requires that women affected by pregnancy, childbirth or related medical conditions be treated the same as other applicants or employees for all employment-related purposes, including receipt of benefits. Benefits such as health insurance must be provided for pregnancy-related conditions if benefits are provided for other medical conditions.

The PDA also prohibits employers from singling-out pregnancy-related conditions for special procedures to determine an employee's ability to work. This means that employers cannot establish arbitrary rules requiring pregnant employees to remain on leave for a predetermined amount of time.

If an employee is temporarily unable to perform her job because of a pregnancy-related condition, she must be treated the same as any other temporarily disabled employee. An employer also must hold open a job for a pregnancy-related absence for the same length of time a job is held open for an employee on sick or disability leave for other medical conditions.

The PDA also protects employees from harassment because of pregnancy, childbirth, or a related medical condition. Harassment that is severe or pervasive, or that affects an employment decision such as hiring, firing or promotion, could result in liability against an employer.

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Pregnancy is not a "disability" under the ADA. Under the ADA, however, various pregnancy-related complications (*e.g.* gestational diabetes), may render a woman disabled for purposes of the Act. A pregnant employee is not a "qualified individual with a disability," unless she can perform the essential functions of the job with or without reasonable accommodation. Where an employee can perform her job with accommodation, the ADA requires employers to work with the employee unless the employer can demonstrate that the accommodation would pose an undue hardship.

Reasonable accommodations for workers with a pregnancy-related disability can include job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment, adjustment or modification of examinations, training materials or policies, the provision of interpreters or readers, and making existing facilities readily accessible and usable.

Although leave is not specifically mentioned as a reasonable accommodation, the EEOC and various courts have taken the position that an employee may take leave as a reasonable accommodation under the ADA. The topic of reasonable accommodation can have important implications for pregnant employees, especially those with pregnancies that rise to the level of "disability," who do not otherwise qualify for FMLA leave (discussed below). Concern with having to grant leave to women with

high-risk pregnancies is no excuse for discriminatory treatment. The ADA also prohibits employers from denying employment opportunities to a job applicant or employee who is a qualified individual with a disability in order to avoid making reasonable accommodations.

Do I Have To Provide Maternity Or Paternity Leave?

While some states have laws mandating "maternity" leave, there is no federally mandated "maternity" leave *per se*. The Family and Medical Leave Act (FMLA), however, permits eligible employees the right to take up to twelve weeks (and upwards of twenty-six weeks in some cases) of unpaid, job-protected leave from work for "qualifying events."

Employers with fifty or more employees within a seventy-five mile radius for twenty calendar weeks during the current or preceding calendar year are covered employers under the Act. The FMLA also extends to public agencies, as well as public and private elementary and secondary schools, regardless of the number of employees.

To be eligible for FMLA leave, an employee must have been employed for the twelve months preceding the leave and worked at least 1,250 hours during those twelve months.. The employee must also work at a worksite having at least fifty employees within a seventy-five mile radius.

Qualifying pregnancy, maternity, and paternity-related events include:

- Birth and care of the employee's newborn or adopted child;
- Placement of a child by the State for foster care;
- The need to care for the employee's child with a serious health condition; and
- A serious health condition that makes the employee unable to perform the functions of her position.

FMLA can be taken on an intermittent or reduced schedule basis if the employer agrees. If the newborn child has a serious health condition or the mother has a serious health condition related to the birth of the child, however, the employer's

agreement is not required. Further, intermittent or reduced schedule leave may only be taken for a qualifying exigency.

Pregnancy, however, is not a serious health condition unless there are complicating serious medical or health conditions of the baby or mother that render the mother unable to work. In those limited cases, FMLA leave is available. Such serious health conditions include illnesses, injuries, impairments, or physical or mental conditions that involving: (1) any period of incapacity due to pregnancy or prenatal care; or (2) absences attributable to pregnancy or chronic conditions, even if the employee or covered family member does not receive treatment from a health care provider during the absence (i.e. severe morning sickness).

Under the FMLA, employers are also prohibited from interfering with, restraining or denying the exercise or attempt to exercise any FMLA rights, including discouraging employees from taking leave; and imposing more stringent requirements on employees taking FMLA leave.

What Are My Obligations Once An Employee Returns From A Pregnancy, Child Birth Or Adoption-Related Leave?

Generally, at the conclusion of a qualified leave period the employee is entitled to her former or equivalent position, along with the same terms and benefits. An equivalent position, for purposes of the FMLA, is nearly identical to the employee's former position in terms of pay, benefits, and working conditions, including privileges, prerequisites, and status. It must involve the same or substantially similar duties and responsibilities. The FMLA also prohibits employers from imposing rules restricting employees from returning to work for a predetermined time after childbirth.

Employers must also ensure that they do not discriminate against workers with caregiving responsibilities once they return work. Employers who treat female employees with infants or young children less favorably than other employees could subject themselves to liability under Title VII. Additionally, employers who refuse to hire a person because he or she has a child with a disability out of concern that the employee would need more time off work, or an increased cost of insurance could be liable for disability discrimination under the ADA.

Nursing and Lactating Employees

The Patient Protection and Affordable Care Act (ACA) provides protections for nursing mothers in the workplace. The ACA amended Section 7 of the Fair Labor Standards Act (FLSA) provides that certain specified employees receive breaks for the purpose of pumping breast milk at work.

The ACA's requirements concerning breast pumping and lactation apply to employers with fifty or more employees. Employers with fewer than fifty employees are exempt from coverage if they can establish that compliance would impose an undue hardship. Under the ACA, only non-exempt employees (those exempt from the overtime requirements of Section 7 of the FLSA) are entitled to the nursing and lactation protections afforded by the ACA. Stated differently, employees who qualify for an exemption under the FLSA are not covered.

Under the ACA, employers are required to provide "a reasonable break time to express breast milk for their nursing child each time such employee has a need to express breast milk for one year after the child's birth." Factors employers should consider in determining the "reasonable time" needed for an employee to express breast milk include the time it takes to walk to and from the lactation space and the wait, if any, to use the space; whether the employee has to retrieve her pump and other supplies from another location; and whether there is a sink and running water nearby for the employee to use to wash her hands before pumping and to clean the pump attachments when she is done expressing milk.

Additionally, employers must provide "a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by the employee to express breast milk." Although an employer is not obligated to maintain a permanent, dedicated space for nursing mothers, the employer must take measures to ensure the employee's privacy. Suitable measures might include installing partitions, curtains, door locks, or signs that designate when a space is in use.

Employer Best Practices

Although no company is immune from allegations of pregnancy or caregiver-related claims, the following best practices may reduce the risk of litigation.

DO

- Review employment policies and practices relating to hiring, promotion, pay and disability accommodations to ensure they neither disadvantage nor otherwise treat pregnant employees or those who plan to take or have taken maternity leave differently.

- Develop specific, job-related qualification standards and document them.

- Ensure managers at all levels are aware of and comply with the organization's anti-discrimination policies as they relate to pregnant and lactating employees.

- Carefully consider the application of absence and disability accommodation policies, which could have a disparate impact on pregnant employees.

DON'T

- Ask interview questions about an applicant's plans to start a family, pregnancy or other questions that might give insight to the applicant's need to take pregnancy-related leave in the future.

- Single out pregnancy-related conditions for special procedures to determine an employee's ability to work.

- Assume pregnant workers are less reliable than other workers.

- Make stereotypical comments about pregnant workers or female caregivers.

- Ask applicants and employees about their childcare responsibilities (*e.g.* "Will your childcare needs prevent you from working late, weekends or holidays?" "What are your childcare arrangements?").

- Ask applicants and employees about previous absences from work to care for children with illnesses.

For more information on employer obligations to pregnant and lactating workers and those with caregiving responsibilities, visit http://www.eeoc.gov/laws/types/pregnancy.cfm

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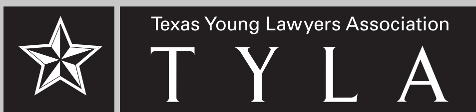

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