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Labor and Employment Law Notes

Pregnancy Discrimination on the Rise

I. The Pregnancy Discrimination Act

According to the United States Equal Employment Opportunity Commission, (“EEOC”) 4,901 pregnancy discrimination complaints were filed nationwide (with the EEOC and state and local fair employment practices agencies) in the fiscal year 2006. According to federal officials, that is a 23% increase since 1997, making pregnancy discrimination one of the fastest growing workplace bias complaints. Under federal law, employers must treat pregnancy the same way they handle a temporary illness or a medical condition. The Pregnancy Discrimination Act (“PDA”), 42 U.S.C. § 2000, applies to employers with 15 or more employees and covers areas of hiring, leave, health insurance and benefits. Discrimination on the basis of pregnancy, childbirth or related medical conditions constitutes unlawful sex discrimination under Title VII of the Americans with Disabilities Act (“ADA”). Women who are pregnant, gave birth or have a pregnancy-related medical condition must be treated in the same manner as other applicants or employees with similar abilities or limitations. Pursuant to the PDA, the following activities are forbidden:

A. Hiring

An employer cannot refuse to hire a woman because of her pregnancy-related condition as long as she is able to perform the major functions of her job. An employer cannot refuse to hire a woman because of its prejudices against pregnant workers or the prejudices of co-workers, clients or customers.

B. Pregnancy and Maternity Leave

An employer may not single out pregnancy-related conditions for special procedures to determine an employees’ ability to work. However, an employer may use any procedure used to screen another employee’s ability to work. For example, if an employer requires its employees to submit a doctor’s statement concerning their inability to work before granting leave or paying sick benefits, the employer may require employees affected by pregnancy-related conditions to submit such statements.

If an employee is temporarily unable to perform her job due to pregnancy, the employer must treat the pregnant employee the same as any other temporarily disabled employee; for example, by providing modified tasks, alternative assignments, disability leave or leave without pay. Pregnant employees must be permitted to work as long as they are able to perform their

jobs. If an employee has been absent from work as a result of a pregnancy-related condition and recovers, her employer may not require her to remain on leave until the baby's birth. An employer may not have a rule which prohibits an employee from returning to work for a predetermined length of time after childbirth. Employers must hold open a job for a pregnancy-related absence the same length of time jobs are held open for employees on non-pregnancy-related sick or disability leave.

C. Health Insurance

Any health insurance provided by an employer must cover expenses for pregnancy-related conditions on the same basis as costs for other medical conditions. Health insurance for expenses arising from abortion is not required, except where the life of the mother is endangered. Pregnancy-related expenses should be reimbursed exactly as those incurred for other medical conditions, whether payment is on a fixed basis or a percentage or reasonable and customary charge basis. The amounts payable by the insurance provider can be limited only to the same extent as costs for other conditions. No additional, increased or larger deductible can be in place. Employers must provide the same level of health benefits for spouses of male employees as they do for spouses of female employees.

D. Fringe Benefits

Pregnancy-related benefits cannot be limited to married employees. In an all female workforce or job classification, benefits must be provided for pregnancy-related conditions in the same way that benefits are provided for other medical conditions. If an employer provides any benefits to workers on leave, the employer must provide the same benefits for those on leave for pregnancy-related conditions. Employees with pregnancy-related disabilities must be treated the same as other temporarily disabled employees for accrual and crediting of seniority, vacation calculation, pay increases and temporary disabilities benefits.

II. The BFOQ Defense to a Claim of Pregnancy Discrimination Under the PDA

A. Safety of the General Public

The bona fide occupational qualification ("BFOQ") is a defense to a claim of pregnancy discrimination that acknowledges that pregnancy was a determining factor in the adverse employment decision. The employer often asserts that the restriction on the pregnant employee is necessary for the safety of the general public. *See, Harriss v. Pan American World Airways, Inc., 649 F.2d 670 (1980)* (holding that employer airline established that its policy requiring commencement of leave of employee upon pregnancy was "reasonably necessary" to passenger safety, which was essence of employer's business, and thus such policy was justified as bona fide occupational qualification.)

B. Safety of the Pregnant Employee

In pregnancy-related cases, employers often assert the BFOQ defense arguing that it is necessary for the health and safety of the pregnant employee. *See, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW v. Johnson Controls, Inc., 499 U.S. 187 (1999)* (holding an employer failed to establish a bona fide occupational qualification permitting its policy barring all women, except those whose fertility was medically documented, from jobs involving actual or potential lead exposure exceeding the

Occupational Safety and Health Administration standard; employer's professed moral and ethical concerns about welfare of the next generation did not suffice to establish BFOQ of female sterility, nor could concerns about the welfare of the next generation be considered part of the "essence" of the employer's business for purposes of establishing a bona fide occupational qualification defense).

C. Customer Preference

Employers also attempt to assert customer preference as a BFOQ. An employer may not discriminate against pregnant women based on customer preference. Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385 (1971) (holding EEOC guidelines state that a BFOQ ought not to be based on "the refusal to hire an individual because of the preferences of co-workers, the employer, clients or customers"). Customer preference may be taken into account only when it is based on the company's inability to perform the primary function or service it offers. Id.

III. The Law Pertaining to Pregnancy Discrimination In the 7th Circuit Court of Appeals and the Illinois State Court

A. 7th Circuit Court of Appeals

To prevail on a claim of pregnancy discrimination under the PDA, a plaintiff must show that she was treated differently because of her pregnancy. Atteberry v. Department of State Police, 224 F.Supp.2d 1208 (7th Cir. 2002) An unlawful employment practice occurs whenever pregnancy is a motivating factor for an adverse employment decision. Id. To prove a *prima facie* case of pregnancy discrimination, a plaintiff must prove the following: (1) She was pregnant; (2) She was performing her duties satisfactorily; (3) She suffered an adverse employment action; and (4) Similarly situated employees not in the protected class were treated more favorably. Id. Also, a disability that arises from pregnancy may be protected if it meets the ADA's requirements for a qualified disability, including that the disability is permanent or chronic. 29 C.F.R. § 1630.2(j)(2). Pregnant employees are entitled to the same benefits employees received for other disabilities, including sick leave, disability payments, and insurance. United States v. Board of Education of Consolidated High School District 230, 761 F.Supp. 524 (N.E. Ill. 1990), Aff'd, 983 F.2d 790 (7th Cir. 1993)

Moreover, although the PDA prohibits an employer from forcing a pregnant woman who remains able to work to take leave, unless the employer can show that leave is necessary because the condition of pregnancy is incompatible with continued employment, it does not prevent the employer from conditioning the availability of an employment benefit on the employee's decision to return to work after the end of the medical disability that the pregnancy causes. Maganuco v. Leyden Community High School, 939 F.2d 440 (7th Cir. 1991) (holding that a school district's sick leave and maternity policies, whose effect was to prevent those female teachers who chose to remain at home after the end of pregnancy-related disability from using sick days to cover periods of disability, did not violate PDA; impact of policies was dependent not on biological fact that pregnancy and childbirth caused some period of disability, but on teacher's choice to forego returning to work in favor of spending time with newborn child, which was not inevitable consequence of medical condition related to pregnancy).

B. Illinois State Court Decisions and Recent Proposed Legislation Relating to Pregnancy Discrimination

“We recognize that in certain instances a hiring practice which discriminates on the basis of pregnancy may constitute sex discrimination. Where, however, no men are in the job applicant pool and the hiring practice only favors non-pregnant women over pregnant women, pregnancy discrimination is not sex discrimination.” Tranquilli v. Irshad, 117 Ill.App.3d 1074 (4th Dist. 1983) Further, an employer has no affirmative duty to accommodate a pregnant worker’s work restrictions. Brown v. Walker Nursing Home, Inc., 307 Ill.App.3d 721 (4th Dist. 1999) (holding that a nursing home had no duty to retain a certified nursing assistant if she became unable to perform her job requirements as a result of her pregnancy).

Proposed Legislation: Public Act 95-25 would amend the Illinois Human Rights Act to prohibit a public employer from refusing to temporarily transfer a pregnant firefighter or peace officer at her request with the advice of her physician for the duration of her pregnancy if the transfer can be reasonably accommodated. If passed, it would be effective January 1, 2008.

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If you have questions or would like to discuss the implications of this report further, please feel free to contact Ronald L. Wisniewski at Cray Huber Horstman Heil & VanAusdal LLC, 303 West Madison, Suite 2200, Chicago IL 60606; 312-332-8824; rlw@crayhuber.com.