An Employer's Obligations Under Federal and State Pregnancy/Maternity Laws

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In the past year, the Equal Employment Opportunity Commission ("the EEOC") issued an Enforcement Guidance about pregnancy discrimination and related issues, and this March, the U.S. Supreme Court issued a decision about the federal Pregnancy Discrimination Act ("the PDA"). What are some steps that an employer can and should take to make sure it is complying with applicable pregnancy and maternity leave laws?

First, an employer should verify what federal and state laws apply to it, which is generally based on part on the number of employees. An employer must comply with *all* applicable laws. To briefly summarize the EEOC's Guidance:

The PDA clarifies that (1) an employer may not discriminate against an employee on the basis of pregnancy, childbirth, or related medical conditions; and (2) women affected by pregnancy, childbirth, or related medical conditions must be treated the same as other persons not so affected but similar in their ability or inability to work. It is unlawful to discriminate because of:

- *Current* Pregnancy
- *Past* Pregnancy
- *Potentia*l or *Intended* Pregnancy
- Medical Conditions Related to Pregnancy or Childbirth.

- Title VII's anti-harassment prohibition applies to pregnancy discrimination.

- Employers who offer employees health insurance must include coverage of pregnancy, childbirth and related medical conditions.

- Employers who have health insurance benefit plans must apply the same terms and conditions for pregnancy-related costs as for medical costs unrelated to pregnancy.

The Americans with Disabilities Act ("**the ADA**") prohibits disability discrimination in employment. Although pregnancy itself is not an impairment under the ADA, some pregnant employees may have impairments *related to* their pregnancies which in turn qualify as disabilities. For instance, a pregnant employee could experience impairments of the reproductive system, like complications requiring bed rest, or impairments involving major bodily functions such as *pregnancy-related* anemia or gestational diabetes.

- An ADA-covered employer must reasonably accommodate to an employee or a job applicant with a disability unless to do so would cause the employer "undue hardship" (i.e. significant difficulty or expense). The EEOC notes the following examples of reasonable accommodations:

    - Redistributing marginal functions that the employee is not able to perform because of the disability

    - Altering how an essential or marginal job function is performed

    - Modifying workplace policies or schedules

    - Purchasing or modifying equipment and devices

    - Granting leave (which can be unpaid leave if the employee is without accrued paid leave) in addition to what an employer would normally provide under a sick leave policy for reasons related to the disability

    - Temporarily assigning the employee to light duty

The Family and Medical Leave Act ("FMLA") covers private employers with 50 or more employees in 20 or more workweeks during the current or preceding calendar year. The FMLA also covers federal, state and local governments (regardless of the number of employees). A FMLA-eligible employee may take up to 12 workweeks of leave during any 12-month period for the birth and care of the employee's newborn child or for the employee's own serious health condition.

- An employer may require an employee to provide certification from health care providers for leave that is due to the employee's own serious health condition, but not for leave to bond with a newborn child.

- An employer must maintain the employee's existing level of health care coverages under a group health plan while the employee is on FMLA leave as if the employee had not taken the leave.

- After the pregnant employee returns from FMLA leave, the employer generally must restore the employee to her original job or to an equivalent job with equivalent pay, benefits and other terms and conditions of employment.

- If the pregnant employee and her spouse work for the same employer, they are not entitled to more than 12 weeks of FMLA leave between them for the birth and care of a healthy newborn child or to care for a parent who has a serious health condition.

- An employer must not interfere, restrain or deny a pregnant employee from exercising any FMLA-protected right, and an employer may not discriminate

against a pregnant employee from opposing any practice that the FMLA prohibits, or from being involved in a FMLA-related proceeding.

Under **New Hampshire law**, a pregnant employee may work as long as she is physically able to do her job. She is entitled to maternity leave for the period that she is physically disabled. Her job must be held or a comparable job made available when she returns, unless compelling business necessity makes this impossible or unreasonable. In all other ways, pregnancy must be treated the same as any other temporary physical disability.

There are several laws which address covered employers' obligations to pregnant employees. Employers are well-advised to be aware of these obligations and being proactive in addressing the rights of pregnant employees under applicable federal and state law.

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