

# Retail Detail



## Pregnancy Discrimination, Accommodations and Issues For Retailers

By Tracy M. Billows and Kevin A. Fritz

Retail employers struggle to avoid pregnancy discrimination and accommodation claims on a regular basis because the law on this issue seems to be ever changing. Just last week, the U.S. Supreme Court agreed to hear a case, *Young v. United Parcel Service*, to determine whether the federal Pregnancy Discrimination Act requires an employer which provides accommodations to non-pregnant employees to provide those accommodations to pregnant employees with similar restrictions.

It is not surprising that pregnancy accommodation issues arise in our retail workplaces frequently. After all, we know that over half of the US workforce is female, more than 65% of women work while pregnant, and over 70% of US mothers with children under 18 work outside the home. Women account for 49% of retail employees. Essentially, in the retail industry, 1 in 2 employees are female.

More women are working now during pregnancy, and after pregnancy, and they seem to be working heavily in retail. As the employment landscape continues to change to fit our new societal values, retail employers must understand the legal developments affecting employees' rights in this area.

### Legal Landscape

In 1978, Congress enacted the federal Pregnancy Discrimination Act ("PDA") amending Title VII of the Civil Rights Act and making it clear that discrimination on the basis of pregnancy or related medical conditions is a form of unlawful sex discrimination. The PDA prohibits discrimination on the basis of pregnancy by requiring that employers treat women affected by pregnancy or other related medical conditions the same and provide them the same benefits. This means that employers cannot discriminate against pregnant women in terms of discipline, employment opportunities, termination and terms and conditions of employment.

Since the PDA's enactment, many states, local civil rights laws and ordinances also require employers to provide reasonable accommodations to employees based on pregnancy needs, childbirth, or related medical conditions. Many of these state laws provide even broader rights and protections than the PDA and require accommodation regardless of whether the pregnancy constitutes a disability as defined under the Americans with Disabilities Act ("ADA").

Additionally, pregnant employees may also have rights under the Family and Medical Leave Act, and similar state and local laws. The FMLA provides 12 weeks of unpaid leave for eligible employees in connection with the birth of a child, for prenatal care and incapacity related to pregnancy, and for the pregnant employee's own serious health condition following the birth of a child. Many states have similar pregnancy leave laws which are broader in their protections and coverage.

Thus, it is imperative that retail employers keep abreast of all of the laws in their jurisdiction which might impact pregnant employees.

## Accommodation Obligations Related to Pregnancy

In addition, while normal pregnancies are not a disability that employers must reasonably accommodate under the ADA, some pregnant employees may have complications which require accommodations and they may ultimately qualify for protection under the ADA.

The issue courts and employers struggle with is that pregnant employees, though not necessarily disabled under the ADA in all cases, may still request an accommodation as a result of their pregnancy. Recent EEOC guidance has clarified that if an employee is unable to perform the essential functions of her job for reasons relating to a pregnancy, her employer should treat the pregnant employee like it would treat any other temporarily disabled employee and engage in the interactive process.

Some states have addressed the issue by requiring accommodations for pregnant employees, regardless of whether the pregnancy rises to the level of a disability. For example, under the Minnesota Women's Economic Security Act, a pregnant employee is automatically entitled to the following "minor" accommodations—without having to provide medical support—and without the employer being able to assert undue hardship:

- More frequent restroom, food and water breaks
- Seating
- Limits on lifting over 20 pounds

The needs for pregnant employees vary before, during, and after pregnancy. You should make individualized assessments in each case. Moreover, employers' obligations to accommodate do not necessarily terminate with the end of a pregnancy or leave. For example, some accommodations pregnant employees, or returning mothers may require include:

- Frequent breaks
- Travel restrictions
- Lifting and standing restrictions
- Extended leaves of absence
- Light-duty work
- Expression of breast milk at work

Amendments to the Fair Labor Standards Act (as well as various state laws) also require minimum rest breaks for returning mothers. Many state and local laws require that employers provide employees returning from maternity leave with an appropriate place (and reasonable time) to express breast milk. Retailers need to be creative in identifying an area that could be utilized for this purpose. For example, for a small store without adequate room or privacy for such activities, this requirement can be especially difficult. If a retailer is located in a larger complex such as a shopping mall, a retailer may need to work with the shopping mall itself to find an office or private area nearby that can be utilized for breast milk expression.

In light of the myriad of laws in play, regardless of whether pregnant employees are disabled, retailers will need to consider what types of accommodations they might need. Failure to do so may leave the employer vulnerable to a pregnancy discrimination claim/failure to accommodate claim.

## Recommendations

Above all, it is important that retailers stay abreast of federal, state and local laws concerning pregnancy discrimination and accommodations. It is also crucial that employers review key policies to ensure that they are current, including equal

employment opportunity, nondiscrimination, reasonable accommodation, FMLA and similar leave policies. These policies should clearly inform employees that they have a right to raise accommodation requests, to whom such requests should be made, and that the employer will engage in the interactive process. It is also important that managers be trained to recognize when requests are being made, triggering the interactive process.

To help retail employers more fully understand these issues and accommodation obligations, Seyfarth will be providing a one-hour Webinar to further explore these issues. Stay tuned for further information regarding the Webinar.

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