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What to Expect When Your Employee is Expecting: A Primer on Pregnancy Discrimination Law

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Discrimination based on pregnancy is prohibited by both federal and state laws. Depending on the size of your company, various laws may apply. Employers of four or more employees must comply with Ohio's anti-discrimination laws. Employers of 15 or more employees also are subject to Title VII of the federal Civil Rights Act as well as the Pregnancy Discrimination Act. Essentially, these laws require that pregnant employees be treated the same as non-pregnant employees with respect to all company benefits, policies and procedures, including those involving leaves of absence. Employers with less than 50 employees are not subject to the federal Family and Medical Leave Act, which provides for unpaid leave after the birth or adoption of a child. Many small companies are surprised to learn, however, that Ohio law requires employers to provide eligible employees with a "reasonable" maternity leave.

In *McFee v. Nursing Care Management of America, Inc.*, the Ohio Supreme Court recently held that employers can require pregnant

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About the photo: Picture of the Ohio Statehouse



employees to meet length-of-service requirements in leave policies. The Court made clear, however, that if an employer provides leave benefits and the pregnant employee meets the eligibility requirements, the benefits must be extended for pregnancy and maternity leave. In the same opinion, the Court also endorsed the Ohio Civil Rights Commission's "reasonable" maternity leave requirement, which provides that "when a woman qualifies for leave, the leave provided for childbearing must be reasonable."

What is a reasonable maternity leave? Although neither the statute nor the regulations define a reasonable leave, the Ohio Civil Rights Commission considers up to 12 weeks of maternity leave to be reasonable - six weeks for a normal delivery and perhaps an additional six week if there are complications with the pregnancy or delivery. If such complications are claimed, the employer may require that the employee provide documentation from her physician to substantiate the need for an additional period of leave. Employers also should be aware that under both FMLA and Ohio law, employers must promptly reinstate employees at the conclusion of maternity leave.

Companies that successfully navigate the maternity leave and reinstatement requirements can inadvertently engage in pregnancy discrimination in other ways. The following do's and don'ts may help to keep your company out of trouble:

- Don't retaliate against a newly hired employee who announces a pre-existing pregnancy. Applicants are not required to reveal pregnancies during the application and selection process.
- Don't refuse to hire or promote a pregnant employee based on assumptions that she will require time off or may elect not to return to work after maternity leave.
- Don't make assumptions regarding a pregnant employee's ability to perform her job while pregnant. Unless and until the employee requests an accommodation or the employer receives work restrictions from the employee's doctor, the employer should not unilaterally limit duties due to safety, convenience or other concerns that only arose because of the pregnancy. (Remember, however, that pregnant employees are not immune to counseling or discipline for poor performance.)
- Don't reassign or reallocate a pregnant employee's duties based on the prejudices or concerns of coworkers, clients or customers. The fact that the discriminatory opinions of others precipitated a change does not insulate the employer from liability.
- Do ensure that no additional, increased or larger health insurance deductible is imposed on pregnant employees. Employers also must provide the same level of health benefits for spouses of male employees as they do for spouses of female employees.
- Do ensure that employees with pregnancy-related disabilities are treated the same as other temporarily disabled employees for accrual and crediting of seniority, vacation, pay increases and temporary disability benefits.

Finally, "do" seek legal advice before making employment decisions impacting pregnant employees. A prior review of options, strategies and potential liabilities is advisable and may save your company the time, money and aggravation associated with defending against a discrimination claim. The attorneys at Eastman & Smith Ltd. are prepared to assist with the many issues involving Ohio and federal pregnancy discrimination laws.



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