Pregnancy discrimination reexamined: Accommodations for pregnancy under the ADAAA

With the enactment of the PDA, prohibiting employment discrimination on the basis of pregnancy, childbirth or related medical conditions, the legal landscape for pregnant women in the workplace changed.

By Kristin L. Bauer and Emily S. Borna

Several years before Congress passed the Pregnancy Discrimination Act in 1978, the Equal Employment Opportunity Commission took the position that Title VII sex discrimination encompassed discrimination on the basis of pregnancy and related conditions. At that time, the EEOC was on unstable legal footing in light of two U.S. Supreme Court decisions that had adopted a narrow view of sex discrimination.

The tide changed, however, when Congress passed the PDA, amending Title VII of the Civil Rights Act of 1964’s definition of “sex discrimination” to include discrimination on the basis of pregnancy and related conditions. Now, more than 30 years later, the EEOC is in a similar position, this time advocating for the provision of accommodations to pregnant workers pursuant to two existing laws – the PDA and the Americans with Disabilities Amendments Act. Although there is no clear obligation under the ADAAA or PDA to provide accommodations for pregnant employees, in light of recent developments, employers are at risk if they fail to provide such accommodations.

Brief overview of the PDA, ADA, ADAAA and accommodation issues

Prior to the PDA’s enactment in 1978, the U.S. Supreme Court concluded in two cases that disparate treatment on the basis of pregnancy was not prohibited by Title VII. In the first such case, the Court refused to find sex discrimination when an employer provided disability benefits for all nonoccupational disabilities, except those resulting from pregnancy. In the second case, the Court likewise did not find sex discrimination when an employer provided disability benefits for all nonoccupational disabilities, except those resulting from pregnancy. In other decisions, however, the Court's reasoning did indicate change was on the horizon. In Cleveland Board of Education v. LaFleur, decided in 1974, the Court struck down mandatory unpaid leave policies implemented to prevent pregnant schoolteachers from working after a certain point in their pregnancy. But it was not until enactment of the PDA, prohibiting employment discrimination on the
Although the PDA prohibits pregnancy discrimination, it does not specifically address pregnancy-related accommodations. The law requires pregnant workers to be treated similarly to other employees temporarily restricted in their ability to work. When the PDA was passed in 1978, however, there were few protections for workers with temporary medical conditions. That is because the Americans with Disabilities Act of 1990 did not take effect for more than a decade after enactment of the PDA. Even then, many courts would interpret the ADA for the next 18 years to exclude temporary conditions from its coverage, including pregnancy.

Shortly after the ADA's enactment, Congress passed the Family and Medical Leave Act of 1993. The FMLA did provide job-protected leave for pregnant workers, but only for those who met the FMLA's eligibility requirements. As a result, not all pregnant workers will be covered by the FMLA, and non-leave based accommodations are not addressed.

In 2008, after years of restrictive judicial interpretation of what it means to be disabled under the ADA, Congress passed the Americans with Disabilities Amendments Act. The ADAAA overturned years of case law, including decisions from the U.S. Supreme Court, which had applied a narrow lens to the disability inquiry. The ADAAA provides that whether someone is disabled is to be interpreted in favor of expansive coverage. Indeed, the ADAAA and its implementing regulations go into great detail regarding what may be a disability, while providing little guidance, if any, regarding what is not a disability.

The issue of accommodations for pregnancy is not squarely addressed by the ADAAA. The only reference to pregnancy is in the preamble and appendix to the ADAAA implementing regulations, both of which note that a normal pregnancy is not a disability, but pregnancy-related complications could be covered.

The ADAAA's broad mandate for expansive coverage effectively encourages conservative employers to err on the side of assuming a medical condition is a disability. Therefore, employers are encouraged to provide accommodations to workers with all but indisputably minor conditions, even if they are not “substantially limited in a major life activity” – what the ADAAA requires before an employer's accommodation obligation is triggered. Moreover, pursuant to the ADAAA, the temporary nature of a condition is not determinative of whether someone is disabled, depending on its severity. As such, more physical or mental conditions of a short-term duration may be considered disabilities than was the case under pre-ADAAA case law.

The ADAAA and its expansive interpretation of what it means to be disabled, and hence broader accommodation coverage for employees, and the PDA's mandate that pregnant employees be given the same benefits as employees who are similar in their inability to work, begs the question of whether accommodations are required for pregnant workers and if so, on what basis.

The EEOC’s enforcement position
Under the PDA, there is no clear obligation to provide accommodations or light duty for pregnant workers. Instead, judicial outcomes are based on a narrow lens to the disability inquiry.

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fact-specific, and many cases aimed at enforcing some sort of accommodation obligation for pregnancy or pregnancy-related conditions have not met with success.12 As for the ADAAA, there is little case law addressing whether pregnancy-related complications may be a disability, and results are likewise mixed and fact specific.13 But this does not mean that employers are without risk if they do not provide accommodations for pregnant workers.

In its Strategic Enforcement Plan for 2013 through 2016, approved in December 2012, the EEOC committed to focusing on “emerging” issues, including pushing employers to accommodate pregnant women.14 A quick review of EEOC press releases reveals a host of pregnancy discrimination litigation filed by the agency, demonstrating enforcement muscle behind this proclamation.15 The EEOC clearly is taking the position that accommodations for pregnancy and related conditions are required under the PDA and the ADAAA. Indeed, EEOC Commissioner Chai R. Feldblum noted the EEOC’s position that the PDA’s protection is now enhanced based on the ADAAA’s broader coverage, which “shifted the background” against which pregnant workers will be compared to non-pregnant workers.16

Through the EEOC Strategic Enforcement Plan and its litigation choices, the EEOC sends the message that employers who make decisions, even in part, on the basis of pregnancy risk legal challenge. Rather, the EEOC encourages employers to focus on an employee’s ability to do the job and treat pregnant workers the same as nonpregnant workers who are limited in their ability to work.

The EEOC is not alone – the Department of Labor, Civil Rights Division and the American Civil Liberties Union have similarly challenged employer policies that deny pregnant workers accommodations or light duty and force them to go on leave.18 Groups such as these take the position that employers must leave it to mothers and their doctors to determine whether the employee is able to work, and not automatically exclude pregnant workers from certain positions or arbitrarily force them to go on leave.19 Given these aggressive advocacy and enforcement stances, there is ample incentive for employers who want to stay in good graces with government agencies and advocacy groups to accommodate pregnant workers as they would accommodate other ill or injured workers.

Local legislative protections
In addition to the EEOC’s aggressive enforcement stance, city and state legislatures are leading the conversation when it comes to mandating accommodations for pregnant workers. For example, on Sept. 24, 2013, the New York City Council amended the New York City Human Rights Law to prohibit discrimination based on pregnancy, childbirth or a related medical condition. Though pregnancy was already provided protected status, this amendment creates an additional right of action against employers that fail to provide reasonable accommodations, such

The EEOC’s website currently states the following in its “Facts About Pregnancy Discrimination”:

**Pregnancy and temporary disability**

If an employee is temporarily unable to perform her job due to pregnancy, the employer must treat her the same as any other temporarily disabled employee; for example, by providing light duty, modified tasks, alternative assignments, disability leave, or leave without pay.

Additionally, impairments resulting from pregnancy (for example, gestational diabetes) may be disabilities under the Americans with Disabilities Act (ADA). An employer may have to provide a reasonable accommodation for a disability related to pregnancy, absent undue hardship (significant difficulty or expense). For example, an employer may be required to provide modified duties for an employee with a 20-pound lifting restriction stemming from pregnancy-related sciatica, absent undue hardship. The ADA Amendments Act of 2008 makes it much easier to show that a medical condition is a covered disability.17
Though pregnancy was already provided protected status, this amendment creates an additional right of action against employers that fail to provide reasonable accommodations, such as bathroom breaks, leaves of absence, periodic rest and assistance with manual labor, to pregnant women.

The new law, signed by Mayor Michael Bloomberg on Oct. 2, 2013, took effect on Jan. 30, 2014. The State of New Jersey similarly introduced legislation on Sept. 30, 2013, that would amend the New Jersey Law Against Discrimination to include pregnancy as a protected class and expressly prohibit workplace discrimination against women because of pregnancy, childbirth, and related medical conditions. New Jersey Governor Chris Christie signed the law on January, 2014. In addition to preventing pregnancy discrimination, the New Jersey law requires employers to make reasonable accommodations for an employee’s needs related to pregnancy when, with the advice of a physician, the employee requests an accommodation. New York City and New Jersey join approximately 10 other jurisdictions mandating certain employers to provide some form of accommodation to pregnant employees.

Proposed federal legislation
In addition to active city and state legislatures, there is movement in Congress to codify ADA-like protections for pregnant women. The Pregnant Workers Fairness Act, introduced to Congress in 2012, would add to the existing framework of legal protections prohibiting pregnancy discrimination. The PWFA would make it unlawful for an employer to refuse to make reasonable accommodations related to the pregnancy, childbirth or related medical conditions of a job applicant or employee, absent some showing of an undue hardship on the business.

The PWFA actually goes a step further than the ADA, making it unlawful to force a pregnant woman to accept an accommodation she does not want, which is troubling to some lawmakers and employers, and stands in stark contrast to the ADA, which in its regulations provides that employers are able to choose among effective accommodations and do not have to provide an employee’s preferred accommodation.

Conclusion
Employers seeking to determine their accommodation obligations with respect to pregnant employees will not find easy answers, at least for now. But aggressive government enforcement agencies and advocacy groups, varying judicial precedents, and the patchwork of local laws such as those noted above create the risk of avoidable litigation in this area of the law. Many employers are exploring potential accommodations for workers with temporary restrictions due to pregnancy or related conditions. Such practices include, but are not limited to:

- providing light duty for employees with pregnancy-related medical restrictions (if such leave is provided for other employees),
- providing unpaid leave even if a pregnant worker is not eligible for FMLA or other forms of state leave related to pregnancy,
- considering workplace accommodations for pregnant workers who are temporarily restricted in their ability to work, and
- not making assumptions about a pregnant worker’s abilities or the health or safety of her fetus.

As with most accommodation issues, an open, interactive dialogue between the employer and employee is an effective way to explore solutions and minimize risk. In addition, employers should be sure to evaluate applicable state and local laws for additional protections mandated for employees on the basis of pregnancy and related conditions.

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Endnotes

6 Section 504 of the Rehabilitation Act, which went into effect in 1977, provided disability protections similar to the ADA for the employees of programs or activities that receive federal financial assistance. See 29 U.S.C. § 701 et seq.
7 See, e.g., Cern v. Enter. Solution Providers, Inc., No. 00 Civ. 8704, 2001 WL 533723 (S.D.N.Y. May 18, 2001) (pregnancy-related complications were not disability based on short-term nature); Colwell v. Suffolk Cty. Police Dept., 158 F.3d 635, 646 (2d Cir. 1998) (seven month impairment with limited residual effect not disability); Roush v. Weasee, Inc., 96 F.3d 840, 844 (6th Cir. 1996) (temporary kidney condition not disability); Sanders v. Arneson Prods., Inc., 91 F.3d 1351, 1354 (9th Cir. 1996) (temporary mental impairment with limited residual effects not disability).
8 29 U.S.C. § 2061. The FMLA eligibility requirements are, generally speaking, that an employee (1) work for an employer for at least 12 months; (2) work at least 1250 hours in the 12 months preceding the leave; and (3) work at a location with at least 50 employees within a 75 mile radius.
9 Public Law 110-325.
10 Despite the expansive coverage dictated by the ADAAA, determining whether someone is disabled is still an individualized inquiry. 29 C.F.R. § 1630.2(j)(iv).
12 See, e.g., Berrios v. University of Miami, No. 11-CV-22586, 2012 U.S. Dist. LEXIS 186572 (S.D. Fla. June 2, 2012) (denying accommodation claim under PDA because evidence showed employer used same accommodation process it did for non-workers’ compensation occupational injuries and plaintiff failed to turn in required paperwork); see also Freppon v. City of Chandler, No. 12-6176, 2013 U.S. App. LEXIS 13424 (10th Cir. July 1, 2013) (no PDA violation when employer had light duty policy that applied only to workers’ compensation injuries and when employer stated that policy had been discontinued at time of pregnant employee request for light duty); Serednyj v. Beverly Healthcare, LLC, 656 F.3d 540, 546-549, 553-556 (7th Cir. 2011) (workers’ compensation only light duty policy does not violate the PDA; denied accommodation claim under pre-ADAAA case law based on temporary nature of pregnancy and related conditions); Reeves v. Swift Transp. Co., 446 F.3d 637, 641 (6th Cir. 2006) (workers’ compensation only light duty policy does not violate PDA); Urbano v. Cont’l Airlines, Inc., 138 F.3d 204, 206 (5th Cir. 1998) (same), but see Meadows v. Ulster County, No. 1:0-CV-550, 2013 U.S. Dist. LEXIS 165488 (Nov. 21, 2013) (noting PDA claim could survive summary judgment when despite light duty for workers’ compensation injuries only policy, plaintiff presented evidence that other male employees who did not suffer on-the-job injuries were permitted to work light duty); cf. EEOC v. Houston Funding II, Ltd., 717 F.3d 425, 430 (5th Cir. 2013) (disregard for a breastfeeding employee may be sex-discrimination); Puente v. Ridge, 324 F. Appx 423, 428 (5th Cir. 2009) (break time for breastfeeding mother measured with reference to break time given other employees).
19 See id. (quoting Thomas E. Perez, assistant attorney general for DOL Civil Rights Division).
20 New York City Local Law Int. No. 974-A.
21 S-2995.
23 29 C.F.R. Pt. 1630, App., § 1630.9.