

Pregnancy Accommodation Update For Employers

Cynthia Thomas Calvert, Workforce 21C

May 14, 2015

WORKLIFE LAW
UC Hastings College of the Law



A Thank You to Our Sponsors

We gratefully acknowledge the generous support of



NoVo Foundation
create. change.

Webinar Agenda

- Pregnancy accommodation under the amended ADA
- State and local laws that require accommodation
- Accommodation under the PDA and the FMLA
- What to do when an employee asks for an accommodation
- Types of accommodations
- Tips for managing pregnant employees
- Best practices for avoiding lawsuits

Handouts: <http://worklifelaw.org/pregnancy-accommodation-for-employers/>

HRCI Credit

This webinar is pre-approved for 1.25 HRCI credits.

To get credit:

- 1) Download the credit form from the webinar page:
<http://worklifelaw.org/pregnancy-accommodation-for-employers/>
- 2) Listen for the three codes during this webinar and record them on the form
- 3) Complete the form and email it to
info@worklifelaw.org.

Working While Pregnant

Meet Gina



Gina is experiencing swelling, which has caused carpal tunnel syndrome. She has asked for breaks from repetitive tasks that use her hands, and for breaks to use ice packs to reduce the swelling. Her supervisor tells her to use her regular morning, lunch, and afternoon breaks, and denies her request to change her duties or extend her breaks.

Working While Pregnant

Meet Shawna



Shawna has been having migraine headaches frequently during her pregnancy. She works next to a paint department, which has a lot of fumes. She is concerned about her and her baby's health, asked to be transferred to a different location, but her employer says there are no openings in other locations.

Working While Pregnant

Meet Jessica



Jessica is experiencing severe morning sickness. She has already been hospitalized once for dehydration, and she still can't eat. She told her supervisor that she feels too weak to work, but she has used up all of her sick days. Her supervisor warned her that, under the attendance policy, she will be fired if she misses more time.

Working While Pregnant

Meet Julia



Julia is five months pregnant with a high risk pregnancy. She needs assistance lifting patients.

Her supervisor denies her assistance and tells her she has to take FMLA leave if she can't do her job.

Are the supervisors right?

Each supervisor is trying to treat the pregnant employees like other employees, and it trying to maintain regular procedures.

In the past, they may have been acting lawfully.

Now, they probably aren't.

New Pregnancy Accommodation Laws, Regulations, and Rulings





Pregnancy Accommodation
under the
Amended Americans with
Disabilities Act

Americans with Disabilities Act

Applies to employers of 15 or more employees

- Smaller employers may be covered by state anti-discrimination laws

Definition:

A disability is a physical or mental impairment that substantially limits a major life activity.

Amendment: Effective Jan. 2009

The ADA Amendments Act (ADAAA) did not change the definition, but it changed its interpretation.

Purpose of amendment:

- Restore expansive scope of statute
- broaden construction of “disability”
- make it easier for employees with disabilities to be protected by the ADA

Shifted the focus from whether the employee has a disability to whether the employer has accommodated the employee

Pre-Amendment Pregnancy Conditions

Before the amendments, pregnant women with pregnancy-related conditions were frequently found not to have disabilities.

- Healthy pregnancy is not a disability (did not change with amendment)
- Pregnancy is temporary, so not substantially limiting
- Pregnancy-related conditions do not involve major life activities
- “Normal pregnancy doctrine” – pregnancy-related conditions are covered only in rare, extreme cases

First Change: “Major Life Activity”

Old: no list of major life activities

- EEOC provided short list
 - “functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.”
- Supreme Court said activities must be of “central importance to daily life”

First Change (cont.)

New: ADA has non-exhaustive list of major life activities:

- “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.”
- EEOC added: sitting, reaching, and interacting with others

AND now “major life activity” includes major bodily functions

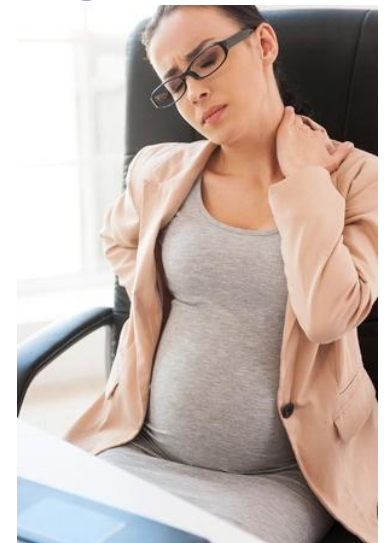
- the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions
- EEOC added: special sense organs, skin, genitourinary, cardiovascular, hemic, lymphatic, and musculoskeletal functions

Application to Pregnancy

Now, common activities that are affected by pregnancy will most likely be considered major life activities

Example: severe morning sickness could involve the major life activities of:

- eating
- standing, concentrating, thinking, and working
- digestive system



Second Change: “Substantially Limits”

Old: Courts held that employee’s ability to engage in a major life activity had to be severely impacted before the employee could be deemed to have a disability

New: “substantially limits” is not a demanding standard, does not require a severe restriction

means that the employee is limited in a major life activity as compared to the general population

Application to Pregnancy

Example: pregnant employee cannot stand for eight hours because her feet are very swollen, which causes pain and numbness

Old: not substantially limited in a major life activity

Now: limited compared to the general population in her ability to stand, which is a major life activity.
(Additionally, swelling involves the cardiovascular system)

Third Change: No Duration Requirement

Old: Disabilities that were short in duration (usually less than six months) were not considered within the ADA's coverage

New: Temporary conditions may be disabilities

- Duration is a factor, but not a bar
- Exception: impairments that are *both* transitory and minor may not be disabilities for “regarded as” claims

Fourth Change: Recognition Pregnancy-Related Conditions Can Be Disabilities

Healthy pregnancy not a disability

Old: Courts routinely found that pregnancy-related conditions that were common or expected could not be disabilities

Now: EEOC guidance says that “a pregnancy-related impairment that substantially limits a major life activity is a disability”

Courts have found pregnancy-related conditions to be disabilities

Application to Pregnancy

Conditions that are pregnancy-related can be disabilities

Example: pregnant employee with high blood pressure at end of her pregnancy needs bed rest.

- Old: short duration, high blood pressure isn't rare in pregnancy, so no disability
- New: high blood pressure can be a disability even if it is expected to last just a few weeks until delivery, irrelevant that is related to pregnancy

Back to Gina, Shawna, Jessica and Julia

Do they have disabilities under the ADA?

- Gina: carpal tunnel is a physical impairment that affects the major life activity of performing manual tasks (could also argue lifting, reaching, cardiovascular system and musculoskeletal system), she is limited compared to people without CTS
- Shawna: migraines affect concentrating (and many other MLA), and she is limited compared to others. Note: concern for baby is not a disability
- Jessica: severe morning sickness affects eating, etc. Note that casual morning sickness may not be a disability
- Julia: high risk pregnancy affects reproductive system

Duty to Accommodate

Employers have a duty to provide reasonable accommodations to employees with disabilities, unless to do so would create an undue hardship.

Failure to accommodate is disability discrimination under the ADA.

Procedure: Request

The employer's duty to provide a reasonable accommodation is triggered by

- Employee's request (no special language needed)
- Obvious need for accommodation



Procedure: Medical Information

Employers can ask for medical information necessary to determine whether the employee has a disability.

Request for information has to be limited to establishing the disability and the need for an accommodation.

Tip: JAN (Job Accommodation Network) has a sample medical information form:

<http://askjan.org/media/medical.htm>

Procedure: Interactive Process

Request triggers duty to engage in interactive process

Informal process

- Employee describes what she is having difficulty doing
- Employer and employee explore different options for making it possible for her to do her job
- Back and forth direct communication is contemplated
- Lack of information is not a defense unless employer attempts to get information

Reasonable Accommodation

Modification of how, when , where employee works

Enables the employee to do the essential functions of her job

Do not have to remove or change essential functions (but can)

Does not have to be the accommodation the employee prefers

Employee is to be returned to original position once accommodation is no longer needed

Types of Reasonable Accommodations

Bathroom breaks

Breaks for rest or water

An accessible worksite

A chair to sit on

Modification of equipment, test or training materials, or policies

Time off for medical appointments

Job restructuring



More Types of Reasonable Accommodations

- Lifting restrictions
 - Most common request
 - May not be due to a disability
 - Look for creative solutions (carts)
- Schedule changes
 - Helpful to deal with morning sickness, fatigue



More Types of Reasonable Accommodations

- Light duty
 - Do not have to create position (but many employers do)
 - Probably cannot limit it to workers comp any longer
- Transfer or reassignment
 - Reasonable only if no other accommodations
 - Do not have to create position or move employee already in position
 - Employee has to have requisite skills



More Types of Reasonable Accommodations

- Work from home
 - Probably not required (Ford case; fact specific)
 - Many employers allow it
- Leave
 - Cannot force employee to take leave
 - Reasonable only if no other accommodation
 - Can be unpaid after exhaustion of accumulated paid leave
 - Lengthy or open-ended leave not reasonable



Undue Hardship

“An action requiring significant difficulty or expense,”
considering

- (1) the nature and cost of the accommodation needed;
- (2) The financial resources of the facility or facilities, or the impact otherwise of such accommodation upon the operation of the facility;
- (3) employer’s finances, the number of its employees; the number, type and location of its facilities; and
- (4) the type of operation or operations of the employer
- (5) Impact on other employees

Burden on the employer to prove, need cost/benefit analysis

Back to Gina, et al. : Accommodations?



Gina wants to take breaks from repetitive tasks and have breaks to ice her wrists. Both are probably reasonable; employer could start by offering one accommodation and see if the second is necessary. Breaks can be unpaid.

Shawna wants a transfer. Not required, because there are no vacant positions. But if the employer has created positions for non-pregnant employees who needed transfers, it may have to for her, as well.

Alternative: May be able to work from home



Back to Gina, et al.

Jessica told her supervisor she felt too weak to work, which was a request for an accommodation and the employer should have started the interactive process. Allowing her to miss work (leave) may be a reasonable accommodation, but the employer may want to first see if there is another accommodation (schedule change, naps during the day) that would allow her to work. She may also be eligible for FMLA leave.



Julia asked for lifting assistance. The supervisor should discuss alternatives with her (assistive devices, co-worker help, light duty). Forcing her out on FMLA leave is asking for a lawsuit unless there are no other options.





Pregnancy Accommodation: State and Local Laws

States With Pregnancy Accommodation Laws

- Alaska
- California
- Connecticut
- Delaware
- Illinois
- Louisiana
- Maryland
- Minnesota
- New Jersey
- Texas
- West Virginia

Example: California

- It's illegal in California for an employer to refuse to provide reasonable accommodations to an employee for a condition related to pregnancy, childbirth, or related medical conditions.
- Californians can also receive a transfer to a less strenuous or hazardous position, if the request is reasonable.

Local Pregnancy Accommodation Laws

- New York City
- Philadelphia
- Providence, RI/Central Falls, RI
- Washington, DC



Example: Philadelphia

- Employers must provide reasonable accommodations to employees for needs related to pregnancy, childbirth, or a related medical condition, so long as such accommodations will not cause an undue hardship to the employer.
- Note: no disability required

A decorative graphic on the left side of the slide, consisting of a vertical, flowing yellow shape that tapers towards the bottom, resembling a stylized flame or a ribbon.

Pregnancy Discrimination Act

Pregnancy Discrimination Act

Applies to employers of 15 or more

Requires employers to treat pregnant employees the same as other employees who are similar in their ability or inability to work

Can treat pregnant employees better, just can't treat them worse

Young v. UPS (U.S. Supreme Court, 2015)

Pregnant UPS driver had lifting restrictions. UPS had policy of accommodating on the job injuries and license suspensions under the CBA and disabilities as required by the ADA, but not pregnant employees.

Supreme Court: Plaintiffs get to have a trial if they show that pregnant women are burdened by the policy and employer's reasons for policy are weak. Cost and convenient are not acceptable reasons.

Bottom line: Most policies limiting light duty to on the job injuries are not going to pass muster.

A decorative graphic on the left side of the slide, consisting of a vertical yellow band that curves and flows downwards, creating a sense of movement and depth.

Family and Medical Leave Act

The FMLA

The Family and Medical Leave Act allows pregnant women to take time off for prenatal visits, pregnancy-related conditions (including morning sickness), and childbirth/recovery/bonding.

- But: employees must be eligible for leave (work for an employer with more than 50 employees at/near the worksite, have worked for employer for at least 12 months, have worked at least 1250 hours last year (25 hours per week avg.)
- Leave is limited to a total of 12 weeks per year

The FMLA (cont.)

Employees cannot be retaliated against for requesting or taking leave

Employees who take leave under the FMLA have to be reinstated to their same jobs or substantially equivalent jobs

Employees have to give at least 30 days' notice of need for leave, unless not possible (unforeseen)

The FMLA: Medical Certification

Employers can request medical certification

Permitted, not required

Have to treat pregnant women the same as non-pregnant

- Don't ask for doctor's note when she announces pregnancy
- Don't ask for note clearing her to return unless ask of all employees

More about the FMLA

- DC and some states like California allow “leave stacking” – pregnant women can use medical leave for their pregnancy-related illnesses and still have their full family leave for baby bonding
- If an employee cannot return at the end of leave for physical or mental conditions that are disabilities, the ADA may require additional leave

Best Practices for Managing Pregnant Employees And Avoiding Lawsuits



The Big Picture

War for talent is common concern among employers

Employers invest a lot in recruiting, training employees

Objective: Retention

- Cheaper to keep good employees

- Maintains productivity

- Sustains customer relationships

- Maintains engagement, morale, collegiality

Retaining Pregnant Employees

Most employers accommodate pregnant employees

- Keeps them working and productive
- Cheaper than replacing them
- Reduces likelihood they will quit
- Sends positive messages to other employees
- Reduces likelihood of lawsuits

But What About the Slackers?

How should employers handle lazy pregnant employees who just try to get out of work?

- Improve your managers' skills
 - Better hiring to screen out underperformers
 - Better communication about expectations and goals
 - Better evaluations to help underperformers improve or move on

But What About the Slackers? (cont.)

- Reflect on your perception
 - We all have biases that affect how we perceive the actions of the people around us, but we are usually not aware of our biases
 - We notice and remember things that are consistent with our biases

Example: A supervisor who believes pregnant employees will have poor attendance is likely to notice and remember a pregnant woman who is home sick for a day but not a non-pregnant man who stays home for a day to take care of a remodeling project

More on Bias

- Test your perception of laziness:
 - What are the specific behaviors that you are observing?
 - Are other employees behaving the same and you are ignoring it? Example:
 - Paul is tired and appears to be working at half-speed. You know it is because he is spending his evenings building a deck on his house, and you cut him some slack.
 - Patrice is tired and appears to be working at half-speed. You assume it is because she is pregnant, and you are ticked off by her laziness.

More Effects of Bias

- Bias can affect:
 - Assignments and opportunities
 - Status, relationships, mentoring
 - Evaluations
 - Compensation
 - Promotion

Pregnancy Bias

- Not as competent
- Not as committed
- Not dependable
- Will just quit

- Benevolent stereotyping



FRD

Family Responsibilities Discrimination is employment discrimination because of family caregiving obligations.

It affects mothers and fathers of young children, pregnant women, and caregivers for family members such as sick spouses/partners, aging parents, and children with disabilities.

Also known as caregiver discrimination.

FRD Against Pregnant Employees

- Firing workers when they announce their pregnancy
- Demoting pregnant workers to “an easier job”
- Putting pregnant workers on medical leave
- Not promoting pregnant women
- Making pregnant women’s jobs harder, hoping they will quit

Prevent FRD: A Few Don'ts

- Don't assume a pregnant employee is not committed to her job
 - She is showing up and doing her best under trying circumstances
- Don't assume a pregnant employee won't return after leave
 - Self-fulfilling prophecy
- Don't make comments about her body, joke about pregnancy, ask personal questions, touch her stomach

Prevent FRD: Apply Rules Consistently

- Don't apply rules more harshly to pregnant employees. Example:
 - Supervisor Sal watches the clock to make sure Pregnant Pam arrives on time, but doesn't track arrival times for other employees.
 - Supervisor Sal writes up Pregnant Pam for not meeting her quota, but gives other employees who miss their quota a second chance.

Makes a lawyer wonder if Sal is trying to create a justification for terminating Pam.

Prevent FRD: Training

- Training for HR
- Training for Supervisors
- Topics:
 - What is FRD?
 - Legal bases for liability
 - How it arises (bias, demographics)
 - Common assumptions about caregivers
 - Business case for retaining caregivers
 - Company policies
 - Techniques for reducing influence of bias in decisions

Prevent FRD: HR Oversight

Be vigilant after a triggering event

- Review supervisors' decisions after pregnancy announcement or after employee returns from a pregnancy/maternity leave
- Review decisions of new supervisors

Recognize Tip-Offs

- Suddenly negative evaluations
- Recent goal increases
- Uneven application of rules or discipline
- Demotion or transfer

Accommodation without Disability

Pregnant employee asks for an accommodation to prevent injury or to protect her unborn baby

Not required to provide it except in some states, but probably a good idea

- Improves loyalty, engagement
- Sends message to other employees

Can the employee sue you if she miscarries or her baby is born with birth defects?

Handling Long Maternity Leaves

Maternity leave is like other leaves employees take, except you get advanced notice and time to plan for it.

Almost every employee will be a caregiver at some point in his or her career, and almost everyone will take an extended leave for own health or family



Handling Long Maternity Leaves (cont.)

Create a coverage plan

- Know how every employee's work will be covered if he/she is out for several weeks
- Alternatives to just dumping work on co-workers:
 - Contract or temp employees
 - Cross-train under-utilized employees
 - Disaggregate duties and decide which can be left undone, outsourced, automated, or done by others
 - Do NOT ask new mother to work while on leave

Handling Long Maternity Leaves (cont.)

Consider having a gradual return to work policy

- Allows employees to work part-time after a parental leave and gradually return to full-time
- Gets employees back in the door sooner
- FMLA allows maternity leave to be taken on a part-time basis if the employer consents

Prevent Backlash

Typically, caused by poor management

- Manage workflow
- Show appreciation for all employees
- Make policies and benefits available to all
- Squelch negative talk
- Provide coaching for empathy, better teamwork

Contact Us



Cynthia Thomas Calvert, Workforce 21C

www.workforce21c.com

CynthiaCalvert@CynthiaCalvert.com

410-480-4882