

Bundles of Joy – Pregnancy and Reproductive Workplace Issues

Presented By:

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EMPLOYERS AND
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So many great names to choose from...

- Title VII
- FMLA
- PDA
- ADA/ADAAA
- FLSA/ACA
- OFCCP



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Pregnancy-Related Claims: Statistics

| # of Charges Received by EEOC | FY 2010 | FY 2011 | FY 2012 | FY 2013 |
|-------------------------------|---------|---------|---------|---------|
| Pregnancy Discrimination | 4,029 | 3,983 | 3,745 | 3,541 |
| All Statutes | 99,922 | 99,947 | 99,412 | 93,727 |
| Percentage of All Charges | 4.03% | 3.98% | 3.76% | 3.79% |

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Pregnancy-Related Claims: Litigation

- Since the start of the fiscal year 2011, the EEOC has filed over 45 lawsuits involving pregnancy discrimination.
- During that time, the federal agency has recovered approximately \$3,500,000 -- as well as injunctive and other case-specific “make whole” relief.

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Title VII, As Amended by the PDA

- PDA passed in 1978 as amendment to Title VII
- Prohibits discrimination based on:
 - Current Pregnancy
 - Past Pregnancy
 - Potential or Intended Pregnancy
 - Medical Conditions Related to Pregnancy or Childbirth



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Pregnancy Discrimination Act

- This protection extends to childbearing capacity or intent to become pregnant (e.g., fertility treatment)
- An employer can still require that a pregnant worker perform the duties of her job
- However, an employer may not act on assumptions or stereotypes about a pregnant worker's abilities or best interests
- PDA covers employers with 15+ employees

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PDA – 42 U.S.C. Sec. 2000e(k)

The terms “because of sex” or “on the basis of sex” include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work

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Discrimination & Harassment

- An employer may not single out a pregnant worker for medical clearance procedures that are not applied to non-pregnant workers
- Harassment based on pregnancy, childbirth, or a related medical condition is illegal when it is so frequent or severe that it creates a hostile or offensive work environment or results in an adverse employment action.



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Family and Medical Leave Act

- A mother can use up to 12 weeks of FMLA leave for the birth of a child, for prenatal care and incapacity related to pregnancy, and for her own serious health condition following the birth of a child
- A father can use FMLA leave for the birth of a child and to care for his spouse who is incapacitated (due to pregnancy or child birth)

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Pregnancy, Maternity, Parental Leave

- Policies must be “pregnancy-blind”
- Employer may not force an employee to take leave because of pregnancy if she can perform her job duties
- Employer may not require doctor’s statements or return to work documents of pregnant workers that are not required of non-pregnant workers
- Parental leave must be provided to men and women on the same terms – for example, provide leave for new mothers *and* fathers following birth of a child
 - FMLA provides 12 weeks leave to care for and bond with newborn or adopted child

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Americans with Disabilities Act

- Pregnancy is not an impairment and therefore cannot be a disability (federal courts and the EEOC agree on this point)
 - See, e.g., *Richards v. City of Topeka*, 173 F.3d 1247 (10th Cir. 1999) (“[N]umerous district courts have concluded that a normal pregnancy without complications is not a disability”)
- Conditions or impairments resulting from pregnancy, even though they are temporary, may qualify as a disability if they substantially limit a major life activity

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Pregnancy-Related Conditions

- For example:
 - Lactation
 - Postpartum Depression
 - Sciatica (limits musculoskeletal function)
 - Gestational diabetes (limits endocrine function)
 - Preeclampsia (limits cardiovascular function)
 - Carpal tunnel (ability to lift)
 - Pelvic inflammation (ability to walk)
- EEOC's Strategic Enforcement Plan prioritizes "accommodating pregnancy-related limitations"

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Reasonable Accommodations

- Redistribute marginal or nonessential functions
- Modify workplace policies
- Modify work schedule
- Permit telecommuting, if feasible
- Grant additional leave
- Purchase or modify equipment
- Temporary light-duty assignment

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Milk: It Does a Baby Good

- March 2013, Affordable Care Act (ACA) amended the Fair Labor Standards Act (FLSA)
 - *What:* “reasonable break time”
 - *When:* *Each time* the employee needs to express breast milk for up to one year
 - *Where:* “A place, other than a bathroom that is shielded from view and free from intrusion from coworkers and the public”

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Milk: It Does a Baby Good

- Who is covered?
 - Employers with more than 50 employees
 - Employers with less than 50 employees
 - Unless compliance constitutes an undue hardship
 - “Significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer’ s business”

Be prepared to defend decision...

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Young v. United Parcel Service, Inc.

- Young, a driver for UPS, became pregnant and requested a light-duty position after her doctor imposed a lifting restriction
- Young could only lift 20 pounds; UPS drivers must be able to lift 70 pounds
- Policy provided temporary light-duty positions only for employees due to on-the-job injuries, ADA disabilities, and loss of DOT certification
- UPS denied the light-duty request, placed her on unpaid leave for the remainder of her pregnancy, and Young sued

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Young v. United Parcel Service, Inc.

- Fourth Circuit affirmed summary judgment for employer, holding that the PDA requires only that light-duty policy be “pregnancy-blind”
 - Young did not qualify for light duty under UPS policy
 - A pregnant worker with a temporary lifting restriction is not “similar in ability or inability to work” to workers with a disability, on-the-job injury, or lost DOT certification
- The court explained that Young’s argument would result in pregnant workers receiving preferential treatment, a position inconsistent with the intent and text of the PDA

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Young v. United Parcel Service, Inc.

- Young appealed, and SCOTUS granted cert in July 2014
- *Question Presented:* “Whether, and in what circumstances, an employer that provides work accommodations to non-pregnant employees with work limitations must provide work accommodations to pregnant employees who are ‘similar in their ability or inability to work’”
- Federal circuits are currently split on the issue
- EEOC has weighed in with guidance issued in July 2014

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***Ensley-Gaines v. Runyon* (6th Cir. 1996)**

- Pregnant postal worker sought light-duty accommodation for 15-pound lifting restriction and 4-hour standing restriction
- Supervisor permitted her to work four hours per day under the restriction and then sent her home for the remainder of each day on sick leave, annual leave, or leave without pay
- Postal worker claimed that employees injured on the job were given more favorable treatment than her (limited-duty positions), and employees with similar medical restrictions due to non-job-related injuries were given more favorable treatment as well (light-duty positions)

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Ensley-Gaines v. Runyon (6th Cir. 1996)

- Court held that limited-duty employees injured on the job and light-duty employees with non-job-related injuries could be “similar in ability or inability to work”
- Consequently, the postal worker established a *prima facie* case of discrimination and the court reversed summary judgment granted to employer
- Sixth Circuit’s decision in *Ensley-Gaines* is contrary to the Fourth Circuit’s in *Young* and more in line with recent EEOC guidance

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New EEOC Guidance

- Pregnancy one of six national priorities
- First comprehensive update on pregnancy discrimination since 1983
- Available at: http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm
- Asserts protection from discrimination based on current, past, and potential pregnancy, and impairments resulting from pregnancy

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New EEOC Guidance

- Pregnancy and temporary disability
 - If a woman is temporarily unable to perform her job due to pregnancy or a pregnancy-related condition, her employer must treat her the same as any other temporarily disabled employee
 - Pregnancy-related impairments may also be disabilities under the ADA and may require reasonable accommodation

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New EEOC Guidance

- Leaves of Absence
 - Employer may not compel leave because of pregnancy
 - But, employer must allow leave for women with limitations resulting from pregnancy on the same terms as to others similar in ability or inability to work
 - Additional leave beyond that provided for other employees may be appropriate as a reasonable accommodation for a pregnancy-related condition that qualifies as a disability

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New EEOC Guidance

- Light-Duty Accommodation
 - Employer may apply same restrictions to pregnant and non-pregnant workers (e.g., not providing light duty at all or limiting the number of positions available)
 - PDA requires employer to provide light duty for pregnant employee if it does so for employees “similar in their ability or inability to work”
 - Employer may not deny light duty to a pregnant employee on the basis that the light-duty policy is limited to on-the-job injuries (this is the EEOC’s answer to the question in *Young*)

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New EEOC Guidance & *Young*

- Employers that provide work accommodations to non-pregnant employees with work limitations must provide work accommodations to pregnant employees who are "similar in their ability or inability to work"
- Two Commissioners voted against the guidance, citing contrary Circuit Court decisions on this issue and potential loss of credibility for the Commission given the SCOTUS review of *Young*

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Pop Quiz: Which of these comments is acceptable in the workplace?

- A. “Wow, when are you due?”
- B. “Your body is trying to tell you something.”
- C. “Should you be lifting that?”
- D. “It’s too risky that you will decide to stop working.”
- E. None.

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Explanation

- Beware of treating pregnant women differently based on stereotypes and assumptions about their job capabilities or job commitment.



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POP QUIZ: Joanne is 5 months pregnant. Her supervisor repeatedly comments that she is “starting to show,” and says he is worried that her baby’s health is at risk because the company is a smoking establishment. Can her supervisor force her to begin maternity leave early?

- A. Yes, if smoking genuinely poses a health risk for the baby.
- B. Yes, if smoking is considered an occupational hazard.
- c. No, under any circumstances.
- D. No, unless there is a bona fide occupational qualification for doing so.

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Explanation

- Employer may not compel leave because of pregnancy.
- An employer's concern about risks to the employee or her fetus will rarely, if ever, justify sex-specific job restrictions for a woman with childbearing capacity.



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POP QUIZ: Michelle requests two months of leave due to pregnancy-related medical complications. Your medical leave policy requires employees to be employed at least 90 days to be eligible. Michelle had only been employed for 65 days at the time of her request. Is Michelle entitled to leave?

- A. Yes
- B. No
- c. Maybe

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Explanation

- Title VII requires employers to provide the same benefits for pregnancy-related medical conditions as they provide for other medical conditions.
- Leave decisions should be made in accordance with the eligibility rules, and not because of pregnancy.



POP QUIZ: You offer pregnant employees up to 10 weeks of paid medical leave for pregnancy and childbirth as part of your short-term disability insurance. You also offer new parents, whether male or female, 6 weeks of parental leave. Does this policy discriminate against male employees?

- A. Yes
- B. No
- c. It depends



Explanation

- Leave related to pregnancy, childbirth, or related medical conditions can be limited to women affected by those conditions.
- However, parental leave must be provided to similarly situated men and women on the same terms.

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POP QUIZ: Catherine requests leave for *in vitro* fertilization treatment. Her doctor's note requires bed rest for several days after implantation due to prior unsuccessful IVF treatments. She is ineligible for FMLA and has exhausted all of her PTO. Must you grant her request?

- A. No, because IVF is *voluntary*.
- B. No, because infertility affects men and women equally, so the PDA is not an issue.
- C. No, because infertility is not a “disability” under the ADA.
- D. Yes, because infertility is a “disability” under the ADA.

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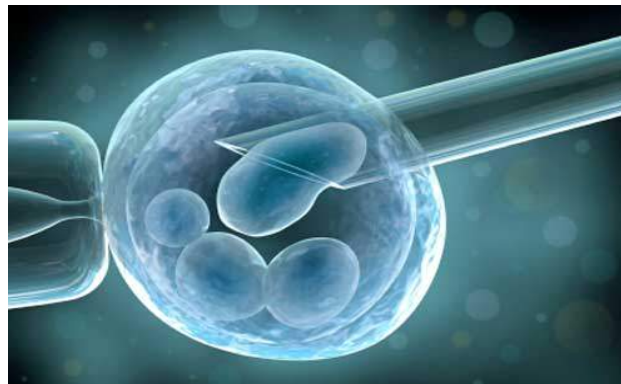
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Explanation

- Employers must allow leave for limitations resulting from pregnancy on the same terms as to others similar in ability or inability to work.
- Additional leave beyond that provided for other employees may be appropriate as a reasonable accommodation for a pregnancy-related condition that qualifies as a disability.



POP QUIZ: Elizabeth becomes pregnant within 8 months of hiring. She experiences severe morning sickness during her first 20 weeks, but is not FMLA-eligible until her 4th month of pregnancy. She tells her supervisor her doctor is requiring weekly appointments due to “high-risk” pregnancy. Which absences are protected?

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Explanation

- If an employee is temporarily unable to perform her job due to pregnancy or a pregnancy-related condition, you must treat her the same as any other temporarily disabled employee.



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POP QUIZ: Candy requests light duty for a 20-lb lifting restriction related to her pregnancy. You have a policy/practice of providing light duty, subject to availability, for employees for up to 90 days due to injury, illness, or a condition that would be a disability under the ADA. True or False: You may deny Candy's request?

- A. True
- B. False

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Explanation

- Employers that provide light-duty positions to employees injured on the job must provide the same light-duty work to pregnant employees who are similarly unable to work.



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POP QUIZ: Jennifer had been successfully managing a neurological condition with medication. When she became pregnant, her physician took her off some of these drugs due to risks they posed. Adequate substitutes were not available. She began to experience increased fatigue and found that rest during short breaks in the day and lunch time was insufficient. Are you required to provide Jennifer with more frequent breaks during the day to alleviate her fatigue?

- A. No.
- B. Yes, under any circumstances.
- C. Yes, absent undue hardship.
- D. Yes, if she is eligible for intermittent leave.

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Explanation

- Pregnant employees may be entitled to reasonable accommodations for limitations resulting from the interaction of the pregnancy with an underlying impairment.
- Employers may only deny a reasonable accommodation to an employee with a disability if it would result in an “undue hardship.”
- An “undue hardship” is defined as an action requiring significant difficulty or expense.

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POP QUIZ: Carol applied for a warehouse job. One of the requirements was the ability to lift up to 50 pounds. Carol said that she could not meet the lifting requirement because she was pregnant but otherwise would be able to meet the job requirements. You can refuse to hire Carol under which of the following circumstances?

- A. All applicants must meet the same lifting requirement.
- B. The lifting requirement is job related for the position in question and consistent with business necessity.
- C. All of the above.
- D. None of the above.

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Explanation

- Facially neutral policies that disproportionately affect women affected by pregnancy, childbirth, or related medical conditions must be job related and consistent with business necessity.



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