

What to Expect When Your Employee Is Expecting

Pregnancy, Paternity
Leave and the
Implications of Federal
and State Law

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Babies seem to spring up in bunches. As an employer, you may have noticed this phenomenon. Once one employee announces an impending bundle of joy, others are no doubt soon to follow. No matter which half of the happy couple you employ (or, sometimes, both), every employer needs to be familiar with and take heed of state and federal laws governing that special time from announcement to birth, and thereafter. This article provides an introduction and primer to the provisions of state and federal law most likely to effect your decision-making: (1) the Pregnancy Discrimination Act, (2) the Family and Medical Leave Act, (3) the Americans with Disabilities Act, to the extent it covers pregnancy-related conditions, and (4) related state laws. ^{1/} In addition, we hope this paper will serve as a guidepost for each of the stages in which an applicant's or employee's pregnancy will or might become an issue: (1) interviewing and hiring, (2) announcement, (3) pre- or post-birth leave, and (4) return from leave.

I. Introduction to the Law.

A. PREGNANCY DISCRIMINATION ACT

The Pregnancy Discrimination Act ("PDA"), which was signed into law on October 31, 1978, amended Title VII of the Civil Rights Act of 1964 to provide that 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." 42 U.S.C. §2000e(k). The statute goes on to provide that "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" Id.

Fundamentally, the PDA requires that employers treat pregnant employees like similarly-situated non-pregnant employees. An employer may not refuse to hire an applicant because of her pregnancy, or a pregnancy related condition, so long as she can perform the "major functions" of the position. 29 C.F.R. Pt. 1604 App. Nor can an employer refuse to hire an employee based on the pregnancy-related bias of its customers or employees. Id. An employer also may not treat pregnancy-related

^{1/} It is also worth noting that gender and pregnancy discrimination claims may be brought against *public* employers pursuant to 42 U.S.C. §1983, though such claims will largely be analyzed in accordance with Title VII and the PDA. See, e.g., Back v. Hastings on Hudson Union Free School District, -- F.3d. --, 2004 WL 739846 (2^d Cir. April 7, 2004).

conditions differently than it treats other health conditions. Id. So, for example, if a shipping company accommodates employees with temporary back conditions preventing their heavy lifting by assigning them to temporary light duty, it must also do so for women unable to perform similar heavy lifting due to pregnancy or a pregnancy-related condition. Employers also must provide health insurance which covers expenses for pregnancy related conditions on the same basis as for other medical conditions. Id.

The PDA also prohibits certain conduct that could be perceived as protective of pregnant women. For example, an employer may not force a pregnant woman to take medically unnecessary leave nor may it prohibit her from returning to work before the birth of her child after recovery from some temporary disabling condition. 29 C.F.R. Pt. 1604 App. Similarly, employers must not require that women wait a certain period of time after birth to return to work. Id.

Despite its terms, the PDA applies to protect men as well as women. For example, the Supreme Court has held that the PDA prohibits discrimination against male employees in the provision of pregnancy-related benefits. Newport News Shipbuilding & Drydock Co. v. EEOC, 462 U.S. 669 (1983) (holding that the Act forbids discrimination in benefits to male employees' dependents). And, men have standing to sue for pregnancy discrimination based on the pregnancy of their partners. Nicol v. ImaMatrix, Inc., 773 F. Supp. 802 (E.D. Va. 1991) (holding that male employee had standing to sue under the PDA and Title VII for discrimination against him allegedly due to his wife's pregnancy).^{2/}

One of the currently unsettled issues under the PDA is to whether its protection applies to individuals seeking infertility treatment. Some courts have held that the PDA covers efforts to become pregnant. In Erickson v. Board of Governors, Northeastern Illinois University, 911 F. Supp. 316, 320 (N.D. Ill. 1995), the court refused to grant the employer's motion to dismiss, finding that the plaintiff stated a claim for discrimination based on her "potential pregnancy" when she alleged discrimination in her termination for

^{2/} Interestingly, in this 1991 opinion, Judge Ellis repeatedly relies on the assumption that only men can have pregnant spouses, and therefore that discrimination against the husbands of pregnant women is "because of" their sex. In the current environment, where some locations are permitting same sex marriages, the court's logic, while still the rule in most states, has lost some of its strength. Hence, the decision could instead be premised on a finding that, to be covered under the PDA, the discrimination need not be based on the *employee's* own pregnancy, but on pregnancy affecting the employee in general.

use of sick leave to receive infertility treatments. However, the weight of authority appears to reject that notion. See, e.g., Krauel v. Iowa Methodist Med. Ctr., 95 F.3d 674 (8th Cir. 1996) (concluding that infertility did not fall within the PDA); Laporta v. Wal-Mart Stores, Inc., 163 F. Supp.2d 758 (W.D. Mich. 2001) (concluding that infertility is not a medical condition related to pregnancy or childbirth within the meaning of the PDA).

The PDA is enforced as part of Title VII, and is subject to the same administrative exhaustion requirements, the same burdens of proof, and the same penalty provisions. 42 U.S.C. §§1981(a), 2000e-5. According to the EEOC, the number of pregnancy discrimination charges reached their highest levels in 2001 at 2,232 claims received, which represents an increase of 30% since 1994.

B. FAMILY AND MEDICAL LEAVE ACT

One of the most significant changes to the landscape of pregnancy and employment has been the enactment of the Family and Medical Leave Act in 1993. See 29 U.S.C. §2601, et seq. Eligible employees, both male and female, are entitled to up to twelve weeks of unpaid leave to care for a newborn or newly adopted child. Id. at §2612(a)(1)(A) & (B).^{3/} This leave may be taken at any time during the first year of the child's life or placement. Id.^{4/} FMLA leave may also be available for pregnancy-related conditions, if they constitute a "serious health condition." Id. at §2612(a)(1)(D).^{5/} Employers may not require employees to take more leave than is required by their health condition. See 29 C.F.R. §825.204(e).

^{3/} To be eligible, an employee must have been employed for at least 12 months (which arguably need not be consecutive) and have worked at least 1,250 hours during the preceding twelve month period. Id. at §2611(2). The FMLA applies only to employers who have 50 or more employees. Id. at §2611(4).

^{4/} Where both a husband and wife work for an employer, the FMLA provides that they need only be permitted to take a total of 12 weeks of leave for the birth or placement of a child. 29 U.S.C. §2612(f); 29 C.F.R. §825.202(a). Each employee, however, must be able to use the remainder of the twelve-week allotment for his or her own serious health condition, or the serious health condition of his or her spouse or child. Id.

^{5/} Pregnancy-related FMLA issues might arise even where an employer least expects it. For example, the FMLA requires that parents be permitted leave to care for their adult son or daughter, if that child is "incapable of self-care because of a mental or physical disability." 29 U.S.C. §2611(12). When her daughter's pregnancy-related serious health condition inhibited her ability to care for herself, a grandparent-to-be was entitled to assert her FMLA rights to leave. See, e.g., Navarro v. Pfizer, Inc., 261 F.3d 90 (1st Cir. 2001) (rejecting the lower court decision that high blood pressure brought on in 36th week of pregnancy would be too "short term" to constitute a disability).

Employees may elect, and employers may require, that employees use any available accrued paid leave during their FMLA leave. *Id.* at §2612(d)(2); 29 C.F.R. 825.100. Upon the conclusion of the leave, employers are required to reinstate returning employees to the same position or to “an equivalent position, with equivalent employment benefits, pay, and other terms and conditions of employment.” *Id.* at §2614(a). ^{6/}

At times, employees will seek “intermittent leave” such as a part time schedule, in addition to a traditional “maternity” or “paternity” leave period of several weeks after the birth of a child. While the FMLA requires that employees be permitted to take “intermittent” leave when medically necessary either to care for a sick family member, or because of the employee’s own serious health condition, it does not require that new parents be permitted to take intermittent leave. See 29 U.S.C. §2612(b)(1). Though not required, the Act specifies that employees and employers may agree that FMLA leave may be taken on an intermittent basis for the birth or placement of a child. *Id.* If such intermittent leave is permitted, it must not reduce an employee’s FMLA allotment by any more time than is actually taken. *Id.*

As a practical matter, there are two other important aspects of the FMLA for employers to consider when faced with an FMLA request or the specter of litigation: (1) the imposition of strict liability and (2) the award of attorneys’ fees. The FMLA essentially imposes strict liability on employers because it requires no particular “intent” on the part of the employer in order to be held liable for a violation. Rather, even a well-meaning employer can be found liable under the FMLA where an administrative mistake or good-faith error results in neglecting to provide an eligible employee with the required leave or preventing a returning employee from obtaining the same or equivalent position. That said, an employer who can prove that their action or omission was “in good faith” will not be liable for liquidated damages afforded under the statute. 29 U.S.C. §2617. In addition, the FMLA provides that plaintiffs “shall” be awarded reasonable attorneys’ fees and costs in any successful suit. This is unlike most other civil rights laws that leave the award of attorneys’ fees to the discretion of the trial judge. This attorneys’ fees provision may limit the ability of defendants to cost-effectively settle cases where there are minimal actual damages, because

^{6/} The FMLA exempts from the restoration requirement certain highly-paid employees if returning those employees to the prior position would cause “substantial and grievous economic injury to the operations of the employer.” 29 U.S.C. §2614(b).

plaintiffs' attorneys – knowing that even the most sympathetic employer will be held liable even for an honest mistake and that they will be paid by the court – have less of an incentive to compromise their claims.

C. AMERICANS WITH DISABILITIES ACT

In typical pregnancies, the protections of the Americans with Disabilities Act, 42 U.S.C. §12101, et seq., should not come into play. ^{7/} As most federal courts have held, a normal pregnancy – even with all the typical discomforts and limitations – does not constitute a “disability” within the meaning of the Act. See, e.g., Richards v. City of Topeka, 173 F.3d 1247, 1251 (10th Cir. 1999); Gorman v. Wells Manufacturing Corp., 209 F. Supp. 2d 970 (S.D. Iowa 2002) (collecting cases); see also Horwitz v. Sterling Miami, Inc., 1998 WL 245883 (N.D. Ill. 1998) (pregnancy loss resulting in need for one week of leave did not constitute “disability” under the ADA). In certain circumstances, however, employers need to be aware that severe, unusual or long-term complications arising from pregnancy could be found to be a qualifying disability under the ADA. In such cases, a pregnant employee would be entitled to the protections of the Act, including the requirement that they be provided “reasonable accommodation.” See, e.g., Gabriel v. City of Chicago, 9 F. Supp. 2d 974 (N.D. Ill. 1998) (denying motion for summary judgment because plaintiff’s severe back pain and stomach pain, which persisted for seven months, combined with premature labor, could constitute a disability under the ADA); Darian v. University of Massachusetts, Boston, 980 F. Supp. 77 (D. Mass. 1997) (finding that severe bone pain, paralyzing uterine contractions, uterine pain and back pain which limited nursing student’s ability to walk, sit, sleep, learn and perform manual tasks constituted a “disability” under the ADA); Cerrato v. Durham, 941 F. Supp. 388 (S.D.N.Y. 1996) (denying motion to dismiss where pregnant employee experienced cramping, leaking, spotting, nausea and dizziness associated with her pregnancy because such condition could, upon further fact development, constitute a disability under the ADA).

Just as there is a division in the federal courts as to whether it garners PDA protection, there is a split in the federal courts as to whether infertility constitutes a disability under the ADA. See Laporta v. Wal-Mart Stores, Inc., 163 F. Supp. 2d 758 (W.D. Mich. 2001) (denying summary judgment

^{7/} Of course, to the extent an employee with a qualifying disability becomes pregnant, the ADA would continue to apply.

on ADA claim where Wal-Mart fired pharmacist after she failed to report to work for a day during which she received infertility treatments); Erickson, 911 F. Supp. at 323; but see Zatarain v. WDSU-Television, Inc., 881 F. Supp. 240 (E.D. La. 1995) (holding that infertility does not qualify as a disability under the ADA).

Though infrequently applicable, care should be taken when considering issues of whether a pregnant employee's limitations, or those of an employee seeking to become pregnant, constitute a disability under the Act because mistakenly assuming that the ADA does not apply because an employee's medical condition has its root in a pregnancy could prove costly to employers. The ADA provides for the same remedies as under Title VII, which includes back pay, front pay, compensatory and punitive damages (subject to the applicable statutory caps), and courts may award attorneys fees to prevailing plaintiffs. 42 U.S.C. §§12117, 12205.

D. STATE LAWS

While much of the focus of these issues centers on the federal statutes discussed above, and rightly so, employers should not ignore the impact of state laws. For nearly a decade after Title VII was amended by the inclusion of the Pregnancy Discrimination Act, the extent to which state law could treat pregnancy-related conditions more favorably than other disabilities remained unanswered. During this period, a number of states passed statutes that provide pregnant women with more favorable benefits than those required under federal law. As one example, California enacted legislation requiring that employers covered by Title VII provide medically disabled pregnant employees with unpaid leave of up to four months. Cal. Gov't Code §12945(b)(2). This statute was challenged by an employer who argued that it was preempted by Title VII. The Supreme Court rejected this challenge, finding that Title VII provided the "floor beneath," but not the "ceiling above" pregnancy benefits. California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272 (1987); see also Miller-Wohl Co. v. Commissioner of Labor & Indus., 214 Mont. 238 (1984) (upholding Montana Maternity Leave Act which, inter alia, requires "reasonable" maternity leave). However, at least one Circuit Court of Appeals has specified that such favorable benefits are permitted only for the period of physical disability. See Schafer v. Board of Educ. of the School Dist. of Pittsburgh, Pa., 903 F.2d 243 (3d Cir. 1990).

Similarly, the FMLA does not supersede any provision of state or local law that provides employees with greater benefits. 29 U.S.C. §2651(b). A number of states have enacted statutes with potentially more significant benefits, including California, which provides, as of July 1, 2004, eligible employees with up to six weeks of leave with partial compensation (Cal. Gov't Code §12945.2); Connecticut, where covered employees are entitled to up to 16 weeks of unpaid leave for birth or adoption (Conn. Gen. Stat. §31-51cc-gg); the District of Columbia, where employers with more than 20 employees are required to allow eligible employees to take up to 16 weeks of family leave and 16 weeks of medical leave during a 24-month period (D.C. Code Ann. § 32-501 et seq.); Minnesota, where employers employing at least 21 employees must grant up to 6 weeks of unpaid leave for birth or adoption (Minn. Stat. §§181.940 through 181.944); and Rhode Island, where employers with least 50 employees must provide up to 13 weeks of unpaid leave for birth or adoption (R.I. Gen. Laws §§28-4-81 thru 28-4-88).

II. How to React to Specific Issues.

A. HIRING

You interview a host of candidates for a demanding position in an accounting firm. Its now September, but you need to hire someone quickly so they are up to speed in time for the tax-time crunch come next April. Based on qualifications and interviews, you settle on hiring Ms. Applicant Extraordinaire, and call to offer her the job. During that call, Ms. Extraordinaire expresses her gratitude and enthusiasm for the position, but asks for additional information regarding the Company's maternity leave policies before she makes her decision. Knowing that your boss would kill you if you hire someone who will not be there come April, you hesitate.

In general, an employer cannot consider a potential hiree's pregnancy or possible pregnancy in deciding whether to hire her: to do so would violate the PDA and Title VII. In the scenario described above, you cannot ask whether she is pregnant or intending to become pregnant. King v. TransWorld Airlines, Inc., 738 F.2d 255, 259 n.2 (8th Cir. 1984) (questions about pregnancy or childbirth in interview would violate PDA in absence of a bona fide occupational qualification). Thus, employers must not act on assumptions about an employee's pregnancy, but may, where appropriate,

take anticipatory action in response to an employee's announced intentions. For example, in Maldonado v. U.S. Bank, 186 F.3d 759 (7th Cir. 1999), the Seventh Circuit ruled that an employer was prohibited by the PDA from taking action against a pregnant employee because of its *assumption* about the effect that the pregnancy will have on the employee's future ability to perform her job. In Maldonado the court rejected the employer's proffered rationale that it fired a pregnant temporary employee because it believed that she would not be available during the summer months in which the bank would most need her to fill in for full-time bank tellers. The court drew a distinction between the circumstances in Maldonado, and a case in which a pregnant employee was discharged after announcing that, despite the fact that her primary job responsibility was organizing a conference in September, she planned to take eight weeks leave after the delivery of her baby sometime in June. Id. at 766 n.7, citing Marshall v. American Hosp. Ass'n, 157 F.3d 520 (1998); see also Marshall, 157 F.3d at 527 ("Marshall makes no showing that AHA terminated her because of her pregnancy rather than because she was planning an extended absence during the busiest time of her first year as an Associate Director . . ."). ^{8/} See also Wagner v. Dillard's Dep't Stores, Inc., 17 Fed. Appx. 141, 149-150, 2001 WL 967495, **6 (4th Cir. 2001) (agreeing that an employer may not take an adverse action because it "anticipated" that an employee would be unable to perform her job, while suggesting that an employer could consider in refusing to hire an employee a stated need to take substantial leave or a stated inability to work the required schedule).

Employers generally are not permitted to consider the risks to an unborn child in making hiring or assignment determinations, because to do so would treat a pregnant woman differently than other employees based on her pregnancy. Similarly, an employer cannot take such action based on the *possibility* of pregnancy, or an employee's ability to bear children. See, e.g., International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW v. Johnson Controls, Inc., 499 U.S. 187, 111 S.Ct. 1196 (1991). In Johnson Controls, the Supreme Court considered whether a woman's physical inability to have children constituted a "bona fide occupational qualification" or "BFOQ," for certain jobs in Johnson Controls' battery manufacturing facility which involved exposure to high levels of lead. ^{9/} There was no question that Johnson

^{8/} Significantly, neither plaintiff in Maldonado or Marshall would have yet been eligible for FMLA leave at the time of the birth of their children. Had they been eligible for such leave and their employers had *still* terminated them in anticipation of their need for FMLA leave, such action would constitute a violation of FMLA, though not the PDA.

^{9/} Title VII permits an employer to discriminate on the basis of religion, sex or national origin "in those certain instances where religion, sex or national origin is a bona fide occupational qualification reasonably necessary to the normal

Controls' policy treated fertile women differently than fertile men, in that "[f]ertile men, but not fertile women, are given a choice as to whether they wish to risk their reproductive health for a particular job." 499 U.S. at 197, 111 S.Ct. at 1202. The Court stressed that the BFOQ exception is a narrow one, and held that to satisfy the test, the qualification must relate to the "essence" or "central mission" of the employer's business. *Id.* at 203, 111 S.Ct. at 1205. The Supreme Court held that concern for the unborn children of its employees could not salvage Johnson Control's facially discriminatory policy, because "the safety exception is limited to instances in which sex or pregnancy actually interferes with the employee's ability to perform the job." 499 U.S. at 204, 111 S.Ct. at 1206. And, while "[n]o one can disregard the possibility of injury to future children; the BFOQ, however, is not so broad that it transforms this deep social concern into an essential aspect of battery making." *Id.* at 203, 111 S.Ct. at 1206. Given the decision in Johnson Controls, employers should not make hiring or assignment decisions based on the pregnancy (or potential pregnancy) of an employee, unless it can articulate specific reasons why permitting a pregnant employee to perform the task would endanger the core purpose of the business function. Those instances will be few and far between. As one example, Justice Scalia suggested in his concurring opinion in Johnson Controls that a shipping company could prohibit pregnant employees from working as crew members on long voyages because "on board facilities for foreseeable emergencies, though quite feasible, would be inordinately expensive." 499 U.S. at 224, 111 S.Ct. at 1216.

B. ANNOUNCEMENT AND AFTER – WORKING WHILE PREGNANT

Once an employee announces that she is expecting a baby, it is natural to wonder how that pregnancy might affect her ability to perform her duties, particularly as the due date approaches. Employers must permit a pregnant woman to continue in her position so long as she is able to complete the essential functions of the position. See, e.g., EEOC, "Facts about Pregnancy Discrimination" (June 1999) ("Pregnant employees must be permitted to work as long as they are able to perform their jobs"). Where questions arise about an employee's abilities, the most prudent

operation of that particular business or enterprise." 42 U.S.C. §2000e-2(e)(1). For further discussion of the BFOQ defense, see Dothard v. Rawlinson, 433 U.S. 321, 97 S.Ct. 2720 (1977) (discussing BFOQ in context of gender discrimination in hiring and assignments of prison guards); Western Air Lines, Inc. v. Criswell, 472 U.S. 400, 105 S.Ct. 2743 (1985) (discussing BFOQ in context of mandatory retirement ages for flight engineering positions).

course will be to permit the pregnant individual to first set her own boundaries, rather than attempt to impose even well-meaning restrictions on her employment. An employer may not change a pregnant employee's position based on its own assumptions about the pregnant employee's abilities, or based on customer or co-workers concerns. See, e.g., Davis v. Emery Worldwide Corp., 267 F. Supp. 2d 109 (D.Me. 2003) (finding an adverse action against a pregnant outside sales person by forcing her to work from the office, which resulted in lesser opportunity for commissions, for the last several weeks of her pregnancy). ^{10/} Other courts have affirmed jury verdicts for employees where the employer acted based on its beliefs about how pregnancy or child birth would affect a particular employee's job performance. See, e.g., Troy v. Bay State Computer Group, Inc., 141 F.3d 378, 381 (1st Cir. 1998) (reversing judgment for employer and finding that evidence that employer was fired because of stereotypical judgment about pregnant women supported finding of gender discrimination); Deneen v. Northwest Airlines, Inc., 132 F.3d 431, 437 (8th Cir. 1998) (affirming jury verdict in favor of employee told she needed a doctor's note to return to work because of her pregnancy-related condition).

It is also important to remember that, during this period of time, pregnant employees are entitled to use FMLA leave to receive pre-natal care. And, while most employers recognize that they are required to permit eligible employees time-off under the FMLA for prenatal care and for leave after the birth of a child, there may indeed be other obligations. At least one court has interpreted the FMLA as requiring that pregnant employees may be excused from overtime if their doctor certifies that their condition requires such "leave," under the FMLA. See, e.g., Whitaker v. Bosch Braking Systems Division of Robert Bosch Corp., 180 F. Supp. 2d 922 (W.D. Mich. 2001)

If, however, a pregnant employee becomes unable to perform one or more of the functions of her job, the employer's obligation is to treat her as it would any other similarly-situated temporarily disabled employee. See, e.g., EEOC "Facts about Pregnancy Discrimination." (June 1999) ("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

^{10/} The employer's restriction of the pregnant sales-person being out on the road stemmed in part from a concern about having her in a company owned car which had been the subject of a safety recall, and because there was some speculation that customers would not want to close a deal with a woman visibly nine-months pregnant because they would feel like she would not be available to follow up with them. Id. at 115.

employee; for example, by providing modified tasks, alternative assignments, disability leave or leave without pay.”). Employers need not make special arrangements or find alternative positions for employees who are not able to perform their jobs due to pregnancy, unless of course they do so for non-pregnant employees. See, e.g., Armindo v. Padlocker, Inc., 209 F.3d 1319 (11th Cir. 2000) (affirming summary judgment for employer where it terminated a pregnant employee with excessive absences during probationary period); Troupe v. May Department Stores Co., 20 F.3d 734 (7th Cir. 1994) (affirming summary judgment for employer which fired a frequently tardy and absent pregnant employee, stating that “[e]mployers can treat pregnant women as badly as they treat similarly affected but nonpregnant employees . . .”); Leeker v. Gill Studios, Inc., 21 F. Supp. 2d 1267, 1273 (D. Kan. 1998) (granting summary judgment to employer on claim of pregnant employee who was put on involuntary disability leave from printing press after her doctor restricted her from being exposed to chemicals).

Where an employer permits “modified duty” or “light duty” assignments only for those injured on the job, several federal courts have determined that such a policy does not violate the PDA, even when the result is that the pregnant employee is terminated because she is unable to perform the functions of her job. See, e.g., Spivey v. Beverly Enterprises, Inc., 196 F.3d 1309 (11th Cir. 1999) (termination of pregnant nurse’s assistant whose doctor restricted her from lifting more than 25 pounds, in reliance on a policy which allowed “modified duty” only for those injured on the job, did not violate PDA); Urbano v. Continental Airlines, Inc., 138 F.3d 204, 206-207 (5th Cir. 1998) (summary judgment granted to employer where plaintiff was treated no differently than other employees with non-occupational injuries); Sermons v. Fleetwood Homes of Georgia, 227 F. Supp.2d 1368 (S.D. Ga. 2002) (summary judgment to employer that terminated pregnant employee from position as panel installer after her doctor restricted her from lifting anything heavier than 15 pounds). But, because there is a difference of opinion on this issue among the Circuits, employers should examine carefully any such policies which result in an adverse employment action to pregnant employees. See EEOC v. Horizons/CMS Healthcare Corp., 220 F.3d 1184 (10th Cir. 2000) (denying summary judgment motion of employer, where there was evidence of discrimination against pregnant women in application of modified duty policy); Ensley-Gaines v. Runyon, 100 F.3d 1220 (6th Cir. 1996) (concluding that pregnant employee need only show that she was treated differently than those with a similar inability

to perform the functions of the job, as opposed to similarly situated in that they were “injured” off the job).

Though there is not a lot of case law on the issue, employers also should be aware of the possibility of a pregnancy based harassment claim. In Gleason v. Mesirow Financial Inc., 118 F.3d 1134 (7th Cir. 1997), the court affirmed summary judgment in favor of the employer, despite the fact that the plaintiff complained about having been told that her boss suspected she was pregnant because her breasts had gotten larger, had been warned that she should get a special computer screen to warn against radiation, and had been repeatedly asked by her supervisor about her dietary restrictions and other pregnancy related questions after having asked him to stop. The court found that these statements “may have been unwelcome and inappropriate” but did not “reveal an animus based on either the plaintiff’s sex or her pregnant condition.” Id. at 140.

C. REQUESTS FOR LEAVE AND OTHER PREGNANCY RELATED BENEFITS

By far, the most frequent issues facing employers who are presented with requests for maternity and paternity leave are those dealing with the obligations to provide leave under the FMLA and related state laws, discussed *supra*. However, employers need to be aware that the PDA also comes into play at this stage. As discussed above, the PDA mandates that employers not place more restrictions on employees who request maternity leave than they place on other employees who request leave for other reasons. The EEOC takes the position that employees on maternity leave should accrue credit for vacation time and pay increases equally with those on other forms of disability leave. 29 C.F.R. §1604.10. Various courts have agreed, finding violations of Title VII when an employer failed to credit time spent on maternity leave equivalently with time spent on disability leave for the accumulation of seniority, see Nashville Gas Co. v. Satty, 434 U.S. 136 (1977), sick leave, vacation, time towards annual salary increases, see Zichy v. City of Philadelphia, 590 F.2d 503 (3d Cir. 1979), and tenure and retirement. See Thompson v. Board of Ed. of Romeo Community Schools, 526 F. Supp. 1035 (W.D. Mich. 1981).

However, the PDA does not require that employers treat employees who give birth any more favorably than employees who are absent for any other

reason. Accordingly, an employer may require a pregnant employee who requests leave to submit a doctor's note certifying that she is unable to work if the employer requires similar statements from employees who are unable to work because of other disabilities. Greenspan v. Automobile Club of Michigan, 495 F. Supp. 1021 (E.D. Mich. 1986). Similarly, the Southern District of New York determined that a policy requiring pregnant employees to inform their employer as soon as they became aware that they would need leave did not violate Title VII because that policy required all disabled employees to so inform the employer. Mazzella v. RCA Global Communications, Inc., 642 F. Supp. 1531 (S.D.N.Y. 1986). And, employers may, under the PDA, enforce non-discriminatory absenteeism policies where neither the FMLA nor the ADA is implicated. In Stout v. Baxter Healthcare Corp., 107 F. Supp. 2d 744 (N.D. Miss. 2000), the district court granted summary judgment in favor of an employer who terminated an individual for missing more than three days of work during the initial 90-day probationary period, even though the absences were due to her pregnancy-related condition, her miscarriage, where the evidence established that the employer terminated anyone who missed more than three days during the probationary period. Id. at 747 (plaintiff's claim that pregnant employees should be exempted from the policy and provided leave "would mandate preferential treatment on the basis of sex which is contrary to the law"). Significantly, because the plaintiff had been employed for less than 90 days, she was ineligible for any of the protections under the FMLA.

Even though the PDA does not itself obligate employers to provide any particular maternity leave (unlike the FMLA), employees may have a claim for discrimination where an employer acts to discharge them upon their request for maternity leave. In Piraino v. Int'l Orientation Resources, Inc., 84 F.3d 270 (7th Cir. 1996), the plaintiff was hired without her employer's knowledge that she was four months pregnant. When she informed her supervisors of her condition, the plaintiff was told that it "would be no problem." Shortly thereafter, however, the company issued an "Unpaid Leave of Absence" policy, which provided that employees were eligible for unpaid leave only after they had been employed for one year. Id. at 272. Immediately upon giving birth to her son, the plaintiff was told that she had "voluntarily quit" and could "reapply" for a position, though she was eventually told that there was no job for her to return to. Id. Though the employer had no statutory obligation to provide maternity leave to the plaintiff because she was not yet eligible for FMLA leave, the court found that there was sufficient evidence to go to a jury that the plaintiff's

pregnancy had been the impetus for the creation of the written policy that led to her dismissal. Id. at 276.

The EEOC considers maternity leave to be “a form of disability or sick leave covering only the period of a female employee’s own actual physical inability to work as the result of pregnancy, childbirth, or related medical conditions.” EEOC Compliance Manual § 626.6. Obviously, men cannot experience physical disability as a result of pregnancy or childbirth. Accordingly, the EEOC acknowledges that an employer does not violate Title VII by denying paternity leave when it grants maternity leave during a period of pregnancy or childbirth-related disability. Id. An employer would risk a violation of Title VII if it were to grant maternity leave for a period of time beyond the duration of such disability and deny or otherwise restrict equivalent paternity leave. As the EEOC explains, “[a]ccommodating female but not male employees constitutes unlawful disparate treatment of males on the basis of their sex.” Id.

The Third Circuit addressed these principles in Schafer, where a male teacher requested a one-year unpaid leave of absence to care for his child. Although a provision of the applicable collective bargaining agreement allowed female employees of the school district to elect such a leave, Schafer’s request was denied. 903 F.2d at 244-45. After resigning his position, Schafer filed a charge of discrimination with the EEOC and the Department of Justice filed a lawsuit against the Board of Education and the unions who had agreed to the challenged provision. Finding that the challenged provision violated Title VII, the Third Circuit reversed a grant of summary judgment for the school district. Id. at 248. Eventually, a consent agreement was reached and male employees were allowed the equivalent benefit.

In the first sex discrimination suit filed under the FMLA, Howard Knussman, a paramedic and Maryland state trooper filed a complaint against the State of Maryland and a number of individual employees of the Maryland State Police. See Knussman v. Maryland, 272 F.3d 625 (4th Cir. 2001). According to Knussman, a state benefits manager rejected his request for paid leave as the primary-care giver for his child, informing him that only mothers qualified under the applicable policy as primary care-givers. Knussman further alleged that the manager informed him that fathers could take only reduced leave as secondary care-givers because they “couldn’t

breast feed a baby." *Id.* at 629. After the a jury found in favor of Knussman, awarding him \$375,000, the Fourth Circuit, in an unpublished decision, found that the award was excessive and reduced the damages, but did not reverse the decision. Knussman v. Maryland, Nos. 02-2130, 03-1608, 2003 WL 2203194 (4th Cir. 2003).

While it is well-settled that the PDA requires employers to treat employees who request maternity leave the same as they treat employees who request leave for other reasons, it is not clear whether the PDA requires employers to grant leave to care for a child after the mother is physically able to return to work. On one hand, the Seventh Circuit has held that workplace leave policies governing leave for childcare after pregnancy-related disability are not covered by the PDA. Maganuco v. Leyden Community High School Dist. 212, 939 F.2d 440 (7th Cir. 1991) (affirming denial of former schoolteacher's charge of PDA discrimination based on policy that prevented teachers from using accrued sick leave for pregnancy-related disability immediately prior to maternity leave). And, federal courts have ruled that employers are not obligated to offer employees leave to wean their infants under the PDA. See, e.g., Barrash v. Bowen, 846 F.2d 927 (4th Cir. 1988) (discharge of government employee was lawful for employee who refused to return to work for six months in order to breastfeed); Wallace v. Pyre Mining Co., 789 F. Supp. 867 (W.D. Ky. 1990) (denial of a leave of absence to wean infant from breast-feeding was not covered as a pregnancy "related medical condition" by the PDA). On the other hand, the EEOC takes the position that Title VII requires employers to provide leave for childcare as they do for leave for other non-medical reasons. 29 C.F.R. Part 1604 Appx., Q 18(A). Regardless, the FMLA or applicable state statutes may allow an employee childcare leave.

D. POST-BIRTH RETURN TO WORK

The PDA requires employers to treat employees returning to work from maternity leave the same as employees returning from disability or sick leave. 29 C.F.R. Part 1604, Appx., Q. 9. And, the FMLA requires that employers permit eligible employees to return to the same or equivalent position at the end of an FMLA-qualifying leave. In a recent decision, the Southern District of New York addressed this principle. In Batka v. Prince Charter, Ltd., 301 F. Supp. 2d 308 (S.D.N.Y. 2004), the plaintiff sued her

former employer for pregnancy and gender discrimination under Title VII and the FMLA. Batka, who was discharged two weeks before she was scheduled to return to work from her maternity leave, was one of 23 employees whose employment was terminated as a result of poor business conditions. *Id.* at 311. Despite this fact, and the employer's argument that Batka was terminated because of poor performance, the court denied the employer's motion for summary judgment, finding that "issues of material fact exist . . . that a discriminatory bias played at least some role in Prime Charter's decision to terminate Batka." *Id.* at 317.

Questions of discriminatory bias against parents of young children, and whether such bias is unlawful, is one area of the law that proves to be evolving rather quickly. In a decision which may have wide-spread ramifications for employers dealing with the sensitive issue of employees trying to balance work and family, the Second Circuit Court of Appeals recently reversed a decision of summary judgment in favor of an employer, which appears to expand the protections of the PDA and Title VII beyond a rigid analysis of whether an action was based on the condition of pregnancy or the act of childbirth. In Back v. Hastings on Hudson Union Free School District, -- F.3d --, 2004 WL 739846 (2^d Cir. April 7, 2004), the court held that taking an adverse employment action -- here the denial of tenure -- based on discriminatory stereotypes of mothers as insufficiently devoted to their work or unable to perform the responsibilities of "motherhood" and their job well, would be sufficient for a finding of gender based discrimination. *Id.* at *1, *6 ("[I]t takes no special training to discern stereotyping in the view that a woman cannot 'be a good mother' and have a job that requires long hours, or in the statement that a mother who received tenure 'would not show the same level of commitment [she] had shown because [she] had little ones at home.'").

Notably, the court also decided that the plaintiff was not required to adduce any evidence of how fathers were treated by the employer and rejected efforts by the School District to defeat the claim based on the fact that it primarily hired women; the insinuating comments regarding plaintiff's devotion to her job and her "little ones" at home was sufficient evidence to go to a jury. *Id.* at *8. See also Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 57 (1st Cir. 2000) (concluding employer's comments regarding whether plaintiff would be able to manage work and family responsibilities provided sufficient evidence to defeat summary judgment); Sheehan v. Donlen Corp., 173 F.3d 1039, 1044-1045 (7th Cir.

1999) (finding that employer's comments to employer and co-workers at time of discharge that she "would be happier at home with her children" provided direct evidence of discrimination").

The Back decision takes a contrasting view to that expressed by several other courts that discrimination based on "new parenthood" would not be cognizable under Title VII. See, e.g., Piantanida v. Wyman Center, Inc., 116 F.3d 340 (8th Cir. 1997) (finding no discrimination where plaintiff was offered a job created for a "new mom," after childbirth, deciding that "new parenthood" was not based on pregnancy and therefore not covered under the PDA); Santrizos v. Aramark Corp., 1998 WL 704114 (N.D. Ill. Sept. 29, 1998) (claim of discrimination based on new parenthood does not state a PDA claim). [11/](#)

State laws may also be implicated when considering an employee's desire to return to work after giving birth. While it is generally true that an employer may not place greater restrictions on an employee's return to work after giving birth than is placed on employees who return after temporary disabilities that are not related to pregnancy or childbirth, some exceptions remain. For example, New York carves out an exception for female employees who wish to return to work in a "factory or mercantile establishment." New York law provides that employers may not knowingly employ a woman in such a workplace within four weeks of the date that she gave birth unless she provides a written statement of her desire to return to work and the written opinion of "a qualified physician that she is physically and mentally capable of discharging the duties of her employment." N.Y. Lab. Law §206-b.

Another issue many employers face as employees return to work from maternity leave is the issue of breast-feeding, particularly as the societal mores swing back toward a preference for nursing. Several states have recently enacted legislation mandating that employers permit nursing mothers sufficient breaks to enable them to pump breast milk while at work, and to provide them with private areas, not simply bathroom stalls, in which

[11/](#) Employers should be mindful that several state laws prohibit discrimination based on marital status, and some plaintiffs have brought suit alleging that employment decisions arguably based on their status as parents constituted marital status discrimination.

they can discretely pump. [12](#)/ Though this is an area of new state regulation, breast-feeding has not yet been the subject of any federal legislation, though it has been proposed. Nor has breastfeeding related “discrimination” been found to be a viable theory of discrimination. See, e.g., *McNill v. New York City Dep’t of Corrections*, 950 F. Supp. 564, 569 (S.D.N.Y. 1996) (finding that absences due to medically necessary breastfeeding were not “pregnancy related” and therefore could not underlie a PDA claim); Jacobson, 1999 WL 373790, at *10 (to the extent that plaintiff attempted to state PDA claim on failure of employer to permit breaks to breast-feed, she failed to state a claim because breastfeeding is not a “medical condition” related to pregnancy or childbirth).

III. CONCLUSION

In general, employers should strive to treat pregnant employees as they would any other employee with a temporary physical condition that may or may not impair her ability to work. Employers should not make decisions based on assumptions regarding the limitations of pregnancy or the desires of new parents to care for their children, and should strive to keep open lines of communications with its expecting employees so all parties know what to expect both before and after the big day. As a practical matter, employers should take a close look at their policies addressing pregnancy, maternity and paternity leave as well as the more general disability leave policies to ensure compliance with governing law. In considering these issues, employers need to consider not only federal law, but state and local laws as well.

[12](#) See Cal. Labor Code §1030, *et seq.*, Conn. Gen. Stat. Ann. §§ 46a-64, 53-34b; Ill. Laws 68 (July 12, 2001); Minn. Stat. Ann § 181.939.