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Lawyer Insights

Avoiding and Defending Against Pregnancy Discrimination Claims

By Amber Rogers
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The number of pregnancy discrimination claims against employers has been rising steadily for the past five years. Hunton Andrews Kurth employment law partner Amber Rogers explains how employers can both avoid and defend against such claims.

In early July, Bloomberg found the number of pregnancy discrimination lawsuits being filed in federal courts has steadily increased each year since 2016. Last year saw a record-breaking number of pregnancy discrimination filings despite the financial and social impacts of the pandemic causing a "baby bust," and 2021 is on pace to break this record yet again.

This is all occurring while the Pregnant Workers Fairness Act (PWFA), legislation seeking to expand federal pregnancy-related protections, pends Senate approval. The PWFA would require employers to make reasonable accommodations for employees limited by pregnancy. Additionally, it would protect pregnant employees from retaliation after making accommodation requests and being forced to take unpaid leave.

The frequency of pregnancy discrimination filings is unlikely to decrease as employers prepare to bring employees back to in-person work environments. Employers should therefore take steps to ensure they are well-positioned to avoid employees bringing pregnancy discrimination claims against them and to defend against any claims that are brought.

Avoiding Pregnancy Discrimination Claims

To avoid pregnancy discrimination claims, employers should consider thoroughly reviewing company policies that often lead to employee challenges. These include policies regarding leave, workplace accommodations, and absences (especially medical-related absences).

It is important for employers to ensure that each of these respective policies complies with federal law as well as any more restrictive state or local laws. This requires frequent monitoring to stay informed of any changes made to these laws.

Compliant policies may emphasize that pregnant employees should be treated the same as employees who have temporary disabilities or medical conditions. Additionally, compliant policies should not require—explicitly or constructively—pregnant employees to take leave, light duty, or other work accommodations they do not want or do not request. Employers should not automatically consider pregnant employees as "disabled" or needing an accommodation.

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Employers should also make sure all managers and other employees receive adequate training with respect to these policies. Employers should ensure their managers and employees understand the types of actions that constitute pregnancy discrimination and adequately communicate their stances against those types of actions.

Additionally, employers should effectively train managers on how best to respond to requests for assistance and accommodations as well as complaints, as missteps at these stages may prove grave for employers in litigation. To this end, employers may find it useful to keep written notes of interactions with pregnant employees regarding their requests for assistance and accommodations concerning their pregnancy.

Further, pregnancy discrimination may arise even after a pregnant employee has given birth and returned to work. The Affordable Care Act amended the Fair Labor Standards Act to require employers to provide reasonable break time and a private location, shielded from view, for new mothers to express breast milk for up to a year after the child's birth. Employers failing to make these accommodations could open themselves up to pregnancy discrimination liability.

Defending Against Pregnancy Discrimination Claims

Whether or not adequate precautionary measures have been taken to avoid pregnancy discrimination claims, an employer may still face the prospect of litigation and ought to know what that entails.

Put simply, the employee must provide either direct or circumstantial evidence indicating the employer took action against her on account of her pregnancy or pregnancy-related conditions. Employers rarely admit directly that adverse employment action taken against pregnant employees was on the basis of their pregnancy, so the majority of employees must prove their cases using circumstantial evidence.

Examples of circumstantial evidence an employee may present to illustrate an inference that the adverse employment action taken against her constituted unlawful pregnancy discrimination include the employer defecting from its usual disciplinary practices and procedures, suspicious timing, shifting reasons for the adverse action, and disparate treatment of other similarly situated employees.

Many pregnancy discrimination claims turn on evidence of disparate treatment, and plaintiffs must overcome a significant burden to show another employee is similarly situated. This includes the plaintiff demonstrating the other employee has similar qualifications, experience, tenure with the company, and responds to the same supervisor(s). As such, employers facing pregnancy discrimination claims should consider these factors and prepare to distinguish between the plaintiff and any other allegedly similarly-situated employees.

Beyond distinguishing between the plaintiff and other employees, employers often defend against circumstantial evidence of pregnancy discrimination with non-discriminatory reasons for the adverse employment action. The most commonly offered defenses include poor performance by the employee, changes in business needs independent of the employee's pregnancy, and violations of documented company conduct or attendance policies.

Employer Defense Pitfalls

Because these defenses are so commonly used, employers facing pregnancy discrimination must be prepared to avoid the pitfalls associated with each defense. For example, if an employer plans to claim a pregnant employee was terminated for sub-optimal performance, the employer should be able to present documentation supporting evidence of poor performance dated prior to the employee disclosing her pregnancy.

Similarly, an employer arguing a termination was based on a change in business needs should plan to show no other employees were hired and had sufficient amounts of work, or that other non-pregnant employees were terminated for the same non-discriminatory reason.

Employers taking these considerations into account and obtaining the services of skilled legal counsel will mitigate the potential risks of discriminating against pregnant employees in the workplace and put them in the best position to defend against any pregnancy discrimination claims that may still be brought.

Amber M. Rogers *is a partner in the firm's labor & employment group in the firm's Dallas office. Amber's national practice assists clients with traditional labor relations and litigation, employment advice and counseling, and complex employment litigation. She can be reached at +1 (214) 468-3308 or arogers@HuntonAK.com.*