Don't want an EEOC pregnancy lawsuit? Then DON'T do these 4 things.

Constangy Brooks Smith & Prophete LLP

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Stuff's getting real.

As many of you know, the U.S. Equal Employment Opportunity Commission is starting to sue employers who it claims are not complying with the reasonable accommodation requirements of the Pregnant Workers Fairness Act. Check out the press releases here, here, here (in this case, conciliation), here, and here (another conciliation). And that's just in the first half of October.

I reported during the summer that the regulations issued by the EEOC are pretty draconian, even if you (like me) believe that employers should make reasonable accommodations for pregnancy and pregnancy-related conditions.

In light of the flurry of EEOC litigation, I thought it might be a good idea to go over these top four pregnancy accommodation DON'Ts. If you DON'T want to be sued by the EEOC, then DON'T do these things:

No. 1: DON'T think you can just follow your old ADA procedures in pregnancy accommodation cases. In one of the lawsuits filed by the EEOC, the employer apparently did just that: When the employee requested pregnancy accommodation, the employer sent its disability-related forms to her physician, asking for all kinds of documentation about her medical issues.

The documentation that you can request in connection with pregnancy accommodation is much more limited than what you can do in handling a request for accommodation under the Americans with Disabilities Act or similar law. To wit:

- At most, all you can request is (1) confirmation of the pregnancy, and (2) recommended accommodations that would be helpful under the circumstances. If the employee has another medical condition that is exacerbated by the pregnancy or vice versa, you can get confirmation of that, too. That's it.
- Notice that I said "at most." If the pregnancy is obvious and the employee herself confirms that she is pregnant, you can't ask for confirmation of the pregnancy from a health care provider.
- Also, there is an entire class of what the EEOC calls "predictable assessment" accommodations that generally have to be granted with no consultation with a health care provider (assuming the pregnancy has been confirmed). These are (1) allowing the employee to carry or keep drinking water nearby, (2) allowing the employee to take extra bathroom breaks, (3) allowing the employee to sit (if in a standing job) or to stand (if in a sitting job), and (4) allowing the employee to take extra breaks for eating or drinking.

The pregnant employee's own regular health care provider does not even have to be the one to provide the paltry documentation that you are entitled to get. If she presents documentation from another HCP, then you have to accept that.

In short, the procedure and documentation associated with pregnancy accommodation is very different from what you do in disability accommodation cases. At a minimum, you'll need to create a whole new set of forms to use in pregnancy cases.

Oh, and you can't *require* the employee or health care provider to use *your* forms.

No. 2: DON'T require a pregnant employee to take a leave of absence instead of accommodating her on the job. Requiring a leave of absence is generally going to violate the PWFA. The only exceptions are (1) when you've engaged in the interactive process with the employee before requiring the leave, or (2) when the employee herself prefers to take a leave. In the latter case, I suggest you get that from her in writing so you can defend yourself if there is an issue later.

No. 3: DON'T think that your pregnancy accommodation obligation will be over after the nine-or-so months of actual pregnancy (roughly 40 weeks). That is the bare minimum. But, in addition to the gestational period, you also have to be willing to consider accommodations, if requested, for

- The period during which the employee is trying to get pregnant.
- The period of maternity leave, which doesn't even count toward the 40 weeks.
- And accommodations after the new mom returns to work, including but not limited to lactation accommodations. According to the EEOC, this could start a whole new 40-week period.

And as I think everybody knows, other pregnancy-related events may have to be accommodated, too, including time off for miscarriages, stillbirths, or elective abortions. (Regarding elective abortions, exceptions may apply if you are a religious or public employer in certain jurisdictions.)

No. 4: DON'T let the FMLA control you. As we all know, the Family and Medical Leave Act requires covered employers to give employees unpaid leave of up to 12 weeks per 12-month period under certain circumstances. Prenatal care and maternity leave are among the many qualifying reasons for FMLA leave.

Unfortunately, a lot of employers who are covered by the FMLA think that they're cool as long as they have (1) complied with their FMLA obligations, or (2) determined that the FMLA doesn't apply (for example, because the employee isn't eligible yet).

This has been a longstanding trap for employers in disability cases. It's not unusual for an employer to focus exclusively on the FMLA and fail to consider disability-related reasonable accommodations under the ADA or other applicable disability rights laws. For example, an employer may terminate an employee who needs time off for cancer treatment because the employee hasn't hit the full 12 months required for FMLA eligibility. Denying FMLA leave to an employee who is not eligible for FMLA leave doesn't violate the FMLA, but failure to grant the leave *as a disability accommodation* sure as heck could (and probably would) violate the ADA.

Getting back to pregnancy, I'm afraid that some employers will fall into a similar trap now that the PWFA is in the picture. Yes, the FMLA covers maternity leave or intermittent prenatal visits (among many other pregnancy-related things). But a pregnant employee who needs time off and who is not eligible for FMLA leave may still need to be given time off as a pregnancy accommodation.

And a special alert for small employers: You may not be covered by the FMLA at all, because a covered employer has to have 50 or more employees. Great! But don't think that necessarily gets you off the hook with employee leaves of absence because coverage under the ADA and the PWFA kicks in at 15 employees.

Another FMLA trap: If you are accommodating a pregnant employee on the job (in other words, she's working), then you can't charge any of the time to FMLA leave. That's cuz she's working.

On the other hand, under the PWFA, you don't have to accommodate dads, or provide baby-bonding time for either parent. So there's that.

In short, if you haven't had time to get familiar with the PWFA, do it now. It appears that pregnancy accommodation has become one of the EEOC's "priority" issues. And unless you are going to immediately grant the accommodation requested by your pregnant employee, consult with your employment counsel in advance.

You've been warned!

Constangy Brooks Smith & Prophete LLP - Robin Shea